

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 4 March 2014

**Public Authority:** Police and Crime Commissioner for Cleveland  
**Address:** Cleveland Police Headquarters  
Ladgate Lane  
Middlesbrough  
TS8 9EH

#### **Decision (including any steps ordered)**

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1. The complainant requested information relating to payments to senior police officers. The Office of the Police and Crime Commissioner (PCC) for Cleveland confirmed that it held the requested information but refused to disclose it citing the following FOIA exemptions: section 22 (information intended for future publication), section 31(1)(b), (c), (g) and (h) (law enforcement), and section 42(1) (legal professional privilege).
2. The Commissioner has investigated the PCC's application of section 31 to the information withheld by virtue of that exemption and does not find the exemption engaged. The complainant has accepted that any legally privileged information is exempt from disclosure.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
  - disclose to the complainant the information withheld only by virtue of section 31.
4. The public authority 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**

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5. On 2 June 2013 the complainant wrote to the Office of the Police and Crime Commissioner (PCC) for Cleveland and requested information in the following terms:

*"Please provide the agenda, reports relating to items on the agenda, and minutes of a meeting of the Leadership Panel of former Cleveland Police Authority held on 29 October 2012.*

*I can find no record of this meeting on the archived website but I understand it did take place. If I have the date wrong a day either side of the 29th, please recognise this request as being for those days".*

6. The PCC responded on 1 July 2013. It confirmed that it held the requested information. It provided the complainant with a copy of the agenda but refused to provide the remaining requested information. It explained that Members of the Leadership Panel had considered whether members of the public were to be excluded from the meeting and had decided that they should be excluded. On that basis – and without citing an FOIA exemption - it said that it was unable to provide him with any papers or minutes of the meeting.

7. The complainant requested an internal review on 1 July 2013. In that correspondence, he clarified his request, stating:

*"To help matters, I only seek the attached report and minutes relating to item 6 on the agenda".*

8. That agenda item is entitled "*Payments to Senior Police Officers*".

9. The PCC sent him the outcome of its internal review on 23 July 2013. It revised its position, citing the following exemptions of the FOIA as its basis for refusing to provide the requested information:

- section 22 (information intended for future publication);
- section 31(1)(b), (c), (g) and (h) (law enforcement); and
- section 42(1) (legal professional privilege).

## Scope of the case

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10. The complainant contacted the Commissioner on 24 July 2013 to complain about the way his request for information had been handled. He told the Commissioner:

*"As regards section 22, there is nothing in the proposed publication scheme relating to Operation Sacristy that involves payments made to senior police officers that may or may not have legal approval.*

*Total payments to senior police officers are routinely published in annual accounts though the specific breakdown of what they were for is not always detailed.*

*In terms of payments to former chief constable Sean Price, the PCC is currently taking a civil claim to recover monies paid on the grounds they were outside national agreements and there was no legal authority to make the payments.*

*Details of the payments are in publicly available court documents. The PCC has launched the claim clearly in the knowledge this information is all publicly available.*

*Revealing the report and minutes does not prejudice any legal actions being taken - bar any legal advice that maybe contained in the report and minutes".*

11. During the course of his investigation, the complainant also told the Commissioner:

*"As regards section 42, if there is specific legal advice that qualifies under LPP that can be exempted".*

12. In its submissions to the Commissioner, the PCC confirmed that it was no longer relying on section 22.
13. Having viewed the withheld information, and in light of the above submissions from the complainant and the public authority, the Commissioner considers the scope of his investigation to be the PCC's application of section 31 to the information withheld by virtue of that exemption. As specified in the request, that information relates to item 6 on the agenda and comprises the report, some of the report's appendices and minutes.

## Reasons for decision

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### *Section 31 law enforcement*

14. Section 31 provides a prejudice-based exemption which protects a variety of law enforcement interests. Consideration of this exemption is a two-stage process. First, in order for the exemption to be engaged it must be at least likely that disclosure would prejudice one of the law enforcement interests protected by section 31 of FOIA.
15. Secondly, the exemption is subject to a public interest balancing test. The effect of this is that the information should be disclosed if the public interest favours this, even though the exemption is engaged.
16. In its submissions, the PCC told the Commissioner:

*"The Police and Crime Commissioner ("PCC") relies on*

*S.31(1)(b)*

*S.31(1)(g) - functions 31(2)(a) and 31(2)(b)*

*S.31(1)(h)".*
17. Having considered its submissions and viewed the withheld information, as marked by the PCC with which exemptions it considers apply, the Commissioner understands that the PCC considers section 31(1)(g) applies to all the withheld information.
18. Section 31(1)(g) states:

*"Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice -*

*(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2)".*
19. Subsection (2) lists ten purposes (a) to (j). Of those, the PCC is citing 31(2)(a) - the purpose of ascertaining whether any person has failed to comply with the law - and 31(2)(b) - the purpose of ascertaining whether any person is responsible for any conduct which is improper.
20. To engage the exemption at section 31(1)(g) of FOIA a public authority must:
  - identify the public authority that has been entrusted with a function to fulfil one of the purposes listed in subsection (2);

- confirm that the function has been specifically designed to fulfil that purpose, and
  - explain how the disclosure would prejudice that function.
21. The Commissioner's guidance on the application of section 31<sup>1</sup> states that the functions referred to in section 31(2) must be imposed by statute and that the Commissioner is unlikely to accept that the exemption is engaged unless legislation specifically imposes a positive duty on the public authority to fulfil the relevant purpose. Therefore, in order to engage the exemption in this case, the PCC must identify that it has been entrusted with a function to fulfil the purpose of ascertaining whether a person has failed to comply with the law or is responsible for any conduct which is improper. It must then confirm that the function has been specifically designed to fulfil that purpose, and finally, it must demonstrate how the disclosure of the withheld information would, or would be likely to, prejudice either of those functions.
22. The Commissioner's guidance on section 31 explains the meaning of the word 'ascertain' in the context of this exemption. It states:

*"To 'ascertain' is to make certain or prove. In this context it means that the public authority with the function must have the power to determine the matter in hand with some certainty. The public authority must not only be responsible for the investigation but it must also have the authority to make a formal decision as to whether that person has complied with the law. This could include taking direct action itself such as revoking licences or imposing fines, or it could involve taking a formal decision to prosecute an offender".*

23. The PCC told the complainant:

*"As you are aware, at the present time certain payments to chief police officers and the reasons they were made are the subject of an ongoing criminal investigation "Operation Sacristy" as well as a current civil claim against the former Chief Constable Sean Price, neither of which have been finalised".*

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[http://www.ico.org.uk/for\\_organisations/guidance\\_index/~media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/law-enforcement-foi-section-31.ashx](http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/law-enforcement-foi-section-31.ashx)

24. It went on to explain:

*"The reports and minutes relating to item 6 (Payments to Senior Police Officers) of the Special Leadership Panel held on the 29<sup>th</sup> October 2012 advises the former Cleveland Police Authority ("CPA") of various payments and benefits made to senior police officers in Cleveland Police over the past few years and seeks to establish the CPA's formal position on the status of these payments, ie whether they fell outside national agreements/structures".*

25. In response to the Commissioner's request for a detailed explanation in respect of its application of section 31 to withhold the requested information, the PCC told the Commissioner that it had received advice from the District Auditor: that advice was the basis of its reliance on section 31(2)(a). The PCC also confirmed:

*"S31(2)(b) is also relied on as is S.31(1)(h)".*

*Is the exemption engaged?*

26. The Commissioner has first considered the PCC's application of section 31(1)(g) by virtue of section 31(2)(a) and (b).

27. The Commissioner acknowledges that a public authority may well carry out activities as a result of a general duty imposed on all public authorities. However, for the section 31 exemption to be engaged, the Commissioner requires the functions identified by the public authority for the purposes of section 31(1)(g) to be functions which are designed to fulfil the purpose(s) specified in 31(2), imposed by statute and specifically entrusted to that particular public authority to fulfil. In other words, the public authority must point to a provision which imposes upon them a specific function, for example ascertaining whether any person is responsible for any conduct which is improper. Action to recover an overpayment of expenses or a disciplinary investigation which any employer might instigate will not be covered.

28. On the basis of the arguments put forward by the PCC, the Commissioner does not consider that it has demonstrated that functions that correspond with the specified section 31(2) purposes have been entrusted to it. He has therefore concluded that the section 31(1)(g) exemption is not engaged.

29. The PCC also considers that section 31(1)(h) applies to some of the withheld information – namely the report and some of its appendices. The Commissioner has considered its application of section 31(1)(h) to that information.

30. Under section 31(1)(h) information is exempt if its disclosure would, or would be likely to, prejudice any civil proceedings which are bought by or on behalf of, a public authority and which arise out of an investigation conducted for any of the purposes specified in subsection section 31(2). To qualify, the proceedings must arise out of investigations carried out under Her Majesty's prerogative or powers conferred under an enactment.
31. In other words, the public authority would need to demonstrate that the exemption is engaged by specifying the basis for their conclusion that the proceedings they cite arise out of an investigation conducted for the specified purposes, and explaining why the proceedings would be prejudiced. They need to be able to show that the body doing the investigation that gave rise to the proceedings had a function to investigate for the specified purpose by pointing to relevant statute (or prerogative) conferring that function for that purpose on that body. They then need to show that the proceedings did arise out of that investigation and that the proceedings would be prejudiced.
32. Having considered its submissions, the Commissioner's view is that the PCC's arguments are general in nature and, for example, fail to point out the actual legislative provision, or prerogative, conferring the relevant function on the body doing the investigation that gave rise to the proceedings that it cites.
33. He has therefore concluded that the section 31(1)(h) exemption is not engaged.
34. The Commissioner has next considered the PCC's application of section 31(1)(b). That subsection is claimed in respect of one part of the report.
35. The PCC explained to the Commissioner why it considers that disclosure of that information is likely to prejudice ongoing investigations. However, in the absence of any evidence to support its claim, the Commissioner's conclusion is that the PCC has demonstrated no real or significant likelihood of prejudice resulting to the apprehension or prosecution of offenders through the disclosure of the information in question. The exemption provided by section 31(1)(b) is not, therefore, engaged.
36. The section 31 exemption is subject to a public interest balancing test. However, as the Commissioner's conclusion is that this exemption is not engaged, it follows that the public interest arguments are not explored in this decision notice.

## Right of appeal

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37. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

38. 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.
39. 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**  
**Deputy Commissioner**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**