

Freedom of Information Act 2000 (Section 50)

Decision Notice

31 March 2009

Public Authority: Commissioner of the Metropolitan Police Service
Address: New Scotland Yard
Broadway
London
SW1H 0BG

Summary

The complainant requested seven items of CCTV footage showing the movements of the perpetrators of the 7 July 2005 terrorist attacks that had been described in the Home Office report of those events. The public authority refused the request, citing sections 30(1)(a)(i) & (ii) (investigations) and 38(1)(a) (endangerment to health). The Commissioner finds that the exemption provided by sections 30(1)(a)(i) & (ii) is engaged, but that the public interest in maintaining the exemption does not outweigh the public interest in disclosure; and that the exemption provided by section 38(1)(a) is not engaged. Although it was not cited by the public authority, the Commissioner has also found that the exemption provided by section 40(2) (personal information) is engaged in respect to footage from which individuals other than the perpetrators of the attacks can be identified. The Commissioner has also concluded that the public authority failed to comply with the procedural requirements of sections 1(1)(b), 10(1), 17(1)(b), 17(1)(c) and 17(3)(b). The public authority is required to disclose the CCTV footage in question, albeit with the footage in respect to which section 40(2) is engaged redacted.

The Commissioner's Role

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

2. On 24 May 2006 the complainant requested the following information:

"There are a number of 'scenes' referred to in the Home Office narrative which I

would like to request, most of which are explicitly referred to as having been caught on CCTV. Some have already been partially released (in which case I would like to request a full release of the footage), but others do not appear to have been issued before.

All from July 7

0454: Tanweer caught on CCTV at Woodall Services on M1 buying snacks, arguing over his change and 'looking straight at the camera'.

0507 Jermaine Lindsay arrives at Luton Station, seen over next 90 mins looking up at departure board etc (description implies CCTV).

0649 All 4 bombers seen on CCTV putting on rucksacks outside Luton Station – rucksacks 'large and full'.

0826 King's X, all 4 captured on CCTV on concourse close to Thameslink platform, heading towards Underground.

0855 Hussain walks out of King's X on to Euston Road, demeanour appears relaxed (CCTV implied).

0900 Hussain back in King's X, walking through Boots into WH Smith on station concourse - buys a 9v battery. (CCTV implied)

0906 Hussain goes into McDonald's on Euston Road, leaving 10 mins later. (CCTV implied)."

3. The public authority responded to this on 24 May 2006 and refused the request, citing the exemption provided by section 30 (investigations and proceedings) as the information related to the investigation by the public authority into the terrorist attacks of 7 July 2005.
4. On 25 May 2006 the complainant requested an internal review of the handling of his request. The public authority responded with the outcome to this review on 24 August 2006. This upheld the initial refusal of the request, with the public authority now specifying subsection 30(1). The public authority also now stated that the exemptions provided by sections 31 (law enforcement) and 38 (health and safety) were engaged. Little explanation was given as to why these exemptions were engaged or why the public interest favoured the maintenance of these exemptions.

The Investigation

Scope of the case

5. The complainant contacted the Commissioner initially on 24 October 2006. The complainant did not agree with the exemptions cited in response to this request

and suggested that this refusal was counter to the spirit of the Act.

6. Prior to the request quoted above, the complainant made a broader request for all unreleased CCTV footage of the perpetrators of the 7 July 2005 attacks. Early in the case handling process it was clarified with the complainant that the refusal of the request quoted above was the basis for this case, not the refusal of his earlier, broader request.

Chronology

7. The Commissioner contacted the public authority initially on 5 June 2008 and set out the basis of the complaint. It was noted that, given that sections 30 and 31 cannot be cited in relation to the same information, the investigation would focus on section 30 initially. Section 31 would be considered only if the conclusion was that section 30 was not engaged and section 38 would be considered only in the event that section 30 was not engaged or the public interest did not favour the maintenance of the exemption.
8. The public authority was asked to respond stating which subsection of section 30 was considered relevant and explaining its reasoning for this. The public authority was also asked to respond giving its reasoning as to why the public interest favoured the maintenance of the exemption. It was noted that, whilst section 30 is a class based exemption, prejudice would be a relevant issue when considering where the balance of the public interest lies. The public authority was asked to address what prejudice, if any, it believed may result through disclosure.
9. The public authority responded to this on 16 July 2008. The public authority specified subsections 30(1)(a)(i) and (ii) and 30(2)(a)(i), (ii), (iii) and (iv). The public authority stated that it believed it could never be in the public interest to disclose information before it "*has been considered by the correct judicial authorities*". It went on to state that it believed that meaningful police investigations would be rendered impossible if police were required to release information about ongoing investigations.
10. The public authority also stated that disclosure may have a "*severe impact*" on relatives of the victims and survivors of the attacks. For this reason the public authority believed that the exemption provided by section 38(1)(a) was engaged.
11. On the issue of the specific information in question here, the public authority stated that the publication of the Home Office report in advance of any trial in connection with the attacks was unprecedented and stated that it did not wish to confirm or deny whether CCTV material was the source of the passages of the Home Office report referred to in the request. The public authority stated that it held in excess of 30,000 items of CCTV footage connected to the attacks and that it believed that disclosure in this case would mean it would be obliged to disclose any footage from the attacks if a request was made for this. The public authority stated that it had been "*determined*" that CCTV footage relating to the attacks would only be disclosed in response to requests from other bodies involved in the investigative process, such as the Crown Prosecution Service and the Courts.

12. The public authority also referred to factors current at the time of its reply that it believed were relevant, stating that the trial of three people for offences linked to the attacks was underway and that an inquest into the attacks was due to start in September 2008. The Commissioner notes that since this time the trial referred to ended without a verdict reached with a retrial underway as of early 2009, and that the inquest has been postponed and is yet to take place.
13. The public authority went on to address some specific factors likely to be of relevance when considering where the balance of the public interest lies. In terms of the stage of the investigation, the public authority referred to the trial that was taking place at the time of its response and stated that the jury was considering its verdict. It also referred again to the inquest being yet to take place.
14. On the issue of what information was in the public domain at the time of the request, the public authority stated that the volume of information already in the public domain about the attacks meant that nothing further would be added to public knowledge about the attacks through the disclosure of the information in question. The public authority also stated that its position with regard to the age of the information was that the significance of the attacks and the investigation into these meant that the age of the information was not significant.
15. The Commissioner contacted the public authority again on 17 July 2008 for further information about what information was held by it that fell within the scope of the request and the status of the investigation into the 7 July 2005 attacks. Firstly it was noted that the public authority had stated previously that *"We continue to neither confirm nor deny whether CCTV material was or was not the grounding source of those passages within the Home Office report"*, but that neither the initial refusal nor the internal review response suggested that the stance of the public authority was that it neither confirmed nor denied whether the information requested was held. The public authority was asked to respond confirming whether it held CCTV images that conformed to each of the seven parts of the information request and to confirm, in the event that the information request was made now, whether it would neither confirm nor deny that the information requested is held.
16. Secondly, the public authority was advised that it would be necessary to be clear about how section 30(1) is engaged. To this end it was asked to respond confirming whether the information requested is held, or was held at any time, for the purposes of the investigation into the 7 July 2005 attacks and whether this investigation was ongoing at the time of the request. It was also noted that the public authority had cited section 30(2) in its previous response. In connection with this the public authority was asked to confirm how the information in question relates to the obtaining of information from confidential sources.
17. The public authority responded to this on 23 July 2008. It confirmed that it does hold the seven items of CCTV imagery specified in the request. The public authority also indicated that its stance was not that it neither confirmed nor denied whether information falling within the scope of the request is held.
18. On the issue of the investigation the public authority confirmed that the material

was held for the purposes of *'an investigation'* and indicated that this investigation is ongoing. The public authority also confirmed that it did not wish to cite section 30(2).

19. On 17 September 2008 a representative of the public authority attended the Commissioner's office to hand deliver a copy of the information falling within the scope of the request and to discuss this case further. At this meeting it was advised that all terrorist cases remain 'live' and that the investigation into the 7 July 2005 bombings would continue to be ongoing as part of a wider investigation into terrorism. The public authority also provided a schedule giving a timeline of the CCTV imagery showing the movements of the perpetrators of the attacks on 7 July 2005.
20. The Commissioner contacted the public authority again on 19 November 2008 and asked for clarification about the investigation regarding which the information is, or was, held. Specifically, the public authority was asked to respond confirming the specific investigation for the purposes of which the information in question was at the time of the request or had previously been held, and to describe how this investigation would conform to the description in section 30(1)(a)(i) or 30(1)(a)(ii). The public authority was also asked to confirm if this investigation is now complete or remains ongoing.
21. The public authority responded to this on 24 November 2008. It stated that the information is held for the purposes of its investigation into the 7 July 2005 attacks. On the issue of how this investigation would fall within the class specified in sections 30(1)(a)(i) & (ii), the public authority referred to the charges brought against several individuals for their alleged roles in the planning of the attacks. The public authority stated that this investigation remains ongoing and referred again to the retrial and inquest, which was pending at the time of writing.
22. The Commissioner contacted the public authority again on 27 November 2008 and requested that it provide further detail about its citing of section 38(1)(a). The public authority was asked to address specifically how endangerment to health would or would be likely to result through disclosure of the seven items of CCTV footage specified in the request and to state why it believed that the public interest favoured the maintenance of this exemption.
23. The public authority responded to this on 1 December 2008 and stated that there was a concern over potential identification of other individuals within the CCTV footage in question and the families of these individuals. The public authority also referred briefly to the *'mental wellbeing'* of relatives of victims of the attacks, but did not explain how disclosure of the information requested by the complainant would or would be likely to endanger the mental health of these individuals.
24. The following link is to a CCTV image of the 7 July 2005 bombers on the day of the attacks that had been released into the public domain prior to the date of the information request:

http://www.met.police.uk/news/terrorist_attacks/groupcctv.jpg

25. The following are links to CCTV images of one of the attackers on 7 July 2005 and an image of three of the attackers carrying out a 'practice run' several days earlier. These images were available in the public domain at the time of the complainant's information request:

<http://news.bbc.co.uk/1/hi/uk/4301512.stm>

<http://news.bbc.co.uk/1/hi/uk/4263176.stm>

The following is an article covering the decision not to hold an independent public inquiry into the 7 July 2005 bombings:

http://news.bbc.co.uk/1/hi/uk_politics/4760709.stm

Findings of fact

26. The public authority holds the seven items of CCTV footage specified in the request.
27. The '*Home Office narrative*' referred to in the request is a publicly available document titled '*Report of the Official Account of the Bombings in London on 7th July 2005*'.
28. CCTV images of the attackers, including some from 7 July 2005, were in the public domain at the time of the complainant's information request.

Analysis

Procedural matters

Section 17

29. Neither the refusal notice nor the internal review response provided adequate explanations for why the exemptions cited were believed to be engaged, nor why the public interest favoured the maintenance of these exemptions. In failing to adequately explain why the exemptions cited were engaged, the public authority breached section 17(1)(c). This section and all others referred to in this notice are set out in full in the legal annex. In failing to explain why the public interest in maintaining the exemptions outweighed the public interest in disclosure, the public authority breached section 17(3)(b).
30. The public authority introduced sections 31 and 38 at the internal review stage. In the internal review response the public authority failed to identify the relevant subparagraphs of sections 31 and 38 in breach of section 17(1)(b).

Exemptions

Section 30

31. The public authority has cited subparagraphs 30(1)(a)(i) and (ii). In order for these exemptions to be engaged, the information in question must have been held by the public authority for the purposes of an investigation with a view to it being ascertained whether a person should be charged with an offence, or whether a person charged with an offence is guilty of it. This exemption is also subject to the public interest test. This means that however clear it is that the information in question conforms to the classes described in subparagraphs 30(1)(a)(i) and (ii), the information should be disclosed unless the public interest in maintenance of the exemption outweighs that in favour of disclosure.

A relevant investigation?

32. The representations from the public authority on this point have not been detailed, either to the complainant or to the Commissioner during the correspondence in connection with this case. In general where the public authority wishes to cite this exemption it should be specific about the investigation to which the information relates. This will remain so even where, as in this case, the public authority may feel it is sufficiently obvious that the information does relate to an investigation without it being necessary for it to be specific on this point.
33. When this point was specifically raised with it, the public authority did confirm that the information in question is held for the purposes of the investigation into the 7 July 2005 attacks. As to whether this investigation has been conducted with a view to it being ascertained whether a person should be charged with an offence and/or whether a person charged with an offence is guilty of it, it is necessary to address the fact that the perpetrators of the 7 July 2005 attacks were killed in the attacks. There was no possibility of these individuals being charged with an offence in connection with these attacks. This removes the option that the exemption provided by section 30(1)(a)(ii) is engaged on the basis of an investigation into those charged with directly perpetrating these attacks.
34. Turning to how else the information in question may fall within the class specified in this exemption, firstly the Commissioner considers it reasonable to assume that, in its earliest stage, the investigation focussed on establishing precisely what had taken place, including whether a crime had been committed. An investigation into whether an offence has been committed would constitute part of the process described in section 30(1)(a)(i); that is, to ascertain whether a person should be charged with an offence.
35. Secondly, having established that an offence had taken place, the Commissioner considers it reasonable to assume that the focus of the investigation would have shifted to establishing whether a person should be charged with an offence. Whilst this process in relation to the perpetrators of the attacks ceased at the point that it was established that those individuals had been killed in the attacks, this would have been the focus of the investigation in its early stages and the investigation would at that stage have fallen within the class specified in section 30(1)(a)(i).
36. Thirdly, the investigation into the 7 July 2005 attacks has extended beyond the

four individuals who carried out the attacks, as the recent trial and retrial of alleged accomplices to these attacks has shown. The public authority has referred specifically to this prosecution when describing how the information in question would fall within the class specified in this exemption. Although the Commissioner has not been privy to any details of the investigation carried out by the public authority into the alleged accomplices to the 7 July 2005 attacks, he accepts that an investigation that culminates in a prosecution for conspiracy to cause an explosion would fall within the classes specified in sections 30(1)(a)(i) and (ii).

37. The Commissioner concludes that the exemption provided by section 30(1)(a)(i) and (ii) is engaged on the basis that the information in question is held for the purposes of the investigation into the 7 July 2005 attacks, and that this investigation conformed to the class specified in section 30(1)(a)(i) in its early stage when the investigation focussed on whether an offence had been committed and whether any person should be charged with that offence; and to the class specified in both 30(1)(a)(i) and (ii) in connection with the wider investigation leading to the prosecution of the alleged accomplices.

The public interest

38. Having established that the exemption provided by section 30(1) is engaged, the Commissioner must go on to consider the public interest test as set out in section 2(2)(b) of the Act.
39. Whilst section 30(1) provides a class based exemption and prejudice is not a relevant issue when considering whether this exemption is engaged, the nature of the prejudice that may result through disclosure, its magnitude and the likelihood of it arising is relevant when considering where the balance of the public interest lies. The Commissioner considers that the following factors, amongst others, are pertinent when assessing such issues and thereby identifying which public interest arguments in favour of maintaining the exemption are relevant in this case and in carrying out the weighing exercise;
- the stage or stages reached in any particular investigation or criminal proceedings;
 - whether and to what extent the information has already been released into the public domain;
 - the significance or sensitivity of the information; and the age of the information.

This is in line with the direction provided by the Information Tribunal in the case *Toms v The Information Commissioner* (EA/2005/0027), in which it stated:

“In striking the balance of interest, regard should be had, inter alia, to such matters as the stage or stages reached in any particular investigation or criminal proceedings, whether and to what extent the information has already been released into the public domain, and the significance or sensitivity of the information requested.” (para 8)

The stage of the investigation

40. In the case of *Guardian v The Information Commissioner and Avon and Somerset Police* (EA/2006/0017), the Information Tribunal noted:

“the interest in principle, recognised by the exemption applying to s30(1), in protecting information acquired, often in confidence, in police investigations.”

This interest will be particularly pertinent where an investigation is still open.

41. In this case the public authority has stated that the investigation into the 7 July 2005 attacks was ongoing at the time of the request, both in terms of the investigation leading to the prosecution of the alleged accomplices and as a wider investigation into these attacks and into terrorism more broadly. That this investigation remained open at the time of the request is a valid factor in favour of maintenance of the exemption.

Information already in the public domain

42. There is a vast amount of information already in the public domain about the 7 July 2005 attacks. Notably, CCTV images of the attackers on 7 July 2005 were in the public domain at the time of the request, web addresses for which are given above at paragraphs 24 and 25. The Commissioner notes that these images are not dissimilar to those that are the subject of this request, both in terms of the content and the level of significance that could reasonably be attached to them.
43. It is also of note that the descriptions of the CCTV footage in question cited by the complainant in his request are publicly available through the Home Office report. Whilst the Commissioner accepts the public authority's contention that the specific images in question were not available in the public domain at the time of the request, accurate descriptions of the content of these images were.
44. The Commissioner considers the existence of these images and descriptions in the public domain at the time of the request to be highly pertinent to the balance of the public interest. The arguments of the public authority focus on the harm that could result to the investigatory process through disclosure. However, the likelihood of such harm resulting through disclosure is reduced by the fact that similar images and the descriptions were in the public domain at the time of the request. The public authority has advanced no argument or evidence that suggests that the investigatory process has been harmed through the disclosure of those images and descriptions that were in the public domain at the time of the request and considers that this is a factor in favour of disclosure that carries considerable weight.
45. Aside from the issue of CCTV images, the vast amount of wider media coverage of the 7 July 2005 attacks is of significance here. Much of this coverage is serious in tone, rather than sensationalist, seeking to inform its audience of the facts of the attacks. Whilst what would be in the public interest to disclose is distinct from

what is of interest to the public, the Commissioner believes that where understanding the facts would, for example, inform debate, then widespread informative media coverage can be indicative of the level of public interest in those facts. The attacks of 7 July 2005 have been the focus of debate, both about what steps could have been taken to prevent these attacks and about what could be done in future to prevent similar attacks. The Commissioner believes that, beyond the CCTV images in the public domain at the time of the request, the wider media coverage is relevant to the balance of the public interest here as it is indicative of a desire to understand the circumstances of the 7 July 2005 attacks and to inform the debate about this. That disclosure would add to the information publicly available about these attacks and contribute to public understanding and debate surrounding the attacks is a valid public interest factor in favour of disclosure.

46. The public authority has cited the widespread media coverage when arguing that the public interest has been satisfied through the information disclosed into the public domain through this coverage and that no further disclosure is necessary. The Commissioner would note, however, that full disclosure in order to avoid any suspicion of 'spin' or 'cover up' will continue to be in the public interest regardless of the volume of related information that has previously been disclosed.

The significance or sensitivity of the information

47. On the issue of the significance of the CCTV images in question, as referred to above at paragraph 19, the public authority provided to the Commissioner a document giving a timeline of the movements of the 7 July 2005 attackers as captured on CCTV. That the public authority has gone through the process of preparing this timeline as part of the investigation is indicative of the important role that CCTV footage played in the investigation into the attacks. The Commissioner accepts that CCTV footage in general was highly significant to the investigation. In relation to the specific items of CCTV footage in question here this significance is a valid factor in favour of maintenance of the exemption on the basis that the argument that the investigation could be disrupted through disclosure is strengthened given the significance of CCTV footage to the investigation.
48. However, the public authority has advanced no arguments as to the significance of the specific CCTV footage in question here. The content of this information, without explanation on this point from the public authority, sheds little light on its significance to the investigation. In the absence of such explanation and without it being clear from the information itself, the weight of this factor in favour of maintaining the exemption is reduced.
49. In *Guardian v The Information Commissioner and Avon and Somerset Police* (EA/2006/0017), the discussions of the Information Tribunal mainly centred on the significance of the information in terms of what it implied about the integrity and probity of the investigation. The view of the Tribunal was that if the information included evidence that the investigation had not been conducted with integrity and probity, this would be a compelling argument in favour of disclosure.

50. Taking a lead from the Tribunal, the Commissioner has reviewed the information in question here in this light. The conclusion of the Commissioner on this point is that the CCTV footage does not, in isolation, provide any insight into the integrity and probity of the investigation. Therefore the Commissioner does not consider that this factor has any bearing on the balance of the public interest in this case.

The age of the information

51. In the case of *Guardian v The Information Commissioner and Avon and Somerset Police* (EA/2006/0017), the Information Tribunal stated the following on the issue of the age of the information when considering the balance of the public interest in connection with section 30(1)(a):

“The passage of time was a double-edged argument, whichever side wielded the sword. It probably reduced the risks of prejudice to future investigations but it similarly weakened the legitimate public interest in knowing more of the background facts.”

52. The ‘double-edged argument’ issue is very relevant here. The information was not old at the time of the request, less than 12 months, and, as established above, related to an investigation that was ongoing at that time. However, that this information related to an incident that had taken place fewer than 12 months prior to the request suggests that the public interest in information relating to the police investigation would not have reduced through the passage of time.
53. On balance the Commissioner believes that the age of the information is a factor that favours the maintenance of the exemption. However, the bearing that this factor has on the balance of the public interest is reduced as the age of the information does not lessen the weight of any of the public interest factors favouring disclosure.

Other factors

54. The content of the information in question here is benign. It does not show the attacks taking place, or the aftermath of the attacks. Neither does this information provide any real insight into the conduct of the investigation by the public authority.
55. Similarly to the age of the information, the relevance of the nature of the content of this information is ‘double edged’. The disruption that disclosure of this information could conceivably cause to the police investigation is not clear given the absence of real insight into this investigation provided by the information in this case. However, this lack of real insight also weakens the argument that disclosure would be in the public interest in order to add to public knowledge about the conduct of the investigation. As a factor in the balance of the public interest, the Commissioner concludes that the benign nature of the information in question is neutral in that it does not carry more weight either in favour of disclosure of the information or maintenance of the exemption.
56. At the time of the request the government had announced its decision that there

was to be no independent public inquiry into the 7 July 2005 attacks. This decision has been the subject of considerable debate and controversy. Had the decision been made to grant a public inquiry, it could have been argued that the public interest in understanding the circumstances of, and response to the attacks had been satisfied through this inquiry and that the public interest in the information in question was therefore reduced. However, given that the decision was made not to hold an inquiry and given that this decision was the subject of controversy and debate, the public interest in further information about the 7 July 2005 attacks being made available remains considerable and this is a valid factor in favour of disclosure.

57. The 7 July 2005 attacks have been the subject of conspiracy theories and the official account of the attacks has also been questioned in other ways. Such questioning of what have been presented as the facts of the events of 7 July 2005 established through the investigation carried out by the public authority, is not in the public interest. Further this is more likely to occur in a situation where there is a perceived lack of transparency about how the official account was formed. That disclosure would presumably support the official account of the time line and basic facts of the attacks and reduce any perceived lack of transparency about how this account was formed, along with removing any suspicion of 'spin' or 'cover up', is a valid public interest factor in favour of disclosure.

Conclusion

58. The factors in favour of the maintenance of the exemption which the Commissioner considers to carry significant weight are that the investigation was ongoing at the time of the request and, as referred to at paragraph 40, the public interest recognised by the Information Tribunal in protecting information acquired, often in confidence, in police investigations where an investigation is ongoing. The Commissioner also considers that the fact that CCTV footage overall was of significance to the investigation adds some weight in favour of maintenance of the exemption.
59. The factors in favour of disclosure of the information in question that carry significant weight are that CCTV footage of comparable content to the information in question was in the public domain at the time of the request, as were accurate descriptions of the content of the footage requested in this case. The Commissioner also considers the fact that the 7 July 2005 attacks were the subject of a significant volume of sober and informative media coverage, and the controversy and debate over the decision not to hold a public inquiry, along with disputes over the official version of events that has occurred due to a perceived lack of information in the public domain, add some weight in favour of disclosure.
60. The conclusion of the Commissioner is that the public interest in maintaining the exemption does not outweigh the public interest in disclosure in this case. The Commissioner has recognised factors in favour of maintenance of the exemption that carry significant weight. However, the similarity of the information available in the public domain at the time of the request to that in question here, along with the absence of public interest factors highlighted by the public authority relating to the content of the specific CCTV footage in question here, leads the

Commissioner to conclude that the balance of the public interest favours disclosure.

61. As referred to above at paragraph 11, the public authority voiced its concern that disclosure of the information in question in this case would have the effect of requiring it to disclose all CCTV footage held by it relating to the 7 July 2005 attacks. The Commissioner would stress that this is not the case. This decision relates only to the 7 items of CCTV footage specified in the complainant's request. Any future request for other CCTV footage relating to the 7 July 2005 attacks should be considered on a case by case basis. Any future decision as to whether to disclose should be based on the specific content of the footage requested.

Section 38

62. The public authority has cited section 38(1)(a). This exemption is engaged where the disclosure of information, *would*, or *would be likely* to, endanger the physical or mental health of any individual. This exemption is also subject to the public interest. This means that however clear it is that endangerment to health would or would be likely to result through disclosure the information should be disclosed if the public interest favours this.

Endangerment to health?

63. In citing section 38(1)(a) the public authority has indicated that it believes that endangerment to physical or mental health *would*, or *would be likely* to, result from disclosure. The public authority has not specified whether its stance is that endangerment would result, or whether it is that it would be likely to result. Where a public authority has not been specific about this, the Commissioner will consider whether the endangerment would be likely to result. In order for the Commissioner to conclude that endangerment would be likely to result, the possibility of endangerment must be real and significant, rather than hypothetical or remote. This is in line with the direction provided by the Information Tribunal in the case *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) in which it stated:

"Likely connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there 'may very well' be prejudice to those interests, even if the risk falls short of being more probable than not."

64. The arguments advanced by the public authority on this point have lacked detail. Whilst it has indicated that it believes the endangerment would take the form of endangerment to the mental health of surviving victims of the July 7 2005 attacks and to relatives of the victims of the attacks, it has not explained why it believes that this endangerment would be likely to result through disclosure of the information in question here.
65. As referred to earlier in this notice, the content of the information in question here is benign. It does not show the attacks taking place and does not show the

aftermath to these attacks. The stance of the public authority appears to be that disclosure of any CCTV footage relating to the attacks would be likely to be sufficiently traumatic to those caught in the attacks or their relatives that the mental health of these individuals would be likely to be endangered, rather than that there is anything specific in the footage in question here that would be likely to cause endangerment to mental health.

66. When the Commissioner contacted the public authority on 27 November 2008, the public authority was asked to provide its reasoning for how disclosure of the seven items of CCTV footage requested by the complainant *would* or *would be likely* to result in endangerment to health. Had the public authority been able to advance evidence to support its arguments, by, for example, referring to an occasion when the mental health of a victim of the attacks had been endangered through the CCTV footage in the public domain, its arguments would have been strengthened considerably. However in this case the public authority advanced no arguments that refer directly to the content of the specific CCTV footage that is the subject of the complainant's request, whether supported by evidence or not.
67. In the absence of an explanation from the public authority, the Commissioner does not accept that disclosure of the information in question would be likely to result in endangerment to the mental health of those present at the attacks or their relatives. Neither does the Commissioner believe that the content of the CCTV footage in question makes it clear that endangerment to health would be likely, even without an explanation from the public authority.
68. The Commissioner concludes on the basis of the content of the footage and in the absence of convincing arguments from the public authority that the likelihood of endangerment to health through disclosure of the CCTV footage that is the subject of the complainant's request is not real or significant and finds, therefore, that the exemption provided by section 38(1)(a) is not engaged. As the Commissioner has reached this conclusion, it has not been necessary to go on to consider where the balance of the public interest lies.

Section 40(2)

69. As referred to above at paragraph 23, when giving its explanations about section 38(1)(a), the public authority indicated that it had concerns about disclosing CCTV footage that would enable identification of individuals aside from the perpetrators of the July 7 2005 attacks. Whilst the public authority voiced these concerns when explaining why it believed that the exemption provided by section 38(1)(a) was engaged, these appear more relevant to section 40(2). Although the public authority did not cite this exemption, given that third parties do appear within the information in question the Commissioner has considered whether section 40(2) is relevant here.
70. The effect of the Commissioner concluding that the exemption provided by section 40(2) is engaged would *not* be that the public authority should withhold the requested information from disclosure. Rather the Commissioner would expect the public authority to redact via pixellation, or any other suitable means, any footage that enables the identification of a third party and release the footage

in this redacted form.

71. The exemption provided by section 40(2) will be engaged where the information in question constitutes the personal data of an individual other than the applicant and where the processing of that personal data inherent in the disclosure of this information via the Act would be in breach of any of the data protection principles.

Personal data?

72. Section 1(1) of the Data Protection Act 1998 (the "DPA") gives the following definition of personal data:

"personal data' means data which relate to a living individual who can be identified-

- (a) from those data, or*
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller."*

73. The footage that is the subject of the complainant's request includes images of individuals aside from those who carried out the attacks. There are a number of examples where the images are of sufficient detail that it clearly would be possible to identify these third parties. On this basis the Commissioner concludes that within the CCTV footage that is the subject of the request are images of individuals other than the perpetrators of the attacks that constitute personal data.

First data protection principle

74. The next step is to consider whether disclosure would result in a breach of any of the data protection principles. The Commissioner has focussed on the first data protection principle, which requires that personal data be processed fairly and lawfully.
75. A key issue when considering whether processing of personal data would be compliant with the first data protection principle is whether the data subjects hold a reasonable expectation that their personal data would not be disclosed. Information disclosed via the Act is, in effect, made publicly available. It is necessary here, therefore, to consider whether the data subjects hold a reasonable expectation that their personal data would not be disclosed into the public domain.
76. The Commissioner considers it likely that the third party individuals included within this footage would hold a reasonable expectation that their personal data would not be included within footage released into the public domain, even if these individuals held an expectation that they may be included within this footage as they were aware that they were at the locations identified at the times specified. This is on the basis that the significance attached to this CCTV footage is due to it showing the movements of the attackers, rather than due to any other individuals shown.

77. Other factors of significance when considering whether it would be fair to disclose personal data are whether the subject of the data has consented to this disclosure. In this case the Commissioner is not aware of any third parties featured in the CCTV footage having provided consent to the disclosure of their personal data. The Commissioner would also note that it could conceivably cause distress to these individuals to be shown in the footage in question given the context of this footage.
78. The Commissioner concludes that disclosure of personal data relating to individuals other than the perpetrators of the attacks would be unfair and in breach of the first data protection principle. The exemption provided by section 40(2) is, therefore, engaged. As the Commissioner has concluded that this exemption is engaged on this basis, it has not been necessary to go on to consider whether disclosure would fulfil any of the conditions within Schedule 2 of the DPA, at least one of which must be fulfilled in order to comply with the first data protection principle.

The Decision

79. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act in that it found incorrectly that the public interest in maintaining the exemption provided by section 30(1)(a)(i) & (ii) outweighed the public interest in disclosing the information and that the exemption provided by section 38(1)(a) was engaged. In failing to disclose this information within 20 working days of receipt of the request, the public authority failed to comply with the requirements of sections 1(1)(b) and 10(1). The Commissioner has also found the public authority in breach of the procedural requirements of sections 17(1)(b), 17(1)(c) and 17(3)(b).
80. Although it was not cited by the public authority, the Commissioner has also found that the exemption provided by section 40(2) is engaged in respect to individuals within the CCTV footage other than the perpetrators of the attacks, and that this footage should be redacted.

Steps Required

81. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

Disclose the 7 items of CCTV footage specified in the complainant's request, redacted via pixellation, or any other suitable means, so that third parties aside from the perpetrators of the attacks are not identifiable. When carrying out this redaction the Commissioner expects the public authority to take a proportionate approach and ensure that redactions are only applied where third parties are clearly identifiable.

82. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Other matters

83. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

In the internal review response the public authority cited both sections 30 and 31. As made clear by the following wording from section 31(1): *“Information which is not exempt information by virtue of section 30...”*, these exemptions cannot both be engaged in relation to the same information. The Commissioner would stress to the public authority that it should remain aware of this and ensure that sections 30 and 31 are not cited in relation to the same information when responding to future requests.

84. As referred to above at paragraph 4, when giving the outcome to the internal review, the public authority gave little explanation for concluding that the refusal of the request should be upheld. Paragraph 39 of the section 45 Code of Practice states the following:

“The complaints procedure should provide a fair and thorough review of handling issues and of decisions taken pursuant to the Act, including decisions taken about where the public interest lies in respect of exempt information. It should enable a fresh decision to be taken on a reconsideration of all the factors relevant to the issue.”

85. The internal review response from the public authority did not reflect that a reconsideration of the request conforming to the description above took place. The Commissioner would advise the public authority that a response giving the outcome to an internal review should state the reasoning for why the initial refusal was upheld and should reflect that there has been a genuine reconsideration of the request.
86. The Commissioner’s published guidance on internal reviews states that a review should be conducted within 20 working days, unless there are exceptional circumstances, in which case the review period may be extended to 40 working days. In this case the Commissioner notes that there appeared to be no exceptional circumstances, but that the public authority failed to provide the outcome to the review within 20 working days. Neither did the public authority provide the outcome to the review within 40 working days. The public authority should ensure that internal reviews are carried out promptly in future. The Commissioner notes that the internal review in this case pre dated the publication of his guidance.

Failure to comply

87. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

88. 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@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

89. 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.

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 31st day of March 2009

Signed

**Nicole Duncan
Head of FOI Operations**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 1

Section 1(1) provides that -

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

Section 10

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Section 17

Section 17(1) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 17(3) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

(a) that, 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 authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in

maintaining the exemption outweighs the public interest in disclosing the information.”

Section 30

Section 30(1) provides that –

“Information held by a public authority is exempt information if it 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 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,
- (b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or
- (c) any criminal proceedings which the authority has power to conduct.”

Section 31

Section 31(1) provides that –

“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,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,
- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls,
- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
- (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.”

Section 38

Section 38(1) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to-

- (a) endanger the physical or mental health of any individual, or
- (b) endanger the safety of any individual.”

Section 40

Section 40(2) provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1),
and
- (b) either the first or the second condition below is satisfied.”