

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 March 2013

Public Authority: Serious Fraud Office
Address: 2-4 Cockspur Street
London
SW1Y 5BS

Decision (including any steps)

1. The complainant has requested information about several companies which he believes the public authority may have received complaints about. The public authority refused to either confirm or deny whether it held any relevant information citing section 30(3); the Information Commissioner's decision is that the public authority was correct to do so. He does not require it to take any steps.

Request and response

2. On 18 September 2012, the complainant wrote to the public authority and requested information in the following terms:

"Under the Freedom of Information Act please provide me with a copy of any correspondence received or documents held by the SFO between the dates of January 2010 and today's date concerning any concerns raised with it about a number of [location redacted] limited companies which trade as [names redacted]. By correspondence I mean email, letter, record of phone call, reports and other documents. Please also provide any copies of documents, emails, letters, notes of meetings or phones calls concerning any action the SFO has taken as a result of the above concerns received.

Please also provide any copies of documents, emails, letters, notes of meetings or phone calls concerning any contact between the FSA and Serious Fraud Office and or any other external agencies following the above concerns.

If you believe that some information in the above will be exempt under the FOI act then please consider making redactions and sending readacted [sic] copies rather than using this as a blanket refusal”.

3. The public authority responded on 10 October 2012. It refused to confirm or deny holding any related information.
4. Following an internal review the public authority wrote to the complainant on 31 October 2012. It maintained its position.

Scope of the case

5. On 31 October 2012 the complainant contacted the Information Commissioner to complain about the way his request for information had been handled.
6. The Information Commissioner advised that the focus of his investigation would be to determine whether or not the public authority was correct to neither confirm nor deny holding any information relevant to the following request

Reasons for decision

7. Section 30(1) of 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...”

8. Section 30(3) states 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).”

9. Section 30(1)(a)(i) provides an exemption to disclosure 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.
10. 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. In order for the exemptions within section 30(1) to be applicable, any information must be held for a specific or particular investigation, and not for investigations in general.
11. The public authority has power to prosecute under the terms of two separate pieces of legislation. It explained to the Information Commissioner:

"... the SFO was constituted under the Criminal Justice Act (1987). Part 1, section 1(3), of the Act sets out that "The Director [of the SFO] may investigate any suspected offence which appears to him on reasonable grounds to involve serious or complex fraud".

And:

"In addition, the Criminal Justice and Immigration Act (2008) added pre-investigation powers at section 2A of the Criminal Justice Act (1987). In particular, this said that "The powers of the Director under section 2 are also exercisable for the purpose of enabling him to determine whether to start an investigation under section 1 in a case where it appears to him that conduct to which this section applies may have taken place."

12. Accordingly the Information Commissioner is satisfied that the public authority has the power to carry out investigations of the sort described in sections 30(1)(a)(i) and (ii) to establish whether an offence has occurred.
13. Section 30 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). The public authority confirmed that it considers that the classes of information specified in section 30(1) would be relevant if it held any information falling within the scope of the request.
14. The request asks for information held which relates to 'any concerns' raised about a number of named companies. The public authority clearly has a statutory duty to investigate such matters and the

Information Commissioner is therefore satisfied that any information it may hold falling within the scope of the request will be held for the purposes of a specific investigation, with a view to ascertaining whether a person should be charged with an offence or whether a person charged with an offence is guilty of it. The Information Commissioner is therefore satisfied that the exemption at section 30 is engaged.

15. As this is a qualified exemption the Information Commissioner must next go on to consider the public interest test. However, before doing so he would like to address a point put forward by the complainant to the public authority.
16. The complainant stated:

"I would argue that there has been no demonstration of why disclosure of the information I have requested would or would likley [sic] to prejudice [sic] the functions in this particular case - it has just been taken as read that it would."

To clarify, as explained in paragraph 13 above, this is a class-based exemption so there is no requirement to establish any prejudicial effect.

17. The complainant also raised a number of arguments that would rely on the public authority first either confirming or denying that any information is held. As the Information Commissioner is only considering the duty to either confirm or deny whether information is held he is not able to take these arguments into consideration.

Public interest test arguments in favour of confirmation or denial that information is held

18. The public authority provided the following arguments to the complainant:

"There is a general public interest in: publicising the work of the Serious Fraud Office so that people know that serious fraud is being dealt with effectively; and releasing information about our work to assure people about how public money is being spent and the general conduct of our organisation. However, we do not believe that the release of the sort of information which you have outlined would add significantly to either of these factors and therefore feel there is minimal public interest in releasing that sort of material".

19. The public authority provided these additional arguments to the Information Commissioner:

"we recognise that in this case there is a very small amount of public speculation that the SFO could be investigating matters to which the information requested could relate. This is in the form of material posted on the internet by private individuals. The SFO also notes that there is the potential for individuals to increase the level of speculation about certain matters – that is, to virtually increase the public's interest (rather than the public interest) – by drawing attention to FOI requests of this nature. Where an investigation may be taking place, that speculation alone may have the power to disrupt or prejudice such an investigation. Where an investigation is not taking place, or where an investigation could eventually not provide sufficient evidence of wrongdoing, that speculation could damage the reputation of individuals or companies concerned".

And:

"The SFO recognises that in very exceptional cases, the public's interest in a matter – generated by social media, the press, and so on – may be a significant factor in weighing the public interest. The investigation into potential manipulation of the LIBOR lending rate is one such exceptional case. In this instance, the SFO does not consider this to be relevant".

20. The complainant also provided his own arguments in favour of disclosure. As mentioned above, several of these would involve the public authority confirming or denying that it holds any information so they cannot be taken into account. However, the Information Commissioner notes the complainant's concerns that people may be investing their pensions into the companies which he has concerns about and, if it were known that these companies were under investigation, then these investors would be able to consider their investment with that knowledge in mind. He also likened the potential seriousness of his concerns to other investigations which the public authority has chosen to make public, such as the LIBOR lending rate.

Public interest test arguments against confirmation or denial that information is held.

21. The public authority provided the following arguments to the complainant:
- *There is general recognition that it is in the public interest to safeguard the investigatory process.*
 - *Investigating bodies should be afforded the space to determine the course of an investigation.*

- *Any potential witnesses need to be protected to ensure people are not deterred from making statements or reports by fear it might be publicised.*
 - *The right of access to information should not undermine the investigation and prosecution of criminal matters nor dissuade individuals from coming forward to report wrongdoing. Release of information such as you have described might dissuade other individuals from providing information to the SFO in future.*
 - *The release of information relating to any ongoing investigation, including confirming or denying whether such information is held, would be likely to cause prejudice to that investigation or prosecution.*
 - *Release of such information may also have a prejudicial affect more generally in relation to the investigatory and prosecution processes of the public authority. Simply confirming or denying that an investigation was taking place, could affect an investigation, or potential future investigations.*
22. The public authority provided these additional arguments to the Information Commissioner:
- *Release of the sort of information requested would not add significantly to the public's assurance that serious fraud is being dealt with effectively, or that public money was being effectively spent.*
 - *There is no significant public or media speculation about a potential investigation relating to the specific information requested or the individuals / organisations to which it could relate.*
 - *There is general recognition that it is in the public interest to safeguard the investigatory process – if significant investigations are taking place, they must be allowed the space to do so at a suitable pace, without being threatened by the premature release of information; conversely, if significant investigations are not taking place, criminals should not be able to confirm this through the Freedom of Information process.*
 - *Regulatory and investigatory bodies should be afforded the space to discuss freely suspected criminal allegations amongst themselves without fear that any and all records of such communications / meetings and material exchanged between them may be at risk of disclosure under FOIA requests.*

23. The complainant recognised that it is in the public interest to safeguard the investigatory process.

The balance of public interest test

24. In the Information Commissioner's view, the public must be satisfied that the public authority takes seriously information it receives from members of the public that may point to the existence of activity in breach of the legislation which it has power to investigate. Sufficient information should therefore be made available to give the public reassurance that its work in this respect is done effectively and promptly.
25. However, in line with previous decisions he has made, the Information Commissioner considers the actual 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. In this case, the request is focussed on a particular incident or possible investigation, rather than investigations in general which makes the request very specific.
26. Whilst he understands that the complainant may have concerns about the activities of the companies concerned, and genuinely have the public interest at heart, the Information Commissioner has taken into account the timing of the request in this case. It purports to be in connection with activities that could have been taking place at the time that it was made, ie an ongoing investigation. The Information Commissioner acknowledges that confirming or denying whether information is held in relation to an investigation that was ongoing at the time, or had been closed recently, could impact on the investigative process and he considers this to be a significant factor in favour of maintaining the exclusion from the duty to confirm or deny.
27. In correspondence with the complainant, the public authority advised:
- "The Information Commissioner has noted that 'The success of many investigations depends upon ensuring that information as to the targets of investigations, suspicions, evidence gathered; leads pursued and so on are not disclosed prematurely. It is likely, therefore that public authorities will wish to respond to a*

number of requests for information by giving a non-committal response¹.”

28. In its correspondence with the Information Commissioner the public authority further stated:

“It is helpful to note the following passage from the Information Commissioner’s Office’s guidance on The exemption for criminal investigations, criminal proceedings and confidential sources (Version 3, 2009, page 11): ‘The success of many investigations depends on making sure that information about them is not disclosed prematurely. Similarly, bodies responsible for carrying out investigations will want to protect confidential sources. In many instances damage can be caused by the confirmation that information is held. It is therefore likely that public authorities will want to respond to a number of requests for information by neither confirming nor denying that information is held.’”

29. In reaching a decision in this case, having considered the opposing public interest factors, the Information Commissioner considers that, in all the circumstances of the case, the public interest in maintaining the exclusion from the duty to confirm or deny outweighs the public interest in confirming or denying whether information is held.
30. In the Information Commissioner’s view, were an investigation underway, premature confirmation may have an impact on proceedings and it may also lead to panic by investors who may expect ‘the worst’; this could exacerbate the situation. Conversely, were an investigation not underway, the companies concerned may believe they are ‘in the clear’ (if indeed there are any founded suspicions) and this could also have the effect of making potential investors believe that any concerns are unfounded. Both positions have the potential to be misleading.
31. He has also given particular weight to the timing of the request in relation to the age of any information which might be held; the fact that any information that may be held would relate to a specific investigation; and the potential prejudice to any investigation which may have been ongoing, or recently closed at the time of the request or be in prospect by the public authority. He has therefore decided that the public authority was correct to apply section 30(3).

¹[http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/S30_EXEMPTION_FOR_INVESTIGATIONS_AND_PROCEEDINGS_V3.ashx](http://www.ico.gov.uk/for_organisations/guidance_index/~/media/documents/library/Freedom_of_Information/Detailed_specialist_guides/S30_EXEMPTION_FOR_INVESTIGATIONS_AND_PROCEEDINGS_V3.ashx)

Right of appeal

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
Website: 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
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