

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 November 2019

Public Authority: Chief Constable of South Yorkshire Police
Address: South Yorkshire Police Headquarters
Carbrook House
Carbrook Hall Road
Sheffield
S9 2EH

Decision (including any steps ordered)

1. The complainant has requested information about meetings concerning a tree-felling operation, from South Yorkshire Police ("SYP"). SYP provided some information but withheld the remainder, citing sections 40(2) (personal information), 30(1)(a) (investigations and proceedings), 31(1)(a) (law enforcement), 38(1)(b) (health and safety) and 42(1) (legal professional privilege) of the FOIA. SYP subsequently withdrew reliance on sections 38 and 42 of the FOIA. The complainant has accepted that personal data may be redacted.
2. The Commissioner's decision is that SYP is entitled to rely on the exemptions at sections 30(1) and 31(1) of the FOIA, and that the public interest favours maintaining these exemptions. No steps are required.

Background

3. The request in this case relates to the policing of public protests against the felling of mature trees by Sheffield City Council ("SCC"), as part of its street maintenance program.

4. SYP has published further information about the tree-felling operation on its website¹.
5. A report about "Policing Sheffield's Trees Protests" is available on South Yorkshire's Police and Crime Commissioner's website².
6. The three meetings referred to in the request were digitally recorded but no formal minutes were produced. SYP therefore transcribed the minutes for the purposes of dealing with this - and another, similar - FOIA request.
7. SYP's submissions to the Commissioner included reference to an injunction. SYP advised the Commissioner that this injunction was obtained by SCC "to prevent certain actions from protestors that could hinder the tree felling or cause health and safety concerns". It added that the original injunction had expired but has since been extended by the courts. There is a link to relevant information on the SCC's website³.
8. Following the injunction, legal advice was sought and discussed during the meetings.

Request and response

9. On 15 February 2019, the complainant wrote to SYP and requested information in the following terms:

"A recent South Yorkshire Police FoI response confirmed the existence of audio recordings of three meetings between the force, Sheffield City Council and Amey on February 5, 19 and 23, 2018, pertaining to Operation Quito, the enhanced police response to tree-felling protests in Sheffield:

https://www.whatdotheyknow.com/request/475284/response/1159387/attach/4/Freedom%20Of%20Information%20Ref%20No%200180371%20Publish.pdf?cookie_passthrough=1

¹ <https://www.southyorks.police.uk/find-out/right-to-information/categories-of-significant-interest/operation-quito-tree-felling-from-jan-2018/>

² <https://southyorkshire-pcc.gov.uk/app/uploads/2018/10/Policing-Sheffield-Trees-Protests.pdf>

³ <https://www.sheffield.gov.uk/home/roads-pavements/streets-ahead/court-injunctions-trespass-tree-work-safety-zone>

Under the FoI Act, please could you release to me the recordings of these three meetings?

Please could you also release any transcripts, minutes or notes that were subsequently made of or about these three meetings?"

10. On 4 April 2019, having extended the time limit in which to consider a public interest test, SYP responded. It disclosed some information within the scope of the request but refused to provide the remainder. It cited the following exemptions as its basis for doing so: section 40(2) (personal information); section 30(1)(a) (investigations and proceedings); section 31(1) (law enforcement); section 38 (1)(a)(b) (health and safety) and section 42(1) (legal professional privilege) of the FOIA.
11. The complainant requested an internal review of the exemptions applied, on 15 April 2019. SYP provided the outcome of its internal review on 1 May 2019; it maintained its position.
12. During the Commissioner's investigation, SYP disclosed some further information and withdrew reliance on sections 38 and 42 of the FOIA.

Scope of the case

13. The complainant contacted the Commissioner on 1 May 2019 to complain about the way his request for information had been handled.
14. On 31 July 2019, the Commissioner requested from the complainant, further information in support of his complaint, which he provided on 13 August 2019. When doing so, he agreed that personal data could be withheld, and so the Commissioner has not considered the application of section 40 of the FOIA to the withheld information.
15. The complainant specified:

"Essentially my issue is the use of Section 30 in withholding information and in the balancing test decision, the officer has said

"I am of the opinion that the strongest reason for withholding information is that due to the relatively recent time parameters, investigations and enquiries may still be continuing. As well as a very real and significant public interest in protecting the longstanding principle of legal privilege. These may be compromised by releasing material pertinent to your request."

However, SYP confirmed to me after this that there were no outstanding cases relating to this operation - which prompted my

request for an internal review. They rejected the review on the grounds that the other exemptions were "of equal importance".

It is my position that it may be possible to some [sic] of the currently-redacted information to be made public which is why I have got in touch with the ICO on this matter".

16. No grounds of complaint were raised regarding the information being considered in its transcribed format as opposed to its recorded format so the Commissioner has only considered the transcribed format, that being what was partially disclosed to the complainant.
17. The Commissioner will consider whether or not SYP is entitled to rely on the exemptions cited below which have been clarified as: 30(1)(a) (investigations and proceedings) and 31(1)(a) (law enforcement).
18. The Commissioner has had full access to both the original recordings and the transcribed document. The transcribed document consists of 36 pages.

Reasons for decision

Section 30 – investigations and proceedings conducted by public authorities

19. SYP has cited section 30(1)(a) in respect of information on page 18 of the transcript.

20. Section 30(1) of the FOIA states:

"Information held by a public authority is exempt information if it has at any time been held by the authority for the purpose of –
(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained—

- (i) whether a person should be charged with an offence, or*
- (ii) whether a person charged with an offence is guilty of it".*

21. The Commissioner considers that the phrase "at any time" means that information can be exempt under section 30(1)(a) of the FOIA if it relates to a specific ongoing, closed or abandoned investigation.
22. Consideration of section 30(1)(a) is a two-stage process. First, the exemption must be shown to be engaged. Secondly, as section 30 is a qualified exemption, it is subject to the public interest test. This involves determining whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Is the exemption engaged?

23. The first step is to address whether the requested information falls within the class specified in section 30(1)(a) of the FOIA.
24. The Commissioner has issued guidance on section 30⁴ which states that section 30(1)(a) can only be claimed by public authorities that have a duty to investigate whether someone should be charged with an offence. The guidance describes the circumstances in which the subsections of section 30(1) might apply. With respect to section 30(1)(a), the guidance says:

"The exemption applies to both investigations leading up to the decision whether to charge someone and investigations that take place after someone has been charged.

Any investigation must be, or have been, conducted with a view to ascertaining whether a person should be charged with an offence, or if they have been charged, whether they are guilty of it.

It is not necessary that the investigation leads to someone being charged with, or being convicted of an offence...."

25. As a police force, SYP clearly has a duty to investigate allegations of criminal offences by virtue of its core function of law enforcement. The Commissioner is therefore satisfied that it has the power to carry out investigations of the type described in section 30(1)(a).
26. SYP explained to the Commissioner:

"Contents of the recordings included various discussions around the on-going investigation into breaches of the Court Injunction and also in respect of investigations into possible criminal behaviour by both the protestors and the enforcement staff employed by the contractors working on behalf of Sheffield City Council. Disclosure of this information could have compromised not only those investigations but also any future investigations resulting from the on-going campaign against the felling of trees.

*Under S30(1), information held by a public authority is exempt if it has **at any time** been held by the authority for the purposes of any investigation that the public authority has the duty to conduct. South Yorkshire Police have a duty to investigate the allegations*

⁴ <https://ico.org.uk/media/for-organisations/documents/1205/investigationsandproceedings-foi-section-30.pdf>

made against different factions involved in this operation. The information discussed in the these meetings included details of the, at that time, on-going investigations into a number of different cases that were at various stages in the judicial process and disclosure of the information to provide a high level of transparency”.

27. The Commissioner notes that SYP also advised the complainant that release of this information: *“... could compromise the effectiveness of the operation, further lines of enquiry and the integrity of any investigations that may be ongoing”*. When asking for an internal review, the complainant specifically referred to this comment, saying: *“I have subsequently established through the South Yorkshire Police press office that there are no cases outstanding relating to this particular operation”*.
28. Whilst the Commissioner has no reason to doubt the complainant’s comment, as mentioned above, the information does not need to relate to an “open” investigation in order to engage this exemption.
29. The Commissioner is satisfied that the withheld information relates to a policing operation conducted by SYP of the type described in section 30(1)(a). She is therefore satisfied that the exemption provided by section 30(1)(a) is engaged.

The public interest test

30. Section 30(1)(a) is subject to a public interest test. This means that even though the exemption is engaged, the information may only be withheld if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
31. In accordance with her guidance, when considering the public interest in maintaining exemptions, the Commissioner considers that it is necessary to be clear what they are designed to protect.
32. The purpose of section 30 is to preserve the ability of the police (and other applicable public authorities) to carry out effective investigations. Key to the balance of the public interest in cases where this exemption is found to be engaged, is whether the disclosure of the requested information could have a harmful impact on the ability of the police to carry out effective investigations. Clearly, it is not in the public interest to jeopardise the ability of the police to investigate crime effectively.

Public interest in disclosing the information

33. SYP acknowledged that disclosure would provide the public with a better understanding of how it conducts its investigations. It also considered that disclosure may lead to more people coming forward with information about incidents in their community. It added:

"... it is important that the public have confidence in public authorities that are tasked with upholding the law and this could be increased with a possible wider disclosure of the measures taken to investigate the cases involving tree felling".

Public interest in maintaining the exemption

34. SYP has argued that current and/or future investigations could be compromised by the release into the wider public domain of details concerning the individuals involved. It expressed concern that individuals may be reluctant to come forward and provide information if they believe that details relating to the investigation could be released, via an FOIA request, whilst an enquiry is ongoing.

35. SYP argued:

"South Yorkshire Police have already published a significant amount of information relating to the ongoing operation in respect of tree felling in Sheffield and whilst it is important that the police demonstrate that they are carrying out their functions effectively, a wider detriment could be caused if they were not able to investigate cases and reach decisions without the risk of disclosure impeding the process of that specific case or, in this event, any future operations that include protesting activities".

36. It also said:

"Any disclosure of information relating to an ongoing investigation would compromise the right for any individual(s) identified from such an investigation to have a fair hearing, and more importantly the rights of a complainant(s) for a resolution".

Balance of the public interest

37. In reaching a conclusion on the balance of the public interest, the Commissioner has considered the public interest in SYP disclosing the requested information. The Commissioner has also considered whether disclosure would be likely to harm any investigation, which would be counter to the public interest, and what weight to give to these competing public interest factors.

38. As set out above, the purpose of section 30 is to protect the effective investigation and prosecution of offences. Clearly, it is not in the public interest to jeopardise the ability of the police to investigate crime effectively.
39. Set against this, the Commissioner recognises the importance of the public having confidence in public authorities that are tasked with upholding the law. Confidence will be increased by allowing scrutiny of their performance and this may involve examining the decisions taken in particular cases.
40. On that point, the Commissioner notes that that much relevant information is already in the public domain, having been proactively disclosed by both SYP and SCC. She considers that informing the public about the issues in this manner is good practice and a positive way of keeping people apprised of the situation.
41. She also notes that public order issues surrounding tree-felling continue to be an issue of concern for SYP and that the further release of information in connection with the investigations referred to here could impact on any future investigations relating to the same operation. She considers this to be a public interest argument of considerable weight.
42. Having given due consideration to the arguments put forward by both parties, the Commissioner decided that section 30(1)(a) of the FOIA has been applied appropriately in this case and that the public interest in maintaining the exemption outweighed the public interest in disclosure.

Section 31 – law enforcement

43. This exemption has been applied to all the remaining withheld information.
44. Section 31(1)(a) of the FOIA 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-
(a) the prevention or detection of crime".
45. Section 31 is a prejudice based exemption and is subject to the public interest test. This means that not only does the information have to prejudice one of the purposes listed, but also that it can only be withheld if the public interest in the maintenance of the exemption outweighs the public interest in disclosure.
46. 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 interests within the relevant exemption (in this case, the prevention or detection of crime);
- 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.

47. SYP has explained that SCC's tree-felling operation is still a live operation and the disclosure of any of SYP's plans or tactical issues, such as details of any planned timetable for tree-felling, could compromise future policing activity. It explained to the Commissioner that:

"... the redactions in the disclosed material relate to specific tactics that have been used by the protest groups to try and frustrate the process of tree felling.

South Yorkshire Police are satisfied that disclosure of this information in its entirety would lay open all of the measures available to police protest activities to ensure the safety of all parties involved, and also the public at large. This includes issues around steps taken by individuals to frustrate the arborists in their work and activities disrupting the movement of equipment and personnel.

If information were disclosed which showed the effectiveness of such measures and what arrangements were being considered to circumvent them, any future operation to police protests has the potential to be significantly compromised which would be likely to prejudice the prevention or detection of crime. It is considered that there is a significant risk that the information could be used by future protestors to prevent SYP from fulfilling its public duty.

Whilst it is acknowledged that disclosure would provide accountability and transparency that SYP is fulfilling its policing functions effectively, there is also the concern that disclosure of information relating to law enforcement tactics could be manipulated and exploited by future protestors to frustrate the legitimate activities of SYP".

48. Having viewed the withheld information, the Commissioner is satisfied that this is an accurate description of its content.

49. The Commissioner has considered the applicability of the exemption at section 31 of the FOIA. With regard to the first criterion of the three limb prejudice test described above, the Commissioner accepts that potential prejudice to law enforcement activity relates to the applicable interest which section 31(1)(a) is designed to protect.
50. With regard to harm being caused by disclosure, having considered the withheld information the Commissioner is satisfied that its disclosure would be likely to have a detrimental effect on future law enforcement. It contains detailed and specific intelligence and legal discussions which, if disclosed, could undoubtedly assist any individuals intent on circumventing the law. This would have a detrimental effect on law enforcement. The Commissioner is satisfied that the resultant prejudice can be correctly categorised as real and of substance.
51. As regards the third criterion, the likelihood of prejudice arising, SYP has not specified the level of likelihood being relied on, so the Commissioner has considered the lower level of "would be likely to" prejudice. SYP was concerned about the likely impact of disclosure on future policing operations, the integrity of its investigations and on public order. Having considered the evidence it supplied, and in light of the intelligence and operational information contained in the withheld information, the Commissioner is satisfied that it demonstrated that prejudice "would be likely to" occur.
52. The Commissioner is therefore satisfied that the exemption at section 31(1)(a) of the FOIA is engaged.

Public interest test

53. Section 31 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption contained at section 31(1)(a) outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosure

54. SYP has acknowledged that disclosure would provide a legitimate public interest in the public knowing that it fulfils its policing functions effectively and efficiently in dealing with particular type of offences and incidents. It also considered that disclosure of the information would reassure the public that it is actively policing certain types of crimes and that the safety of communities is paramount.
55. SYP accepted that:

"The Tree felling program is a matter of great public interest and, there has been much media attention, incidents and criticisms directed towards SYP and their involvement along with a need for

transparency of decision making which could weigh strongly in favour of disclosing”.

Public interest arguments in favour of maintaining the exemption

56. SYP advised that police resources, and its ability to operate effectively and efficiently, would be directly affected by disclosure, as the information could be used by those with criminal intent to understand law enforcement capacities and limitations. Such action could ultimately lead to an increase of police deployment in particular areas which, in turn, could compromise wider police tactics and capabilities.

57. It further argued that:

“The Police Service is charged with enforcing the law, the prevention and detection of crime and protecting the public. Whilst there is a public interest in the transparency of policing functions and operations and also providing assurance that the police service is appropriately and effectively resourced in order to enforce the law, there is also a strong public interest in the safeguarding the public in the communities they live and work”.

Balance of the public interest

58. The Commissioner has weighed the public interest in avoiding prejudice to the prevention or detection of crime against the public interest in openness and transparency; she has also taken into account any arguments advanced by both parties.

59. The Commissioner considers that it is important that the general public has confidence in the police service, which is responsible for enforcing the law. Confidence will be increased by allowing scrutiny of how the police execute their duties. Accordingly, there is a general public interest in disclosing information that promotes accountability and transparency in order to maintain that confidence and trust.

60. Whilst the Commissioner accepts that the subject matter of the request is of concern to the public, it also remains an on-going issue for both SYP and SCC. SYP has genuine concerns that disclosure of any of the intelligence discussed in the meetings, and of how it approaches policing the tree-felling operation, would be likely to impact on its ability to undertake its duties effectively. The Commissioner recognises that there is a very strong public interest in protecting the law enforcement capabilities of a police force and she considers that appropriate weight must be afforded to the public interest inherent in the exemption - that is, the public interest in avoiding prejudice to the prevention or detection of crime.

61. With this in mind, the Commissioner believes that there is stronger public interest in ensuring that the overall effectiveness of the policing operations being undertaken by SYP is not undermined or compromised. Whilst there is a public interest in understanding SYP's approach to an often volatile area of policing, the Commissioner considers that there is a stronger public interest in ensuring that the force's role in the prevention of crime is not prejudiced as a result of inappropriate disclosures. The public is entitled to expect that effective measures will be taken to try to frustrate those intent on breaking the law. It would clearly not be in the public interest for information to be disclosed which undermined the ability of the police to prevent instances of disorder.
62. The Commissioner has concluded that, in all of the circumstances of this case, the public interest in maintaining the exemption at section 31(1)(a) outweighs the public interest in disclosing the withheld information.

Other matters

63. Although they do not form part of this notice the Commissioner wishes to highlight the following matters of concern.

Information Notice

64. As SYP failed to respond to the Commissioner's enquiries in a timely manner it was necessary for her to issue an Information Notice in this case, formally requiring a response.

Recording meetings

65. The Commissioner also notes that, in this case, the meetings which took place were not formally minuted, having only been digitally recorded. This has resulted in unnecessary delays and additional work in transcribing the recordings in order to respond to information requests under the FOIA – something which might have been expected in light of the considerable public interest in this matter.
66. The model publication scheme published by the Commissioner⁵ describes the seven classes of information that a public authority should publish. These are broad and cover the more formal types of information a public authority holds, such as information about the structure of the organisation, minutes of meetings, contracts, reports, plans and policies.

⁵ <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/publication-scheme/>

A public authority should include all information that falls in the seven classes, unless there is a good reason not to. This is in line with one of the principles of the FOIA – that public information should be made available unless there is good reason to withhold it, and the FOIA allows it.

67. Had the meetings been properly minuted and proactively disclosed as part of SYP's publication scheme then this may have resulted in less work for SYP and could also have satisfied the public, without their need to submit requests under the FOIA.
68. The Commissioner will use intelligence gathered from individual cases to inform her insight and compliance function. This will align with the goal in her draft Openness by Design strategy⁶ to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in our Regulatory Action Policy⁷.

⁶ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

⁷ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

69. 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@justice.gov.uk

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

70. 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.

71. 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

Carolyn Howes
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF