

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 July 2016

Public Authority: Chief Constable of West Yorkshire Police

Address: West Yorkshire Police

PO Box 9

Laburnum Road

Wakefield

WF1 3QP

Decision (including any steps ordered)

1. The complainant has requested information regarding a helicopter surveillance recording. West Yorkshire Police withheld the information under sections 31(1)(g) and 2(b) and (c) (law enforcement) of the FOIA.
2. The Commissioner's decision is that West Yorkshire Police has applied section 31(1)(g) and (2)(b) and (c) of the FOIA appropriately.
3. The Commissioner does not require West Yorkshire Police to take any further steps as a result of this decision notice.

Background

4. There was a fire at a factory in Manchester on 5 April 2015. The local police force, in this case Greater Manchester Police, deployed the National Police Air Force Service (NPAS), which is made up of police forces from England and Wales and offers air support. In this case a helicopter took aerial footage of the fire.
5. West Yorkshire Police (WYP) is the lead force in NPAS and has overall responsibility for it. At the time of the request, WYP held the footage. In this case, the incident was referred to the Health and Safety Executive (HSE) to investigate, as it has statutory responsibility to investigate incidents concerning public health and safety.

6. WYP explained that a request for the footage could be made under the ACPO & Association of British Insurers (ABI) Memorandum of Understanding on the exchange of information between the Police, Insurance Companies and Loss Adjusters. This provides a framework to deal with requests for information involving property crime. It explained it would still need to assess if the information could be provided whilst there was an ongoing investigation and if not the disclosure would await the conclusion of the investigation. WYP also explained that the complainant could request the information directly from the police in writing, providing a legal basis and fee.
7. The complainant is acting on behalf of an insurance company.

Request and response

8. On 6 July 2015 the complainant wrote to West Yorkshire Police (WYP) and requested information in the following terms:

"Helicopter surveillance recording of a fire at Clayton Lane Manchester (M11 4RA) at 16:11 on 5 April 2015. I am writing to enquire into the possibility of obtaining a copy of your helicopter surveillance recording for the above mentioned incident."

9. WYP responded on 16 July 2015. It stated that as the information was already in the public domain, it was applying section 21 (information accessible by other means).
10. Following an internal review WYP wrote to the complainant on 6 August 2015, upholding its application of section 21.

Scope of the case

11. The complainant contacted the Commissioner on 4 September 2015 to complain about the way his request for information had been handled.
12. During the Commissioner's investigation, WYP explained that it was no longer relying upon section 21 to withhold the information, but was relying on section 31(1)(g) and 2(b) and (c) instead and informed the complainant of this.
13. The complainant explained to the Commissioner that he did not consider that WYP had provided adequate arguments for its application of sections 31(1)(g) and 2(b) and (c).

14. The Commissioner will consider WYP's application of sections 31(1)(g) and 2(b) and (c).

Reasons for decision

15. Section 31(1)(g) states that

"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).'

16. In relation to the specified purposes under (2), WYP explained that the relevant functions were those contained at sections 2(b) and (c). These sections state:

(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,

(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise."

17. Section 31 is a prejudice-based exemption. In order to be engaged, the following criteria must be met:

- The actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interest within the relevant exemption;
- The public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
- It is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.

18. WYP explained that the wording of section 31 did not mean that it had to be the authority in question. It confirmed that it was referring to the HSE which was carrying out an investigation into the factory fire in Manchester.

19. The relevant applicable interests cited in these exemptions are that it must be the function of a public authority, in this case the HSE, to ascertain whether any person is responsible for conduct which is improper and whether regulatory action would be justified. The Commissioner accepts that the arguments made by the WYP in relation to the HSE's investigation set out below address the prejudice at sections 31(1)(g) and 2(b) and (c).
20. When considering the second point, the Commissioner must be satisfied that the nature of the prejudice is *"real, actual or of substance"* and not trivial or insignificant. He must also be satisfied that some causal relationship exists between the potential disclosure and the stated prejudice.
21. WYP explained that the HSE has a function to secure the health, safety and welfare of people at work under the Health and Safety Act 1974; and that part of that function is to investigate industrial accidents such as fires. WYP also confirmed that it had received confirmation from the HSE that it was investigating the factory fire.
22. WYP also argued that disclosure of the requested footage which relates to a current HSE investigation, has the potential to undermine any criminal proceedings which may be instigated, or impede the HSE in establishing if any breaches of the Health and Safety Act 1974 had taken place.
23. WYP also argued that disclosure of the footage has the potential to hinder its ability to work with other parties. It explained that in its role as lead authority in NPAS, it has a duty to ensure that any information which has the potential to undermine the investigative procedure is not released into the public domain prematurely.
24. WYP also confirmed that the HSE would be the prosecuting agency if it was found that there were any breaches and the case went to court.
25. With regard to the third point, WYP argued that disclosure of the requested information would prejudice the function of the HSE to investigate whether anybody is responsible for the fire and also whether circumstances would justify regulatory action.
26. The Commissioner notes that WYP has argued that disclosure of the footage *"would"* prejudice the HSE's investigation. However, the complainant pointed out to the Commissioner that in a letter of 14 October 2015 WYP stated:

"It is not clear at present what effect disclosure would have on the investigation."

27. In the Commissioner's guidance "The prejudice test"¹ he considers the issue of whether disclosure "would" or "would be likely to" prejudice a cause or matter. He notes that in the Information Tribunal decision of *Christopher Martin Hogan and Oxford City Council v the Information Commissioner* (EA/2005/0026 and 0030, 17 October 2006) it states:

"there are two possible limbs on which a prejudice-based exemption might be engaged, Firstly, the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not".

28. The Commissioner considers that the first limb relates to "would" and the second limb to "would be likely". The Commissioner's view is that "would" means "more probable than not" ie more than a 50% chance of the disclosure causing the prejudice, even though it is not absolutely certain that it would. With regard to "would be likely to" the Commissioner considers that this refers to a lower level of probability than "would" ie there must be more than a hypothetical or remote possibility of prejudice occurring. The Commissioner considers that there must be a real and significant risk of prejudice, even though the probability of prejudice would be less than 50%.

29. The Commissioner does not consider that WYP has provided arguments to him demonstrating that disclosure of the footage it holds would prejudice the HSE's investigation. However, he considers that, given that the footage in question is part of the HSE's investigation into the factory fire disclosure during its investigation would be likely to prejudice that investigation.

30. Taking everything into account, the Commissioner is satisfied that the disclosure of the requested footage would be likely to prejudice the function of the HSE to ascertain whether any person is responsible for any improper conduct and/or whether regulatory action would be justified in pursuance of any existing enactment or any that may arise. Having accepted that the exemptions are engaged, the Commissioner will go on to consider the public interest arguments.

¹ https://ico.org.uk/media/for-organisations/documents/1214/the_prejudice_test.pdf

Public interest arguments in favour of maintaining the exemption

31. WYP argued that the public interest in maintaining sections 31(1)(g) and 2(b) and (c) outweighed the public interest in disclosure.
32. It explained that it considered that disclosure of the requested footage would be a disclosure to the world at large under the FOIA. It argued that this would include people who may be part of the investigation. This would potentially mean that these people would have the opportunity to view evidence before it is put to them in the formal setting of the HSE's investigation.
33. WYP also argued that the work of the HSE is important in ensuring public safety not only in the workplace, but also in relation to those who live near factories or warehouses.
34. Furthermore, WYP argued that disclosure of the footage has the potential to hinder its ability to work with others. It explained that, as the lead authority in NPAS, it has a duty to ensure that any information which has the potential to undermine the investigative process is not released into the public domain prematurely.
35. WYP also argued that although the requested footage would be of interest to the complainant as he is acting on behalf of an insurance company, there was no wider public interest in disclosing it, especially whilst there was an ongoing investigation. It also pointed out that there were separate processes for insurers to view such footage.

Public interest arguments in favour of disclosing the requested information

36. WYP acknowledged the public interest in transparency by showing the public how NPAS helicopters are used to prevent and detect potential criminal acts. WYP also acknowledged that disclosure would show how public funds are being spent.
37. The complainant argued that, even if there had been an investigation initially, it may well have been concluded by now.

Balance of the public interest arguments

38. The Commissioner has considered the public interest arguments from both parties, including the public interest in transparency.
39. The Commissioner notes the complainant's argument that even if there had been an investigation carried out by the HSE, it may be over now. The Commissioner has seen confirmation from the HSE that its investigation commenced on 23 April 2015. As the date of the request

was 6 July 2015, he is satisfied that, at the time of the request, there was an on-going investigation into the fire by the HSE.

40. The Commissioner accepts WYP's argument that it is important that individuals, who may be part of an ongoing the investigation, should not be given the opportunity to view evidence before it is put to them in the formal setting of the HSE's investigation.
41. The Commissioner also considers that it is in the public interest for the HSE to be able to carry out investigations into incidents regarding public safety, without being undermined by the premature disclosure of information.
42. Furthermore, the Commissioner accepts WYP's argument that disclosure of the footage has the potential to hinder its ability to work with others. As the lead authority in NPAS, the Commissioner accepts that WYP has a duty to ensure that any information which has the potential to undermine the investigative process, in this case the HSE, is not released into the public domain prematurely.
43. The Commissioner also accepts WYP's argument that, whilst disclosure of the footage in question would be of use to the complainant, there is no wider public interest in disclosing it while the HSE's investigation is ongoing.
44. The Commissioner considers that appropriate weight must be given to the public interest inherent in the exemption; that is, the public interest in avoiding likely prejudice to the HSE's ability to ascertain whether anybody is responsible for any improper conduct and whether regulatory action would be justified. The Commissioner considers that it is clear that there is a very substantial public interest in avoiding that prejudice and that this is a strong public interest factor in favour of maintenance of the exemption.
45. The Commissioner has weighed the public interest in avoiding prejudice to the HSE's function to investigate whether a person has acted improperly and whether there are any circumstances which would justify regulatory action, against the public interest in the openness and transparency and the complainant's arguments regarding disclosure. His conclusion is that the public interest in avoiding this prejudice is a strong factor and so considers that the public interest in maintaining the exemption outweighs the public interest in disclosure.

Conclusion

46. Taking all of the above into account, the Commissioner is satisfied that section 31(1)(g) and (2)(b) and (c) have been applied appropriately in this case and that the public interest in maintaining the exemption outweighs the public interest in disclosure.

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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

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

Jon Manners
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