

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 9 September 2010

Public Authority: The Queen's Award Office, part of the Department for Business, Innovation and Skills
Address: 1 Victoria Street
London
SW1H 0ET

Summary

The complainant made a request for information under the Freedom of Information Act 2000 (the "Act") for a copy of an application form submitted for the Queen's Award for Enterprise: Innovation. The public authority provided some of the information from the form but withheld the remaining information on the grounds that section 43(2) of the Act applied. Prior to the commencement of the Commissioner's investigation, the public authority also applied sections 41 and 37(1)(b) to the withheld information; however, it only informed the Commissioner of these additional exemptions and not the complainant. The Commissioner's decision is that the information is exempt under section 41 of the Act. He has not therefore gone on to consider other exemptions cited. In addition, the Commissioner has noted some procedural breaches of the Act.

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 April 2009 the complainant wrote to the public authority and requested the following information under the Act:

"I am formally requesting, in writing, to see [company name redacted] application form for 2007 Queen's Award for Innovation..."

3. The public authority responded on 14 August 2009 and provided some of the requested information to the complainant. However, it withheld the remaining information and explained that it was considered to be exempt under sections 40 and 43(2) of the Act. The public authority explained that, in relation to section 43(2), the public interest in maintaining the exemption outweighed the public interest in disclosure.
4. The complainant responded on 13 October 2009 and requested an internal review into the application of section 43(2) of the Act.
5. The public authority contacted the complainant on 16 November 2009 and confirmed its original decision to withhold the requested information.

The Investigation

Scope of the case

6. On 23 November 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
7. As the complainant had asked the public authority to review only its application of section 43(2), the Commissioner considered the complainant had narrowed the scope of his request to include only information that was initially withheld under this section. The Commissioner confirmed this with the complainant on 26 January 2010. The Commissioner has also considered any procedural issues arising from the withholding of this information.
8. During the course of the investigation, some additional information was disclosed to the complainant. The Commissioner considers the issue of this information to be informally resolved and therefore he has not considered the matter in this Notice.

Chronology

9. On 24 November 2009 the Commissioner contacted the public authority and explained that a complaint had been made about the handling of this request under section 50(1) of the Act. The Commissioner asked the public authority to provide a copy of the information that had been withheld from the complainant and explained that the case would shortly be allocated to a case officer for investigation.
10. On 23 December 2009 the public authority wrote to the Commissioner and provided a copy of the information that had been withheld from the complainant. Further, it claimed additional exemptions, namely sections 41 and 37(1)(b), in respect of the withheld information, and explained to the Commissioner why it considered these exemptions to apply. The public authority also provided additional information to assist the Commissioner in making his decision.
11. The Commissioner wrote to the public authority on 4 February 2010 and asked for further clarification regarding the application of exemptions.
12. On 19 February 2010 the public authority responded and provided the Commissioner with the requested clarification.
13. Following correspondence with the complainant, the Commissioner contacted the public authority for information to address further allegations raised by the complainant.
14. The public authority responded on 17 May 2010 with the necessary information.

Analysis

Exemptions

Section 41 – information provided in confidence

15. The Commissioner has exercised his discretion to adjudicate on an exemption applied outside the statutory time for compliance with a request. He has done so as the exemption was raised prior to the commencement of his investigation and therefore he does not believe any prejudice has arisen by virtue of the exemption having been applied late. The Commissioner has therefore considered whether the

requested information is exempt under section 41 of the Act.

16. Section 41 provides that –

“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.”*

17. The withheld information constitutes part of an application form submitted by [company name redacted] to the public authority in a bid to receive the Queen’s Award for Enterprise: Innovation. The information was clearly obtained by the public authority from another person, in this case the company. Therefore, section 41(1)(a) is satisfied.

18. The Commissioner has considered whether disclosure of the information would constitute an actionable breach of confidence. In order for an actionable breach of confidence to arise, the following factors must be present:

- the information must have the necessary quality of confidence, namely it must not be trivial and must not be in the public domain; and
- the information must have been imparted in circumstances importing an obligation of confidence, whether expressed explicitly or implicitly.

19. In addition, the Commissioner is of the view that where the information that has been imparted is considered to be commercially confidential, it is necessary for the public authority to demonstrate that a detriment to the confider would occur if the information were to be disclosed. This approach was supported by the Information Tribunal in the case of *Higher Education Funding Council for England v Information Commissioner and Guardian News and Media Ltd* (EA/2009/0036).

20. The Commissioner has examined the remaining disputed information. It comprises the details of the company’s turnover, profits, sales figures, and other financial information, over a period of three years.

The Commissioner considers this not to be trivial information. Further, the public authority, having consulted with the company, has confirmed that this information is not in the public domain. The Commissioner therefore considers the information to have the necessary quality of confidence.

21. The Commissioner has considered the circumstances in which the company provided the information to the public authority. The public authority has explained that the application form (on which the withheld information was provided to the public authority) provides an express guarantee that the information contained within it will be kept confidential. The Commissioner is therefore satisfied that the information was imparted in circumstances importing an obligation of confidence.
22. The public authority has put forward the company's view that it would suffer a detriment if the requested information were to be released, as it would give the company's competitors information regarding market penetration and turnover. This could then be used by the competitors to the company's disadvantage when seeking business in a small market. The Commissioner considers that risk to the company's business may clearly be categorised as a detriment. The Commissioner is therefore satisfied that section 41(1)(b) of the Act applies.
23. Section 41 is an absolute exemption and there is no requirement for the public authority to conduct a public interest test under section 2(2) of the Act. However, there is a public interest defence to breach of confidence. The Tribunal considered the matter in the case of *Derry City Council v Information Commissioner* (EA/2006/0014) and concluded that there did not need to be an exceptional case to overturn an obligation of confidence, simply that the public interest balancing exercise to be carried out is the reverse of that usually carried out under the Act. Public authorities must therefore consider whether the public interest in disclosing the information outweighs the public interest in maintaining the confidence. However, the Commissioner is mindful that overriding the public interest in maintaining confidentiality is not to be done lightly.
24. The public authority recognised that there is a public interest in allowing the public to assess the integrity of the Queen's Award scheme. However, it explained that this public interest factor is met by the various checks that are built into the assessment process. Further, the public authority explained that additional information about the scheme is available online, and information about the company's performance is available on its website.

25. In relation to the public interest in maintaining the confidence, the public authority identified the following arguments:
 - the public interest in maintaining a duty of confidence where this duty exists;
 - the public interest in minimising risk to the company's business; and
 - the potential detriment to the Queen's Award scheme itself as a result of disclosure.
26. The public authority has explained that the information was provided by the company solely for use in conjunction with the assessment of its application for a Queen's Award for Enterprise. The company was given clear assurances that the information would be treated in confidence and that this confidence would be preserved. Further, as explained in paragraph 22 above, the company considers disclosure of the withheld information would be detrimental to its business, as it would provide useful information, particularly financial information, to competitors.
27. Further, the public authority has argued that breaching the duty of confidentiality to applicants for the Queen's Award for Enterprise is very likely to have a "*significant detrimental effect*" on the award scheme itself. The public authority has argued that if it cannot maintain its assurance that information supplied will be treated in confidence it is likely that the scheme will fall into disrepute with a reduction in the number of applicants, thus resulting in embarrassment to the Queen.
28. The complainant has made the Commissioner aware that he has attempted to be included on an award that has been granted and that disclosure of the requested information may assist him in deciding whether to take legal action in respect of the matter. However, this is a private, not a public, interest that the Commissioner is not able to take into account when determining whether the public authority would be able to defend its decision to disclose the requested information under the Act, and thus judging whether section 41 applies.
29. On being presented with the public interest arguments outlined above, the complainant made reference to various pieces of guidance issued by the Commissioner which state that embarrassment to the public authority should not be taken into account when deciding whether or not requested information should be released. However, the Commissioner draws a distinction between the argument raised by the complainant and the issue that arises in the present case, since there is no suggestion that the information itself contains embarrassing revelations. Furthermore, neither the Sovereign nor the Royal Family are public authorities for the purposes of the Act. In the circumstances of this case, the Commissioner accepts that potential embarrassment

- to the Queen is not a factor relevant to the assessment of the public interest which is specific to section 41. However, he does put significant weight on the explanation of the public authority in this case that its overriding concern is to be able to continue to attract a high number of applicants to the Queen's Award scheme (who are in turn willing to provide the necessary information to the public authority) and thus continue to be able to perform its functions in this regard.
30. The complainant has also asked the Commissioner to consider the age of the requested information, as he suggests that the requested information will become less sensitive with time. The Commissioner would like to make it clear that he is required to consider whether the public authority dealt with the request properly at the time it was made; he may not take into account any circumstances that have arisen since then or the passage of time since the request was made. Therefore, the request was made in April 2009 for information that includes financial information from as recently as 2007. The Commissioner therefore disagrees that a significant period of time has passed between the creation of the information at issue and the date of the request.
31. The Commissioner has considered the public interest arguments in favour of disclosure and in maintaining the confidence. He is of the view that, whilst there is a public interest in the openness and transparency of public authorities' performance of their functions, there is a particularly strong public interest in protecting the duty of confidence to the company. Information is already available to go towards meeting the public interest in transparency, whereas disclosure of the withheld information in this case, which is limited to financial information provided by the company to the public authority, is unlikely to increase the public's ability to evaluate the awards process.
32. The Commissioner's decision is therefore that the public interest in disclosing the information does not outweigh the public interest in maintaining the confidence. Therefore, the Commissioner is of the view that the public authority would have no public interest defence to breach of confidence if the requested information were to be disclosed. The section 41 exemption is therefore engaged.
33. As the Commissioner has found the information to be exempt under section 41, he has not gone on to consider whether the information is also exempt under sections 43(2) and 37(1)(b) of the Act.

Procedural Requirements

Section 1 – general right of access

34. The Commissioner has considered whether the public authority has complied with section 1 of the Act.

35. 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.”

36. The complainant made a request for information to the public authority. The public authority confirmed it held the information requested, but refused to provide it on the grounds that it was exempt from disclosure.

37. In confirming it held the requested information, the public authority has complied with section 1(1)(a). As described above, the Commissioner has determined that the public authority correctly withheld the requested information. Therefore, the public authority was not required to comply with section 1(1)(b).

Section 10 – time for compliance

38. The Commissioner has considered whether the public authority has complied with section 10(1) of the Act.

39. 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.”

40. The complainant’s request was made on 24 April 2009. The public authority failed to confirm, in writing, that it held the information in question until 14 August 2009. This is outside the twenty working day period for compliance. The public authority has therefore breached section 10(1) in respect of section 1(1)(a).

Section 16 – advice and assistance

41. The Commissioner has considered whether the public authority has complied with section 16(1) of the Act.

42. Section 16(1) provides that –

“It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it”.

43. The Commissioner considers that where a public authority complies with Part II of the Code of Practice issued under section 45 of the Act, it will be taken to have complied with section 16(1).

44. The complainant alleged that he made a verbal request for information on 11 February 2009 but was not informed until 23 April 2009, following several further conversations with the public authority, that the request should be made in writing. Section 8 of the Act states that requests must be made in writing to be valid for the purposes of the Act; only when they are valid are public authorities obliged to respond to them.

45. Paragraph 6 of the Code of Practice states that –

“Staff working in public authorities in contact with the public should bear in mind that not everyone will be aware of the Act, or Regulations made under it, and they will need where appropriate to draw these to the attention of potential applicants who appear unaware of them.”

46. The Commissioner asked the public authority to respond to the complainant's allegation that it had breached section 16(1) of the Act. It responded that it has no record of the telephone calls with the complainant but recognises that a delay *“may have occurred”*. The Commissioner considers that, in failing to inform the complainant that his request must be made in writing, the public authority has, on the balance of probabilities, breached section 16(1) of the Act.

Section 17 – refusal of a request

47. The Commissioner has considered whether the public authority has complied with section 17.

48. 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."*

49. The request was made on 24 April 2009 and responded to on 14 August 2009. Section 17(1) requires public authorities to provide refusal notices within twenty working days of receipt. The public authority has breached section 17(1) in responding outside the twenty working day period.
50. Further, the public authority cited further exemptions to the Commissioner, but not to the complainant, prior to the Commissioner beginning his investigation. In specifying exemptions late, the public authority breached section 17(1). In failing to provide details of the additional exemptions claimed to the complainant, the public authority has breached section 17(1)(b) and (c).

The Decision

51. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- it correctly withheld the requested information under section 41 of the Act.

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

- sections 10(1) and 17(1) by failing to observe the statutory time periods for confirming whether information is held and when refusing the request;
- section 16(1) for failing to provide timely advice and assistance; and
- section 17(1)(b) and (c) for failing to provide the complainant with a refusal notice in respect of certain exemptions.

Steps Required

52. The Commissioner requires no steps to be taken.

Right of Appeal

53. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

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 sent.

Dated the 9th day of September 2010

Signed

**Jon Manners
Group Manager**

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

Legal Annex

General Right of Access

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 1(2) provides that –

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

Section 1(3) provides that –

“Where a public authority –

- (a) reasonably requires further information in order to identify and locate the information requested, and
- (b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.”

Section 1(4) provides that –

“The information –

- (a) in respect of which the applicant is to be informed under subsection (1)(a), or
- (b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or

deletion that would have been made regardless of the receipt of the request."

Section 1(5) provides that –

"A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b)."

Section 1(6) provides that –

"In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as "the duty to confirm or deny"."

Time for Compliance

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 10(2) provides that –

"Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt."

Section 10(3) provides that –

"If, and to the extent that –

- (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
- (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given."

Section 10(4) provides that –

“The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.”

Section 10(5) provides that –

“Regulations under subsection (4) may –

- (a) prescribe different days in relation to different cases, and
- (b) confer a discretion on the Commissioner.”

Section 10(6) provides that –

“In this section –

“the date of receipt” means –

- (a) the day on which the public authority receives the request for information, or
- (b) if later, the day on which it receives the information referred to in section 1(3);

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.”

Duty to provide Advice and Assistance

Section 16(1) provides that –

“It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it”.

Section 16(2) provides that –

“Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is taken to comply with the duty imposed by subsection (1) in relation to that case.

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(4) provides that –

“A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt 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 17(6) provides that –

“Subsection (5) does not apply where –

- (a) the public authority is relying on a claim that section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and

- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request."

Section 17(7) provides that –

"A notice under section (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50."

Information provided in confidence

Section 41(1) provides that –

"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."

Section 41(2) provides that –

"The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence."

Commercial interests

Section 43(1) provides that –

"Information is exempt information if it constitutes a trade secret."

Section 43(2) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

Section 43(3) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).”