

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 18 December 2008

Public Authority: Her Majesty's Court Service [HMCS] (an executive agency of the Ministry of Justice)

Address: Data Access and Compliance Unit
Information Directorate
Ministry of Justice
First Floor – Zone C
102 Petty France
London
SW1H 9AJ

Summary

The complainant requested information about a complaint he made against a member of staff. The public authority informed the complainant that this information was exempt under section 40(2) and section 31(g) [sic]. After examining the requested information the Commissioner has determined that the information was in fact exempt by virtue of section 40(1) as it was all the personal data of the complainant and that in fact the public authority was not obliged to comply with section 1(1)(a) by virtue of section 40(5). He has concluded that the request should have been processed as a request under the Data Protection Act 1998. He will now go on to make a separate assessment under section 42 of that Act. In failing to provide a refusal notice within twenty working days the public authority breached section 17(1). In failing to cite the section 31(1)(g) exemption it chose to rely on accurately it breached section 17(1)(a). The Commissioner has determined that the public authority should have issued a refusal notice stating that it was not required to confirm or deny whether the information requested was held by virtue of section 40(5). This is on the basis that the information would be the complainant's personal data and exempt under section 40(1). However the Commissioner has not ordered any remedial steps in this case.

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 Commissioner notes that under the Act Her Majesty's Court Service (HMCS) is not a public authority itself. At the time of the request it was actually an executive agency of the Department of Constitutional Affairs. Therefore the public authority for the purposes of the Act was actually the Department of Constitutional Affairs. Responsibility for HMCS transferred to the Ministry of Justice (MOJ) on 9 May 2007. Therefore this notice is served on the MOJ.
3. On 10 March 2007 the complainant made the following request to the public authority in accordance with section 1(1) of the Act:

'Your letter of 1 March is not acceptable. The damage caused by [Person name redacted] alleged behaviour is to me. I have to assess what to do next and whether to bring further proceedings against the Court Service or report [Person name redacted] for criminal prosecution.

I need to see the report [into this incident] and any documents, recordings or notes that were compiled in its preparation.'
4. On 26 March 2007 the public authority wrote to the complainant and advised him that it would have to take legal advice prior to disclosing the requested information under the Act. On 2 April 2007 the public authority wrote to the complainant about his initial complaint and informed him that it would contact the Access Rights Unit about what information he requested could be disclosed under the Act. On 14 April 2007 the complainant complained about the delay.
5. On 18 April 2007 the public authority provided a refusal notice. It indicated that it did hold information relevant to the complainant's requests. It also informed him that the information that he had requested included statements, written notes and the completed investigation report. It informed him that the information could not be disclosed under the Act because it had determined that sections 40 (2) (personal Information) and section 31(g) (by virtue of subsection (2)(b)) applied to the requested information. It also provided details of its public interest determination when determining whether section 31(g) should be maintained. It felt that the balance favoured maintaining the exemption in this case. The Commissioner notes that 31(g) is not a full citing of an exemption under the Act (see paragraph 22 below).
6. On 21 April 2007 the complainant requested an internal review from the public authority. He informed the public authority that he was dissatisfied with the response and asked for a reply in relation to a number of points.
7. On 3 May 2007 the public authority acknowledged the request for internal review. On 8 May 2007 the complainant requested clarification in relation to its previous letter. On 14 May 2007 the public authority wrote to the complainant and informed him that it was going to conduct an internal review because the letter of 21 April expressed dissatisfaction about the handling of his information request. On 18

May 2007 the complainant responded to this letter confirming that he required an internal review.

8. On 22 June 2007 the public authority provided an internal review. It informed the complainant that the exemptions were correctly engaged in its initial refusal notice dated 18 April 2007. It also responded to the number of points the complainant made in his letter of 21 April 2007.

The Investigation

Scope of the case

9. On 7 July 2007 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
10. This relates only to his request for information dated 10 March 2007 and not any other requests for information made by the complainant before or since.
11. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act. This relates to his later complaints about this matter. The Commissioner is only able to determine whether requested recorded information can be provided to the complainant.

Chronology

12. On 15 May 2008 the Commissioner wrote to the public authority and asked for information relating to the request including the withheld material.
13. On 5 June 2008 the Commissioner wrote to the complainant to indicate that he had requested the recorded information that was relevant to the request. He explained that in the first instance he would be assessing whether the information was the complainant's personal data and therefore exempt under section 40(1) the Act. If it was the request would become a Subject Access issue under the Data Protection Act 1998 (DPA).
14. On 5 June 2008 the public authority provided the information requested by the Commissioner.
15. On 17 June 2008 the Commissioner wrote to the complainant. He informed him that having examined the withheld information he was satisfied that it was his personal data. He explained that because this was the case it was exempt absolutely under section 40(1) of the Act. He further explained that he would set up another case for an assessment to be conducted under section 42 of the DPA as this was the correct legislation to consider the request under.
16. On 3 July 2008 the complainant indicated that he was dissatisfied with the Commissioner's opinion that this information was his personal data and asked for the Commissioner to consider again whether this information should be available

to him under the Act. The complainant indicated that he required a decision notice in this case.

Analysis

Procedural matters

17. In light of the Information Tribunal Decision in *King v Department for Work and Pensions* [EA/2007/0085] the Commissioner now determines whether there have been procedural breaches at the time of the internal review and if there has been no review, then at 20 working days from the date of the request.

Section 17(1)

18. The complainant made his request for information on 10 March 2007 and received a response dated 18 April 2007. This meant there were thirty three working days from the date of request to receiving a substantive response.
19. In *Bowbrick v Information Commissioner* [EA/2005/2006] at paragraph 69, the Tribunal confirmed that failing to issue a refusal notice within twenty working days is a breach of section 17(1) of the Act. It stated in relation to the case it was looking at that:

“the Council failed to identify within 20 working days of the request the exemptions upon which it relied in respect of certain documents falling within the scope of [the] request. It therefore failed to comply within its duty under s17(1) of FOIA within the time limit prescribed by that section.”

20. 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.”*
21. The thirty three working days taken to issue a refusal notice exceeds the statutory deadline of twenty working days. The Commissioner therefore finds that, in exceeding this statutory time limit, the public authority breached section 17(1) of the Act.

Section 17(1)(a)

22. The public authority also failed to correctly specify 31(1)(g) in both its refusal notice and its internal review. Instead it cited just section 31(g) on both occasions. The failure to correctly specify an exemption claimed is a breach of section 17(1)(a).

Exemption

Section 40(1)

23. The Commissioner is the regulator of both the DPA and the Act. The way the Act is worded means that the rights under the Act cannot prejudice or take precedence over a data subject's rights under the DPA.

24. In *Bowbrick v Information Commissioner* [EA/2005/2006] at paragraph 51 the Information Tribunal confirmed that the Commissioner can use his discretion to look at section 40 when considering cases under the Act:

'If the Commissioner considered that there was a section 40 issue in relation to the data protection rights of a party, but the public authority, for whatever reason, did not claim the exemption, it would be entirely appropriate for the Commissioner to consider this data protection issue because if this information is revealed, it may be a breach of the data protection rights of data subjects....Section 40 is designed to ensure that freedom of information operates without prejudice to the data protection rights of data subjects.'

25. The public authority cited section 40(2) and not 40(1) in its refusal notice and its internal review. The Commissioner has decided as the regulator of the DPA to use his discretion to consider whether section 40(1) applies to the requested information. If he identifies that section 40(1) applies he will ensure that an assessment under the DPA is carried out to determine whether the complainant has a right of access to the information under section 7 of that Act.
26. Under section 40(1) information that is requested that constitutes the applicant's 'personal data' is exempt information. This exemption is absolute and requires no public interest test to be conducted. In addition, in relation to information which is exempt by virtue of subsection (1) or would be if it were held, public authorities are not obliged to comply with section 1(1)(a) by virtue of section 40(5).
27. Section 40(1) states that:
- "(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject".

Subsection (5) states that:

"The duty to confirm or deny:

(a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1)".

28. In order to rely on the exemption provided by section 40, the information being requested must constitute personal data as defined by the DPA. The DPA defines personal data as:

'...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,

and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect to the individual'.

29. The Commissioner's understanding of the nature of personal data has been informed by the recent discussions of the Article 29 Working Party (a European advisory body on data protection and privacy). The Working Party worked to harmonize the definition of the nature of personal data.

30. In August 2007 to reflect these discussions, the Commissioner revised his guidance which is designed to assist organisations and individuals to determine whether information may be classified as personal data. In order to do this the guidance asks a series of questions. The Commissioner has considered the information being sought by the complainant along side these questions.

31. The Commissioner's Guidance can be viewed in full at the following link:

http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf

32. The Commissioner is satisfied that using his guidance all the requested information is the complainant's personal information in this case. It is information about the complainant that relates directly to him, that identifies and distinguishes him from other members of the public. It includes a report about his complaint and statements in connection with it. The Commissioner acknowledges that there is also third party data within the withheld material. Information can constitute the personal data of more than one individual and where this is the case, if the complainant is one of those individuals then section 40(1) is likely to apply.

33. In the case of *Mr Nicholas George Fenney v Information Commissioner [EA/2008/001]*, the Information Tribunal considered an appeal regarding a request for information about the appellant's complaint against the police. It stated that.

"There is no basis for arguing that the DPA intended that the only data subject to be considered when assessing a document incorporating data on more than one individual is the one whose data is more extensive or more significant. If information incorporates the personal data of more than one person the data controller is not required to attempt an assessment as to which of them is the

more significant and to then recognise the rights to protection of that individual and ignore any others. Its obligations are set out in sections 7(4) to 7(6) DPA, which require it to consider whether the information requested includes information relating to a third party and, if it does, to disclose only if that third party consents or it is reasonable in all the circumstances (by reference to the particular matters identified in subsection (6)) to comply with the request without his or her consent.

14. The file recording how the complaint lodged by the Appellant was handled includes his personal data for the purposes of DPA section 1 and therefore falls with FOIA section 40(1). The structure of the FOIA in this respect is quite clear and is intended to avoid overlap with the DPA. The information is therefore treated as covered by an absolute exemption and falls out of the machinery for disclosure set out in the FOIA and must be treated as a data subject request under DPA" (paragraphs 13 and 14).

34. The Commissioner has determined that, in view of the above, the public authority was in fact not obliged to confirm whether or not it held the information sought by the complainant, by virtue of section 40(5). However the request should have been treated as a Subject Access Request under section 7 of the Data Protection Act 1998. This is referred to in the 'Other matters' section below.
35. As the Commissioner has concluded that the withheld information is exempt from disclosure on the basis of section 40 (1) of the Act, and the appropriate regime under which the complainant may have a right of access to this information is under the DPA rather than the Act, the Commissioner has not gone on to consider whether the information was also exempt from disclosure on the basis of sections 31(1)(g) and 40(2).

The Decision

36. The Commissioner's decision is that the information was exempt from disclosure under section 40(1) of the Act and the public authority should have identified this as a request that needed to be processed under the DPA. In light of the contents of this Decision Notice the Commissioner has not ordered any remedial steps in this regard. However, as mentioned in the Other Matters section below, he does consider it appropriate for him to carry out an assessment of the public authority's compliance with the DPA under section 42 of that Act.
37. The public authority breached section 17(1) as it failed to provide a refusal notice to the complainant within the statutory time limits. It also breached section 17(1)(a) as it failed to correctly cite section 31(1)(g) accurately.

Other matters

38. Section 7 of the DPA gives an individual the right to request copies of personal data held about them – this is referred to as a right of Subject Access.
39. The Commissioner notes that this request should have been dealt with as a subject access request under section 7 of the DPA. He would encourage public authorities to consider requests under the correct regime in the first instance.
40. The Commissioner will go on to make an assessment under section 42 of the DPA of the public authority's compliance with that Act. This assessment will be dealt with separately and will not form part of this Decision Notice. An assessment under section 42 of the DPA is a separate legal process from the consideration under section 50 of the FOI Act.

Right of Appeal

41. 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

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 18th day of December 2008

Signed

**Steve Wood
Assistant Commissioner**

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

Legal Annex

Freedom of Information Act 2000

Section 1 - General right of access to information held by public authorities

- (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.

Section 10 - Time for compliance with request

- (1) 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 – Refusal of request

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(2) states –

“Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.”

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 17(5) provides that –

“A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.”

Section 31 - Law enforcement

Section 31(1) provides that:

“(1) 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—

...

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),

(2) The purposes referred to in subsection (1)(g) to (i) are—

(a) the purpose of ascertaining whether any person has failed to comply with the law,

(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,

(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,

(d) the purpose of ascertaining a person’s fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,

(e) the purpose of ascertaining the cause of an accident,

- (f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,
- (g) the purpose of protecting the property of charities from loss or misapplication,
- (h) the purpose of recovering the property of charities,
- (i) the purpose of securing the health, safety and welfare of persons at work, and
- (j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.'

Section 40- Personal Information

Section 40(1) provides that –

'Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.'

Section 40(5) provides that –

The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
- (b) does not arise in relation to other information if or to the extent that either-
 - (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
 - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).

Data Protection Act 1998

Section 7 - Right of access to personal data

Section 7 of the DPA 1998 provides that -

(1) Subject to the following provisions of this section and to sections 8 and 9, an individual is entitled—

- (a) to be informed by any data controller whether personal data of which that individual is the data subject are being processed by or on behalf of that data controller,
- (b) if that is the case, to be given by the data controller a description of—

- (i) the personal data of which that individual is the data subject,
 - (ii) the purposes for which they are being or are to be processed, and
 - (iii) the recipients or classes of recipients to whom they are or may be disclosed,
- (c) to have communicated to him in an intelligible form—
- (i) the information constituting any personal data of which that individual is the data subject, and
 - (ii) any information available to the data controller as to the source of those data, and
- (d) where the processing by automatic means of personal data of which that individual is the data subject for the purpose of evaluating matters relating to him such as, for example, his performance at work, his creditworthiness, his reliability or his conduct, has constituted or is likely to constitute the sole basis for any decision significantly affecting him, to be informed by the data controller of the logic involved in that decision-taking.

Section 42 - Request for assessment

Section 42 of the DPA provides:

- ‘(1) A request may be made to the Commissioner by or on behalf of any person who is, or believes himself to be, directly affected by any processing of personal data for an assessment as to whether it is likely or unlikely that the processing has been or is being carried out in compliance with the provisions of this Act.
- (2) On receiving a request under this section, the Commissioner shall make an assessment in such manner as appears to him to be appropriate, unless he has not been supplied with such information as he may reasonably require in order to—
- (a) satisfy himself as to the identity of the person making the request, and
 - (b) enable him to identify the processing in question.
- (3) The matters to which the Commissioner may have regard in determining in what manner it is appropriate to make an assessment include—
- (a) the extent to which the request appears to him to raise a matter of substance,
 - (b) any undue delay in making the request, and
 - (c) whether or not the person making the request is entitled to make an application under section 7 in respect of the personal data in question.
- (4) Where the Commissioner has received a request under this section he shall notify the person who made the request—
- (a) whether he has made an assessment as a result of the request, and
 - (b) to the extent that he considers appropriate, having regard in particular to any exemption from section 7 applying in relation to the personal data concerned, of any view formed or action taken as a result of the request.’