

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 August 2013

Public Authority: Chief Constable of South Yorkshire Police

Address: Carbrook House,
5 Carbrook Hall Road
Sheffield
South Yorkshire
S9 2EH

Decision (including any steps ordered)

1. The complainant has requested copies of some audio transmissions made during the Hillsborough Disaster. Having initially advised him that the information was already available to him as publicly available transcripts, the public authority subsequently relied on the exemptions in sections 11, 31(1) and 40(2). The Commissioner partly upholds the citing of section 11 to the extent that some of the information is already transcribed and therefore reasonably available to the public, but he does not accept that this applies to all the information that is recorded on the tapes. However, he finds that any remaining information that is not caught by section 11, falls within the exemption at section 31(1) and the public interest favours maintaining the exemption. He does not find section 40(2) to be engaged.

Background

2. On 12 September 2012, shortly before this request was made, the Hillsborough Independent Panel (the "HIP") issued a formal Report¹.
3. The remit for the HIP was to:
 - *oversee full public disclosure of relevant government and local information within the limited constraints set out in the Panel's disclosure protocol*
 - *consult with the Hillsborough families to ensure that the views of those most affected by the tragedy are taken into account*
 - *manage the process of public disclosure, ensuring that it takes place initially to the Hillsborough families and other involved parties, in an agreed manner and within a reasonable timescale, before information is made more widely available*
 - *in line with established practice, work with the Keeper of Public Records in preparing options for establishing an archive of Hillsborough documentation, including a catalogue of all central Governmental and local public agency information and a commentary on any information withheld for the benefit of the families or on legal or other grounds*
 - *produce a report explaining the work of the panel. The panel's report will also illustrate how the information disclosed adds to public understanding of the tragedy and its aftermath.*
4. The foreword of the report included these comments:

"The Panel has overseen full public disclosure of information relating to Hillsborough. The new Hillsborough website makes this information available publicly. Most of it is now being published for the first time.

The Panel was also asked to illustrate how the information disclosed adds to public understanding of the tragedy and its aftermath. The Panel does so through this Report, firstly by providing an overview of what was previously known and then by explaining, in 12

¹ http://hillsborough.independent.gov.uk/repository/report/HIP_report.pdf

chapters, how the disclosed information changes public understanding.

When the Panel began its work in February 2010, it could not and did not know whether the information it would reveal would add to public understanding and change that understanding. Over the intervening months, we have discovered that the information disclosed will add significantly to public understanding...

When over 30,000 came to Anfield for the 20th Anniversary of Hillsborough, it showed that the wound of grief was still sore because so many questions were yet unanswered. These disclosed documents address many of those questions. The Panel ... produces this Report ... in the profound hope that greater transparency will bring to the families and to the wider public a greater understanding of the tragedy and its aftermath. For it is only with this transparency that the families and survivors, who have behaved with such dignity, can with some sense of truth and justice cherish the memory of their 96 loved ones".

5. Following a review of the HIP's report, on 12 October the Independent Police Complaints Commission (the "IPCC") announced that it would be launching an independent investigation into allegations surrounding the aftermath of the Hillsborough disaster². Although its initial terms of reference indicate it will consider the 'aftermath' of the Hillsborough Disaster, it also states:

"64. The Director of Public Prosecutions has announced that he intends to consider all the material now available, to identify what the focus of any further criminal investigation should be in order for the CPS to determine whether there is now sufficient evidence to charge any individual or corporate body with any criminal offence.

65. The Attorney General needs to decide whether to go to the High Court to have the inquest verdict quashed. Should this happen, a new Coroner would be appointed to oversee a new inquest. While it is usual practice for a criminal investigation to precede an inquest, it is not essential. In the unique circumstances of Hillsborough, including the fact that so much time has passed since the deaths, this is likely to be a matter the Coroner would wish to consider and take views on from the families.

²http://www.ipcc.gov.uk/Documents/investigation_commissioner_reports/IPCC_DECISION_IN_RESPONSE_TO_HILLSBOROUGH_REFERRALS.pdf

66. *We are also aware that many of the families would like to see a prosecution for manslaughter. Our role in this is likely to become clearer as other decisions are made. We will work with the Director of Public Prosecutions, and any Coroner appointed, to carry out any further investigation that may be required, either before or after any new inquests are held, and identify the appropriate body to investigate any individual or entity we cannot.*
67. *In parallel with this, the IPCC will launch an independent investigation into the conduct matters identified above regarding the police actions in the aftermath of the disaster. This may extend to any other conduct matters that come to light in the course of investigation”.*
6. The complainant is a Hillsborough Disaster researcher and journalist. In his complaint to the Commissioner he provided the following helpful background information in support of his request:

“During the Hillsborough Disaster on 15/4/1989, South Yorkshire Police and the South Yorkshire Metropolitan Ambulance Service ... recorded the transmissions made on their radio systems on multi-track RACAL tapes. It was standard practice to do so.

Following the disaster, these audio recordings were copied from the RACAL multi-track tapes onto a series of standard audio cassettes and each was given a reference number ... the contents of these audio tapes were then transcribed and the information was used in the subsequent investigation into the Hillsborough Disaster...

During the recent Hillsborough Independent Panel scrutiny, thousands of papers, tapes and videos were handed to the researchers as part of South Yorkshire Police’s commitment to ‘full disclosure’. These cassettes were among material handed over to the panel...

As well as the actual cassettes and RACAL master tape, various transcripts of these cassettes were also handed over to the panel. These have now been scanned and put onto the Hillsborough Independent Panel’s website for public reference...

But, the crucial difference is, the actual audio has never been released for the public to hear.

I believe there is a key difference between the written word and the spoken word. A transcript can never fully express the emotion of the spoken word. It cannot convey whether emergency services were calm and in control of the situation or were flustered and

panicking. I believe the release of this audio will help the public further understand the challenges experienced by the emergency services on the day. The whole reason for the disclosure project was to aid public understanding of the disaster”.

Request and response

7. Following on from earlier correspondence with the public authority, the complainant submitted two requests, on 22 and 24 October 2012, for the following:

1) Request of 22 October 2012

“This is a Freedom of Information application requesting the release of audio cassettes related to the Hillsborough Disaster ...

The tapes in question are:

KWP 30/3/17

KWP 30/7/17

KWP 30/9/17

KWP 30/13/17

KWP 30/14/17

KWP 30/15/17

KWP 30/19/17

KWP 30/24/17

KWP 30/25/17

KWP 30/15/18

KWP 30/25/18

KWP 30/15/19

The format it is supplied in does not matter – cassette, CD, DVD, MP3, WAV etc is all acceptable. And if these have not been digitised, I will happily digitise the material”.

2) Request of 24 October 2012

“This is an additional Freedom of Information application further to my previous request earlier this week ...

I am also requesting the release of audio material from the South Yorkshire Ambulance Service which relates to the Hillsborough Disaster.

I appreciate that this request is for Ambulance service material ... but my understanding is that South Yorkshire Police hold this material ... and passed tapes to the Hillsborough Independent Panel

... I am requesting audio copies of Track 16, Track 18 and Track 19 from the master RACAL tape (or copies of) containing the South Yorkshire Ambulance radio transmissions from 15th April 1989.

I am requesting audio from 1500hrs to 1630hrs only.

The format it is supplied in does not matter – as long as it is either cassette, CD, DVD, MP3, WAV.

And if these have not been copied over or digitised, I am happy to help with this process”.

8. The public authority responded to both requests together on 6 November 2012. It confirmed that it held the information but refused to provide it in the specified format as it stated that it was already reasonably accessible to the complainant and was therefore exempt by virtue of section 21. It provided links to the various transcripts which were available online³.
9. The complainant did not agree. On 6 November 2012, he wrote saying that this stance seemed to go against the commitment to full disclosure of all Hillsborough-related information, as he was not seeking the transcripts but instead wanted the audio.
10. On 22 November the public authority responded. It advised him:

“... in so far as it relates to anything SYP may hold, we are subject to an IPCC investigation and the sub judice rule applies. As such, any request must be to the IPCC”.
11. Accordingly, the complainant approached the IPCC. The IPCC advised it did not hold the information and suggested the complainant revert to the public authority, which he did. The public authority advised that it would consult with the IPCC and get back to him.

³ <http://hillsborough.independent.gov.uk/repository/SYP000096400001.html>
<http://hillsborough.independent.gov.uk/repository/SYP000096420001.html>
<http://hillsborough.independent.gov.uk/repository/SYP000135240001.html>
<http://hillsborough.independent.gov.uk/repository/SYP000014030001.html>

12. In its response the public authority advised the complainant:

"Everything other than what is on the website should not be disclosed as it forms part of an ongoing investigation. However, all FOI requests will be considered on a case by case basis and we will consult with the IPCC for each".

13. The Commissioner notes that this was dealt with as 'business as usual' rather than as a formal internal review. This appears to have occurred because the complainant is a journalist who was corresponding with a contact in the press office at the public authority.
14. On 3 December 2012 the complainant wrote to the Commissioner to complain about the response to his request. The Commissioner advised that he would need to write to the public authority and request an internal review as one had not been included with his complaint.
15. An internal review was provided on 10 January 2013. It upheld the earlier citing of section 21 saying that they requested information was already reasonably accessible to the complainant.
16. During the course of the Commissioner's investigation the public authority changed its position. It removed reliance on section 21 and introduced sections 11, 40(2) and 31(1), advising the complainant accordingly.

Scope of the case

17. The complainant wants the Commissioner to consider full disclosure of the requested audio tapes.
18. The complainant has confirmed to the Commissioner that he is happy to have any personal data redacted in line with those redactions which currently exist on the transcripts of the tapes which are in the public domain. The Commissioner will therefore not consider the citing of section 40(2) by the public authority as this data is not being sought.

Reasons for decision

Section 11 – means by which communication to be made

19. Section 11 of the Act states that:

"(1) Where, on making his request for information, the applicant expresses a preference for communication by any one or more of the following means, namely –

(a) the provision to the applicant of a copy of the information in permanent form or in another form acceptable to the applicant...

the public authority shall so far as reasonably practicable give effect to that preference."

20. In his request the complainant stipulates that he would like "audio copies" of the information, in any available format, eg cassette, CD, etc. The FOIA does not afford an individual a guarantee to receive a copy of a document, or in this case a recording, but rather the information it contains. However, the Act does allow an individual to state whether they would like the information in permanent or electronic form.
21. The public authority initially advised the complainant that the information was already available to him by way of transcripts that the HIP had put into the public domain (providing him with the links as shown above) and that it was therefore exempt by virtue of section 21 of the FOIA (information accessible to applicant by other means). However, the Commissioner here notes that the complainant was very clear that he required audio versions of the transcripts, as these would contain additional information to that which had been transcribed.
22. During the course of the Commissioner's investigation the public authority changed its position and no longer sought to rely on section 21. Instead of this it cited sections 11(2) and 11(4) as follows:

"Section 11(2). The requestor asked for information to be provided in audio format. In the case of KWP 30/14/17 and KWP 30/25/18 it would not have been reasonably practicable to comply with this request as the information has not yet been digitised. Copying the audio for this specific request would have disturbed the pre-planned Hillsborough Independent Panel digitisation process as described above. In the case of KWP 30/3/17, KWP 30/7/17, KWP 30/9/17, KWP 30/13/17, KWP 30/19/17, KWP 30/24/17 and KWP 30/25/17 all items were digitised, but were still in the possession of the Panel as part of their process. Again it would have been unreasonable to disturb the process for this specific request, especially as the Panel had already published the transcripts on the website and their intention throughout the disclosure process was to make audio available to the public in the longer term.

Section 11(4). In the circumstances it was reasonable to communicate the information in transcript form which was available on the Hillsborough Independent Panel website".

23. Based on these arguments the Commissioner accepts that it is reasonable in the circumstances to provide access to 'hard copy' transcripts of the requested information. However, he notes that such a provision will only partly satisfy the request as not everything that is recorded on the tapes will have been transcribed, for example background noises, the timbre of the voices concerned and any words that may have been indecipherable to the typist. Therefore, although much of the recorded information will be publically available having been transcribed and put online, it is not actually possible to transcribe everything held on the tapes because some of this will be recorded information that cannot be accurately transcribed.
24. As such, the Commissioner concludes that not all of the recorded information is reasonably available to the complainant and he therefore only partly upholds the citing of section 11(2) by the public authority. The remaining content of the tapes will be considered next.

Section 31 – law enforcement

25. Section 31(1)(g) provides that information is exempt if disclosure would, or would be likely to, prejudice the exercise by any public authority of its functions for any of the purposes specified in section 31(2).
26. The public authority has explained:

"Information contained within the audio versions of the requested radio transmissions is exempt as disclosure would prejudice the exercise of the IPCC's functions of ascertaining whether any person is responsible for any conduct which is improper".

This indicates that it is further relying on 31(2)(b).

27. The Commissioner finds that the use of the word 'ascertaining', ie determining definitely or with certainty, limits the application of this exemption to those cases where the public authority in relation to whom the prejudice is being claimed, has the power to formally ascertain compliance with the law, and judge whether any person's conduct is improper etc.
28. Therefore, for section 31 to be engaged the Commissioner requires the function identified by the public authority for the purposes of section 31(1)(g) of the FOIA to be a function which is: (i) designed to fulfil the purposes specified in section 31(2)(b); (ii) imposed by statute; and (iii) specifically entrusted to that party to fulfil.
29. The public authority has explained:

"The function of the IPCC is to investigate the most serious complaints and allegations of misconduct against the Police. Disclosing material that forms part of a highly sensitive, complex investigation would prejudice their ability to carry out this function effectively. Unlike other investigations, much of the material is already in the public domain, however if the information in the audio contains additional information, for example tone, mood and expression it may be vital evidence for the investigation. It would [be] harmful to the investigation if South Yorkshire Police disclosed information that could potentially be evidence that could lead to disciplinary action or be referred to the DPP for consideration as to a criminal offence."

30. Because some of the requested tapes relate to the ambulance service, the Commissioner sought confirmation that these were also required by the IPCC. The IPCC advised as follows:

"One of the terms of reference for the IPCC's managed investigation into the disaster is to investigate "The communication between the police and the other emergency services" so yes, these tapes will be considered as part of that investigation."

31. The Commissioner further notes the complainant's contention that the original terms of reference for the IPCC's investigation refer to it considering the 'aftermath' of events rather than the time period that would be covered by the requested recordings. However, the Commissioner notes that in its initial response to the HIP report, as cited in 'Background' above, there is a clear indication that there is likely to be a much wider remit to the investigation undertaken.
32. The Commissioner is satisfied that the IPCC's functions are appropriate to the section 31(1)(g) exemption and meet the test outlined above.
33. The Commissioner will now go on to consider the nature of the prejudice claimed and the likelihood of the prejudice occurring. In his view, three criteria must be met in order to engage a prejudice based exemption.
- First, the actual harm which the public authority alleges would, or would be likely, to occur if the disputed information was disclosed has to relate to the applicable interests within the relevant exemption.
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the disputed information and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance.

- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold (would be likely), the Commissioner believes that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. The Commissioner considers that the higher threshold places a stronger evidential burden on a public authority to discharge. The chances of the prejudice occurring should be more probable than not.

34. The public authority has explained:

"... at the time of the request the IPCC had announced their decision to investigate the conduct of South Yorkshire Police during and after the Hillsborough Disaster. It was the view of the IPCC that the audio versions of the radio transmissions should not be disclosed or anything that wasn't already in the public domain. The IPCC also considered that if it can be argued that information in audio form is different from information in written form, then any audio versions of information not in the public domain should be refused for disclosure as this forms material that will be used as part of their investigation."

35. The Commissioner has seen further correspondence from the IPCC to the public authority which states:

"... we would not want the tapes disclosed – until we get further into the investigation we simply do not know what relevance these tapes or their content may have but it is likely to be significant because of the clear significance of the tapes to the rescue operation. Accordingly, we believe that the section 31 exemption should be used. We believe that their disclosure would be likely to harm our investigation."

36. The Commissioner accepts that that the tapes contain information which directly relates to the applicable interests of this exemption. He also accepts that the views expressed by the IPCC itself indicate that there is a genuine causal relationship in existence between the potential disclosure of the disputed information and potential prejudice to the IPCC's function of investigating the actions of the public authority. He accepts that disclosure would be likely to present a real and significant risk of prejudice to that investigation.

37. For these reasons the Commissioner has decided that disclosure of the information would be too likely to prejudice the IPCC's functions for the purposes of section 31(2)(b). Consequently, the Commissioner has

decided that the exemption in section 31(1)(g) is engaged and he will now consider the public interest test.

The public interest test

38. Section 31 is a qualified exemption and therefore the Commissioner has carried out a public interest test, balancing the public interest in maintaining the exemption against the public interest in disclosure.

Public interest in favour of disclosure

39. The public authority has argued:

"... some of the information is in the public domain and disclosure would give the public a better understanding of the radio transmissions on the day of the Disaster".

Public interest in favour of maintaining the exemption

40. The public authority has argued:

"South Yorkshire Police is being investigated for its role during and after the Disaster. It would not be in the public interest to disclose information that would undermine an IPCC investigation. It would not be in the public interest for the Force to ignore the wishes of the IPCC who have stated that the information should not be disclosed.

On balance it would not be in the public interest to disclose information that forms part of a police complaints investigation that could prejudice their function to establish potential misconduct and or criminal activity".

41. It further advised:

"As part of our consideration in disclosing information, we also have to think about the affect this may have upon the families of the deceased and victims of the disaster. The philosophy of the Hillsborough Independent Panel is "families first" in which disclosure should take place initially to Hillsborough families and then the wider public. The digitisation process is not yet complete and the families have not had the opportunity to access the requested information and may not be able to do so for some time. The expectations of the families is that disclosure will continue to follow the same process, once the investigations are complete."

Balance of the public interest

42. The Commissioner considers that the 'default setting' of the FOIA is in favour of disclosure. This is based on the underlying assumption that disclosure of information held by public authorities is in itself of value because it promotes better government through transparency, accountability, public debate, better public understanding of decisions and informed and meaningful participation of the public in the democratic process.
43. The Commissioner also recognises the complainant's concerns about the published aims of full disclosure of information held in connection with the Hillsborough Disaster and the continued public suspicions attached to events.
44. The Commissioner considers that a large part of the requested information is already available to the public; however, he does understand that some of the recorded information is not available as it cannot be transcribed in the same way that 'normal' speech can. He therefore recognises the subtle differences and the public interest in considering something which may not have been previously addressed. The requested information may therefore shed more light onto the situation on the day which may not have been fully taken into account before.
45. However, the Commissioner has accorded significant weight to the fact that there is an ongoing inquiry by the IPCC coupled with the premise that, as stipulated by the HIP, it should be 'families first' prior to full public disclosure under the FOIA. He has also noted that the vast majority of the content of the tapes has already been placed into the public domain, albeit it in a different format to that requested. He considers that, for the present, this is sufficient to ensure that the public is well informed, whilst not causing prejudice to any ongoing inquiry.
46. In conclusion, as this information has not previously been placed in the public domain, it is likely that disclosure at this time would be prejudicial to that inquiry; the public interest in avoiding such prejudice is strong. The Information Commissioner does not consider that the public interest would be better served by ordering disclosure of any remaining recorded information held on the audio tapes. He notes that most of the information has already been made available by means of the published transcript and the remainder is the subject of an ongoing inquiry. The Commissioner has therefore concluded that, in all the circumstances, at this time the greater weight of the public interest rests with maintaining the exemption.

Right of appeal

47. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

48. 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.
49. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Graham Smith
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