Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 November 2013

Public Authority: Avon Fire and Rescue Service
Address: Avon Fire and Rescue Service Headquarters
Temple Back
Bristol
BS1 6EU

Decision (including any steps ordered)

1. The complainant has requested information from Avon Fire and Rescue Service ("the fire service") relating to three companies. The fire service refused to supply requested in formation, initially in reliance of the exemptions provided by sections 24(1) (national security) and 38 (health and safety) of the FOIA.

2. The Commissioner's decision is that the fire service is entitled to rely on section 24(1) of the FOIA as the basis for withholding the information sought by the complainant.

3. No steps are required.

Request and response

4. On 26 April 2013, the complainant wrote to the fire service and requested information in the following terms:

    1. "Please provide copies of the most recent fire inspection report for the following company (I have been unable to locate a full address for this site):
        a. M & J Transport Ltd – Bristol
        b. United Molasses Group Ltd – Bristol
        c. Bunn Fertiliser Ltd - Bristol

    2. Please provide any other information held in relation to the following company (I have been unable to locate a full address for this site):
        a. M & J Transport Ltd – Bristol

b. United Molasses Group Ltd - Bristol
c. Bunn Fertiliser Ltd – Bristol"

5. The fire service responded to the complainant's request on 15 May 2013. It advised the complainant that it holds no recorded information in respect of the first element of her request. It also advised the complainant that it holds 'operational intelligence' in respect of the second element of her request, which it had gathered as part of its routine familiarisation visits under section 7(2)(d) of the Fire and Rescue Services Act 2004. The fire service refused to supply this information to the complainant in reliance of the exemptions provided by sections 24 (national security) and 38 (health and safety) of the FOIA.

6. The complainant requested an internal review on 16 May 2013.

7. The fire service completed its internal review and sent this to the complainant on 29 May. The fire service upheld its application of sections 24 and 38 of the FOIA and introduced a reference to section 7(4) of the Data Protection Act and therefore to section 40(2) of the FOIA which concerns personal data.

Scope of the case

8. The complainant contacted the Commissioner on 13 June 2013 to complain about the way her request for information had been handled. The complainant provided the following arguments in support of her position that the information she had requested should be disclosed by the fire service:

a) "I believe there is a strong public interest in disclosing the information to promote accountability and transparency of public authorities for the decisions taken by them, to allow individuals, companies and other bodies to understand decisions made by public authorities affecting their lives and to bring to light information that could affect public health and safety.

b) In light of the recent incident in Waco, Texas releasing this information could reassure the public that safety procedures are in place to protect those living close to companies involved in the fertiliser industry and to protect those who work on these sites and the emergency services who would have to attend any incident if it were to occur.

c) The information that these companies are involved in the fertiliser industry is already publicly available so it would already be known that these companies would hold fertilisers and other chemicals."

9. The Commissioner's investigation of this complaint was focussed on the fire service's initial application of sections 24 and 38 of the FOIA. During the course of his investigation the fire service withdrew its reliance on section 40(2), but also sought to rely on sections 41 (information provided in confidence) and 31 (law enforcement).

10. In this decision notice the Commissioner has considered whether the fire service is entitled to withhold the information sought by the complainant in reliance of the exemptions listed above.

Reasons for decision

Section 24(1) – National security

11. Section 24(1) of the FOIA states:

> "Information which does not fall within section 23(1) [information supplied by, or relating to, bodies dealing with security matters] is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding the national security."

12. In broad terms section 24(1) allows a public authority not to disclose information if it considers that the release of the information would make the United Kingdom or its citizens vulnerable to a national security threat.

13. The term "national security" is not specifically defined by UK or European law. However in *Norman Baker v the information Commissioner and the Cabinet Office (EA/2006/0045 4 April 2007)* the Information Tribunal was guided by a House of Lords case, *Secretary of State for the Home Department v Rehman [2001] UKHL 47, concerning whether the risk posed by a foreign national provided grounds for his deportation.* The Information tribunal summarised the Lords' observations as:

- "national security" means the security of the United kingdom and its people;
- The interests of national security are not limited to actions by the individual which are targeted at the UK, its system of government or its people;
- The protection of democracy and the legal and constitutional systems of the state are part of national security as well as military defence;

- Action against a foreign state may be capable indirectly of affecting the security of the UK; and

- Reciprocal cooperation between the UK and other states in combating international terrorism is capable of promoting the United Kingdom's national security.

14. The exemption provided by section 24 applies in circumstances where withholding the requested information is "required for the purpose of safeguarding national security". Required is taken to mean that the use of the exemption is reasonably necessary.

15. "Required" is defined by the Oxford English Dictionary as 'to need something for a purpose'. This could suggest that the exemption can only be applied if it is absolutely necessary to do so to protect national security. However, the Commissioner's interpretation is informed by the approach taken in the European Court of Human Rights, where the interference of human rights can be justified where it is 'necessary' in a democratic society for safeguarding national security. 'Necessary' in this context is taken to mean something less than absolutely essential but more than simply being useful or desirable. The Commissioner therefore interprets 'required' as meaning 'reasonably necessary'.

16. It is not necessary to show that disclosing the withheld information would lead to a direct threat to the United Kingdom.

17. The Commissioner's approach is set out by the House of Lords in *Secretary of State for the Home Department v Rehman* (as referred to above). Lord Slynn found that:

    "To require the matters in question to be capable or resulting 'directly' in a threat to national security limits too tightly the discretion of the executive in deciding how the interests of the state, including not merely military defence but democracy, the legal and constitutional systems of the state need to be protected. I accept that there must be a real possibility of an adverse effect on the United Kingdom for what is done by the individual under inquiry but I do not accept that it has to be direct or immediate."

18. The Commissioner considers that safeguarding national security also includes protecting potential targets even if there is no evidence that an attack is imminent.

19. The Commissioner has carefully examined the information held by the fire service which is relevant to the second part of the complainant's request. This information can be characterised as being operational intelligence information.

20. The Commissioner has determined that the withheld information should be considered as a single entity. He considers that it would be inappropriate to consider the information on a line-by-line basis.

21. The fire service has advised the Commissioner that it inspects/audits a wide range of premises which fall under the Regulatory Reform (Fire Safety) Order 2005. Such an audit may be required as part of a planning application; may result from a complaint being be made by a member of the public; may follow an incident at a particular premises; or, may be requested by an agency such as the Health and Safety Executive.

22. The information obtained by the fire service is required by section 7(2)(d) of the Fire and Rescue Service Act 2004.

23. Under section 7(1) of the Fire and Rescue Services Act, the fire service is required to make provision for the purpose of extinguishing fires in its area and for protecting life and property in the event of fire. Under section 7(2)(d) the fire service is required to make arrangements for obtaining information which is needed so that it can properly execute its duties under section 7(1).

24. In this case, the fire service has provided the Commissioner with persuasive arguments which describe how its operational intelligence could be used to jeopardise or make vulnerable the infrastructure of the United Kingdom and the health and safety of its citizens.

25. The Commissioner has considered the operational intelligence held by the fire service and its detailed representations. He has concluded that it the withheld information has direct relevance to the United Kingdom's national security and he therefore accepts that section 24(1) is engaged.

Section 24(1) – Balance of the public interest test

26. Section 24(1) is a qualified exemption. In order for the fire service to rely on this exemption the public interest arguments favouring disclosure of the withheld information must outweigh the public interest favouring withholding it.

Public interest arguments favouring disclosure

27. It is a statutory requirement under section 7(2)(d) of the Fire and Rescue Services Act 2004 for the fire service to undertake familiarisation visits to inspect/audit a wide range of premises. During these visits operational intelligence is gathered to assist the fire service to effectively and safely deal with an incident at those premises.

28. The operational intelligence held by the fire service is acquired primarily for the purpose of assisting it to effectively extinguish fires and to

protect life and property. This information is designed for, and limited to, that function.

29. In the Commissioner's opinion the disclosure of the operation intelligence information would be of limited legitimate utility to the public.

30. He does however accept that its disclosure would assure the public that the information is appropriate and adequate for its purpose, that the fire service has fulfilled its statutory duties in making appropriate familiarisation visits and would assist the public in understanding the actions taken by the fire service in the event of an incident.

Public interest arguments against disclosure

31. The withheld information is clearly designed to satisfy the operational needs of the fire service.

32. The Commissioner understands that it is an accurate record of the information the fire service has gathered. He is also satisfied that the information is appropriate for meet the fire service's operational requirements.

33. The Commissioner further understands that the fire service inspects/audits a wide variety of premises. Some of the premises visited by the fire service are places where hazardous materials, such as inorganic nitrogenous fertilisers, are produced and/or stored.

34. It is well documented that inorganic nitrogenous fertilisers have been misused by terrorists for the production of homemade explosives. Consequently it is important for the fire service to work collaboratively with the Centre for Protection of National Infrastructure (CPNI)[1] and the National Counter Terrorism Security Office (NaCTSO)[2] to identify and protect sites that store hazardous materials.

35. It is inevitable that the fire service will record information relating to the production and storage of hazardous materials, including inorganic nitrogenous fertilizers, when making its inspection/audit visits. This information is of vital importance to the fire service and the Commissioner acknowledges that this operational intelligence – an accurate record of the amount and location of the fertilisers, ensures

[1] http://www.cpni.gov.uk

[2] http://www.nactso.gov.uk

that the fire service can effectively deal with incidents at these premises. The Commissioner is entirely confident that the possession of this information is likely to reduce the loss of life and property and significantly add to the safety of the fire officers attending any incident.

36. The Commissioner must consider the potential consequences that would ensue if the information held by the fire service was to be disclosed. He has reviewed the representations made by the fire service along with the withheld information itself. He is persuaded that disclosure of the information could result in a real and significant threat to the national security of the United Kingdom.

Balance of the public interest

37. In cases where the Commissioner considers that section 24(1) is engaged – as in this case, there will always be a compelling argument in maintaining the exemption in situations where a severe harm may flow from the disclosure of the requested information to the public. For the public interest to favour disclosure there must be specific and clearly decisive factors in favour of that disclosure. Without such evidence the Commissioner is compelled to recognise the public interest inherent in the exemption and afford this appropriate weight.

38. The Commissioner recognises the public interest in learning more about the work of the fire service in respect of the types of premises identified by the complainant. He acknowledges the risks posed by these premises and that there is a legitimate public interest in knowing how the fire service would deal with incidents at these sites. In this respect he is also mindful of the incident at the West Fertilizer Company in Texas on 17 April 2013, where a large explosion involving ammonium nitrate fertilisers resulted in the deaths of fifteen people and the destruction of 150 buildings.

39. The Commissioner is required to weigh the public interest arguments associated with the accountability and transparency of the operating practices of the fire service against the threat posed to the national security of the United Kingdom.

40. The commissioner is always sympathetic to arguments which genuinely promote the accountability and transparency of public authorities in respect of their work and the decisions they make. In this case however these arguments cannot be reconciled with the necessary weight which must be given to maintaining the national security of the United Kingdom.

41. It is the Commissioner's view that the information held by the fire service is of limited legitimate utility to persons or organisations outside

of the fire service and organisations associated with national security. There is clear evidence that the information sought by the complainant could be open to misuse and be potentially damaging to our national security. For this reason the Commissioner has decided that the balance of the public interest lies with maintaining the section 24(1) exemption.

42. The Commissioner is satisfied that the fire service can rely on section 24(1) as the basis for withholding the information sought by the complainant.

43. Given the Commissioner's conclusion in respect of the application of section 24(1), he has not gone on to consider any of the other exemptions cited by the fire service in respect of the withheld information.

Right of appeal

44. 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

45. 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.

46. 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 .....

Andrew White
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