

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 16 August 2007

Public Authority: The Parades Commission
Address: 12th Floor, Windsor House
9-15 Bedford Street
Belfast
BT2 7EL

Summary

The complainant requested information from the Parades Commission relating to allegations made about a particular parade. The Parades Commission provided some information to the complainant and withheld other information, relying on the exemptions under sections 36(2)(b) and 41 of the Act. The Commissioner is satisfied that the withheld information is exempt under section 41, and does not therefore require the Parades Commission to take any further steps in relation to the complainant's request.

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. The complainant has advised that on 28 December 2005 he requested the following information from the Parades Commission:

"... please send me all information which the Parades Commission holds concerning the above Parade"

3. The parade in question was organised by the South Fermanagh Loyalist Flute Band (the Band), and was held in Enniskillen on 28 September 2005. Following

the parade, the Parades Commission wrote to the parade organiser, who is the complainant in this case, to advise that it had received information suggesting that the parade had breached the Parades Commission's Code of Conduct. The complainant indicated to the Parades Commission that he wished to have sufficient information to "deal properly with the allegations made".

4. The Parades Commission was established in 1998 to regulate public processions (including parades) and related protest meetings in Northern Ireland. The Parades Commission has the power to issue determinations in respect of public processions and related protest meetings, including the power to impose restrictions of various kinds. The Parades Commission receives information from interested parties, as well as its own monitors, which inform its determinations.
5. The Parades Commission responded to the complainant on 24 January 2006, confirming that it held information of the description requested. The Parades Commission advised the complainant that it was able to provide him with some of the information requested, but that the remainder was exempt under sections 36 and 41 of the Act. The Parades Commission referred the complainant to its Procedural Rules, which state that:

"3.3 All evidence provided to the Commission, both oral and written, will be treated as confidential and only for the use of the Commission, those employed by the Commission and Authorised Officers. The Commission, however, reserves the right to express unattributed general views heard in evidence but only as part of an explanation of its decision".
6. With regard to the exemption under section 41 of the Act, the Parades Commission advised the complainant that it believed disclosure of the withheld information would constitute an actionable breach of confidence, and that it considered that it would not be in the public interest to breach this confidence.
7. With regard to the exemption under section 36 of the Act, the Parades Commission advised the complainant that the exemption applied because the "qualified person" as set out in the exemption was of the opinion that disclosure of the information would, or would be likely to inhibit the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation.
8. The complainant requested an internal review of the Parades Commission's decision on 21 April 2006. The Parades Commission responded on 28 July 2006, advising that it upheld its original reliance on the exemptions under sections 36 and 41 of the Act.

The Investigation

Scope of the case

9. The complainant contacted the Commissioner on 30 December 2006 to complain about the way his information request had been handled. In particular the complainant felt that as he was the organiser of the parade in question, he could not be considered simply as a member of the public. The complainant was concerned that allegations made against the parade in question could impact on the Band's right to freedom of peaceful assembly, as set out in Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention). The complainant argued to the Commissioner that Procedural Rule 3.3 cited at paragraph 5 above was in breach of the Convention, and could not be used to withhold information that may be used in order to impose restrictions on a parade, thus interfering with the Article 11 right.
10. The complainant also challenged the Parades Commission's application of the exemptions under sections 36 and 41 of the Act. The complainant argued that disclosure of the withheld information would in fact help all interested parties to exchange views and provide information that would assist the Parades Commission in producing future determinations.
11. Finally the complainant advised the Commissioner that he was not seeking the identity of the person(s) who made the allegations, merely the details of those allegations.
12. The Commissioner explained to the complainant that his role was limited to deciding whether or not the information ought to be disclosed into the public domain under the Act. The Act is motive-blind, and a public authority cannot take the identity of the requester into account when deciding whether or not to release information.
13. The Commissioner's investigation therefore focused on how the Parades Commission had handled the complainant's request, and whether or not the information requested by the complainant should be released into the public domain.

Chronology

14. The Commissioner contacted the Parades Commission on 24 April 2007, advising that a complaint had been received, and requesting a copy of the withheld information. The Commissioner agreed to view the withheld information in the Parades Commission's offices, due to the sensitive nature of the information.
15. The Commissioner met with the Parades Commission on 8 May 2007 and viewed the withheld information. The Commissioner also discussed the Parades Commission's handling of the request.

16. The Parades Commission's arguments for withholding the information referred to at paragraph 5 above can be summarised as follows.
17. **Section 41:**
The provider(s) of the information did so under an expectation of confidence, as indicated in Procedural Rule 3.3. The information was confidential in nature, and unauthorised disclosure would give rise to an actionable breach of confidence. The Parades Commission was unable to identify any overriding public interest argument for breaching this confidence.
18. **Section 36**
The Commissioner notes that in its refusal notice the Parades Commission referred to its reliance on the exemption under section 36 of the Act. It did not specify which subsection of the exemption it sought to rely on, but indicated its view that disclosure of the withheld information would, or would be likely to inhibit the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation. This correlates with subsections 36(2)(b)(i) and 36(2)(b)(ii) as set out in the Act (the legal annex on page 9 provides full details of the exemption).

Analysis

Procedural matters

Refusal notice

19. Where a public authority refuses a request for information it is required under section 17 of the Act to provide the applicant with a 'refusal notice' detailing the refusal and explaining the exemption or exemptions relied upon.
20. In addition, where the public authority is seeking to rely on a qualified exemption (one subject to the public interest test) it must provide details of the public interest arguments considered for and against disclosure of the requested information. The authority must also explain the balance of these competing arguments.
21. The Commissioner is of the view that the Parades Commission's refusal notice of 24 January 2006 did not provide sufficient detail on the application of the exemptions to the withheld information. As required under section 17(1), the Parades Commission did identify the exemptions being applied to the withheld information. In relation to the exemption under section 41 of the Act, the Parades Commission explained that the withheld information was provided in confidence, and that it felt disclosure of that information would constitute an actionable breach of confidence.
22. Section 36 is a "qualified" exemption, therefore a public authority must consider whether the public interest arguments in favour of maintaining the exemption outweigh those in favour of disclosing the information. The Parades Commission did not refer to the public interest in relation to its application of the section

36(2)(b) exemption in its refusal notice. The Commissioner is therefore of the view that the Parades Commission failed to comply with section 17(3) in that it did not provide details of the public interest considerations in relation to the application of the exemption under section 36(2)(b) of the Act. However, the Commissioner has had sight of the Parades Commission's deliberations, including full details of public interest considerations, and he is therefore satisfied that the public interest test was in fact conducted.

23. The Commissioner is aware that the complainant did receive a large proportion of the information held by the Parades Commission, and therefore his decision in this case relates solely to the information which was withheld from the complainant.

Exemptions

Section 41: information provided in confidence

24. The Commissioner notes that the Parades Commission applied the section 41 exemption to all of the withheld information. Information is exempt by virtue of section 41 of the Act if it was obtained by the public authority from any other person (including another public authority), and the disclosure of the information to the public (otherwise than under this Act) by the authority holding it would constitute a breach of confidence '*actionable*' by that or any other person.
25. In considering whether or not the exemption is engaged, the Commissioner must first determine whether the information was obtained by the public authority from another person (not necessarily an individual, person in this sense means a legal person). Having had sight of the withheld information the Commissioner is satisfied that the information was in fact provided by another person.
26. Having satisfied the first limb of the exemption under 41, the Commissioner must then decide whether or not disclosure of the information would give rise to an actionable breach of confidence. The Commissioner considers that for a breach of confidence to be actionable it must meet the established tests in *Coco v Clarke*¹. The requirements are that the information must have the necessary quality of confidence; it must be imparted in circumstances giving rise to an obligation of confidence; and there is an unauthorised use of that information.
27. The Commissioner is satisfied that the withheld information was inaccessible to the public at large at the date of the request. Having had sight of the information in question, the Commissioner is also satisfied that it has the necessary quality of confidence, as it relates to allegations made about a public procession. The Commissioner considers that, given the nature of the information, there was an expectation on the part of the confider(s) that the information was to be held in confidence, and that the identity of the confider(s) was to be protected. The Commissioner is further satisfied that the information was imparted in circumstances giving rise to an obligation of confidence. Although not a prerequisite in every case, the Commissioner has considered the issue of

¹ *Coco v Clarke* [1969] RPC 41

detriment which may be required for a breach of confidence to be actionable. The Commissioner is satisfied that in this case damage could be caused by the release of the information.

28. Although section 41 is an absolute exemption, so in itself not subject to the public interest test, the Commissioner recognises that in certain circumstances the public interest may override any duty of confidence. Where there is an overriding public interest in any particular case in disclosing the information the courts have accepted that no duty of confidence is owed. The Commissioner must therefore consider whether there was an overriding public interest at the time of the Complainant's request which favoured disclosure of the information.
29. The Commissioner recognises that there is a strong public interest in the public being informed about the alleged conduct of contentious parades in Northern Ireland. However, the nature and source(s) of the allegations were not in the public domain at the time of the request.
30. The Commissioner is also mindful of the public interest in ensuring that people are not discouraged from expressing opinions to regulatory bodies by the possibility of the information they provide being made public. When information relating to such concerns is provided to a public authority in confidence, there is a legitimate expectation that this confidence will be protected by that authority. Without this expectation, people may be less willing to express their concerns to such regulatory bodies. In this particular case, the Commissioner is of the view that disclosure of the withheld information would hamper the ability of the Parades Commission to collect information about parades from interested parties and official monitors.
31. For the reasons set out above, the Commissioner is satisfied that there is no overriding public interest in disclosure of the information requested, therefore the information withheld by the Parades Commission as described at paragraph 5 above is exempt by virtue of the section 41 exemption.

Other exemptions claimed

32. The Commissioner notes that the Parades Commission sought to rely on section 36(2)(b) in relation to the withheld information. As the Commissioner is satisfied that the information is exempt by virtue of section 41 he is not required to make a decision relating to the Parades Commission's application of the other exemption in this case.

Release of information under the Act

33. The Commissioner is mindful of the fact that the complainant was the organiser of the parade in question. The complainant felt that he should be entitled to receive all the information held by the Parades Commission in relation to that parade, in order for the Band to investigate the allegations made. However, as explained at paragraph 12 above, the Act provides only for information to be disclosed into the public domain, it makes no allowance for selective disclosure. If the information

were to be released to the complainant under the Act, the Parades Commission would be obliged to release the same information to anyone who requested it.

34. The Commissioner is of the view that the nature of the information, and the circumstances under which it was provided, is such that the information ought not to be released into the public domain. Therefore under the Act the withheld information cannot be provided to the complainant. This interpretation of access rights under the Act has been acknowledged by the Information Tribunal in the case of *Guardian & Brooke V the Information Commissioner & the BBC*². The Commissioner also recognises that there may be other avenues that the complainant could pursue to obtain the information he seeks. It is often the case that information cannot be disclosed into the public domain, but an applicant may be able to obtain information outside the Act, for example through the discovery procedure relating to litigation. The access rights afforded by the Act enhance, rather than replace, existing means of accessing official information.

The Decision

35. The Commissioner's decision is that the Parades Commission dealt with the request for information in accordance with the Act. The Commissioner is satisfied that the withheld information is exempt under section 41 of the Act.
36. However, the Commissioner is also of the view that the Parades Commission failed to comply with section 17(3) in that it did not provide details of the public interest considerations in relation to the application of the exemption under section 36(2)(b) of the Act.

Steps Required

37. The Commissioner requires no steps to be taken.

² Case references EA/2006/0011 and EA/2006/0013

Right of Appeal

38. 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

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 16th day of August 2007

Signed

**Steve Wood
Assistant Information Commissioner**

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

Legal Annex: Relevant statutory obligations

1. **Section 1(1)** provides that:

(1) 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.

2. **Section 17** provides that:

(1) A public authority which ... 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.

3. **Section 41** provides that:

(1) Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

4. **Section 36(1) and (2)** provide that:

(1) This section applies to-

- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

- (a) would, or would be likely to, prejudice-
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or

- (iii) the work of the executive committee of the National Assembly for Wales,
- (b) would, or would be likely to, inhibit-
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.