

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 November 2013

Public Authority: Serious Fraud Office
Address: 2-4 Cockspur Street
London
SW1Y 5BS

Decision (including any steps ordered)

1. The complainant requested a copy of a report (draft copy of the Newton Report) that had been supplied to the public authority in relation to an investigation of South Yorkshire Trading Standards Unit. The public authority withheld the report on the basis of the exemptions at sections 30(1) (a) and (c), (and in the alternative, 31(1) (b) and (c)) and section 41.
 2. The Commissioner's decision is that the public authority was not entitled to withhold the report on the basis of the exemptions relied on.
 3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose a draft copy of the Newton Report save the information which he has previously ordered to be redacted on the basis of section 40(2) FOIA and the small number of annotations in the report.
 - The information which should be redacted on the basis of section 40(2) can be found in the confidential annex.
 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.
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Background

5. When South Yorkshire County Council was established in 1974, responsibilities for trading standards or 'weights and measures' was transferred from the 4 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. The Unit was headed by Mike Buckley, general manager of the Unit since 1976.
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 4 local authorities amounted to some £14 million. It transpired that the Unit head had been concealing the losses via fraud and false accounting. The police and then the Serious Fraud Office investigated and a number of third party agents involved in the fraud were prosecuted on false accounting charges.
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.
9. The complainant initially wrote to the public authority on 10 June 2012 and requested the Newton Report in the following terms:

'Would you be so kind as to send me a digitised version of [the Newton Report].'
10. The public authority refused to confirm or deny whether it held the Newton Report and cited the exemption at section 30(3) (information held for the purposes of an investigation) of the FOIA.
11. On 7 May 2013 the Commissioner issued a Decision Notice¹ in which he did not uphold the public authority's reliance on section 30(3). He consequently ordered the public authority to re-issue a response in line with the requirements of section 1 and/or section 17 FOIA.

¹ Case reference FS50474916

12. Of equal significance to this case, the Commissioner had previously issued a Decision Notice² to Sheffield City Council on 8 May 2012 (following a request from the complainant) in which he ordered the Council to disclose *a copy of the Newton Report* save a small amount of information which he accepted could be redacted on the basis of section 40(2) (personal information) FOIA. The Council complied with the Decision Notice.

Request and response

13. On 7 June 2013 the public authority confirmed (in compliance with the Decision Notice issued on 7 May) that it held a version of the Newton Report³. It however withheld the report on the basis of the exemptions at sections 30(1) (a) and (c) FOIA. As mentioned, the request was phrased as follows:

'Would you be so kind as to send me a digitised version of [the Newton Report].'

14. On 7 June 2013 the complainant requested an internal review.
15. On 8 July 2013 the public authority wrote to the complainant with details of the outcome of the internal review. It upheld the decision to withhold the report on the basis of sections 30(1) (a) and (c). It additionally applied the exemptions at sections 41 and 42(1) FOIA to the report.

Scope of the case

16. On 9 July 2013 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He disagreed with the public authority's decision to withhold the report. His reasons for disagreeing with the public authority's position were phrased as follows:

² Case reference FS50425762

³ Hereinafter referred to interchangeably as 'the report'

'.....the SFO [the public authority] was not aware that the ICO has already forced Sheffield Council to disclose the Newton Report, so all their arguments for non-disclosure are invalid.

Interestingly, the SFO concedes that they have a different version of the Newton report to that which the ICO said must be disclosed by Sheffield Council. It was this, different version that I still seek, complete with any annotations. Please bear in mind that SCC [Sheffield City Council] denied that different version of the the [sic] Newton Report existed.

Where material relates to personal information.....such information is already known and in any case is not material to the object of the exercise. Should the SFO wish to redact those details, so be it.'

17. During the course of the Commissioner's investigation, the public authority clarified that the version of the Newton Report in its possession was a draft copy that had been provided by the Council in February 2009 pursuant to the public authority's obligations under The Criminal Procedure and Investigations Act 1996 (CPIA). The public authority withdrew its reliance on the exemption at section 42(1) and introduced the exemptions at sections 31(1) (b) and (c) in the alternative to the exemptions relied on at section 30.
18. The substantive scope of the Commissioner's investigation therefore was to determine whether the public authority was entitled to withhold the Newton Report on the basis of the exemptions at sections 30(1) (a) & (c) (sections 31(1) (b) & (c) in the alternative) and section 41.
19. Given the nature of the complaint, the Commissioner also considered whether the request made by the complainant on 10 June 2012 included annotations to the Newton Report.

Reasons for decision

The scope of the request

20. The public authority did not consider that the scope of the request extended to the small number of hand written comments made by its officers on the report.
21. The Commissioner accepts the public authority's interpretation of the request. Read plainly and objectively, there is nothing to suggest that the request extended to annotations on the report by the public authority's officers. It was phrased as a request for presumably an electronic version of the Newton Report. It was therefore reasonable for the public authority to interpret it as such.

Section 30(1) (a) and (c)

22. Information is exempt from disclosure on the basis of the above exemptions if has at any time been held by the authority for the purposes of-
- (a) any investigation which the public authority has a duty to conduct with a view to being ascertained-

whether a person should be charged with an offence, or

whether a person charged with an offence is guilty of it,
 - (c) any criminal proceedings which the authority has power to conduct.
23. The public authority explained that it is empowered to carry out criminal investigations by virtue of the Criminal Justice Act 1987 (the Act). Section 1(3) of the Act provides that '*The Director [of the Serious Fraud Office] may investigate any suspected offence which appears to him on reasonable grounds to involve serious or complex fraud.*' Section 1(5) further provides that '*The Director may – (a) institute and have the conduct of any criminal proceedings which appear to him to relate to such fraud.*' It was on the basis of its powers under the Act that it investigated the fraud at the Unit and initiated criminal proceedings thereafter.
24. The public authority was initially provided a copy of the report by the Council whilst the latter was conducting its investigation into the fraud allegations at the Unit. At the request of the Council, the report was returned in August 2006. In February 2009, the public authority sought to review the report in accordance with its obligations under the CPIA, explaining that the report was relevant to the criminal proceedings it had initiated against individuals who were later convicted (in February 2010) for their involvement in the fraudulent activities at the Unit.
25. The public authority therefore considers that the report falls into the category of information envisaged in sections 30(1) (a) and (c).
26. Sections 30(1) (a) and (c) are classed based exemptions. This means that any information falling within the class described in the exemptions is automatically exempt from disclosure regardless of the likely harm/prejudice in disclosure. However, in determining where the balance of the public interest lies, the likely prejudicial effects (if any) of disclosing the information would be considered.
27. The Commissioner accepts that the report was held for the purposes of its duty under the Act. It was relevant to the criminal proceedings it had

initiated pursuant to its investigation of the allegations of fraud at the Unit. The report therefore falls within the category of information envisaged by sections 30(1) (a) and (c) and the public authority was correct to engage the exemptions.

Public interest test

Complainant's arguments

28. The thrust of the complainant's argument is that there would be no harm in disclosure given that the Council has already disclosed its version of the Newton Report.

Public authority's arguments

29. The public authority acknowledged the general public interest in promoting accountability and transparency in the decisions taken by it and how it spends public money. There is also a public interest in demonstrating that it investigates fraud and corruption effectively and impartially and building public understanding of its work.
30. There is also a public interest in promoting accountability and transparency on the part of other public bodies such as the Council, and exposing wrongdoing and misuse of public funds where this occurs.
31. The public authority however argued that the public understanding of what took place at the Unit has been enhanced by the criminal proceedings which subsequently led to the conviction of individuals found culpable, and the publication of the final Newton Report.
32. The report was provided in confidence in connection with the public authority's functions of investigating and prosecuting serious and complex fraud. It was provided in the expectation that use of the material would be confined to the purposes for which it was provided and not otherwise disseminated further. The Council has not consented to the public authority disclosing the report.
33. The public authority explained that third parties frequently hold material that is relevant to the public authority's investigations and provide it in confidence and solely for the purposes of the public authority's functions. Collateral use of such material without consent is likely to have a chilling effect on co-operation from third parties to the detriment of the public authority's ability to investigate and prosecute serious fraud and corruption. It would also mean that public resources and court time would be diverted to pay for witnesses to be summoned to court to produce documents where they would previously have provided them voluntarily. This would cause delays to the criminal proceedings and not be in the interests of justice.

34. It further argued that the fact that the investigation and prosecution have long concluded is not an important factor in the circumstances of this case. This is because the harm with which the public authority is concerned is the chilling effect on future co-operation with third parties in general, rather than any damage to a specific investigation or prosecution. While there are differences between the report and the published version, there is nothing to suggest that significant information was excluded from the final Newton Report. The incremental transparency and understanding which would be achieved through disclosure of the report, when compared with what is already in the public domain, would be minimal and would not equal or outweigh the substantial public interest in favour of maintaining the exemptions.

Balance of the public interest

35. The Commissioner accepts that preventing a chilling effect on future co-operation by third parties especially with regards the voluntary provision of information pursuant to the public authority's investigatory and prosecutorial functions is generally a strong public interest. Therefore, where information such as the report was supplied to the public authority by an organisation (including another public body), it is reasonable and certainly in the public interest that the public authority carefully considers (in the event of a request under FOIA) what impact disclosing that information to the public at large could have on the voluntary provision of information by similar organisations in future.

36. However, it is inevitable that other factors which might also be relevant in the particular circumstances of that request including the information in question are also considered. The public authority has clearly done so in this case. Its view is that there is nothing significant in the report which was excluded from the final Newton Report disclosed by the Council. Disclosure would not therefore be of any significant public interest. For that reason, the fact that the investigation and prosecution have long concluded is not very significant.

37. The complainant on the other hand believes that the publication of the final Newton Report negates any likely harm in disclosing the report. In other words, there is little or no public interest in the circumstances in withholding the report. Given the scale of the wrongdoing exposed at the Unit, the Commissioner believes that the report would enhance the transparency of the Council's and the public authority's investigations. The public authority may be right that the transparency and understanding would be incremental in the circumstances and consequently minimal. However, the Commissioner believes that the scale of wrongdoing exposed means that any information that would increase public understanding of what went on, how it was uncovered,

and how it was addressed is more likely than not to be of significance in that context.

38. In any event, given the public authority does not consider that any significant information is included in the report which was excluded from the published final Newton Report, the Commissioner does not consider the chilling effect argument especially persuasive. In the Commissioner's view, if any organisation cited the disclosure of the report in this case as grounds for reluctance to supply information to the public authority in any future case, the public authority could refer to the specific circumstances of this case. In doing so it could explain that it felt able to disclose the report as a result of the investigation and prosecution being complete long before the date of the request, and due to the fact that a substantially similar version of the report had previously being disclosed by the Council. It could state that the disclosure in this case should not be taken as an indication that a similar response would be given in any future case. The Commissioner believes that no organisation supplied with this explanation could reasonably cite the disclosure of the report in this case as grounds for reluctance to supply information to the public authority.
39. The Commissioner therefore finds that in all the circumstances of the case, the public interest in maintaining the exemptions at sections 30(1) (a) and (c) does not outweigh the public interest in disclosing the report.

Sections 31(1) (b) and (c)

40. Information which is not exempt information by virtue of section 30 is exempt from disclosure on the basis of the above exemptions if its disclosure would, or would be likely to, prejudice the apprehension or prosecution of offenders and the administration of justice.
41. The public authority considered the report exempt on the basis of the exemptions above for the same reasons it argued that it was exempt on the basis of sections 30(1) (a) and (c). In summary, it argued that the chilling effect on future co-operation by third parties would or would be likely to prejudice its ability to apprehend and prosecute offenders and consequently the administration of justice.
42. As the Commissioner has already found that the report is exempt on the basis of sections 30(1) (a) and (c) (regardless of the public interest in disclosure), the exemption at sections 31(1) (b) and (c) cannot apply to the report. Both exemptions are mutually exclusive. If one is engaged, the other cannot also be engaged. The public authority was therefore not entitled to rely on the exemptions at sections 31(1) (b) and (c).

Section 41

43. Information is exempt from disclosure on the basis of the above exemption if it was obtained by the public authority from any other person (including another public authority), and the disclosure of the information by the public authority holding it would constitute a breach of confidence actionable by that or any other person.
44. Two criteria must be met in order to engage section 41. First, information requested must have been provided by a third party. It is clear that the report was supplied to public authority by the Council.
45. The second criterion is that the disclosing the information requested must constitute an actionable breach of confidence. In the Commissioner's view, a breach will be actionable if:
 - i. The information has the necessary quality of confidence.
 - ii. The information was communicated in circumstances importing an obligation of confidence.
 - iii. Unauthorised disclosure could cause a specific detriment to either the party which provided it or any other party.⁴

Does the report have the necessary quality of confidence?

46. Information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial.
47. The public authority explained that at the time it provided the report, the Council took the view that it was a highly sensitive first draft and did not want it disseminated any further. More recently, the Council re-affirmed that it considers the report confidential and did not want it disclosed.
48. The public authority argued that the *'...commissioners of reviews of this kind have confidence that drafts can be prepared and developed in a safe space in order that the final version is meaningful, accurate and sound. Any author would expect this and the Council commissioned the report on the basis that the author would inevitably develop and improve upon drafts before delivering a final product to them.'*

⁴ Detriment is not always a pre-requisite to an actionable breach of confidence.

49. Given the published final Newton Report is substantially similar to the report, the Commissioner asked the public authority to identify those parts of the report it considered possess the necessary quality confidence. The public authority responded as follows:

'There is no specific section of the report I can point to say that this or that part should remain confidential and I have sought assistance from the Council on this. It is a draft report and there are variations throughout the document. I consider that it is the circumstances as a whole that import the necessary quality of confidence to the draft as at 10 June 2012. By the circumstances as a whole I refer to how we came to hold the report, on what basis it was given to us and Sheffield City Council's continuing view that they expect us to maintain it in confidence.'

50. As the public authority itself admitted, the report is not significantly different from the final Newton Report. The variations in both reports do not appear to be substantive and therefore do not possess the necessary quality of confidence. The public authority was unable to point out any substantive part(s) of the report it considered was not in the public domain by virtue of the disclosed final Newton Report.
51. The Commissioner accepts that the sensitivity of the report in June 2012 would have been more substantial than perhaps it currently is. However, as at 8 May 2012, the Commissioner had ordered the Council to disclose the final Newton Report. The request for the report was made slightly a month after that decision. As mentioned, the Council did not appeal the Commissioner's decision. Therefore, at the time of the request in June 2012, there was no longer any need for safe space in order to prepare a final version of the report. By the same token, the sensitivity of the draft version of the report (i.e. the report) would have diminished greatly given the substantive similarities between both versions.
52. The Commissioner accepts that a third party's view on the confidentiality of information it has supplied to a public authority is an important factor in considering whether the information possesses the necessary quality of confidence. Nevertheless, the starting point must always be the information itself. It has been established that final Newton Report which was published pursuant to the Decision Notice issued to the Council is substantially similar to the information in the report. The information in the report cannot therefore possess the necessary quality of confidence because it is otherwise accessible.
53. In view of the above, the Commissioner finds that the public authority was not entitled to rely on section 41 because disclosing the report would not constitute an actionable breach of confidence.

Right of appeal

54. 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

55. 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.
56. 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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