

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 November 2013

Public Authority: Gloucestershire County Council

Address: Shire Hall
Westgate Street
Gloucester
GL1 2TG

Decision (including any steps ordered)

1. The complainant has requested information from Gloucestershire County Council ("the council") relating Bunn Fertiliser Limited. The council initially refused to neither confirm nor deny holding information relevant to the complainant's request in reliance of the exemptions provided by the FOIA at sections 24(2) (national security), 31(3) (law enforcement) and 43(2) (commercial interests). Following the involvement in this case of the Information Commissioner, the council withdrew its 'neither confirm nor deny' position and its reliance on section 43(2). The council did however assert that it was entitled to withhold the information it holds in reliance of sections 24(1) and 31(1)(a).
2. The Commissioner's decision is that the council 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 25 April 2013, the complainant wrote to the council 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. Bunn Fertiliser Ltd – Berkeley
 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. Bunn Fertiliser Ltd Berkeley"
5. The council responded to the complainant's request on 24 May 2013. It advised the complainant that it can neither confirm nor deny that the council held the information she had requested. The council cited sections 24(2), 31(3) and 43(2) as its reasons for making this response.
6. The complainant requested an internal review on 29 May 2013.
7. The council completed its internal review and sent this to the complainant on 12 June 2013. In its internal review the council upheld its decision to neither confirm nor deny that it held any information relevant to the complainant's request.

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 council:
 - 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 wrote to the council on 30 July 2013 to investigate its application of the exemptions it had cited.
10. The Commissioner’s enquiries resulted in further contact with the Chief Fire Officer on 15 August and with the council withdrawing its ‘neither confirm nor deny’ position in respect of section 24(2), and its reliance on section 43. The council confirmed to the complainant that it holds a fire inspection report in the form of an up-to-date risk card for Bunn Fertiliser Ltd, Berkeley. It confirmed that it was withholding this information in reliance of sections 24(1) (national security) and 31(1)(a) (law enforcement) of the FOIA.
11. In this decision notice the Commissioner has considered whether the council 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

12. 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.”

13. 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.
14. 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.
15. 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.
16. "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'.
17. It is not necessary to show that disclosing the withheld information would lead to a direct threat to the United Kingdom.
18. 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.”

19. The Commissioner considers that safeguarding national security also includes protecting potential targets even if there is no evidence that an attack is imminent.
20. The Commissioner has carefully examined the information held by the council. This information can be characterised as being operational intelligence information.
21. The Commissioner has determined that the withheld information should be considered as a single entity. It is not capable of being broken down to be considered on a line-by-line basis due to how this information is held.
22. The council has advised the Commissioner that the Bunn Fertiliser Limited site is covered by the Control of Major Accident Hazard Regulations which are overseen by the Health and Safety Executive – it is a site which has clear relevance to the national security of the United Kingdom and the information held by the council would be helpful to persons of malicious intent.
23. The Commissioner understands that the council’s fire service 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 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.
24. The information obtained by the council is required by section 7(2)(d) of the Fire and Rescue Service Act 2004.
25. Under section 7(1) of the Fire and Rescue Services Act, the council’s 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 council’s 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).
26. In this case, the council 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.

27. The Commissioner has considered the operational intelligence held by the council and its detailed representations. He has concluded that 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

28. Section 24(1) is a qualified exemption. In order for the council 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

29. It is a statutory requirement under section 7(2)(d) of the Fire and Rescue Services Act 2004 for the council to undertake familiarisation visits to inspect/audit a wide range of premises. During these visits operational intelligence is gathered to assist the council's fire service to effectively and safely deal with an incident at those premises.
30. The operational intelligence held by the council 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.
31. In the Commissioner's opinion the disclosure of the operational intelligence information would be of limited legitimate utility to the public.
32. 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

33. The withheld information is clearly designed to satisfy the operational needs of the council's fire service.
34. The Commissioner understands that it is an accurate record of the information the council has gathered. He is also satisfied that the information is appropriate for meet the council's fire service's operational requirements.
35. The Commissioner further understands that the council's fire service inspects/audits a wide variety of premises. Some of the premises visited

by the council's fire service are places where hazardous materials, such as inorganic nitrogenous fertilisers, are produced and/or stored.

36. 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 council's 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.
37. It is inevitable that the council's 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 and up-to-date record of the amount and location of the fertilisers, ensures 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.
38. The Commissioner considers that knowing the council holds up-to-date information about the Bunn Fertiliser site goes some way of reassuring the public that measures are in place to safeguard national security.
39. The Commissioner must however consider the potential consequences that would ensue if the information held by the council was to be disclosed. He has reviewed the representations made by the council 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

40. 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

¹ <http://www.cpni.gov.uk>

² <http://www.nactso.gov.uk>

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.

41. The Commissioner recognises the public interest in learning more about the work of the council's fire service in respect of the Bunn Fertiliser site. He acknowledges the risks associated with this site and that there is a legitimate public interest in knowing how the fire service would deal with incidents there. 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.
42. 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.
43. 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.
44. It is the Commissioner's view that the information held by the council 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.
45. The Commissioner is satisfied that the council can rely on section 24(1) as the basis for withholding the information sought by the complainant.
46. 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

47. 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

48. 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.
49. 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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