

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 May 2013

Public Authority: Serious Fraud Office
Address: Elm House
10-16 Elm Street
London
WC1X 0BJ

Decision (including any steps ordered)

1. The complainant requested a copy of a report that he believed that the Serious Fraud Office (SFO) had been supplied in relation to an investigation of South Yorkshire Trading Standards Unit. The SFO refused to confirm or deny whether it held this information and cited the exemption provided by section 30(3) (information held for the purposes of an investigation) of the FOIA.
2. The Commissioner's decision is that the public interest favours disclosure of the confirmation or denial and so the SFO cited section 30(3) incorrectly.
3. The Commissioner requires the SFO to take the following steps to ensure compliance with the legislation.
 - Issue a reconsidered response to the request that is compliant with the requirements of section 1 and/or section 17.
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.

Background

5. When South Yorkshire County Council was established in 1974 responsibilities for trading standards, or 'weights and measures', was transferred from the four existing local authorities – Barnsley, Doncaster, Rotherham and Sheffield – to the new County Council. The South Yorkshire Trading Standards Unit (the "Unit") was set up at the same time.
6. In 1986, following the abolition of the metropolitan counties, the four local authorities took on responsibility for running the Unit and a joint committee, comprised of members from each authority, was established to oversee its operation. From 1976 the Unit was headed by Mike Buckley, General Manager.
7. Following the death of Mr Buckley in 2005 it emerged that the Unit had, for a number of years, been incurring substantial losses. The losses accruing to the four local authorities amounted to some £14 million. It transpired that the Unit head had been concealing the losses via fraud and false accounting.
8. An independent review of the circumstances which gave rise to these matters has been conducted and the final draft of the resulting report – the "Newton Report" – was completed in late 2010.

Request and response

9. On 10 June 2012, the complainant wrote to the SFO and requested information in the following terms:

"Would you be so kind as to send me a digitised version of [the Newton Report]."
10. After the complainant had chased up a response on 30 September 2012, the SFO responded on 15 October 2012, outside 20 working days from receipt of the request. It was acknowledged that the complainant's email of 10 June 2012 had been overlooked.
11. It stated that the request was refused under section 30 (information held for the purposes of an investigation or proceedings). It referred to section 30 providing that a public authority is not obliged to confirm whether information is held if that exemption is engaged, but also went on to discuss whether the public interest favoured disclosure of the requested information.

12. The complainant responded on the same date and requested an internal review. The SFO wrote to the complainant on 30 October 2012 with the outcome of the review. The refusal of the request under section 30 was upheld, and the SFO again referred to section 30 allowing that a public authority is not obliged to confirm or deny whether information is held where it is engaged.

Scope of the case

13. The complainant contacted the Commissioner on 23 November 2012 to complain about the refusal of his information request. Whilst the complainant was not specific at this stage, it was apparent that his complaint was that he did not agree with the grounds given for the refusal of his information request.
14. Section 30(3) provides that, where any of the subsections from 30(1) or (2) of the FOIA apply, a public authority is not required to confirm or deny whether the requested information is held. In correspondence with the ICO the SFO confirmed that its position was that it neither confirmed nor denied whether it held the requested information, in reliance on section 30(3). The analysis in this notice therefore covers whether section 30(3) was cited correctly and, therefore, whether the SFO was required to confirm or deny if it held the requested information.

Reasons for decision

Section 30

15. The SFO has relied on section 30(3). This provides an exemption from the duty to confirm or deny imposed by section 1(1)(a) in relation to any information that, if held by the public authority, would fall within any of the classes described in sections 30(1) and (2). Consideration of this exemption is a two-stage process: first, the exemption must be engaged; secondly, this exemption is qualified by the public interest, which means that the confirmation or denial must be provided if the public interest in doing so is not outweighed by the public interest in favour of the exemption.
16. Covering first whether the exemption is engaged, the position of the SFO is that, if it did hold any information falling within the scope of this request, this would be within the class specified in section 30(1)(c). This section provides an exemption for any information that is held for the purposes of any criminal proceedings which the public authority has the power to conduct.

17. The reasoning of the SFO is that any copy of the Newton Report it held, which would have been supplied to it by the four local authorities referred to above, would be held for the purposes of its criminal proceedings relating to the South Yorkshire Trading Standards Unit¹. It has explained that, if it held a copy of the Newton Report, this would have been provided to it in connection with the discharging of its functions under section 1 of the Criminal Justice Act 1987, which sets out its authority to investigate and prosecute serious or complex fraud.
18. On the basis of this explanation from the SFO, the Commissioner accepts that, if it did hold a copy of the report specified in the request, this would have been held for the purposes of criminal proceedings that the SFO had power to conduct under the aforementioned Act, and so would have fallen within the class specified in section 30(1)(c). The exemption provided by section 30(3) was, therefore, engaged and the SFO was entitled to neither confirm or deny whether it held the information requested.
19. Having found that the exemption is engaged, the next step is to consider the balance of the public interest. In reaching a conclusion on the public interest here, the Commissioner has taken into account the general public interest in the openness and transparency of the SFO, as well as those factors that apply specifically in relation to the confirmation or denial in question. Importantly, the issue here is whether the public interest favours confirmation or denial; it is not whether the public interest favours the disclosure of any information that the SFO may hold.
20. Turning first to factors that favour maintenance of the exemption, the argument of the SFO was that disclosure of the confirmation or denial in this case could discourage third parties from providing to it information required by the SFO for investigations. It acknowledged that it has powers to compel the provision of information to it, but argued that it is preferable to maintain a relationship of cooperation with third parties.
21. The Commissioner agrees that a situation where organisations will voluntarily provide information to the SFO is preferable to a situation where it has to use its powers to force cooperation. He also agrees that there is in general a strong public interest in ensuring that the SFO has

¹ <http://www.sfo.gov.uk/press-room/press-release-archive/press-releases-2010/three-sentenced-after-pleading-guilty-to-false-accounting-at-south-yorkshire-trading-standards-unit.aspx>

space in which to carry out its role. However, due to the circumstances in this case, the Commissioner does not agree that the provision of a confirmation or denial here would be likely to have the effect predicted by the SFO.

22. The confirmation or denial in this case relates to an investigation and subsequent legal proceedings that were already complete by the date of the request, and had been publicised as such by the SFO (see footnote on page 4). Also, this report, albeit what the complainant believes to be a different iteration of it, had not only been confirmed as existing by Sheffield City Council, but had also been disclosed by that Council in response to a previous decision of the Commissioner².
23. The view of the Commissioner is that, if any organisation cited the disclosure of the confirmation or denial in this case as grounds for reluctance to supply information to the SFO in any future case, the SFO could refer to the specific circumstances of this case. In doing so it could explain that it felt able to give the confirmation or denial in this case as a result of the investigation and prosecution being complete by the date of the request, and due to the fact that a version of this report had previously been disclosed by Sheffield City Council. It could state that the provision of the confirmation or denial in this case should not be taken as an indication that a similar response would be given in any future case. The view of the Commissioner is that no third party supplied with this explanation could reasonably cite a confirmation or denial in response to the complainant's request as grounds for reluctance to supply information to the SFO.
24. As the Commissioner does not believe that the provision of the confirmation or denial in this case would be likely to have the negative impact predicted by the SFO, he does not regard this argument from the SFO as carrying weight as a public interest factor in favour of maintenance of the exemption.
25. Turning to those factors that favour provision of the confirmation or denial, the Commissioner believes that there is public interest in the work of the SFO in general, as well as specific public interest in the investigation to which this information request relates. In general, there is a public interest in knowledge that the SFO, as a publicly funded

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http://www.ico.gov.uk/~media/documents/decisionnotices/2012/fs_50425762.ashx

organisation providing a public service, is carrying out sufficiently thorough investigations.

26. In relation to the specific investigation to which the information request relates, this was an investigation into wrong-doing at another publicly funded body. The view of the Commissioner is that this means that there is a legitimate public interest in disclosure of the actions taken by the SFO in relation to this investigation. Such disclosure would serve to improve public knowledge of the steps taken by the SFO in this investigation and to understand more about how this long-running fraud within a publicly-funded body came about. The view of the Commissioner is that there is a legitimate public interest both in the investigatory work of the SFO in general and in the specific investigation in question here. His view is that this is a valid factor in favour of provision of the confirmation or denial in this case.
27. In conclusion, the view of the Commissioner is that, whilst it is clearly in the public interest in general terms for the SFO to have a space in which to perform its role, in the circumstances of this case he does not accept that provision of the confirmation or denial would harm the work of the SFO. He does not, therefore, accept that there is a public interest in the maintenance of the exemption on that basis.
28. Given this, he finds that the public interest in provision of the confirmation or denial on the basis of openness about the work of the SFO in relation to this investigation is not outweighed by the public interest in the maintenance of the exemption. The SFO is, therefore, required at paragraph 3 above to issue a reconsidered response to this request.

Other matters

29. Whilst it transpired during the Commissioner's investigation of this case that the position of the SFO was that it neither confirmed or denied whether the requested information was held, the refusal notice and internal review response were not entirely clear on this point. Whilst the complainant was advised that section 30 contains a "neither confirm or deny" provision, the responses did not state specifically that this was the position of the SFO.
30. Whilst section 30(3) does provide for a "neither confirmation or denial response", a public authority can choose whether to apply that, or to confirm that information is held, but refuse to disclose it under any of the subsections within 30(1) and (2). In other words, it is not the case that it automatically and necessarily follows that where section 30 is

cited, the public authority is neither confirming or denying whether the requested information is held.

31. When citing section 30 in future, the SFO should first consider whether it should choose to neither confirm or deny, or whether it can confirm that the information is held, even if it is not appropriate to disclose it. Secondly, it should state specifically and clearly in the refusal notice that it neither confirms or denies whether the information is held if that is its choice.
32. As noted above at paragraph 10, the SFO responded to this request late and when doing so acknowledged that the request had initially been overlooked. The SFO should ensure that it has appropriate measures in place to recognise information requests, even where these are made in the context of a wider ongoing correspondence. A record has been made within the ICO of this delayed response and this issue may be revisited should it become apparent through future cases that this is a systematic problem.

Right of appeal

33. 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

34. 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.
35. 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

Gerrard Tracey
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