

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 9 March 2011

Public Authority: Ministry of Justice
Address: 102 Petty France
London
SW1H 9AJ

Summary

The Ministry of Justice refused a request for a copy of a Home Office circular on the treatment of police informants. It cited the exemption at section 31(1)(f) and subsequently sections 38 and 44. During the course of the investigation it became apparent that the requested information was held on public deposit by the British Library and thus was reasonably accessible to the applicant otherwise than under the Act. The Commissioner therefore decided that the request should have been refused under section 21. He also found breaches of section 17(1) and 17(3).

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. Home Office circular 9/1992, issued in February 1992, offers guidance to Chief Officers of Police on the handling and supervision of resident informants (referred to in the Prison Service as "protected witnesses") and on the procedures for securing their temporary release from prison, where appropriate.
3. A resident informant is an active participant in a serious crime or a succession of serious crimes who, after arrest or conviction, elects to identify, give evidence against and provide intelligence about fellow criminals involved in those or other offences.

4. The circular's main message concerns the need to proceed with resident informants in a way in which later allegations of inducement can be rebutted. It also focuses on the management command concerned with resident informant status and the drawing up of any contract; operational handling; and day to day requirements, including security and welfare.

The Request

5. On 17 August 2009 the complainant emailed the Ministry of Justice ("the MoJ") with a request for a number of items of information. One of the items was a copy of what he referred to as "*The restricted Home Office circular*", which had been discussed by the two parties in an earlier exchange of correspondence.
6. On 14 September 2009 the MoJ contacted the complainant, confirming that it held some of the requested information and explaining that it needed to extend the time limit for response in order to consider the public interest in respect of "section 31(f)". Although it misquoted the sub-section reference, it did refer to it as "*the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained*". It said he could expect a full response by 9 October.
7. The MoJ actually supplied its response to the request on 23 October 2009. It supplied some of the requested information and refused to provide the remainder, citing various exemptions. It refused to supply the restricted Home Office circular on the grounds that it was exempt under section 31(1)(f) of the Act. It set out the public interest arguments it had considered in reaching this decision.
8. The complainant asked for a review of the handling of the request on 30 November 2009. He clarified that he wished the decision to withhold the Home Office circular only to be reviewed, and challenged the MoJ's application of section 31 and the public interest arguments it cited. He also asked whether the document could be released with redactions.
9. The MoJ replied on 23 December 2009. Although the complainant had specified that he was only challenging the decision in respect of the Home Office circular, the MoJ reviewed the request in its entirety and provided justification for each of its decisions. However, it asked for further time to once again consider public interest arguments in respect of the application of section 31(1)(f) to the circular and said it hoped to provide a full response by 15 January 2010.

10. The MoJ wrote again on 3 March 2010, setting out the public interest arguments it had considered. It stated that disclosure of the circular would be likely to prejudice:
- covert operational policing procedures and the ability of the police to protect assisting offenders;
 - the ability of the prison to protect protected assisting offenders; and
 - the safety of all protected witnesses who are assisting offenders.
11. It found these arguments more powerful than the countervailing one that disclosure would give the public a slightly deeper understanding of the way in which protected witnesses are managed. It therefore upheld its decision to exempt the circular in its entirety, under section 31(1)(f).

Scope of the case

12. On 12 March 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specified that he only wished to challenge the decision not to release the Home Office circular. He asked the Commissioner to consider:
- whether the exemption at section 31(1)(f) had been applied properly and, in particular, whether the MoJ had demonstrated evidence of significant risk of harm, were the disclosure to be made;
 - whether the public interest arguments cited by the MoJ were sufficiently persuasive to merit withholding the information.

Chronology

13. The Commissioner commenced his investigation on 14 September 2010, asking the MoJ for information about its application of section 31(1)(f). In its response, the MoJ added a claim that section 38 and section 44 also applied in respect of the circular. Its arguments focussed around the sensitive operational information about the treatment of informants contained in the circular, the disclosure of which would jeopardise the success of covert operations and place individuals in physical danger.
14. However, during the course of the investigation, the case officer established that the British Library holds copies of Home Office circular 9/1992, which it makes available for inspection at its reading rooms (anyone with a permanent address who wishes to carry out research can apply for a Reader Pass; they are required to provide proof of signature

and address for security purposes). It also makes copies available for purchase by any member of the public online, via its secure electronic delivery service.

Findings of fact

15. Whilst the MoJ has argued that disclosure of Home Office circular 9/1992 would prejudice or endanger a number of matters, it is in fact publicly available and has been since it was placed on deposit at the British Library by the Home Office in 1992. The MoJ has viewed the circular held by the British Library and has confirmed to the Commissioner that it is identical to the copy it holds.

Analysis

Exemptions

16. Although the MoJ argued that the exemptions in section 31(1)(f), section 38 and section 44 applied, the Commissioner considered whether the exemption in section 21 of the Act should have been applied in respect of the requested information.
17. In doing so, he has been guided by the Information Tribunal's comments in *Craven v ICO* (EA/2008/0002) that, where information is fully in the public domain, there would be no purpose in requesting it under the Act; nor would there be any basis in disclosing it under the Act, as it would be exempt from disclosure by virtue of section 21. He has also referred to the decision of *Bowbrick/City of Nottingham* (EA2005/0006), in which the Tribunal commented that the Commissioner was entitled to consider exemptions not referred to by the public authority, in appropriate cases.

Section 21

18. Section 21 provides that information which is reasonably accessible to the applicant is exempt information.
19. The Commissioner accepts that information is reasonably accessible if the public authority:
 - knows that the applicant has already found the information; or
 - is able to precisely direct the applicant to the information (the public authority has to be reasonably specific to ensure the information is found without difficulty and not hidden within a mass of other information).

20. In this case, the British Library has confirmed to the Commissioner and the MoJ that it currently has in its collection three copies of Home Office circular 9/1992:
- a copy received under UK legal deposit in 1992 – available publicly in the Library's reading rooms;
 - a further copy – available to purchase remotely via the Library's Document Supply service;
 - a copy contained within the Chadwyck-Healey microfiche set of Official publications not published by HMSO – available publicly in the Library's reading rooms.
21. The British Library says that Home Office circular 9/1992 was received via legal deposit in 1992. It is not protectively marked, and the Library received no special instructions from the Home Office about restricted access when it was first accessioned. It has been available for inspection and purchase by any interested parties since that date.
22. The British Library also believes that further copies are available in a number of other libraries in the UK and outside UK sovereign territory as follows:
- the other 5 legal deposit libraries who would have been sent a copy (SUNCAT – the Serials Union Catalogue for the UK research community - confirms holdings at the Bodleian Oxford, Trinity College Dublin and the National Library of Scotland);
 - any library which had purchased the Chadwyck-Healey microfiche set of Official publications not published by HMSO;
 - the Library of the London School of Economics (according to SUNCAT);
 - the Institute of Advanced Legal Studies Library (according to SUNCAT).
23. The circular can be identified on the British Library's catalogue through its online search tool at <http://www.bl.uk/>, using the term "resident informants". This reveals that the circular is held on its catalogue records at shelfmark reference MFE 1169 CH--92.1019(microfiche) DSC. A link appears next to the reference allowing the purchase of the document, which can be supplied to the purchaser by post or by secure email.

21(2)(b) Obligated by or under any enactment to communicate

24. 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.
25. The British Library has advised the Commissioner that all publishers who publish works in the UK are obliged under the Legal Deposit Libraries Act 2003 (and before that the Copyright Act 1911) to deposit a copy of that work with the British Library. The Library's remit and functions in relation to the collection are set out in the British Library Act 1972. Section 1(2) of that Act states that the Library was established "*as a national centre for reference, study and bibliographical and other information services*". The Library has confirmed that it makes copies of the Home Office circular available for purchase by the public via its remote Document Supply service.
26. The Commissioner therefore finds that the information is reasonably accessible using the information in paragraph 23, albeit that the MoJ failed to recognise this and consequently did not direct the applicant to where the information could be found. The Commissioner considers that the appropriate response for the MoJ was to have applied section 21.

Section 31, section 38, section 44

27. Because the Commissioner considers that the appropriate response was to have applied section 21, he has not gone on to consider the application of sections 31, 38 and 44.

Procedural Requirements

28. The MoJ failed to cite section 21(1) to justify withholding the information within the statutory time frame. Accordingly, there were breaches of sections 17(1)(a), (b) and (c) in respect of the failure to inform the complainant of the application of section 21 within 20 working days.
29. Section 17 also has the effect of requiring a public authority to accurately convey its position as to why it is refusing a request, irrespective of whether the Commissioner subsequently determines the position to be incorrect. There will be a breach of section 17(3) if, having notified the complainant that it needs further time to consider the balance of the public interest, the public authority fails to communicate the outcome of its public interest test deliberations within a further 20 working days. In this case, the MoJ responded on 14 September 2009 by referring to section 31(1)(f) but did not provide the outcome of its public interest test deliberations until 23 October 2009.

The Decision

30. The Commissioner's decision is that the public authority did not deal with the request in accordance with the Act in that it failed to apply section 21 to the information which it held.
31. In failing to cite section 21(1) within the statutory time frame, it breached sections 17(1)(a),(b) and (c) of the Act.
32. In failing to communicate the outcome of its public interest deliberations in respect of section 31, within a further 20 working days, it breached section 17(3).

Steps Required

33. The Commissioner requires no steps to be taken.

Other matters

34. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.
35. Part VI of the section 45 Code of Practice (the "Code") 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 60 working days for an internal review to be completed. The Commissioner also considers that the content of the review does not demonstrate that the additional time taken in this case was warranted. In future, he expects that the public authority will conduct reviews in accordance with the Code.

Right of Appeal

36. 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

37. 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.
38. 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 9th day of March 2011

Signed

**Jon Manners
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
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SK9 5AF**

Legal Annex

General Right of Access

Section 1(1) provides that -

"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."

Section 2(3) provides that –

"For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

- (a) section 21
- (b) section 23
- (c) section 32
- (d) section 34
- (e) section 36 so far as relating to information held by the House of Commons or the House of Lords
- (f) in section 40 –
 - (i) subsection (1), and
 - (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
 - (iii) section 41, and
 - (iv) section 44"

Refusal of Request

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."

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)-

- (d) information may be reasonably accessible to the applicant even though it is accessible only on payment, and
- (e) 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."