

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 December 2013

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

Decision (including any steps ordered)

1. The complainant requested from the Crown Prosecution Service (CPS) internal communications dating from around the time of the publication of the report of the Hillsborough Independent Panel. The CPS disclosed some information, but withheld the remainder under sections 36(2)(b)(i) and (ii) (inhibition to the free and frank provision of advice and exchange of views) and 41(1) (information provided in confidence) of the FOIA.
2. The Commissioner's decision is that sections 36(2)(b)(i) and (ii) were cited correctly and so the CPS is not required to disclose the information withheld under those exemptions. However, the Commissioner has also found that section 41(1) was cited incorrectly.
3. The Commissioner requires the CPS to take the following steps to ensure compliance with the legislation.
 - Disclose the information which was withheld under section 41(1).
4. The CPS 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 pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 22 September 2012, the complainant wrote to the CPS and requested information in the following terms:

"Please provide copies of all internal correspondence and communications relating to Hillsborough from September 3 to September 13, 2012.

Please provide copies of all external correspondence and communications relating to Hillsborough from September 3 to September 13, 2012."

6. The scope of this request was later refined to the following:

"All internal and external communication and correspondence relating to Hillsborough from 3 September to 13 September 2012 either to or from the two specialist lawyers allocated to the Hillsborough work or to or from the Press Office".

7. After a lengthy delay, the CPS responded substantively to the request on 19 February 2013. Some information was disclosed, but with part of the content redacted. Other information was withheld entirely. In relation to the information that was not disclosed, the CPS cited the following exemptions from the FOIA:

36(2)(b)(i) and (ii) (inhibition to the free and frank provision of advice and exchange of views)

40(2) (personal information)

41(1) (information provided in confidence)

8. The complainant responded on the same date and asked the CPS to carry out an internal review. At this stage the complainant confirmed that he did not object to the citing of section 40(2). In relation to the other exemptions cited, the complainant argued that the public interest favoured disclosure.
9. The CPS responded with the outcome of the internal review on 30 April 2013. The refusal under sections 36 and 41 was upheld.

Background

10. The significance of the dates specified in the request relates to the publication of the report of the Hillsborough Independent Panel, which took place on 12 September 2012.

Scope of the case

11. The complainant contacted the Commissioner on 30 April 2013 to complain about the partial refusal of his information request. As well as arguing that the withheld information should be disclosed, the complainant specifically raised the issues at this stage of the delay in sending the refusal notice and in completing the internal review, and what he considered to be an inadequate explanation for the citing of sections 36(2)(b)(i) and (ii).
12. As the complainant confirmed at the time of requesting an internal review that he did not object to the citing of section 40(2), that exemption is not covered in this notice.

Reasons for decision

Section 17

13. Section 17(1) requires that a response refusing an information request must be sent within 20 working days of receipt of the request. Whilst section 17(3) allows that where a qualified exemption is cited, the time to respond can be extended in order to allow extra time to consider the balance of the public interest, the view of the Commissioner is that such an extension should be for a maximum of a further 20 working days.
14. In this case, whilst the CPS sent holding responses advising the complainant that an extension in order to consider the balance of the public interest would be necessary, the substantive response was not provided until considerably more than 20 working days had elapsed. In so doing the CPS breached the requirement of section 17(1). The Commissioner comments further on this delay and on the delay in the completion of the internal review in the '*Other matters*' section below.
15. The complainant also raised the issue of the timing and quality of the explanation that was provided to him for the citing of sections 36(2)(b)(i) and (ii). The complainant is correct that an explanation as to why section 36 was believed to be engaged should have been provided to him within 20 working days of receipt of the request as the possibility of an extension provided by section 17(3) applies only in relation to the explanation of the balance of the public interest. In failing to provide

that explanation within 20 working days the CPS committed a further breach of section 17(1). However, on the issue of the quality of the explanation provided for the citing of these exemptions, the view of the Commissioner is that the explanation provided by the CPS was sufficient.

Section 36

16. The CPS has cited sections 36(2)(b)(i) and (ii). Section 36(2)(b)(i) provides an exemption for information the disclosure of which in the reasonable opinion of a qualified person would, or would be likely to, inhibit the free and frank provision of advice. Section 36(2)(b)(ii) provides the same in relation to the free and frank exchange of views for the purposes of deliberation.
17. Consideration of these exemptions is a two-stage process. First, the exemptions must be engaged on the basis of a qualified person having provided a reasonable opinion. Secondly, these exemptions are qualified by the public interest, which means that the information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.
18. Covering first whether these exemptions are engaged, for each public authority there is a qualified person (QP) either specified in the FOIA or separately authorised by a Minister of the Crown. For section 36 to apply, it must have been cited on the basis of an opinion from that QP. The task for the Commissioner here is to verify that these exemptions were cited on the basis of an opinion having been given by the specified QP and that this opinion was objectively reasonable.
19. As to whether these exemptions were cited on the basis of an opinion given by the correct QP, section 36(5)(c) of the FOIA provides that the QP for any non-ministerial government department is the "*person in charge of that department*". For the CPS, this is the Director of Public Prosecutions (DPP). The CPS has supplied to the ICO evidence that the DPP gave an opinion on the citing of sections 36(2)(b)(i) and (ii) on 31 January 2013 and so the Commissioner accepts that the correct QP did give an opinion on the citing of this exemption.
20. The next step is to consider whether this opinion was objectively reasonable. The approach of the Commissioner here is simply whether it was an opinion that a reasonable person could hold. In order to explain the basis for the citing of sections 36(2)(b)(i) and (ii) in this case the CPS supplied to the Commissioner a copy of a submission prepared for the DPP in order to provide background for the forming of his opinion.

21. This submission records that the basis of the opinion was that disclosure of this information, which consists of communications between CPS staff on the subject of preparing press lines prior to the publication of the Hillsborough Independent Panel report, would lead to staff being inhibited in future discussions. This submission advised the DPP that this inhibition "*would inevitably*" result through disclosure, suggesting that the opinion of the DPP was that inhibition *would* result, rather than *would be likely* to result.
22. As to whether the advice provided in the submission appears to be relevant to the content of the withheld information, the Commissioner notes first that the discussions recorded within the withheld information were on a sensitive matter. He also accepts that this information reflects that the discussion was free and frank and, therefore, that it was relevant for the DPP to take into account that disclosure might discourage a similar level of openness by officials in future.
23. On the basis of the advice provided to the DPP in the submission and the content of the withheld information, the Commissioner finds that the opinion of the QP that disclosure would result in inhibition relevant to sections 36(2)(b)(i) and (ii) was reasonable. These exemptions are, therefore, engaged.
24. The next step is to consider the balance of the public interest. The Commissioner has accepted that the opinion of the DPP that disclosure would result in inhibition was reasonable; the role of the Commissioner here is not to challenge or reconsider his conclusion on the reasonableness of that opinion. Instead, his role is to consider whether the public interest in disclosure equals or outweighs the concerns identified by the QP. In forming a view on the balance of the public interest here, the Commissioner has taken into account the general public interest in the openness and transparency of the CPS, as well as those factors that apply in relation to the specific information in question here.
25. Covering first factors that favour disclosure of this information, that this information relates to the Hillsborough disaster is significant. It remains the case that the issue of responsibility and accountability for those events is a matter of considerable public interest. Official inquiries into aspects of the incident and its aftermath are continuing. The view of the Commissioner is that there is a public interest in full disclosure of information that relates to Hillsborough, even if that relationship is distant, in order to counter any future perception of unnecessary secrecy. This is particularly so, given that the apparent suppression of information to obscure the truth has been a consistent theme of the inquiries into the Hillsborough disaster.

26. However, in this case the withheld information relates to Hillsborough itself only distantly. It consists of communications between staff of the CPS on the preparation of press lines. This information does not date from the time of the Hillsborough disaster and it contains nothing about what happened then or in the aftermath. Disclosure of this information would not add to understanding or aid accountability in relation to Hillsborough. This means that, whilst there is a public interest in ensuring maximum openness of all information relating to Hillsborough, the weight that this public interest carries in relation to the specific information in question here is slight.
27. As to other public interest factors in favour of disclosure of this information, whilst the Commissioner can say little in this notice about the actual content of the withheld information, he can confirm that he has examined this information and there is nothing within the specific content that would suggest a strong public interest in disclosure. As a result, the Commissioner does not believe that there is any particular public interest in the disclosure of exchanges between staff preparing these press lines.
28. Furthermore, in relation to any press lines that were subsequently used in response to media enquiries, the final result of these discussions was made public at that time. This means that the public interest in the reaction of the CPS to the publication of the Hillsborough Independent Panel report has largely been satisfied already by any disclosure of the finalised press lines.
29. Turning to those factors that favour the maintenance of the exemptions, having accepted as reasonable the opinion of the DPP that disclosure *would* result in inhibition, the Commissioner must give this opinion corresponding weight when considering the balance of the public interest. When considering other exemptions that do not rely on the opinion of a qualified person, the Commissioner takes the approach that *would* rather than *would be likely* indicates that an outcome is more probable than not. Therefore, the Commissioner has taken into account here that he has accepted as reasonable the DPP's opinion that inhibition would be more probable than not to result.
30. This is relevant here as it would not be in the public interest for disclosure to harm the work of the CPS. The harm in question here would be to the ability of the CPS to respond effectively to events within a short time frame and be seen to do so. Having accepted that inhibition would result through disclosure, the Commissioner also recognises that in order for the CPS to be capable of responding effectively to events, the maintenance of a safe space for staff to provide advice and exchange views is necessary. The view of the Commissioner is that it is in the public interest to avoid the inhibition that he has accepted the

DPP was reasonable to expect would result through disclosure. This is a legitimate factor in favour of maintenance of the exemptions of considerable weight.

31. In conclusion, the Commissioner has recognised some public interest in the disclosure of this information on the basis that it relates to the Hillsborough disaster and there is a public interest in disclosure of all information on this subject matter. However, as this information relates only distantly to Hillsborough and as there is nothing within the specific content of this information suggestive of a strong public interest in disclosure, this public interest in favour of disclosure carries only limited weight.
32. Having found that the opinion of the DPP that disclosure would result in inhibition was reasonable, the Commissioner also recognises that there is a weighty public interest in avoiding that outcome. His finding is that this tips the balance so that the public interest in favour of maintenance of the exemptions outweighs the public interest in disclosure. The conclusion of the Commissioner is, therefore, that the public interest in the maintenance of the exemptions outweighs the public interest in disclosure and so the CPS is not required to disclose this information.

Section 41

33. Section 41(1) of the FOIA provides an exemption for information that was obtained by the public authority from another person and where the disclosure of that information would constitute an actionable breach of confidence. Consideration of this exemption is a two-stage process; first, the information in question must have been provided to the public authority by a third party. Secondly, the disclosure of this information must constitute an actionable breach of confidence.
34. This exemption has been cited in relation to a small amount of information, which records approaches to the CPS from a number of media outlets around the time of the publication of the Hillsborough report. The position of the CPS is that these media outlets would have expected the fact of their approach to the CPS and details of their enquiry to remain confidential.
35. Turning to whether disclosure of this information would constitute an actionable breach of confidence, the approach of the Commissioner to this exemption is that he will consider the following points:
 - whether the information has the necessary quality of confidence; and
 - whether the information was imparted in circumstances importing an obligation of confidence.

36. The approach of the Commissioner is that information will have the necessary quality of confidence if it is not otherwise accessible and is more than trivial. On the issue of whether this information is otherwise accessible, the Commissioner is aware of no evidence that this is the case and the stance of the CPS suggests that it is not. On this basis, the Commissioner accepts that this information is not otherwise accessible.
37. As to whether the information in question is more than trivial, the issue here is whether the confiders would consider it as such. Having viewed the content of the information, the view of the Commissioner is that the confiders may not regard this information as more than trivial. It records the identity of several media outlets that contacted the CPS shortly after the publication of the Hillsborough report. The view of the Commissioner is that these approaches were predictable; the publication of that report was the subject of intense media coverage and its conclusions were clearly of relevance to the CPS.
38. The CPS position appears to be that media outlets would be sensitive to 'tipping off' their rivals as to a possible story. That argument might be convincing where a single media outlet had uncovered a previously unknown or little covered issue. That is clearly not the case here. Given this context, the Commissioner believes that these media outlets would regard disclosure of the fact of their approach to the CPS at that time to be trivial.
39. As to whether what is recorded about the detail of those approaches is more than trivial, there is little detail on this within the content of the information. The questions asked are recorded only in general terms and are not attributable to individual media outlets. Also, the content of this information is again predictable; what it records about the questions asked is unsurprising given the context of the publication of the Hillsborough report. As a result the Commissioner doubts that the confiders would consider what is revealed about the enquiries made to be more than trivial.
40. Turning to whether the information was imparted in circumstances importing an obligation of confidence, the clearest means to show that this was the case would be if there had been an explicit agreement between confider and recipient that this information would be kept confidential. Alternatively, an implied obligation of confidence may be said to exist if, for example, the content of the information suggests that the confider would have expected it to remain confidential.
41. The CPS argued that an implied obligation of confidence existed here, in order to maintain confidentiality around the pursuit of a story and to avoid alerting other journalists and media organisations to a potential story. Again, the Commissioner might have found this a convincing

argument where the circumstances supported it. The circumstances in this case as outlined above, however, do not provide that support. The Commissioner does not accept there to be an implied obligation of confidence in relation to information that records in general terms the predictable approach to the CPS of a number of media organisations about such a high profile matter.

42. For these reasons, the Commissioner does not accept that the information in relation to which section 41 was cited has either the necessary quality of confidence, or that it was imparted in circumstances importing an obligation of confidence. His conclusion is, therefore, that disclosure of this information would not constitute an actionable breach of confidence and so the exemption provided by section 41(1) is not engaged. At paragraph 3 above, the CPS is now required to disclose this information.

Other matters

43. Whilst the FOIA does not provide a time limit within which internal reviews should be completed, the approach of the ICO is that reviews should be completed within a maximum of 40 working days. In this case the review was not completed within 40 working days. Combined with the earlier delay in providing a substantive response to the request, this meant that a period of several months elapsed from the date of the request to the completion of the internal review.
44. This was an excessive delay and a record has been made of this. This issue may be revisited should evidence from other cases suggest that this is a systemic issue with information requests made to the CPS. In any event, the CPS should ensure that this delay is not repeated in relation to other information requests.

Right of appeal

45. 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: GRC@hmcts.gsi.gov.uk

Website: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

46. 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.
47. 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

Graham Smith
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