

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 1 March 2010

**Public Authority:** The Home Office  
**Address:** 2 Marsham Street  
London  
SW1P 4DF

### Summary

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The complainant requested information, including a briefing paper and a report, about gun crime. The Home Office claimed that the information was exempt from disclosure by virtue of sections 31 (law enforcement), 35 (the formulation and development of government policy) and section 36 (prejudice to effective conduct of public affairs). During the course of the Commissioner's investigation the Home Office additionally cited section 21 (accessible to applicant by other means). The Commissioner finds that some of the information is not exempt and orders its disclosure. The Commissioner also found a number of procedural breaches.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

### Background

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2. In August 2007, the Home Secretary wrote to the President of the Association of Chief Police Officers (ACPO) on the subject of gun crime and gangs. In this letter the Home Secretary asked for an assessment of the scale and nature of the problem of gun crime across England and Wales as well as for proposals in relation to addressing the supply of guns.
3. On 9 December 2007, an article in the Observer newspaper addressed the issue of the possession of deactivated weapons.

4. On 10 January 2008, the Home Office issued a press release entitled '*Home Secretary to ban deactivated firearms*'.

## The Request

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5. On 11 January 2008 the complainant made the following request for information to the Home Office:

*'1. [Complainant] is aware of material published in The Observer of 9 December 2007 that refers to "a briefing paper sent by senior firearms intelligence officers (some from the National Ballistics Intelligence Service) to the Home Secretary" calling for further restrictions on firearms deactivated to Government standards. ... A copy of this document is requested ...*

*2. ... [Complainant] requests details of all the information available on the use of firearms that have been deactivated according to Home Office specification and (a) remain deactivated and (b) have been reactivated to discharge a missile and which have been used in offences of violence in the statistical year 2005 to 2006.*

*3. ACPO President, Ken Jones, was commissioned to produce a report to the Home Secretary concerning, inter alia, source of firearms used in crime. A request is made for a copy of that Report'.*

6. The Home Office responded on 25 February 2008. In its response, the Home Office advised the complainant where the requested statistical information could be found on its website and that it was therefore exempt by virtue of section 21 of the Act. In respect of items (1) and (3) of the complainant's request, the Home Office confirmed it held the briefing paper calling for further restrictions on firearms deactivated to Government standards (the briefing paper) and a report to the Home Secretary commissioned by ACPO concerning the source of firearms used in crime (the report). However, it withheld this information, citing section 35(1) of the Act (formulation or development of government policy).
7. On 20 March 2008, the complainant requested an internal review of the decision not to disclose the requested information in respect of items (1) and (3).
8. The Home Office replied on 17 June 2008, upholding its decision that the information was exempt by virtue of section 35(1), clarifying that it was citing section 35(1)(a). In addition, it cited further exemptions in relation to the requested information, namely section 31(1)(a) and (b) (law enforcement) and section 36 (prejudice to effective conduct of public affairs).

## The Investigation

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### Scope of the case

9. On 1 July 2008, the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
  - the validity of the exemptions being claimed by the Home Office in relation to his request for information; and
  - whether or not the balance of interest test has been correctly applied in this case.
10. During the course of the Commissioner's investigation, the Home Office wrote to the complainant advising him that the Association of Chief Police Officers (ACPO) report 'Gun Crime and Gangs' had been published by ACPO in April 2009. It also advised him that the information in the requested briefing paper *'is substantially contained within the published version of the ACPO Gun Crime and Gangs paper'* and provided him with details of what it considered to be the relevant paragraphs.
11. The complainant wrote to the Commissioner on 7 August 2009 confirming that he had been aware of the availability of the published report for some time. However, he described it as being *'one of several versions of the document that have been prepared'* and advised the Commissioner that it did not satisfy his request for information. On this basis, in relation to the report, the Commissioner has restricted his investigation to the unpublished elements of the report.
12. During the course of his investigation, the Home Office confirmed to the Commissioner that it is no longer relying on the exemption in section 36. Accordingly, the Commissioner has focussed his investigation on whether or not the Home Office was correct to cite the exemptions in sections 21, 31 and 35 of the Act in relation to parts (1) and (3) of the complainant's request for information.

### Chronology

13. The Commissioner wrote to the Home Office on 14 May 2009 asking it to provide him with further information in relation to its decision to withhold the requested information.
14. The Home Office provided the Commissioner with a copy of the withheld information on 9 June 2009.
15. On 3 July 2009 the Home Office responded to the Commissioner's questions. In its correspondence, the Home Office advised that in respect of the report it considered the withheld information to be exempt under section 21 (information accessible to applicant by other means), section 31(1)(a) and (b) (law enforcement) and section 35(1)(a) (formulation of government policy). In respect of the briefing paper, it told the Commissioner that it considered this to be exempt by virtue of section 21 only. The Home Office confirmed that its citing of section

36 (prejudice to effective conduct of public affairs) at the internal review stage was an error and that it was no longer citing this exemption.

16. At the instigation of the Commissioner, the Home Office wrote to the complainant on 23 July 2009 advising him that the published version of the requested ACPO report was available on ACPO's website, having been published there in April 2009. The Home Office provided him with the link to the report.

## Analysis

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### Exemptions

17. In this case, the Commissioner has first considered whether or not it was appropriate for the Home Office to cite section 21.

### Section 21 Information accessible to applicant by other means

18. Section 21(1) provides that :

*'Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.'*

19. The thinking behind the exemption is that if there is another route by which someone can obtain information there is no need for the Act to provide the means of access.

#### *The briefing paper*

20. During the course of his investigation, the Home Office advised the Commissioner:

*'given that the information in the briefing note is covered in the published version of the paper, and so accessible to [the complainant], we propose to continue to withhold the briefing note itself under section 21'.*

21. The Commissioner acknowledges that the Home Office advised the complainant on 23 July 2009 that the withheld briefing paper consisted of '*short notes on the preferred option for firearms legislation and the key themes for such legislation*' and provided him with details of the specific passages in the published version of the ACPO paper which it considered relevant.
22. However, in this case, the Commissioner notes that the report in question, which the Home Office argues contains the withheld briefing paper information, had not been published at the time of the complainant's request for information. Therefore section 21(1) of the Act was not applicable at the time of the request.
23. Therefore, in respect of the briefing paper, he does not find the exemption engaged.

## Section 31 Law enforcement

24. The Home Office has confirmed that it is citing sections 31 and 35(1)(a) in respect of those elements of the Association of Chief Police Officer's (ACPO) report not already published. The Commissioner has first considered the exemption in section 31.
25. Section 31 creates an exemption from the right to know if the release of information would, or would be likely to, prejudice the purposes of law enforcement, taxation, and various types of regulatory activity as defined in the section.
26. In this case, the Home Office has cited section 31(1)(a) and (b) which provide that:

*'Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-*

- (a) the prevention or detection of crime,*
- (b) the apprehension or prosecution of offenders'.*

### *Applicable interest*

27. In order for section 31 to be engaged, the Home Office must show that the disclosure would, or would be likely to, prejudice the stated interest. Accordingly, the Commissioner has only considered as relevant those arguments about whether or not disclosure of the withheld information could be prejudicial to the prevention or detection of crime or the apprehension or prosecution of offenders.

### *Nature of the prejudice*

28. The Information Tribunal in *Hogan* (EA/2005/2006 and EA/2005/0030) commented:  
  
*'An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and the prejudice is, as Lord Falconer of Thornton has stated "real, actual or of substance" (Hansard HL (VOL. 162, April 20, 2000, col. 827)'*
29. When making his assessment regarding the prejudice test, the Commissioner must consider not only whether the prejudice identified can be said to have a real, detrimental or prejudicial effect but also whether or not the nature of the prejudice can be adequately linked back to the disclosure of the information in question.
30. In this case, the Home Office has argued that releasing the withheld information *'could prove advantageous to those seeking to commit serious crimes'*.

### *Likelihood of prejudice*

31. In relation to the information withheld under both section 31(1)(a) and section 31(1)(b), the Home Office advised the complainant that '*disclosure of the information would be likely to compromise intelligence or disclose information useful to criminals*'.
32. In correspondence with the Commissioner, in relation to the information withheld in accordance with section 31(1)(a), the Home Office advised him that disclosure '*would*', as opposed to '*would be likely to*', prejudice the prevention or detection of crime.
33. In relation to the information withheld in accordance with section 31(1)(b), which only relates to a small amount of information, the Home Office advised the Commissioner that this information was withheld because disclosure at the time of the request '*would*' have prejudiced the apprehension or prosecution of offenders.

### *Evidence of prejudice*

34. The Commissioner's view is that the use of the term 'prejudice' is important to consider in the context of the exemption. It implies not just that the disclosure of information must have some effect on the applicable interest, but that this effect must be detrimental or damaging in some way.
35. In the Commissioner's view, the law enforcement activity referred to in section 31(1)(a) of the Act (the prevention or detection of crime) includes not only the procedures followed by the police, HM Revenue and Customs and other investigatory bodies but also crime prevention measures in general. For example information about the physical security of buildings or the security of IT systems is likely to be covered. There is no requirement for the information to have been obtained specifically for the purpose of prevention or detection of crime.
36. With regard to the law enforcement activity at section 31(1)(b) of the Act (the apprehension or prosecution of offenders), the Commissioner's view is that this is not restricted to information held by investigating bodies, nor restricted to individual offenders. He considers this activity is wide enough to cover any situation that could lead to penalties for criminal behaviour or for breaking military law. It could cover activities both in relation to specific instances of the apprehension and prosecution of offenders and to general strategies, techniques, processes and policies established for these purposes.
37. In this case, although the Commissioner is satisfied that the Home Office has provided evidence in support of its arguments in relation to the likelihood of prejudice as a result of disclosure, he is not satisfied that the Home Office has demonstrated sufficiently that prejudice '*would*' as opposed to '*would be likely to*' be caused by disclosure.
38. However, although restricted in what he is able to say because of the nature of the withheld information, having duly considered the arguments put forward by

the Home Office, the Commissioner's view is that the lower level of 'would be likely to occur' has been demonstrated. He therefore finds the exemption engaged in relation to the information withheld by virtue of section 31(1)(a) and (b) and he has carried this lower level of likelihood through to the public interest test.

*Public interest arguments in favour of disclosing the requested information*

39. The Home Office acknowledges that *'the public has a legitimate expectation that the police and others will take all reasonable steps to prevent gun crime which can cause harm to people and property'*.

40. In this respect, the Home Office recognises that disclosure of the withheld information:

*'may inform public debate about what is being done to reduce gun crime and reassure the public that not only do the police and others take steps to maintain public safety, but they also work hard to apprehend offenders and bring them to justice'*.

41. The complainant has argued that *'it is in the public interest to ensure that the Home Secretary is not misinformed'*. The Commissioner understands this to be in relation to firearms that have been deactivated.

42. With regard to public interest arguments that weigh in favour of disclosure, the Commissioner recognises that, at the time of the request, gun crime was a 'live' and contemporary issue and a matter of considerable public debate. He has also taken into account the complainant's argument that *'a great deal of information is published about the type of firearms used in crime and the sources'*.

*Public interest arguments in favour of maintaining the exemption*

43. In favour of maintaining the exemption, the Home Office has argued that:

*'Disclosure of the information would be likely to compromise intelligence or disclose information useful to criminals. Releasing the information could prove advantageous to those seeking to commit serious crimes, a possibility which could increase public fear and anxiety as well as putting public safety at risk. Release may also have an impact on investigations and/or prosecutions'*.

44. Whilst acknowledging the strong public interest in protecting the activities in section 31 of the Act, the Commissioner is mindful of the fact that the public interest factors must be considered and given the appropriate weight in accordance with the circumstances of the case.

45. In this case, he has given weight to the argument that:

- ongoing investigation and the apprehension of offenders should not be prejudiced;

- assisting offenders to commit crime or avoid apprehension should be avoided; and
- it is not in the public interest to disclose information which is likely to compromise intelligence.

*Balance of the public interest arguments – prevention or detection of crime*

46. As the Home Office is citing multiple limbs of the exemption, the Commissioner has considered separately, in the case of each limb of the exemption, whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information under consideration.
47. The Commissioner has considered firstly the public interest arguments in relation to the prevention or detection of crime.
48. Having considered the arguments for and against disclosure, the Commissioner considers that the arguments in favour of maintaining the exemption carry greater weight in the circumstances of this case.

*Balance of the public interest arguments – apprehension or prosecution of offenders*

49. The Commissioner has next considered the public interest arguments in relation to the Home Office's claim that disclosure would be likely to prejudice the apprehension or prosecution of offenders.
50. He notes that, in this case, the public interest arguments in relation to section 31(1)(b) are broadly similar to those cited above in relation to section 31(1)(a).
51. Having viewed the withheld information and balanced the opposing public interest factors in this case, the Commissioner is satisfied that the arguments in favour of withholding the information outweigh those favouring disclosure. He is therefore satisfied that the information was appropriately withheld.

**Other exemptions**

52. The Home Office has also argued that the withheld information in the ACPO report is exempt by virtue of the exemption in section 35(1)(a) of the Act.
53. As the Commissioner is satisfied that the withheld information is exempt by virtue of section 31(1)(a) and (b) and that the public interest in maintaining both of these exemptions outweighs the public interest in disclosure, he has not gone on to consider the application of the exemption at section 35.

**Procedural Requirements**

*Section 1 - General right of access*

54. Section 1(1) states:



*'Any person making a request for information to a public authority is entitled –*

- a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- b) if that is the case, to have that information communicated to him'*

55. As the Commissioner considers that the briefing paper should have been disclosed, he finds the Home Office in breach of section 1(1)(b) of the Act in that it failed to provide disclosable information by the time of the completion of the internal review.

#### *Section 10 - Time for compliance*

56. Section 10(1) of the Act provides that:

*'Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.'*

57. In this case, the complainant made his request for information on 11 January 2008 but the Home Office did not issue its refusal notice until 25 February 2008. In failing to confirm to the complainant that it held information falling within the request within the statutory timescale, the Commissioner finds the Home Office in breach of section 10(1) of the Act. It also breached section 10(1) in failing to disclose information that was not exempt within this statutory time limit.

#### *Section 17 – Refusal of request*

58. Section 17(1) provides that:

*'A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -*

- (a) states that fact,*
- (b) specifies the exemption in question, and*
- (c) states (if that would not otherwise be apparent) why the exemption applies'.*

59. The Commissioner notes that, in taking more than 30 working days to issue its refusal notice, the Home Office was clearly in breach of the statutory timescale, and therefore breached section 17(1) of the Act.

## The Decision

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60. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act:
- it breached section 1(1)(b) by not providing the complainant with the requested information improperly withheld under section 21 by the time of the completion of the internal review;
  - it breached section 10(1) by not confirming to the complainant within the statutory timescale that it held the requested information;
  - it also breached section 10(1) by failing to disclose improperly withheld information within the statutory timescale; and
  - it breached section 17(1) by not providing the complainant with a valid refusal notice within the statutory timescale.

## Steps Required

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61. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- disclose the withheld briefing paper.
62. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

## Failure to comply

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63. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Other matters

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64. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.
65. Part VI of the Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that

these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that, in this case, it took over 40 working days for an internal review to be completed, despite the publication of his guidance on the matter.

## Right of Appeal

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66. Either party has the right to appeal against this Decision Notice to the First-Tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals  
PO Box 9300  
Arnhem House  
31 Waterloo Way  
Leicester  
LE1 8DJ

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 1<sup>st</sup> day of March 2010**

**Signed .....**

**Steve Wood  
Assistant Commissioner**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

### Information Accessible by other Means

Section 21(1) provides that –  
“Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.”

Section 21(2) provides that –  
“For the purposes of subsection (1)-

- (a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and
- (b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.”

Section 21(3) provides that –  
“For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.”

### Law enforcement

Section 31(1) provides that:

‘Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,
- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls,
- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or

- (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.'