

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 24 May 2010

Public Authority: Surrey Police
Address: Police Headquarters
Mount Browne
Sandy Lane
Guildford
Surrey GU3 1HG

Summary

The complainant requested information on anthrax or white powder hoaxes utilising the postal system in 2003. Surrey Police neither confirmed nor denied that this information was held citing the exemptions at sections 23(5) (information supplied by security bodies), 24(2) (national security), 27(4) (international relations), 30(3) criminal investigations, 31(1) (law enforcement) and 38(2) public safety. It upheld this decision at the internal review stage, additionally citing section 40(5). The Commissioner concludes that none of the exemptions ultimately relied upon are engaged for NCND purposes. The public authority is required to provide to the complainant confirmation or denial of whether information falling within the scope of the request is held. Any information that is held should either be disclosed to the complainant or the public authority should issue a refusal notice valid for the purposes of section 17(1). The Commissioner also found procedural breaches.

The Commissioner's Role

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

2. Anthrax is a contagious disease, affecting both humans and other animals. Most forms of the disease are lethal. It can spread from one animal to another animal or human beings, through air inhaled or food/meat contaminated with spores. Anthrax spores can be produced in vitro and used as a biological weapon.

The Request

3. The complainant wrote to Surrey Police on 11 December 2008 making the following request:

"I am seeking information on anthrax or white powder hoaxes utilising the postal system in 2003".

4. Having not received a response, the complainant sent a reminder on 3 February 2009. In this correspondence, the complainant provided Surrey Police with further details in relation to his request for information. Specifically, he provided the names of victims involved in the hoaxes and details of a possible suspect:

"Response is now overdue however the additional information may be helpful, some of the hoaxes involved the following victims:

(a) [Name provided]

(b) [Details provided]

One of the suspects may have been a Mr. [details provided]."

5. On 4 February 2009, Surrey Police contacted the complainant, explaining that the Act provides that a public authority may extend the time limit for responding where it is still considering the public interest after 20 working days. In line with this, it advised him that *'the matters under consideration have not yet been finalised'*. However, the public authority did not provide an indication at this stage as to which exemption(s) it was considering.
6. Surrey Police wrote to the complainant on 18 March 2009. In its correspondence, Surrey Police told the complainant that one incident which related to his request is already in the public domain. It provided him with details of where to access the relevant press release. It neither confirmed nor denied that it held any additional information

relevant to his request, citing the exemptions at sections 23(5) (information supplied by security bodies), 24(2) (national security), 27(4) (international relations), 30(3) (criminal investigations), 31(1) (law enforcement) and 38(2) (public safety).

7. The public authority did not state why it considered the public interest favoured the maintenance of the exemptions in these sections.
8. The complainant requested an internal review on 19 March 2009.
9. Surrey Police provided the complainant with the outcome of its internal review on 30 April 2009. In this correspondence, it upheld its decision neither to confirm nor deny that it held information relevant to the request. With regard to the exemptions it had previously cited, it told the complainant that although it had intended to apply section 31(3), it had incorrectly written section 31(1). It also told him that it was now additionally citing section 40(5).

The Investigation

Scope of the case

10. On 5 May 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled.

"All in all, while this is a serious matter, the response by Surrey Police is inadequate and an attempt obfuscate by piling on multiple exemptions [sic]".

11. The focus of the Commissioner's investigation has been to determine whether or not Surrey Police was correct neither to confirm nor deny that it held information relevant to the request. In this respect, and taking account of developments during his investigation, his investigation has focussed on Surrey Police's citing of sections 30(3), 23(5) and/or 24(2).

Chronology

12. Having been notified by the Commissioner's office that a valid complaint had been received, and following further correspondence from the Commissioner's office dated 3 June 2009, Surrey Police replied to the Commissioner on 22 September 2009.

13. The Commissioner wrote to Surrey Police on 24 November 2009 asking it to provide further arguments in support of its neither confirming nor denying that it held information relevant to the request.
14. Surrey Police provided a comprehensive response on 12 January 2010.
15. Subsequently, following further correspondence, Surrey Police confirmed that it was no longer relying on the exemptions at sections 27, 31, 38 or 40. However, it maintained its reliance on section 30(3) and clarified that it was citing sections 23(5) and 24(2) in conjunction.
16. This is in line with the Commissioner's guidance that, in some circumstances, it is necessary for a public authority to state that it is relying either on section 23(5) or on 24(2) without specifying which. The Commissioner accepts that citing 23(5) and 24(2) in conjunction, where either of these exemptions is engaged, may be an appropriate approach in order to obscure the involvement (or non-involvement) of any security body. This is in line with the Information Tribunal decision in the case of *Baker v the Information Commissioner and the Cabinet Office* (EA/2006/0045).
17. During the course of his investigation, the complainant made submissions to the Commissioner in relation to his interest in this information being disclosed.
18. While he understands the complainant's personal reasons for wanting access to the requested information, the Commissioner has taken into account the fact that neither the identity of the applicant nor any purely personal reasons for wanting the requested information is relevant to the consideration of a freedom of information request. He must consider the wider public interest issues.

Analysis

Exemptions

Section 30 Investigations and proceedings

19. The Commissioner has first considered Surrey Police's citing of the exemption at section 30(3).
20. This exemption is concerned primarily with preserving the integrity of certain proceedings and investigations which public authorities have the power or duty to conduct. Specifically, section 30(3) provides an exemption from the duty to confirm or deny in relation to any

information, whether held or not, that falls within any of the classes specified in sections 30(1) or 30(2).

21. In this case, Surrey Police has clarified that it considers the classes specified in section 30(1) would be relevant if it held any information that falls within the scope of the request.

22. Section 30(1) states:

"Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-

(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained-

(i) whether a person should be charged with an offence,

or

(ii) whether a person charged with an offence is guilty of it,

(b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or

(c) any criminal proceedings which the authority has power to conduct."

23. Section 30(3) states:

"The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1) or (2)."

24. Surrey Police has told the Commissioner that, in its view, the requested information would, if held, be exempt from disclosure by virtue of section 30(1)(a), (b) and (c).

25. The Commissioner notes that sections 30(1)(b) and 30(1)(c) are only available to public authorities with powers to conduct criminal proceedings. In relation to police investigations, the prosecuting authority is the Crown Prosecution Service. Accordingly, the Commissioner has focussed his investigations on sections 30(1)(a)(i) and (ii).

26. Section 30(1)(a)(i) provides an exemption for information held for the purposes of an investigation conducted with a view to it being

ascertained whether a person should be charged with an offence. Section 30(1)(a)(ii) provides an exemption for information held for the purposes of an investigation conducted with a view to it being ascertained whether a person charged with an offence is guilty of it.

27. In order for the exemption in section 30(1) to be applicable, the information must be held for a specific or particular investigation, not for investigations in general and it continues to be applicable even after an investigation has been completed. This is in line with the case of *Toms v The Information Commissioner* (EA/2005/0027).
28. The Commissioner must therefore consider whether, if the public authority held information falling within the scope of the request, that information would conform to the classes specified in section 30(1)(a)(i) and/or (ii).
29. As the public authority in this case is a police force, the Commissioner is satisfied that it has the power to carry out investigations of the sort described in section 30(1)(a)(i) and (ii).
30. The Commissioner is also satisfied that any information falling within the scope of the request that may have been held by Surrey Police would have been held for the purposes of an investigation which it has a duty to conduct with a view to it being ascertained whether a person should be charged with an offence or whether a person charged with an offence is guilty of it. It follows that he is of the view that section 30(1) is engaged and therefore that, in this case, section 30(3) is also engaged.

The public interest test

31. As section 30 is a qualified exemption the Commissioner has next considered whether, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority held any information falling within the scope of the request.
32. In the Commissioner's view, the explanation provided to the complainant of its reasoning as to why the public interest favoured the maintenance of the exemptions it cited, was inadequate. It was not until the Commissioner's investigation that Surrey Police provided substantive arguments regarding the public interest.
33. In relation to the subject matter of the request, Surrey Police has told the Commissioner that:

"Offences of this nature ... are considered to be and are investigated as terrorist incidents".

34. In this respect, the Commissioner notes that the Anti Terrorism Crime and Security Act 2001, contains a section on *"hoaxes involving noxious substances or things"*, which refers to the sending of such substances by post as an offence.

Public interest arguments in favour of confirming or denying

35. Surrey Police acknowledges that there are public interest considerations *"in the transparency of policing operations and in this case providing assurance that the police service are appropriately and effectively engaging with the threat posed by domestic terrorist attack. The public has an expectation that the Police and its partners will protect them from harm"*.
36. Surrey Police has also told the Commissioner that *"there is a public interest around awareness and safety"*. In this respect, it has argued that confirming that the information was held, if it were held, could serve to raise the awareness of the public, for example when opening letters and parcels. However, it recognises the fact *"that the information requested, if held, would now be 7 years old may diminish that effect"*.
37. In the Commissioner's view, where the existence of the information is already in the public domain, a refusal to confirm or deny is not appropriate. The Commissioner notes that Surrey Police provided the complainant with details of an incident relevant to his request that is in the public domain.

Public interest arguments in favour of maintaining an NCND response

38. In relation to his request for information *"on anthrax or white powder hoaxes utilising the postal system in 2003"*, Surrey Police told the complainant that *"it will be apparent that the police service, by virtue of its core functions, will record and investigate incidents of this nature"*.
39. During the course of his investigation, the Commissioner has noted examples of press coverage of incidents of suspect packages and *"anthrax scares"* in the UK between 2001 and 2004. In these cases the incidents involved the evacuation of members of the public and/or admissions to hospital.
40. Surrey Police acknowledges that *"there is no doubt that Surrey Police has a duty to investigate this type of offence"*. However, it has argued

that not all investigations of this type attract such high media interest, for example where there are no casualties or mass evacuation.

41. While Surrey Police provided the complainant with details of an incident relevant to his request that is in the public domain, it argued that:

"to confirm or deny that Surrey Police has recorded other such incidents would potentially harm any ongoing criminal investigations linked to those offences".

42. Although not clearly stating that this was its public interest argument in support of its neither confirming nor denying that it held the requested information, the Commissioner understands that this why Surrey Police provided the complainant with this explanation.

43. In support of its argument neither to confirm nor deny that it held the requested information in this case, Surrey Police told the Commissioner that to confirm whether or not it held the information requested would, if it were held, *"be telling the world, which obviously includes any potential offender, that such an incident has been reported to the police"*.

44. Surrey Police has argued that:

"there is a very strong public interest in safeguarding ... the integrity of police investigations and operations in the highly sensitive area of terrorism prevention. To confirm or deny that information is held would identify whether or not their activities have been detected and ultimately risk compromising any ongoing investigation".

45. In this respect, it has also argued that:

"if a suspect for an offence of this nature was the subject of a covert operation for instance, then disclosure of this type of information if held would clearly frustrate the object of covert operations and would seriously impact on our ability to detect crime and prosecute the offender".

46. The Commissioner gives weight to the public interest argument with regard to the potential to undermine ongoing criminal investigations, particularly those involving alleged acts of terrorism.

Balance of the public interest arguments

47. The Commissioner's 'Awareness Guidance 21 The duty to confirm or deny' explores the implications of the wording of the request in relation to the duty to confirm or deny. In the Commissioner's view, the

wording of the request for information will affect whether or not a public authority will confirm or deny it holds that information. He also considers that, in many cases, the more specific the request, the lower the likelihood of the duty arising.

48. In this case, he considers the request was wide-ranging.
49. The Commissioner has also taken into account the timing of the request in relation to the requested information. In this respect, he notes that the request, made in December 2008, was in relation to information about potential activity in 2003. During his investigation, Surrey Police acknowledged that:

"... the information requested, if held, would now be 7 years old".
50. However, Surrey Police has also argued that investigations similar in nature to the sort of information requested can be long-running, with the build-up of intelligence crucial to success. In this respect, the Commissioner is aware of media reports of a trial involving defendants accused of offences involving the possession of poison who were arrested followed a long-running intelligence-led operation.
51. The Commissioner recognises the public interest in principle in protecting information acquired during police investigations. Accordingly he gives weight to the factors favouring maintenance of neither confirming nor denying whether the information is held where the information, if held, has implications for the investigation of criminal activities including those classified as terrorist incidents.
52. In reaching his decision, the Commissioner acknowledges that there will, of course, be cases where it is right neither to communicate nor to confirm or deny, both in cases where information actually is and is not held.
53. In this case, the Commissioner does not consider that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority held any information falling within the scope of the request.

Section 23 Information supplied by, or relating to, bodies dealing with security matters

Section 24 National security

54. As the Commissioner has not found the exemption at section 30(3) applies, he has next gone on to consider Surrey Police's citing of sections 23(5) and 24(2).

55. Section 23(5) provides that:

"The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3)."

56. The bodies in subsection (3), a copy of which can be found in the Legal Annex at the end of this Notice, include the Security Service, the Secret Intelligence Service and the Government Communications Headquarters.

57. Section 24(2) states:

"The duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security."

58. Surrey Police's explanation of its reliance on section 23(5) and 24(2) in conjunction in this case is of the part that Surrey Police Special Branch would play in an incident of this type.

59. In its refusal correspondence, Surrey Police told the complainant that, in relation to incidents of this nature, *"the police service ...will work closely with other ... bodies tasked with national security"*.

60. In support of its argument, Surrey Police referred the Commissioner to the document *Guidelines on Special Branch work in the UK*. This publication gives details of the role of Special Branch in national security and its links to section 23 bodies:

"Although Special Branches continue to have important roles in the policing of extremist activity and in the provision of personal protection for VIPs and Royalty, counter terrorist work, in close co-operation with the Security Service (MI5), is currently the main focus of their activity. The current nature of the terrorist threat requires a flexible response".

61. Considering the issues in this case, the Commissioner accepts that any terrorist attack on the people of the UK would be counter to national security and that this argument from the public authority is relevant to this exemption.
62. The Commissioner also accepts that security operations may be carried out by bodies both listed and not listed in section 23(3). In his view, in order to avoid responses to requests for information on such matters disclosing the involvement, or otherwise, of either a section 23(3) body specifically or, alternatively, a body not listed in that subsection, it can be appropriate for a public authority to rely on section 23(5) and 24(2) in conjunction.
63. However, in order to determine whether or not the exemptions are engaged in this case, he must consider whether the arguments advanced by Surrey Police that confirmation or denial would have an adverse effect on national security, are persuasive. In considering this matter, the Commissioner draws a distinction between the issue of whether or not terrorism itself represents a threat and whether a further threat to national security would arise through confirmation or denial in this case.
64. In reaching a conclusion, the Commissioner considers that the arguments put forward by Surrey Police in its initial refusal notice were general in nature. He also notes that no further arguments in support of its citing of these exemptions were put forward at the internal review stage.
65. He accepts that, in subsequent correspondence during his investigation, Surrey Police explained its rationale for citing these exemptions in conjunction was on the basis of the part Special Branch would play in this type of incident.
66. In reaching his decision in relation to the citing of these exemptions, the Commissioner is not persuaded that the fact that the information requested, if held, would be of interest to Special Branch is a sufficient basis on which to conclude that sections 23(5) and 24(2) are engaged.

Procedural Requirements

67. Section 1(1) of the Act 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."

68. Accordingly, the Commissioner finds Surrey Police in breach of section 1(1)(a) as it did not confirm to the complainant whether or not it held the requested information.

69. 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."

70. It follows that the Commissioner considers Surrey Police to be in breach of section 10(1) of the Act in that it failed to confirm or deny within the statutory timescale.

71. Section 17(1) of the Act states:

"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."

72. However, section 17(2) provides that a public authority may extend the time limit where it is still considering the public interest after 20 working days, as long as certain measures are taken. Where any additional time beyond the initial 20 working days is required, the public authority must still serve a 'refusal notice' under section 17 of

the Act within 20 working days of a request even in those cases where it is relying on a qualified exemption and has not yet completed the public interest test, state the exemption(s) being relied on and, if not apparent, the reasons why they apply, and give an estimate of the time by which the final decision will be reached.

73. In this case the complainant made his request on 11 December 2008 but Surrey Police did not advise him until 4 February 2009 that it was extending the time for responding in order to consider the public interest test. It finally responded on 18 March 2009. In taking more than 20 working days to respond to the information request, the Commissioner finds Surrey Police breached the requirements of section 17(1) by failing to provide the details required by that section within the statutory timescale.
74. In the Commissioner's view, at neither the refusal notice nor internal review stage did the public authority adequately set out why it considered that the exemptions cited were engaged. In so doing the public authority failed to comply with the requirement of section 17(1)(c).
75. In the Commissioner's view, at neither the refusal notice nor internal review stage did the public authority adequately set out, where this was required, why it considered that the public interest in maintaining the exclusion of the duty to confirm or deny outweighed the public interest in disclosing whether it held the information. In so doing, the public authority failed to comply with the requirement of section 17(3)(a).

The Decision

76. The Commissioner's decision is that the public authority did not deal the request in accordance with the requirements of the Act:
 - it breached section 1(1)(a) by failing to notify the complainant in writing whether it held information of the description specified in the request;
 - it breached section 10(1) by failing to confirm or deny within the statutory time limit;
 - it breached section 17(1) by failing to issue the refusal notice within the statutory time limit;
 - it breached section 17(1)(c) by failing to state why the exemptions applied; and
 - it breached section 17(3)(a) by failing to set out, where this was required, why it considered that the public interest in maintaining

the exclusion of the duty to confirm or deny outweighed the public interest in disclosing whether it held the information.

Steps Required

77. The Commissioner requires Surrey Police to take the following steps to ensure compliance with the Act:
- to confirm or deny whether it holds information that falls within the scope of the request and, in respect of any held information, to disclose it (in full or part) or withhold it by reference to an appropriate exemption.
78. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

79. 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.

Right of Appeal

80. 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.
Website: 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 sent.

Dated the 24th day of May 2010

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

Section 23(3) provides that –

“The bodies referred to in subsections (1) and (2) are-

- (a) the Security Service,
- (b) the Secret Intelligence Service,
- (c) the Government Communications Headquarters,
- (d) the special forces,
- (e) the Tribunal established under section 65 of the Regulation of Investigatory Powers Act 2000,
- (f) the Tribunal established under section 7 of the Interception of Communications Act 1985,
- (g) the Tribunal established under section 5 of the Security Service Act 1989,
- (h) the Tribunal established under section 9 of the Intelligence Services Act 1994,
- (i) the Security Vetting Appeals Panel,
- (j) the Security Commission,
- (k) the National Criminal Intelligence Service, and
- (l) the Service Authority for the National Criminal Intelligence Service.”