

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 March 2012

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

Decision (including steps ordered)

1. The complainant has requested: *"minutes of the Association of Chief Police Officers (ACPO) Road Policing Enforcement Technology Committee meetings held from the beginning of 2006 to the present date"*. The request was made on 21 May 2010.
2. The Commissioner's decision is that the Home Office (HO) has partly complied with FOIA in withholding some of the requested information relying on sections 41(1), 42(1), 43(2) and 40(2) of the Act, but has incorrectly relied upon sections 31(1)(a), 40(2), 41(1) and 43(2) of the Act to withhold some of the requested information which the HO should have disclosed.
3. The Commissioner requires the HO to disclose the information specified in the confidential schedule annexed to this notice, to ensure compliance with the legislation. The schedule has been issued to the HO only and not to the complainant since the schedule itself contains withheld information.
4. The HO must take these steps within 35 calendar days of the date of this decision notice. Failure to comply 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 FOIA and may be dealt with as a contempt of court.

Request and response

5. On 21 May 2010, the complainant wrote to the HO and requested information in the following terms:

minutes of the ACPO Road Policing Enforcement Technology Committee [the committee] meetings held from the beginning of 2006 to the present date.

6. The committee is a key part of the HO type approval process for accrediting new speedometer devices provided to assist with road policing enforcement on public roads.
7. The HO responded on 23 July 2010, resending its reply on 9 and 12 August 2010, and disclosed redacted copies of minutes of the relevant meetings of the committee. At the complainant's request, the disclosed information was provided electronically and the size of the relevant emails led to some technical transmission difficulties which were finally resolved on 12 August 2010. The HO released some of the information requested, redacting some information on the grounds that it was exempt under section 40(2) (Personal information), section 41(1) (Information provided in confidence) and section 43(2) (Commercial interests) FOIA.
8. Following an internal review the HO told the complainant on 28 October 2010 that its original decision had been correct.

Scope of the case

9. The complainant contacted the Commissioner on 3 March 2011 to complain about the way his request for information had been handled. He challenged the HO's application of the section 41(1), 43(2) and 40(2) exemptions including the HO's application of the public interest test for section 43(2).
10. The Commissioner, through his staff, has reviewed the withheld information in detail and held discussions with the HO. He has received and considered very detailed representations from both parties. He has had regard for his own earlier decision in a related matter, ICO reference FS50083358. He has also noted the considerable volume of information about the devices and the matters considered by the committee that is available on the internet, originating both in the UK and in other countries in Europe and beyond, and which has been provided by official bodies, interested members of the public and the equipment suppliers themselves in promoting their products and services. He has also noted information made public from time to time by some members of the committee.
11. During the course of the Commissioner's investigation the HO additionally sought to rely on the section 42(1) exemption (Legal professional privilege).

12. Following his investigation, the Commissioner invited the HO to agree to informal resolution of the matter and provided the HO with a schedule setting out an ICO analysis of the matter. The HO, on 5 September 2011, appeared to agree. However, on 10 October 2011, the HO made further significant representations to the Commissioner and additionally sought to rely on the law enforcement exemption in section 31(1)(a) of the FOIA.

Reasons for decision

Information provided in confidence

13. Section 41(1) of FOIA states that:

"Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and*
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."*

14. The traditional test of confidentiality involves determining whether the information was obtained in confidence, and whether its disclosure would constitute an actionable breach of confidence. For the purposes of section 41 a breach will be actionable if:

- the information has the necessary quality of confidence;
- the information was imparted in circumstances importing an obligation of confidence; and
- there was an unauthorised use of the information to the detriment of the confider (the element of detriment is not always necessary).

Was the information provided by a third party?

15. The HO argued that the information was provided by various third parties and therefore meets this test.
16. The Commissioner has inspected the withheld information and agrees that it originates from various third parties ie members of the committee and delegates that attended the relevant meetings.

Does the information have the necessary quality and obligation of confidence?

17. The Commissioner considers that information will have the necessary quality of confidence if it is not otherwise accessible to the public, is more than trivial and is of importance to the confider. Information will not have the necessary quality of confidence if it is already in the public domain.
18. The Commissioner has carefully considered the withheld information and notes it was marked "confidential" and, for some meetings, members were reminded that some of the information discussed was sensitive. The Commissioner decided that while members could have a reasonable expectation that some of the information would be treated as having been received in confidence, this could not and would not apply to all the information recorded in the minutes of the committee's meetings, which ranged from the trivial to the more sensitive.
19. For the information in the committee's minutes that he decided had been **withheld correctly**, relying on section 41(1), identified in the confidential schedule, the Commissioner decided that: the information had been provided in the expectation of confidence by or through its members and that the information had the necessary quality of confidence as it was more than trivial in nature and was not in the public domain. The Commissioner also concluded that there had been an obligation of confidence in relation to this information.
20. For the information in the committee's minutes that he decided had been **wrongly** withheld relying on section 41(1), for example, information about safety measures, such as community speed watch schemes or the use of graduated fixed penalties for those exceeding speed limits, the Commissioner decided that the recorded information lacked the necessary quality of confidence, particularly for the older devices, technical details of many which are widely available and discussed freely on the internet. As regards the obligation of confidence, he decided that the use of sales demonstrations to third party committee members and others, and demonstrations to other authorities in other jurisdictions, meant that the information was becoming widely available and that this limited the expectations of confidence that the suppliers could reasonably have obliged from the HO as well as any detriment to the suppliers from its disclosure.

Would disclosure be detrimental to the provider?

21. The Commissioner has gone on to consider the detriment question in respect of the information that has met the first two parts of the test. The HO argued that disclosure would be detrimental to the business

interests of the confiders where they were the suppliers of the devices under consideration by the committee or were other relevant public authorities. This applied to discussions of experimental devices and included matters where technical challenges and possible solutions to them were being discussed. The HO also highlighted the serious concerns representatives from the industry have raised about the confidential nature of the committee's meetings being compromised and the resulting impact that would have. Having considered the withheld information and the arguments put forward by the HO the Commissioner concludes that there would be detriment to the providers of the information in this instance in relation to that information identified in the confidential schedule but not to the remaining information.

Would disclosure of the confidential information be actionable?

22. A breach of confidence would not be actionable if there was a public interest in favour of disclosure. Although section 41 of the Act is an absolute exemption and not subject to the public interest test at section 2 of the Act, the common law concept of confidence will not be actionable in circumstances where a public authority can rely on a public interest defence. This common law test is the reverse of that normally applied under the Act.
23. The Commissioner decided that there was a strong and legitimate public policy interest in the greater transparency and accountability that would result from disclosing information about the nature and technical capabilities of devices being considered for use in monitoring traffic on public roads and giving assurance of the type and level of scrutiny given by the committee to matters of public road safety. This outweighed the public interest in some of the confidential information continuing to be withheld; in balancing the public interest arguments in favour of upholding the obligation of confidence, the Commissioner had regard for the wider public interest in preserving confidentiality and the impact that disclosure would have on the interests of the confiders. The Commissioner decided that disclosure of relevant information would augment and assist the public understanding of information already made public by HO and others, including the suppliers of the devices about the type approval process and the devices themselves. He decided that the scope and scale of the disclosures would be modest and would not be actionable by them.
24. The Commissioner saw no evidence to support HO's assertion that disclosure could cause suppliers to decline to take part in the type approval process. Nor did he see evidence that, for the information he decided should be disclosed, there would be detriment to the suppliers or to the HO arising from disclosure of that information.

25. However, in relation to that information, identified in the confidential schedule, which the Commissioner considers has the necessary quality and obligation of confidence and the disclosure of which would be detrimental to the provider, the Commissioner also accepts, in the particular circumstances of this case, that disclosure of this information would constitute an actionable breach of confidence and should be withheld.

Legal professional privilege

26. Section 42(1) of FOIA states that:

"Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information."

27. In a small number of instances, the committee's minutes recorded the legal advice that had been supplied to the committee. Section 42 is a class-based qualified exemption requiring a public interest test to be conducted. The Commissioner decided that the relevant information recorded in the minutes was properly regarded as legal advice that attracted legal professional privilege and, as it had not been disclosed, its confidential nature was maintained and the exemption was engaged.
28. The public interest factors the Commissioner saw as **favouring** disclosure are: knowing that policy developed and guidance produced on prosecutions and sentencing has been based on sound legal advice, that appropriate advice has been provided to policymakers in a timely fashion, and that there is transparency and accountability regarding the rules applied to those suspected of having driven at excessive speeds or other relevant road traffic offences.
29. The public interest factors the Commissioner sees **against** disclosure are that HO officials and other committee members must be able to obtain and discuss comprehensive and frank legal advice in private. The committee must be fully informed of the relevant legal context and considerations for its decisions such as the type approval of devices, to ensure the effective conduct of its business and that of the HO, the police and the other bodies that the committee represents. Moreover disclosure of the legal advice given to it in confidence would be likely to prejudice the ability of HO, and others represented within the committee, to defend their interests effectively. To put in place any measures that would effectively deter the committee from seeking legal advice in the first instance could lead to decisions being taken by it that would be unsound in law, which would be against the public interest.

30. The Commissioner decided that, for the information being withheld relying on section 42(1), the public interest in maintaining the exemption outweighed that in disclosing it.

Commercial interests

31. Section 43(2) of FOIA states that

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."

32. The HO has specified that its stance is that prejudice *would be likely to* result through disclosure, rather than that it *would* result. The test that the Commissioner applies where a public authority has stated that prejudice would be likely to result is that the risk of prejudice must be real and significant, and certainly more than hypothetical or remote.
33. For the information in the committee's minutes that he decided had been **withheld correctly** relying on section 43(2), identified in the confidential schedule, the Commissioner accepted the disclosure would be likely to prejudice the interests of the suppliers of the devices and, reflecting what HO told him, of the HO itself. The market contains some eight mainstream companies and a further five smaller suppliers and is therefore competitive. Because the relevant devices were actively being developed or had novel features with technical adaptations being sought and tested, the Commissioner concluded that the nature of the prejudice was real and significant and therefore would be likely to damage the commercial and competitive positions of the relevant suppliers. He therefore decided that the exemption was engaged. He then considered the balance of the public interest.
34. Public interest factors which the Commissioner considered favoured disclosure included public scrutiny of the committee and public awareness of its actions to improve its accountability through greater transparency and public knowledge of road safety strategies – including the public interest in greater scrutiny of the development and direction of public policy and the technical options that were and were not considered. The public needs to be confident that the measures and technology being approved by and through the committee are adequate, reliable in operation and proportionate in scale to ensure the safety of the travelling public from traffic-related offences. There is a legitimate interest in providing the public with the ability to scrutinise the proceedings of the committee and obtain assurance that the measures being championed by the committee are proportionate to the ends it seeks to achieve and in line with its terms of reference and that any weaknesses or difficulties in the use of devices have been properly

addressed. Greater transparency of the proceedings of the committee would be likely to increase general awareness of the opportunities afforded by the road safety market, thereby opening up the potential for further new suppliers to emerge. The Commissioner decided that the passage of time had reduced the sensitivity of much of the information about the devices considered in the earlier years of the four-year timeframe spanned by the requested information.

35. Public interest factors which the Commissioner considered favoured withholding the relevant information included any deterrent effect that disclosure might have on potential suppliers of relevant devices if that then reduced their number. The Commissioner considered, but did not accept, the argument that HO put forward, without supporting evidence, that disclosure would decrease the likelihood of suppliers applying for type approval of devices as the committee effectively provides the sole route to participation in the UK road safety device market. In some specific cases, notably where technical features of the devices were being developed, proved or tested he decided that, at least for the present, there was a strong public interest in withholding the information, identified in the confidential schedule, which outweighed the public interest factors favouring disclosure. However, in relation to the remaining information the Commissioner concluded that the public interest favoured disclosing the information.
36. In deciding that some of the information in the committee's minutes had been **withheld wrongly** relying on section 43(2), the Commissioner decided that commercial prejudice would not be likely to arise so that the exemption was not engaged.
37. As the Commissioner concluded this information did not engage the exemption he has not gone on to consider the public interest test in relation to this information.
38. The Commissioner saw that there was one company named in the recorded information which was not publicly associated with the road safety device market and had chosen not to make its involvement more widely known. In this regard, the company was unique in that all of the other relevant companies strongly promoted their involvement with road safety technology by publicity and through their websites. He decided, for this company, that prejudice would be likely to result from disclosing its identity and that the exemption was engaged in respect of it. He also concluded that, in the light of its avoidance of publicity, the balance of the public interest factors in respect of that company favoured maintaining the exemption.

Personal information

39. Section 40(2) of FOIA states that:

"Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and*
- (b) either the first or the second condition below is satisfied."*

Section 40(3) states that:

"The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-*
 - (i) any of the data protection principles, or*
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and*
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded."*

Section 40(4) states that:

"The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data)."

40. Section 40 is an absolute exemption so there is no public interest test.

41. In order to rely on the exemption provided by section 40(2), the withheld information must constitute personal data as defined by the Data Protection Act 1998 (DPA). Section 1 of the DPA says that "personal data" is data which relates to a living individual who can be identified:

- (a) from that data, or
- (b) from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.

It includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.

42. The first data protection principle states that:

“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless -

*(a) at least one of the conditions in schedule 2 is met, and
(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.”*

43. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the data protection principles.

44. The HO withheld some of the names of individual attendees at meetings of the committee and also the names of some industry professionals mentioned during its proceedings. The Commissioner decided that the names withheld by HO were the personal data of the people concerned. He then considered whether or not disclosure of their names would be unfair.

45. The Commissioner decided that the public has a legitimate interest in knowing the composition of the committee. In considering whether disclosure of committee membership is fair under the first principle of the DPA, for the purposes of section 40 FOIA, the Commissioner will normally balance the consequences of any disclosure and the reasonable expectations of the data subject with general principles of accountability and transparency.

46. For those individuals who were senior officials at HO or in police forces, the Commissioner decided that given their existing public engagement in related matters there would not be adverse consequences from disclosing their involvement with the committee. He considered that they could not reasonably have expected that their presence at meetings of the committee would not be made public and accordingly disclosure of their attendance in their official capacities would not be unfair; moreover, disclosure would be desirable in promoting the accountability and openness of the committee and its proceedings. For those persons who were prominent within the road safety industry, and whose roles in it were widely known and had been prompted or made public, either by themselves or by others on their behalf (eg through the internet), similar considerations applied and the Commissioner also decided that disclosure of their names would not be unfair.

47. The Commissioner considered whether the legitimate interests of the public are sufficient to justify any negative impact of disclosure on the rights and freedoms of the individuals concerned. He considered that there is a legitimate interest in disclosure of this information as there is a strong public interest in increased transparency and accountability by senior decision makers in these matters and that disclosure of the withheld information is necessary to achieve it. The Commissioner concludes that disclosure of these names would be both fair and lawful.
48. However, the Commissioner decided it would not be fair to disclose the names of junior officials who did not have a public role within the road safety industry. The Commissioner has a long established position that the personal data of junior officials whose roles are not public facing is not normally disclosable and he saw no reason to depart from that position in this matter.
49. He also decided that it would not be fair to disclose the names of those other individuals whose roles within road safety matters were not well known and had not been made public by them or with their knowledge.

Law enforcement

50. Section 31(1)(a) of FOIA states 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..."

51. On 10 October 2011, almost at the end of the Commissioner's investigation, HO sought to apply the law enforcement exemption to a fragment of information in the minutes of the committee meeting of 19 January 2010. HO offered no supporting evidence or explanation for its late application of the law enforcement exemption other than to say that the relevant information contained what HO described as an unhelpful typographical error.
52. The Commissioner reviewed the content and context of the relevant information and saw no evidence that its disclosure would prejudice the prevention or detection of crime. Accordingly he did not accept that the exemption was engaged.

Other matters

53. HO acknowledged that its delay in response to the information request had been a breach of section 10(1) FOIA (Time for compliance with the request).

Right of appeal

54. 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,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

55. 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.
56. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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