

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

15 March 2007

**Public Authority:** Nottinghamshire Fire & Rescue Service  
**Address:** Bestwood Lodge  
Arnold  
Nottingham  
NG5 8PD

### Summary

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The complainant requested information relating to alleged surveillance of him by the public authority. The public authority will neither confirm nor deny the existence of such information as if it were to exist; it would be subject to the exemption at section 31 relating to law enforcement. Following consideration of the public interest, the Commissioner upholds the public authority's decision.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

### The Request

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2. On 21 March 2006 the complainant (a former employee of the public authority) made the following request for information from the public authority:
  1. *"My understanding is that you or your representative, (NF&RS) have had correspondence and or communication with the Office of the Deputy Prime Minister in relation to the Fire-fighters pension scheme and my particular case. Please supply copies of all correspondence electronic or written and / or the notes pertaining to any telephone conversations you or your representatives may have had in regard to my case, from the date of my retirement to the current date.*
  2. *Following several unusual incidents that have occurred to me recently and particularly on Sunday 19<sup>th</sup> March 2006, when I observed someone hidden*

*behind a tree, (on a property adjacent to my home), filming me with a video camera. I have reason to believe that I am being filmed / videoed and / or observed in pursuance of some kind of investigation that you or your representatives may be undertaking against me.*

*These investigations, undoubtedly involves the collection of video evidence and / or written observations and material pertaining to my case, and therefore, please supply copies of;*

- a. Invoices and costs pertaining to this investigation to date.*
  - b. Time Sheets pertaining to this case, from the start of the investigation to date.*
  - c. Work Sheets pertaining to this case, from the start of the investigation to date.*
  - d. Any video tapes or any other electronically gathered information or material pertaining to this case made, from the start of the investigation to date.*
  - e. Observations notes pertaining to this case made by the observer / observers concerned, from the start of the investigation to date.*
  - f. Any material electronic or written that may not be held with the case notes but may be relevant to the case, from the start of the investigation to date.*
- 3. Please supply me with the name of the person who approved this investigation if that was not you.*
  - 4. Please supply copies of minutes of the meeting or meetings that authorised the use of additional personnel or outside resources to undertake this investigation.*
  - 5. Please supply copies of any minutes of meetings that have mention to my case and any actions surrounding my case.*
  - 6. Please supply me as a matter of course any future evidence or written material gathered in the progress of investigations or meetings involving my case from today's date onwards.*
  - 7. Please supply for reasons of comparison, the normal time taken by NF&RS to process a disability pension and award from application to issue.*
3. The public authority responded to the request by letter of 22 March 2006. The purpose of this letter was to explain to the complainant that not all of the information requested fell under the remit of the Act. The following points (in accordance with the numbering system in the original request) were considered to be requests under the Act:

Point 2a, Point 2b, Point 2c, Point 3, Point 4 and Point 7.

The Remainder – Point 1, Point 2d, Point 2e, Point 2f and Point 5, were regarded as information covered by the Data Protection Act 1998 (the "DPA"), although the public authority did later appear to change its position with regard to which legislation some points fell under. Point 6 was not considered to fall under either

- the Act or the DPA as it did not relate to information currently held by the public authority, in that it relates to information which may be created in the future.
4. A further letter in direct response to the freedom of information aspects of the complainant's letter of 21 March 2006 was sent to him on 19 April 2006. This stated that the public authority would not be able to provide the information relating to Point 1 due to staff being on annual leave but would provide it by 8 May 2006. (This point was originally classed as an item for response under the DPA by the public authority.)
  5. Information relating to Point 7 was enclosed with the letter. The public authority stated that it would neither confirm nor deny the existence of the information relating to Points 2a, 2b, 2c, 2f, 3, 4 and 5 (two of these points were previously considered under the DPA). The public authority reiterated that Point 6 does not fall under the remit of the Act as it relates to information not yet in existence although it confirmed that a request for such information could be made if any such information were published in the future.
  6. The public authority's details, should the complainant wish to request an internal review, were included within this letter along with the Commissioner's contact details.
  7. The complainant wrote to the public authority on 28 April 2006 asking that it reconsider its decision not to confirm or deny the existence of some of the information requested; asking for a response regarding Points 2d and 2e; stating that he felt that Points 2d, 2e and 2f fell under the DPA and asking for the information that it had confirmed would be provided in accordance with Point 1.
  8. The public authority responded to the complainant's letter on 5 May 2006. This explained that the letter of 19 April 2006 was in response to the information requested that fell under the remit of the Act and that this letter (5 May 2006) was in response to the information that was covered by DPA. Points 1, 2d and 2e were specifically referred to.
  9. The complainant wrote to the public authority on 8 May 2006 expressing his concern that despite ongoing correspondence, it had only supplied information relating to three of the 12 items requested. He specifically asked that the public authority detail the exemptions relied upon for non-disclosure of the remaining information.
  10. The public authority responded to the complainant's letter initially by letter of 18 May 2006 stating that it would make no further comment on its decision; it did not identify the exemptions relied upon.
  11. A further letter from a higher ranking individual within the public authority dated 31 May 2006 was also sent to the complainant. This letter was a response as per the public authority's complaints procedure and therefore acts as an internal review. There was no further detail contained in the letter, it confirmed the decision reached.
  12. Both letters provided details of the Information Commissioner's Office should the complainant wish to pursue the matter further.

## The Investigation

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### Scope of the case

13. On 4 June 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
  - The information requested had not all been supplied and
  - the exemptions relied upon by the public authority had not been provided
14. The complainant also raised issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act. Some of his request falls under the remit of the Data Protection Act and this aspect of the complaint is being handled separately within the Information Commissioner's Office.

### Chronology

15. The Commissioner wrote to the public authority on 21 August 2006 and pointed out that the refusal notice provided to the complainant was not compliant with section 17 of the Act. This is because when a public authority chooses to neither confirm nor deny whether information is held, it is still required to cite the exemption(s) relied upon, state why it applies and to explain why it will neither confirm nor deny whether the information is held.
16. The letter of 21 August 2006 further explained that the public authority must conduct a public interest test and be able to demonstrate that the public interest lies in favour of not confirming or denying. A copy of the Awareness Guidance 21, published by the Commissioner in relation to the duty to confirm or deny was enclosed. (A copy is attached to this Notice). It asked the public authority to write to the complainant in accordance with section 17 of the Act and to send a copy of the letter to the Commissioner.
17. During a telephone conversation on 23 August 2006, the public authority explained that it was relying upon the exemption at section 31 of the Act. This is because the request was for information relating to investigations which might be carried out by the public authority. It did not wish to confirm or deny whether such information was held as to do so would inform the complainant whether or not he was or had been the subject of an investigation.
18. In discussion, the public authority explained that if an individual could ascertain in this way whether they were under investigation, it could render the public authority's investigation process ineffective. The disclosure as to whether such information was held could result in an individual modifying his/her behaviour in ways which might frustrate any such investigation.
19. The public authority wrote to the complainant on 5 September 2006. This letter explained that the exemption applied was at section 31 of the Act as the request relates to surveillance information. The public interest was considered to lie in

favour of non-disclosure as to confirm or deny may prejudice the public authority's effectiveness at carrying out its duties. Further, the public authority confirmed that it applies this exemption in all cases where this type of information is requested. A copy of this letter was sent to the Commissioner on 6 September 2006.

20. Although it had been implied, the specific subsection of section 31 relied upon by the public authority had not been stated. It was confirmed during a telephone conversation with the Commissioner on 27 February 2007 that subsection (1)(a) of section 31 was being relied upon.

## Analysis

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### Procedural matters

21. In compliance with section 2(1)(b) of the Act, a public authority may decide to neither confirm or deny whether the requested information is held, subject to the public interest being in favour of exclusion of the duty to confirm or deny. This section is quoted in the legal annex attached to this Notice.
22. If a public authority does decide to neither confirm nor deny whether information is held, in accordance with section 17 of the Act (see legal annex), it must state that fact, specify the exemption in question and state why it applies, if it is not obvious. In cases where the exemption is not absolute, as in this case, the public authority must within the Refusal Notice, or within a separate Notice provided within a reasonable time, state the reasons for its conclusions on the outcome of public interest test required under section 2 of the Act.
23. The public authority in this case did provide a Refusal Notice by letter of 19 April 2006 to the complainant. That Notice simply stated that it would neither confirm nor deny the existence of the information. No exemption was cited, no reason was given as to why an exemption applied and no reference to the public interest test was made. Following the Commissioner's letter to the public authority of 21 August 2006, the public authority wrote to the complainant on 5 September 2006 to rectify these deficiencies.

### Duty to confirm or deny in conjunction with section 31(1)(a)

24. The exemption conferred by section 31 of the Act relates to law enforcement. The full text can be found in the attached legal annex. Essentially, information is exempt by virtue of section 31 if the public authority can demonstrate that to disclose the information would or would be likely to prejudice one of a list of circumstances which can be found at subsection (1), such as subsection (1)(a) - the prevention or detection of a crime - as in this case.
25. The exemption under section 31 of the Act provides, under subsection (3), public authorities with the right to refuse to confirm or deny whether information is held, if the act of doing so would in itself prejudice the ability of the public authority to perform one of the functions listed in subsection (1).

26. In answering the request for information, the public authority has refused to confirm or deny whether it holds the information in question. As a result, the Commissioner has assessed the validity of this action. In doing so, the Commissioner has taken account of all relevant submissions from the public authority and the complainant and other relevant sources of reference.

#### Nature of duty to confirm or deny

27. In analysing this case, the Commissioner has considered the nature of the duty to confirm or deny and notes that section 1 of the Act first obliges a public authority to confirm to an applicant for information whether the information is held or not. Accordingly, a public authority must first determine, where relevant, whether it is possible to confirm or deny that the information is held or whether the act of doing so would, in itself, cause the harm which the exemptions to disclosure in Part II of the Act were designed to prevent.
28. The Commissioner has taken into account the way in which the principle of allowing public authorities to avoid the duty to confirm or deny will work in practice. It is important that the analysis of the principle of the duty to confirm or deny is carried out in such a way that the validity of the decision to refuse to confirm or deny does not hinge on whether or not the information actually exists.

#### Whether duty to confirm or deny would prejudice the prevention or detection of crime

29. To assess whether the public authority can rely on section 31(3) of the Act and refuse to confirm or deny whether the information is held, the Commissioner has first looked at the type of information which would be covered by the sort of request which the complainant submitted to the authority. Following discussion with the Commissioner, the public authority narrowed the exemption it had applied when deciding whether it had a duty to confirm or deny that the information is held. As described in paragraph 20 above, the public authority considers that the appropriate exemption is section 31(1)(a), namely that to confirm or deny whether the information is held would, or would be likely to, prejudice the prevention or detection of crime.
30. Taking this into account, the Commissioner has examined the nature of the information request. He is satisfied that the part of the request to which no substantive response has been provided (that is, the public authority has not supplied the information and neither confirmed nor denied whether it is even held) is for information which relates to surveillance materials which might have been generated if any surveillance had taken place. From a review of the nature of this request, the background to the request and the submissions of both parties, the Commissioner is satisfied that the request relates to information which would be covered by section 31(1)(a) of the Act if it were in existence.
31. In view of the above, the Commissioner is satisfied that, in the circumstances of this particular case, it is appropriate to assess whether compliance with the duty to confirm or deny whether information is held would, or would be likely to, have the prejudicial effect which the public authority alleges would be the case.

32. In this case, the Commissioner is satisfied that to confirm that the information is held, would immediately provide the complainant with confirmation that some form of surveillance / investigation is being carried out by the public authority. Equally, the Commissioner is aware that to state that no information is held would alert the complainant to the fact that no form of surveillance / investigation is being carried out.
33. To allow a situation to occur whereby details of whether surveillance and / or investigations are taking (or have taken) place are routinely disclosed would be likely to prejudice the ability of the public authority to carry out the type of investigation which it has described to the Commissioner. By informing individuals whether they are subject of an investigation would potentially put the person in a position to modify his/her behaviour in accordance with that knowledge. This would, or would be likely to, prejudice the ability of the public authority to carry out the kind of investigation covered by the exemption.

#### The public interest

34. Section 31 provides a 'qualified' exemption under the Act and so the public interest in refusing to confirm or deny whether the information is held must be considered. Having established that complying with the duty to confirm or deny under the Act would be prejudicial to the public authority's ability to investigate in accordance with section 31(1)(a), the Commissioner has therefore gone on to consider the public interest in this matter. The test to be applied is whether, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information.

#### Factors in favour of confirming or denying

35. There is a public interest in allowing access to information relating to investigations, in order to allow a better public understanding of the kind of investigations that are carried out. Disclosing information relating to the investigation, even if it is simply to confirm or deny the existence of such information, would provide some information as to the role of the public authority in conducting an investigation into the prevention or detection of crime. However, the Commissioner accepts that this would not provide a great deal of information and has considered this matter in more detail in paragraph 43 below.
36. In addition to this, disclosing information about investigations would provide a greater transparency in the investigating process and the actions of a public authority. It is clear that there is a public interest in public authorities operating in as transparent a manner as possible, as this should ensure they operate effectively and efficiently.
37. A further factor in public authorities confirming or denying that information is held relating to investigations is to confirm that investigations are carried out. This should satisfy the public interest in ensuring that authorities do not overlook issues which they should investigate or that they have good reasons for not investigating.

38. The Commissioner also considers that there is a clear public interest in ensuring that public authorities do not act outside their authority by investigating matters which fall outside their remit. By making certain that public authorities confirm or deny whether information is held in relation to investigations, this should provide the necessary safeguards and satisfy the public interest in this matter.

#### Factors against confirming or denying

39. Turning to the factors against confirming or denying whether the information requested is held by the authority, the Commissioner has taken into account a number of factors.
40. Firstly, the Commissioner considers that there is an inherently strong public interest in public authorities carrying out investigations to prevent and detect crime. This ensures that offenders are brought to justice and that the necessary checks and balances are in place to safeguard public funds and resources. The Commissioner has weighed this public interest consideration and believes that to allow the effectiveness of investigations to be reduced as described in paragraphs 29-33 above, is not in the public interest. Authorities clearly require the ability to conduct investigations / surveillance without the subject being alerted to this, as he / she would then be in a position to behave accordingly. Further, a public authority is likely to require some 'space' in which to carry out investigations effectively away from public scrutiny until such times as the details need to be made public, otherwise it will be difficult for accurate, thorough and objective investigations to be carried out.
41. The Commissioner believes that it is important to consider who the information requested relates to. It is clear from the evidence that any information, if in existence, would relate to the complainant and his personal circumstances. This is evidenced by the fact that the public authority treated certain parts of the complainant's information request under the DPA. While the information requested is of obvious importance to the complainant, the Commissioner must consider whether it is of wider significance to the general public. Having considered the nature of the information request, he concludes that there is limited public interest in disclosing this type of information. In reaching this view, he believes that the public interest in allowing an effective investigation process to take place clearly outweighs an individual's own personal interest in learning whether an investigation or any surveillance has taken place.
42. The Commissioner has also considered the issue of the timing of the investigation / surveillance and how this would affect the public interest considerations. It is clear from the request that any relevant information would relate to an issue which is ongoing (or at least in the very recent past) between the complainant and the public authority. To confirm or deny whether information is held relating to a contemporaneous investigation is more likely to hinder the public authority's ability to investigate effectively than historical information would, and the Commissioner has weighted this factor accordingly.



43. In this case, to confirm or deny whether the public authority holds the information requested would essentially confirm whether an investigation has taken or is taking place. To disclose this information would not further the understanding of the role of this public authority in undertaking investigations to prevent or detect crimes. It is only the detail of any such investigation which would provide the public with the necessary information to understand the function of this particular authority in conducting such investigations.
44. The Commissioner has also considered that, in order to take forward any issues arising from any investigation / surveillance, it is very likely that a public authority would have to put any evidence of alleged criminal activity before an individual, in the course of, for example, disciplinary action, court proceedings, or simply informal discussion. This would allow the subject of any investigation / surveillance the opportunity to consider the material gathered and to comment and / or defend him/herself. The fact that this is likely to be the result of any investigation should mean that some of the factors in favour of disclosure would be satisfied at a future date.

### Balancing the public interest

45. In view of the above, the Commissioner has concluded that the public interest in maintaining the exclusion of the duty to confirm or deny whether the information is held clearly outweighs the public interest in favour of disclosing whether the public authority holds the information. Taking into account the factors in this case, the Commissioner is clear that the principle of allowing public authorities to carry out investigations is a strong one. There are also a number of checks and balances on authorities to assess whether investigations are conducted appropriately. In particular there are clear rules about how evidence obtained in the course of an investigation may be used in any subsequent proceedings. Clearly, confirmation of whether or not the requested information is held by the public authority, might be of some assistance to the complainant in this instance, but this is essentially a personal or private interest. The wider public interest lies in protecting the ability of the public authority to conduct an effective investigation and consider the outcome.
46. As time passes, the Commissioner believes that the balance of the public interest is likely to change. Where information relates to investigations which have been conducted in the past, there will come a point where to confirm or deny that information is held by the public authority would be unlikely to prejudice its ability to carry out investigations in the future.

### The Decision

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47. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

The application of the section 31(1)(a) exemption and the decision not to confirm or deny whether the information is held in accordance with that exemption and the provisions of section 2(1)(b).

However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

The Refusal Notice provided initially did not comply with section 17 of the Act. However, the Commissioner does recognise that this was later rectified.

## Steps Required

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48. The Commissioner requires no steps to be taken.

## Other matters

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49. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
50. The public authority were correct to identify that some of the information requested fell under the remit of the Data Protection Act and to separate the requests made accordingly. However, there is some confusion within the correspondence as to which parts of the request relate to which legislation. The Commissioner would like the public authority to ensure that it is clearer when responding to requests that encompass both Acts as this will assist the requestor.
51. Although the public authority did not expressly rely on section 40(1) – that the information requested was exempt by virtue of it being the complainant's personal data – it was implied in the handling of the matters and explanation that some of the information requested was subject to the provisions of the Data Protection Act.

## Right of Appeal

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52. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@dca.gsi.gov.uk](mailto:informationtribunal@dca.gsi.gov.uk)

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 15<sup>th</sup> day of March 2007**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

**Information Commissioner's Office  
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Cheshire  
SK9 5AF**