

Close Paul

From: Clements Simon
Sent: 10 August 2010 10:43
To: 'Grocott, David'
Cc: [redacted] Code A
Subject: RE: Operation Rochester Freedom of Information

David

Thanks for your e-mail in which you have told me that your view, once Hampshire Constabulary have received written confirmation from the CPS that this matter is concluded, that you can no longer apply an exemption to release information under either Section 30 (Investigations & proceedings conducted by public authorities) or Section 31 (Law enforcement).

As requested I have copied in your Information manager Rebecca Warhurst. I have also copied in Janet Altham a senior manager in the CPS with FOI responsibilities.

The CPS view is as follows.

I have concentrated on four sections, 30, 31, (which you have quoted) and 40 and 42 as those which are most regularly engaged when requests are made to us for 'prosecution material'. This is the approach that we will take if required to consider requests under the FOI from persons concerned in this investigation. Of course I cannot advise your Force how to apply FOI, but I would hope that if you receive any request for copies of correspondence between the CPS and the Police: notes of advice from counsel or the CPS to the police that we would be consulted before release.

Section 30

This is a qualified exemption and exempts information held by a public authority if it has been held by it at any time for the purposes of any investigation which it has a duty to carry out, with a view to it being ascertained whether to charge someone with an offence or whether a person charged with such a criminal offence is guilty. Section 30 is concerned with the investigation and prosecution of crime.

By reason of **section 30(1)** information held by a public authority is exempt information if:

- it has been held by it, at any time, for the purpose of any investigation which the public authority had a duty to carry out with a view to it being ascertained whether to charge someone with an offence or whether a person charged is guilty; or
- It has been held for the purposes of an investigation conducted by the public authority and which may lead to a decision by the public authority to institute criminal proceedings, which the authority has power to conduct.

It would only be necessary to rely on section 30(1) to the extent that the material does not fall within any other exemption, such as the absolute exemption in section 41. Section 30 is most apt

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to be used where disclosure of the material in question is confidential but where disclosure would not give rise to an actionable breach of confidence.

Section 30(2) provides for the non-disclosure when the information requested was obtained or recorded by the public authority for the purposes of criminal investigations or proceedings and it relates to the obtaining of information from a confidential source.

The information **must** 'relate to the obtaining of information from confidential sources'; therefore section 30(2) relates to information which is itself not confidential **but** which derives from a confidential source.

There are a number of important points to be made concerning section 30:

1. it does not create an absolute exemption;
2. the information once exempt is always exempt, even if a decision was made not to prosecute and even where the prosecution has been completed;
3. information is exempt whether or not its disclosure would prejudice the investigation or prosecution of crime (this is in contrast to section 31, which contains a prejudice based law enforcement exemption);
4. the exemption applies to public authorities who hold information with 'a view to' themselves investigating or prosecuting crime;
5. The information need only be held with 'a view to' the investigation or prosecution of crime. It matters not if a prosecution does not in fact take place;
6. There is no duty to confirm or deny in relation to information which is exempt by reason of section 30(1).

Section 30 is the most obviously applicable exemption to information held by the CPS when the request relates to case papers.

The application of the public interest test and section 30

Where section 30 (1) or 30 (2) is relied upon, it will be necessary to carry out the public interest balancing exercise. I set out below how we would approach applying the public interest test.

FoIA is not intended to be used as a tool to undermine the effective administration of justice, as is borne out by the inclusion of the section 30 exemption. As The White Paper "*Your Right to Know. The Government's Proposals for a Freedom of Information Act*" (Cm.3818, 1997) explains in two passages:

[Freedom of information] should not undermine the investigation prosecution or prevention of crime, or the bringing of civil or criminal proceedings by public bodies. The investigation and prosecution of crime involves a number of essential requirements. These include the need to avoid prejudicing effective law enforcement, the need to protect witnesses and informers, the need to maintain the independence of the judicial and prosecution processes, and the need to preserve the

criminal court as the sole forum for determining guilty. Because of this, the Act will exclude the information relating to the investigation and prosecution functions of the police, prosecution and other bodies carrying out law enforcement work..."

"There should be no commitment to disclose information which would help potential lawbreakers and criminals, put life, safety or the environment in danger...investigations of suspected crime... must normally be kept secret from the suspect and others. Witness statements, names and addresses of witnesses and reports from the police and others to prosecutors could, if disclosed other than as required by the courts, jeopardise law enforcement or the prevention or prosecution of crime, or be extremely unfair to a temporary suspect against whom (in the event) no real evidence existed. It is in the interests of both the individuals concerned and the integrity of the prosecution process that material relating to both live and contemplated prosecutions and to prosecutions which do not go ahead can be kept confidential."

When considering a FOIA request for information that is covered by section 30, the public interest to disclose should be balanced against the following potential factors:

- disclosure may endanger the physical well-being and interests of victims and witnesses;
- diminish the chances of a successful prosecution being brought, or future charges or future arrests;
- diminish the chances of a fair trial taking place;
- facilitate the commission of crime; and
- Impede future operations or investigations.
- be fair, in cases when decisions have been taken not to proceed, to those who have not been prosecuted;
- assist or hamper the gathering of intelligence information from confidential sources (e.g. informants / whistleblowers / calls to Crimestoppers);

Section 31

This is a qualified exemption, and exempts information that is not exempt by virtue of section 30 but nonetheless, disclosure would or would be likely to, prejudice the prevention or detection of crime, or the apprehension, or prosecution of offenders. Section 31 covers information relating to law enforcement

By section 31(1)(a) and (b) of the Act, information which is not exempt under section 30 is nevertheless exempt if its disclosure would or would be likely to, prejudice the prevention or detection of crime, or the apprehension or prosecution of offenders.

The essential difference between the two sections is that section 30 relates to information held for specific investigations or proceedings, whilst section 31 covers information, which is general and does not specifically pertain to a particular investigation or case. The clearest example is

information concerning investigation methods and investigation manuals.

If the information in question comes within the section, the duty to disclose the information does not apply if the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Section 40

This is an absolute exemption, and is designed to give pre-eminence to rights of access under the Data Protection Act 1998 (as amended by the Freedom of Information 2000 Act).

Under the Data Protection Act 1998 an individual has a right of access to information held by a public authority relating to him. Accordingly, section 40 provides that information held by a public authority is absolutely exempt from disclosure when the Data Protection Act 1998 might give a right of access to it.

The intention behind section 40 is twofold. First, to direct any request by an applicant for personal data relating to himself through the access provisions of the earlier legislation. Secondly, to limit the rights of an applicant in relation to personal information concerning third parties, thus if someone could not get access to his own personal data under the Data Protection Act 1998, another person should not be able to gain access to it under the Act.

In order to understand the operation of section 40 it is necessary to say something about the Data Protection Act 1998 ("the DPA"). The access regime of the DPA is contained in section 7, which provides individuals whose personal information is processed by an individual or organisation (known as a data controller) with the right to be informed of the nature of the data. The DPA also contains exemptions from the general right to be informed.

Section 29(1) provides:

"Personal data processed for any of the following purposes

- (a) the prevention or detection of crime,*
- (b) the apprehension of prosecution of offenders*

are exempt from ... section 7 in any case to the extent to which the application of those provisions to the data would be likely to prejudice any of the matters mentioned in this subsection."

When considering the operation of section 40 of FoIA, it is necessary to consider whether the applicant is seeking 'personal data' and, if so, whether the applicant is seeking their own data or the personal data of a third person.

"Personal data" is data that relates to a living individual who can be identified from the data or from the data and other information which is held by a data controller. It includes expressions of opinion about the person and indications of the intention of the data controller or any other person in respect of the individual.

If the request for information relates to personal data of the applicant, it is exempt from the regime contained within the Act and falls to be dealt with exclusively under the DPA "subject access" regime.

If the request for information relates to personal data of a person other than the applicant, it may be exempt from the disclosure provisions of FoIA Act, if:

- disclosing the information would breach any of the data protection principles;
- disclosure would contravene a notice received under section 10 of the DPA (the right to prevent the processing of information which is likely to cause damage or distress to the data subject or another);
- The person who is subject of the data would not be entitled to access to it under the DPA access regime because one of the data subject access exemptions would apply.

As in the case of other exemptions, there may well be circumstances in which the CPS could rely on this provision. However our approach to section 40 is that it should only be considered if the personal information requested is not otherwise exempt under other provisions.

Section 42

This is a qualified exemption in relation to information subject to legal professional immunity. Section 42 of the Act creates a qualified exemption in relation to information subject to legal professional privilege.

The duty to confirm or deny does not arise if to do so would effectively disclose the exempt material.

Legal professional privilege applies to confidential communications between lawyers and their clients for the purposes of giving or receiving legal advice, and to any communication whose dominant purpose was the prosecution or defence of legal proceedings.

Section 42 clearly applies to instructions to counsel from the CPS, and counsels advice.

Section 42 cannot **normally** apply to communications and documents passing between the CPS and the police because the relationship is not analogous to that of a private law firm or barristers' chambers advising or conducting litigation on the behalf of a private client. The relationship between the CPS and the police is not a solicitor – client relationship. The CPS is an independent prosecuting authority created by statute, which has broad powers and extensive duties relating to the advising and prosecuting of criminal cases. The role of the CPS is to act for the public and to act in the public interest. Furthermore, the relationship that exists between the CPS and the police is governed by statute. The police have no choice in who should conduct a public prosecution, unlike a member of the public who has the freedom of instructing any solicitor. The police provide information to prosecutors in order for decisions to be taken as to whether a prosecution is appropriate, what charges should be sought or whether an investigative technique would be admissible as

In **extremely rare** circumstances, the police can effectively become the client of the CPS and LPP would therefore apply. In *Goodridge v Chief Constable of Hampshire Constabulary* [1999] 1 All E.R. 896, Moore-Bick J. held that the general test in deciding whether confidential communications between the DPP and the police were subject to legal professional privilege was whether a relationship tantamount to that of client and legal adviser existed between parties. Such a

relationship would exist when:

"..The police were seeking legal advice for their own benefit of a kind or in circumstances which would be analogous to a client approaching his solicitor for legal advice." (Page 896).

In any unclear situation, the test to be applied is whether the advice given or communication occurred within a "relevant legal context" as defined by the House of Lords in ***Three Rivers District Council v Bank of England (No 6)*** [2004] 3 WLR 1274. In that case, Lord Scott set out a three stage test for deciding whether LPP had arisen in a particular set of circumstances:

1. Does the advice relate to the rights, liabilities, obligations or remedies of the client either under private law or under public law? If so;
2. Does the communication fall within the policy underlying the justification for legal advice privilege in our law?
3. Is the occasion on which the communication takes place and is the purpose for which it takes place such as to make it reasonable to expect privilege to apply?

This does not mean that communications between the CPS and police will fall for disclosure under FOIA, as it is highly likely that other exemptions will apply such as sections 30, 31 and 41 and there is a clear public interest for a free and frank exchange of views to occur between officers and prosecutors.

The CPS approach to qualified exemptions

With those exemptions that are qualified the CPS (as with all public bodies) must apply the **public interest test**. The public interest test is a balancing exercise that determines

1. whether the duty to confirm or deny arises; or
2. Whether the duty of disclosure arises.

The balancing exercise is defined in section 2:

".. In all the circumstances of the case the public interest in maintaining the exclusion of the duty to confirm or deny or in maintaining the exemption outweighs the public interest in disclosing whether the public authority holds the information or in disclosing the information."

...

Its effect is that where information falls within a provision conferring a qualified exemption, it will be necessary to decide, having regard to **all the circumstances of the case**, whether:

1. the duty to confirm or deny should be disapplied; and
2. The duty to disclose should be disapplied.

Where the public interest in maintaining the exclusion or exemption outweighs the public interest in disclosing the information, then the right to access is disapplied.

When reading this section, the two following fundamental principles **must** be borne in mind:

1. FoIA creates a right to access information, which means that the Act operates on the presumption that the FoIA request should be granted and the information released;

And

2. Each case **must** be decided on its own circumstances and the nature of the request.

We do not apply a blanket approach to all requests without considering the merits of the individual request. It is clear upon reading the list of exemptions, that some are more relevant than others to the Crown Prosecution Service. This does not mean that the other exemptions will have no application to a request for disclosure; rather everything will depend on the circumstances of the case and the nature of information in question.

Further guidance about our approach is available on the CPS website in the Legal Guidance section.

I hope that this is helpful

Best wishes

Simon

Simon Clements

Head of Special Crime Division

Rose Court, 2 Southwark Bridge Road

London SE1 9HS

Code A

DX 154263 Southwark 12

From: Grocott, David [Code A]
Sent: 10 August 2010 09:29
To: Clements Simon
Subject: Operation Rochester Freedom of Information

Simon,

Good morning, thank you for taking the time to meet yesterday I found it very beneficial.

Whilst I am happy to finalise later in the week the day that we send letters to the families, I

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note Paul's email that already suggests that next Monday (16th) may be more acceptable. I am discussing the case with ACPO today and will update you by the end of today.

As we are now approaching the final stages of this case I would ask if you could provide some assistance and guidance in respect of Freedom of Information requests, particularly in respect of any CPS material/ correspondence that the Hampshire Constabulary hold.

My understanding of the legislation and the advice of my own FOI manager is as follows.

Once Hampshire Constabulary have received written confirmation from CPS that this matter is concluded we can no longer apply an exemption to release information under either Section 30 (Investigations & proceedings conducted by public authorities) or Section 31 (Law enforcement).

This appears an unusual case for FOI exemptions. There has been considerable family and media interest in this case and we have a number of requests for information outstanding. It has been our stance to adopt Section 22 of the act (Intention to publish in the future) for some time now and I am finalising a publication strategy. It is on this basis that I have been able to negotiate with a number of partner agencies not to release information until such time as the CPS review was complete.

I shall therefore be writing to these agencies once we have informed the families.

All agencies have stated an intention to release whatever they are asked for (subject to analysis and redaction as appropriate)

That in effect leaves me with correspondence from CPS during the last 11 years and specifically the written advices in respect of 10 cases prepared by Mr Close in 2006. Could I ask for a letter please that details CPS views on the potential release of this information (if requested) and any exemptions you wish to apply? This will ensure that information that should be protected is not inadvertently released.

I have included a copy of the ACPO manual of guidance which I use as a reference document given my limited knowledge of the legislation. I always anticipated that your information would be covered by Section 42 (legal privilege). The commentary on page 104 states that CPS advice is not covered, hence my request for clarification?

I have also included contact details for our FOI manager in case both depts wish to talk directly but would ask that any final correspondence is routed through me please

Rebecca Warhurst
Freedom of Information Officer
Hampshire Constabulary

Code A

Many Thanks

Dave Grocott

Code A