

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Dated 18 September 2006

**Public Authority:** Information Commissioner

**Address:** Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF

**Note:** The complaint in this case was made against the Information Commissioner. Since the Commissioner is himself a public authority for the purposes of the FOI Act, he is unusually under a duty to make a formal determination of a complaint made against himself. Although the Decision is that of the Commissioner, a draft of this Decision Notice was reviewed by a non-executive member of the Commissioner's Management Board to provide an independent element.

#### Summary decision and action required

The complainant requested a copy of a letter received by the UK government and copied to the Commissioner regarding alleged deficiencies in the implementation of Directive 95/46/EC by the UK. Although the Commissioner accepts that in some respects the request could have been better handled, in particular the manner of the refusal of the request, he remains of the view that he was correct not to communicate the requested information to the complainant. In the light of that conclusion, the notice requires no further action.

#### 1. Freedom of Information Act 2000 ('the Act') – Application for a decision and the duty of the Commissioner

1.1 The Commissioner has received an application for a decision whether, in any specified respect, the complainant's request for information made to the public authority has been dealt with in accordance with the requirements of Part I of the Freedom of Information Act 2000.

1.2 Where a complainant has made an application for a decision, unless:

- a complainant has failed to exhaust a local complaints procedure, or
- the application is frivolous or vexatious, or
- the application has been subject to undue delay, or
- the application has been withdrawn or abandoned,

the Commissioner is under a duty to make a decision.

- 1.3 The Commissioner shall either notify the complainant that he has not made a decision (and his grounds for not doing so) or shall serve a notice of his decision on both the complainant and the public authority.

## 2. The complaint

- 2.1 On 2 January 2005 the complainant made the following request for information to the Commissioner in accordance with section 1 of the Act:

*"In June [2004] the UK Government has received a 20 page letter from the European Commission about alleged deficiencies in the UK's implementation of Directive 95/46/EC. Could I have a copy of that letter please if you have it. If you have a copy of the Government's response (or likely response), I would like a copy of this please. This request should also include any communication received by the OIC [sic] in connection with the EC complaint.*

*I would also like any formal document that you have created internally which has as its focus letter [sic]. I do not want drafts of this document."*

- 2.2 A response was provided on behalf of the Commissioner on 28 January 2000, confirming that the requested information was held. The complainant was informed that the information was exempt from disclosure by virtue of exemptions at s.27 (international relations) and s.36 (prejudice to the effective conduct of public affairs) of the Act. Both these exemptions are subject to the public interest test and the complainant was advised that the Commissioner required more time to consider this. The letter of 28 January is referred to as the "first refusal notice".
- 2.3 The complainant was contacted again on 8 March 2005 and advised it that the public interest required the maintenance of the exemption at s.27 of the Act. No reference was made to s.36 although this had previously been cited. This letter is referred to as the "second refusal notice".
- 2.4 The complainant requested an internal review of this decision on 30 March 2005. This was conducted by one of the then Deputy Commissioners. In accordance with the Code of Practice issued by the Secretary of State under section 45 of the Act, this was someone more senior than the members of staff involved in the initial handling of the complainant's request and who had not himself been previously involved. He informed the complainant on 13 May 2005 that he had confirmed the initial decision to withhold the requested information. The complainant was informed that the Information Commissioner, as the "qualified person" for the public authority, had stated that in his opinion the disclosure of the requested information "would or would be likely to inhibit the free and frank exchange of views between [his] office and the DCA [Department of Constitutional Affairs] for the purposes of deliberation; and/or would otherwise prejudice, or would be likely to otherwise prejudice, the effective conduct of public affairs." The complainant was further advised that the Commissioner took the view that the public interest required the maintenance of this exemption. No other exemption was cited. The letter of 13 May is referred to as the "final refusal".

- 2.5 On 3 June 2005 the complainant contacted the Commissioner again to ask whether there was any further right of appeal. The complainant also asked whether the Commissioner could serve a Decision Notice in respect of the decision not to provide the requested information.
- 2.6 Following further correspondence, the file relating to the complainant's request was handed to a member of staff who had not been involved in the previous decisions to withhold the information.

### **3. Relevant statutory obligations under the Act**

#### **3.1 Section 1(1): general right of access**

“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.”

#### **3.2 Section 17: Refusal notices**

“(1) 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...

(3) 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...

- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

#### **3.3 Section 36: Effective conduct of public affairs.**

“(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 ...

- (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. “

#### **4. Review of the case**

- 4.1 The complainant has asked the Commissioner to review his decision to withhold the requested information.
- 4.2 The complainant had also requested information about the infraction proceedings from the DCA, and subsequently complained to the Commissioner about its refusal to provide it. The reference number of that case is FS50110720.
- 4.3 The officer to whom the case was allocated (“the investigating officer”) has had access to all the relevant papers and has had the opportunity to discuss the approach taken by those who dealt with the original request for information.
- 4.4 The complainant’s request was refused on 13 May 2005 (the second refusal notice) on the basis of s.36 of the Act. This exemption is only engaged if, “in the reasonable opinion of a qualified person, disclosure of the information under the Act” would prejudice the effective conduct of public affairs. The qualified person in this particular case is the Information Commissioner himself. The investigating officer established that the Commissioner gave his opinion in writing on 10 May 2005. The question of whether or not the Commissioner had regard to the relevant considerations and, therefore, whether his opinion was a reasonable one is considered in the next section of this Notice.
- 4.5 The requested information consists of a copy letter from the European Commission dated 7 July 2004, a letter from the public authority to the DCA dated 7 September 2006 and an undated copy letter from the UK Government to the European Commission. The correspondence concerns prospective infraction proceedings against the UK Government in connection with its transposition into national law of the European Data Protection Directive (95/46/EC) – ‘the Directive’.
- 4.6 It is clear from a review of the documents generated as a result of the request that the stated grounds for the refusal shifted. Initially access was refused on the basis of the s.27 and s.36 exemptions (the first refusal notice). Following the

application of the public interest test, reliance was placed on s.27 alone (the second refusal notice). The complainant requested an internal review of the refusal. As described above, this was carried out by one of the Deputy Commissioners then in office who took the view that although s.27 might be relevant in this case, it was difficult for the Commissioner, to whom the information had simply been copied, to reach an independent view as to the impact of disclosure upon relations between the UK government and the EU Commissioner. It should not be inferred from this that the Commissioner would find it difficult to properly assess whether or not another public authority has correctly relied upon the exemption provided by s.27 where required to do so in his capacity as regulator of the Act. Rather, it is suggested that any public authority which receives a document, the disclosure of which may prejudice international relations, will be likely to find it difficult to judge this point, if it does not itself generally deal with such information.

- 4.7 The then Deputy Commissioner considered that the application of s.36 was much more clear-cut and made a recommendation to that effect to the Commissioner. Refusal was subsequently confirmed, although reliance was now placed on s.36 rather than s.27 (the final refusal). The complainant considered that it was unfair that the Commissioner had apparently changed the basis of his refusal of the request on two separate occasions. This is a matter that is considered in the "Other Matters" section of the decision notice below.
- 4.8 In addition, the Commissioner has considered whether the second refusal notice given to the complainant on 13 May 2005, confirming that his request was being refused, complied with the requirements of s.17 of the Act.

## **5. The Commissioner's decision**

- 5.1 Since no reliance is now placed upon s.27 of the Act, this exemption is not considered in this Notice. The Commissioner has, instead focused upon the section 36 and the public interest test. He has also considered whether the request made to him was correctly handled.

### **5.2 Section 36**

- 5.2.1 Section 36 is engaged if, "in the reasonable opinion of the qualified person" the disclosure of information would prejudice the effective conduct of public affairs. In conducting the review of the initial refusal of the request, the then Deputy Commissioner highlighted the very strong view expressed by the DCA, which had originally supplied the information to the Commissioner. The basis of the DCA objection to disclosure (and, according to the DCA, that of the Foreign and Commonwealth Office) was the prejudice that would be likely to be caused to the relationship between the UK government and the EU Commission. In particular it was suggested that disclosure would have an adverse affect upon the continuing engagement of the UK government with the Commission on the current infraction proceedings. Although, as indicated earlier, the then Deputy Commissioner took the view that it was difficult for the Commissioner to judge the extent of any prejudice that might arise to the relations between the UK Government and the

EU Commissioner, he was in no doubt that the consequence of disclosure would be a worsening of the relationship between the Commissioner and the DCA.

- 5.2.2 One consequence of this would be that the DCA would be extremely reluctant to share similar correspondence with the Commissioner in the future. In the view of the then Deputy Commissioner this would lead to the adverse affect identified in s.36(2)(b), namely the inhibition of the free and frank exchange of views between the Commissioner's Office and the DCA for the purpose of deliberation.
- 5.2.3 A direct consequence of that is that being excluded from discussion of the proper interpretation of the Directive, the Commissioner would be less able to correctly interpret the Data Protection Act and thus to discharge his functions as a supervisory authority. In other words, disclosure would fall within the scope of s.36(2)(c) and would otherwise prejudice or be likely to prejudice the effective conduct of public affairs.
- 5.2.4 Having reviewed the advice given by the then Deputy Commissioner who conducted the internal review and the correspondence received from the DCA, the Commissioner remains of the view that the requested information was exempt by virtue of s.36 and that it was correct and reasonable, therefore, for him as the qualified person to have given his opinion to that effect. The opinion was given in writing shortly before the complainant's request was finally refused.
- 5.2.5 In addition to the advice given by the then Deputy Commissioner, the Commissioner also discussed the application of the exemption with his other Deputy and his Legal Adviser. It seems to the Commissioner that these are proper steps to have taken in forming a reasonable opinion.

### **5.3 The application of the public interest test**

- 5.3.1 Section 36 provides a qualified exemption. This means that even though information may be exempt a public authority is still required to disclose it if the public interest in disclosure is equal to or greater than the public interest in maintaining the exemption. In reviewing the public interest, the Commissioner has firstly identified the public interest factors favouring disclosure and then those favouring the maintenance of the exemption, before weighing one set of factors against the other.
- 5.3.2 Although complainants are under no obligation to explain why they consider that the public interest requires the disclosure of information, it is helpful that in this case very full representations on this point were received. A full account of these representations is detailed in the Decision Notice issued in relation to the case referenced FS50110720.
- 5.3.3 As the complainant has pointed out, the transposition of the Directive - particularly regarding issues of scope - has significant implications for the protection of individuals in respect of information held about them. It also affects the plans of businesses and others to process information about individuals. The complainant has pointed out that there is considerable uncertainty about the scope of data protection law, for example in the context of CCTV footage, and has argued that



releasing the requested information would shed some light on these matters. He has also argued that there is a legitimate public interest in allowing scrutiny of exchanges between the European Commission and the UK Government about implementation of the Directive, as apparently happens in other European countries, and that withholding the requested information harms the democratic process. Releasing the requested information would also allow a better understanding of the UK Government's general approach to the implementation of data protection law, particularly regarding issues of scope.

- 5.3.4 The Commissioner accepts that these are good arguments in favour of disclosure.
- 5.3.5 The Commissioner considers that there are three principle public interest factors in favour of maintaining the exemption.
- 5.3.6 Firstly there is a general public interest in the maintenance of confidences. This is recognised in the Act itself. Section 27(2) recognizes the importance of preserving confidences in respect of information obtained from other governments and international bodies. Section 41 meanwhile provides an absolute exemption if disclosure would result in an actionable breach of confidence. It is not argued here that either s.27 or s.41 is necessarily engaged. However, they do support the Commissioner's view that there is a general public interest in the preservation of confidences.
- 5.3.7 Second, the Commissioner and his staff are recognised as experts in Data Protection matters and as stakeholders in the legislation. The Commissioner believes that it is of public benefit to the DCA to be able to consult with him and take advantage of his expertise when considering possible amendments to the legislation. Although the DCA may be the immediate beneficiary of the expertise of the Commissioner in contexts such as this, the Commissioner believes that there are wider public benefits. In particular, he considers that there is a strong public interest in having the ability to influence public policy as it is made rather than after the event as a public consultee. This public interest factor relates particularly to the maintenance of the exemption provided by section 36(2)(b).
- 5.3.8 Finally, there is a public interest in the Commissioner being able to discharge his functions under the Data Protection Act as effectively as possible. From time to time issues may arise as to the extent to which the provisions of the Directive have been correctly transposed into the Act. An understanding of these issues may assist the Commissioner in developing advice for data subjects or data controllers and in placing a correct interpretation on the Act itself. If the DCA (or the Government in general) were to conclude that information about such matters could not be safely confided to the Commissioner this would hinder the Commissioner in the discharge of his functions. This factor relates particularly to the exemption provided by section 36(2)(c).
- 5.3.9 The Commissioner has weighed the factors in favour of the disclosure of the requested information against those in favour of maintaining the exemption. As stated, he recognises the significance which the Data Protection Directive and the 1998 Act have for data subjects, particularly as regards the intended reach of the

legislation and the important contribution which public debate may have to consideration of these matters. He is not convinced, however, that disclosure of the requested information would of itself resolve any areas of uncertainty or lead directly to greater protection for individuals. By contrast, he is certain that the disclosure of the requested information, despite the clear wishes of the party which provided it, would have a direct and adverse impact both upon the consideration of any similar issues arising in the future (since the Commissioner would be unlikely to be as fully consulted) and upon the discharge of his functions under the Act (since he would be cut off from access to important information as to the correct interpretation of the legislation for which he is the supervisory authority.) While recognising the force of the argument put by the complainant, the Commissioner remains of the view that while disclosure may bring some public benefits, it is much more certain that it would operate against the public interest for the reasons set out above.

#### **5.4 Section 17 (Refusal notices)**

- 5.4.1 Section 17 provides that where a public authority considers that the public interest requires the maintenance of an exemption, the refusal notice given to the applicant must explain why the public authority considers that this is the case.
- 5.4.2 In this particular case, the second refusal notice given to the complainant on 13 May 2005 simply stated that the requested information was exempt by virtue of s.36 of the Act. This led the complainant to enquire of the Commissioner whether there was any further right of appeal and, indeed, whether it was proposed now to apply the public interest test to the information which had been refused.
- 5.4.3 Although the then Deputy Commissioner did explain to the complainant, in his letter of 10 June, that the public interest test had been applied by the Commissioner when considering the applicability of the exemption and described the considerations that had been taken, the Commissioner considers that the notice of 13 May did not conform to the requirements of s.17. He also considers that it would have been helpful (even if not a strict requirement of the Act) to explain why it was not longer argued that the requested information was exempt by virtue of s.27.

#### **5.4 Process of establishing the relevance of section 36**

- 5.4.1 Information is exempt by virtue of section 36 of the Act if in the reasonable opinion of a qualified person the exemption is engaged. The timing of the giving of the opinion is therefore important since, until the opinion is given, information is not exempt.
- 5.4.2 Although it is clear that before the complainant's request was finally refused on 13 May 2005 the Commissioner had given his formal opinion, it is also clear that when s.36 was first cited in the refusal notice of 28 January no opinion had been given. The Commissioner considers, therefore, that it was not correct to cite s.36 in the first refusal notice.



5.4.3 At the same time, the Commissioner is satisfied (as discussed below) that the reliance placed upon s.27 was genuine and that he would have been entitled to claim an extension to the normal 20 working day period for response allowed by s.10 had s.36 been considered at the proper time. The Commissioner has emphasised to his staff that before s.36 is cited in the refusing any information request, his opinion as to the applicability of that section must be obtained.

## **6. Action required**

6.1 In the light of the above considerations, this Notice requires no steps to be taken to achieve compliance with the Act.

## **7. Other matters**

7.1 The complainant has raised concerns about the manner in which his request was handled and, in particular, the fact that different grounds for the refusal of his request were cited at different times.

7.2 As noted above, the first refusal notice given by the Commissioner on 28 January 2005 cited the exemptions at s.27 and (incorrectly) s.36 of the Act. An extension to the 20 working period for response allowed by s.10 of the Act was claimed in order to consider the public interest in relation to both exemptions. When the second refusal notice was given on 8 March 2005 no mention was made of s.36. The complainant requested an internal review of the refusal of his request. This concluded that, contrary to the grounds for refusal explained earlier, s.27 was not relevant but that s.36 was.

7.3 The Commissioner fully accepts that a complainant faced with changing grounds for the refusal of a request may feel that he or she has not been afforded an adequate opportunity to make representations.

7.4 He would certainly be highly critical of a public authority which changed its grounds for the refusal of a request in order to delay the release of information or order to force an applicant for information to make an appeal to the Information Tribunal, again resulting in a delay in the release of information.

7.5 However, the Commissioner is satisfied that in this particular case there was no intention to introduce unnecessary delay into the process. In effect the request was received and the DCA, the immediate source of the requested information, was consulted. The view was expressed by the DCA that disclosure would result in prejudice to the relations between the UK government and the EU Commission. Officials acting on behalf of the Commissioner accepted the force of the DCA arguments and on that basis agreed that s.27 was engaged. Had the Commissioner been asked for his opinion, as the qualified person, as to whether disclosure of the requested information was exempt by virtue of s.36, then the opinion given on 10 May would have been given at an earlier stage in the proceedings. In any event, the extension to consider the public interest could, however, still have been claimed.

- 7.6 The Commissioner recognises that the grounds for the refusal of the request were changed when the refusal was reconsidered on appeal. Since the whole purpose of a review is to reconsider the handling of a request with fresh eyes, it is not unlikely that this will occur from time to time. In the Commissioner's view, a public authority which realises that has erred in its initial handling of a complaint is right to correct that error. Providing that the Commissioner is satisfied that a public authority has been acting in good faith, as he is in this instance, and is not changing the grounds for refusal in order to delay the release of information, he does not find the fact the different exemptions are cited on appeal to be evidence of a failure to comply either with the letter or the spirit of the Act.
- 7.7 At the same time, the Commissioner notes that in this particular case the complainant, upon being informed of the outcome of the internal review did indicate that there were additional representations that he would have liked to make. Given the comprehensive submissions earlier made by the complainant, in this instance the Commissioner believes that the arguments in favour of the disclosure had been fully considered. However, he does accept that in other cases it may be appropriate to allow the opportunity for a second review.

## 8. Right of appeal

Either party has the right to appeal against this Decision Notice to the Information Tribunal (the "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](mailto:informationtribunal@dca.gsi.gov.uk)

Any Notice of Appeal should be served on the Tribunal within 28 days of the date on which this Decision Notice is served.

**Dated the 18<sup>th</sup> day of September 2006**

**Signed .....**

**Richard Thomas  
Information Commissioner**

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