

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 01 March 2012

**Public Authority:** Crown Prosecution Service  
**Address:** Rose Court  
2 Southwark Bridge  
London  
SE1 9HS

#### Decision (including any steps ordered)

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1. The complainant, a firm of solicitors acting on behalf of an applicant, requested a copy of what it described as a named investigator's report (the report) from the Crown Prosecution Service (CPS). The complainant asserted that the report existed and was held by CPS in connection with criminal proceedings taken against the applicant. CPS neither confirmed nor denied holding the report.
2. The Commissioner's decision is that CPS has complied with FOIA in neither confirming nor denying, under section 30(3) FOIA, whether it did nor did not hold the report.
3. The Commissioner did not require CPS to take any remedial steps to ensure compliance with the legislation.

#### Request and response

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4. The background to the request is that the complainant firm of solicitors acts on behalf of the applicant, who is currently in prison having been convicted of VAT fraud and money laundering offences in July 2010. A co-defendant is still awaiting trial in the UK but is understood to have been detained by the local authorities in connection with other proceedings in another European jurisdiction.
5. In correspondence which predated the information request, CPS told the complainant, on 10 March 2011, that:

*"My obligations of disclosure to you following the conclusion of [the criminal] proceedings are to consider disclosure of material that might cast doubt upon the safety of [the applicant's] conviction. I am not in possession of any material that casts doubt upon the safety of [the applicant's] conviction either generally or specifically in relation to your suggestion that police officers in the case misled the Court during questioning as to whether they knew the whereabouts of [a named co-defendant]."*

6. On 11 August 2011, the complainant wrote to CPS and requested information on behalf of the applicant under FOIA in the following terms:

*"I request ... a copy of the [company name] report (the investigators report)."*

7. The complainant asserted that CPS held the report and had relied upon it in respect of criminal proceedings relating to the applicant.
8. CPS responded on 9 September 2011 saying that it could neither confirm nor deny possession of such a report. In saying that, CPS relied upon the exemptions in section 40(5)(b)(i) FOIA (Personal information) and section 30(3) FOIA (Investigations and proceedings conducted by public authorities). CPS did not carry out a public interest test in respect of the latter exemption.
9. Following an internal review CPS wrote to the complainant on 27 October 2011. It stated that the application of the section 40(5)(b)(i) FOIA exemption had been correct. CPS also said that it had correctly applied the section 30(3) FOIA exemption. CPS added that there was a public interest test for the latter and that it was in the public interest for any trial to be carried out in accordance with the criminal procedure rules and the relevant disclosure regime. CPS added, for the avoidance of doubt, that it gave no indication that the information requested was or was not held by it.

## **Scope of the case**

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10. On 31 October 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant maintained its belief that the report was held by CPS and said that it was in the public interest for it to be disclosed.
11. The Commissioner considered the application of the section 30(3) exemption and, in the light of his conclusion about that and the balance

of the public interest, did not proceed to consider the application of the section 40(5)(b)(i) FOIA exemption.

## Reasons for decision

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12. Section 30(1) FOIA states that:

*"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."*

Section 30(2) provides that:

*"Information held by a public authority is exempt information if-*

- (a) it was obtained or recorded by the authority for the purposes of its functions relating to-*
  - (i) investigations falling within subsection (1)(a) or (b),*
  - (ii) criminal proceedings which the authority has power to conduct..."*

Section 30(3) provides that:

*"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)."*

13. Section 30 FOIA is a class-based exemption, which means that there is no need to demonstrate harm or prejudice in order for the exemption to be engaged. 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).

14. The Information Commissioner found that the request had been made in connection with criminal proceedings taken by CPS against the applicant

and that the information requested, if held by CPS, could be relevant to criminal proceedings. He therefore decided that the section 30 FOIA exemption was engaged.

15. Section 30(3) FOIA relates to the position adopted by CPS to neither confirm nor deny holding the information requested. The Commissioner recognises that the success of many investigations depends on making sure that information about them is not disclosed prematurely and that it may be necessary for public authorities carrying out investigations to protect confidential sources. He recognises that there are circumstances where damage can be caused by the confirmation that information is or is not held.
16. The Commissioner considers that a neither confirm nor deny response will not be sustainable in the face of independent evidence that the requested information is, or is not, held. The Commissioner has seen no independent evidence in the correspondence provided to him. He invited the complainant to provide independent evidence that a report of the description requested existed at the time of the information request and that it was held by CPS, but the complainant did not do so. Given the lack of independent evidence that the alleged report was or was not held by CPS at the date of the request, the Commissioner decided that the section 30(3) exemption had been correctly engaged.

### **Public interest test**

17. As section 30 FOIA is a qualified exemption the Commissioner went on to consider the balance of the public interest.
18. The Commissioner considers that, within the context of the section 30 exemption, the following factors are germane to the public interest balancing test for neither confirming nor denying whether or not information requested is held:
  - the stage or stages reached in any particular investigation or criminal proceedings;
  - whether and to what extent the information requested has already been released into the public domain;
  - the significance or sensitivity of the information; and
  - the age of the information.
19. There is a public interest in favour of requiring that CPS does either confirm or deny holding relevant information in that CPS is charged with prosecuting alleged offenders and acting fairly and in accordance with the criminal procedure rules. This means that confirming or denying whether the information was held could increase public confidence and

trust in CPS and how it deals with members of the public who are charged with having committed criminal offences.

20. The Commissioner sees a strong public interest in making available to a person convicted of a serious criminal offence, any evidence that might reasonably be said to cast doubt on the safety of his conviction.
21. The public interest in protecting information acquired during investigations is considerable while they remain open. As regards the stage reached in the investigation of the applicant's matters, and of the CPS proceedings, the Commissioner has seen that, while the initial proceedings against the applicant have been concluded, other connected matters had not been concluded at the time of the request. The Commissioner understands that connected matters had also not been concluded against one or more of the applicant's co-defendants. He also understands that he cannot discount the possibility that there may be relevant connected matters still to be concluded in another jurisdiction.
22. The Commissioner has not seen any evidence that information relevant to the confirmation or denial of the request has already been released into the public domain.
23. The complainant has said that the information requested has considerable significance. The complainant said that it is in the public interest for the report to be disclosed and if it did not assist the applicant, or undermined the CPS prosecution in relation to the evidence that was given during the trial, then it should be disclosed as a common principle of equity. The complainant said that if the information is not held then CPS should say so and, if it is held but CPS does not wish to disclose it, then CPS should provide a reasoned case for withholding it.
24. The complainant told the Commissioner on 23 December 2011 that it believed the report existed and was of vital importance to the mounting of a possible appeal out of time by the applicant. The complainant said it believed that the requested report would show that CPS and police officers had withheld important evidence from the defence at the time of the applicant's trial.
25. CPS told the Commissioner that the applicant had been convicted after an 11-week trial during which full representations on disclosure matters had been made and considered by the Court.
26. CPS confirmed to the Commissioner that it recognised its duty to disclose to a convicted defendant any material that might undermine the safety of his conviction. The Commissioner noted that CPS had told the complainant on 10 March 2011 that it held no information that might cast doubt on the safety of the applicant's conviction. CPS confirmed to the

Commissioner that this was still the case at the time of the information request in August 2011 and remained so at the time of his investigation in January 2011.

27. The Commissioner has seen no evidence regarding the age of the report that CPS neither confirm nor deny holding.
28. In the light of the confirmation from CPS that connected matters remain to be resolved, and that at all relevant times it held no information that might call into question the safety of the applicant's conviction, the Commissioner has decided that the balance of the public interest lies in maintaining the section 30(3) FOIA exemption.

### **Other matters**

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29. In its refusal notice of 9 September 2011 CPS did not carry out a public interest balancing test; this was a breach of section 17(3) FOIA.
30. CPS told the Commissioner that there is no CPS policy on "neither confirm nor deny" responses to FOIA requests. The Commissioner invited CPS to consider whether developing such a policy might be helpful for the future.
31. For the avoidance of doubt, nothing in this decision notice should be taken as confirming or denying the existence of the report identified by the complainant or of its possession by CPS.

## Right of appeal

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32. 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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

33. 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.
34. 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 .....**

**Jon Manners  
Group Manager  
Information Commissioner's Office  
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