



Freedom of Information Act 2000 (Section 50)

Decision Notice

Dated 31st May 2006

Public Authority: The Information Commissioner

Address: Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Summary Decision and Action Required

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.

The Commissioner's decision in this matter is that he did not deal with the Complainant's request for information in accordance with Part I of the Act in that it has failed to comply with its obligations under section 10, and section 17. The Commissioner is, however, satisfied that he was correct not to provide all the requested information by virtue of section 44 of the Act.

Although not a breach of Part 1 of the Act Commissioner also notes that there was a failure to comply with the provisions of the Code of Practice issued under section 45 of the Act.

The Commissioner is satisfied that there is no outstanding non-compliance. The Notice does not, therefore, specify any steps to be taken.

- 1. Freedom of Information Act 2000 (the 'Act') – Application for a Decision and the Duty of the Commissioner**
 - 1.1 The Information Commissioner (the 'Commissioner') has received an application for a decision whether, in any specified respect, the complainant's request for information made to the Commissioner himself has been dealt with in accordance with the requirements of Part I of the Freedom of Information Act 2000 (the 'Act').
 - 1.2 Where a complainant has made an application for a decision, unless:



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- 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- the application has been withdrawn or abandoned,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 The Complainant has advised that on 13 December 2005 he wrote to one of the Commissioner's assistant case resolution officers who was dealing with a complaint previously submitted by the complainant seeking copies of documents/information provided by the DTI to the ICO. The complaint also asked to be provided with further details of the "interim thinking of the Commissioner" to which the case officer had referred in an earlier letter of 6 December 2005.
- 2.2 On 14 December 2005 the officer wrote to the complainant, withholding the requested information (both "further details of our thinking" and the information provided by the DTI) on the ground that "providing you with further details of our thinking and information provided by the DTI would hinder us from conducting an efficient and effective independent investigation."
- 2.3 On 19 December, the complainant wrote to the case officer to complain about the response of 14 December, arguing, among other things, that this did not meet the requirements of section 17 of the Act and requesting an internal review of the decision not to release the requested information.
- 2.4 The letter of 19 December was acknowledged and a response promised by 16 February 2006. The response was not provided by the promised date and on 11 April 2006, the complainant wrote to the Commissioner chasing a response.
- 2.5 On 18 April the complainant reported receiving a response from the Commissioner to his letter of 19 December, although this was dated 10 April 2006. The 18 April letter acknowledged that the original request for information had not been correctly handled and stated that a refusal notice should have been issued. Some of the requested information, in particular copies of ICO letters to the DTI and notes of telephone conversations, was provided to the complainant. Other information, in particular information received from the DTI was refused. A refusal notice was attached explaining that this information had been withheld in reliance on section



44 of the Act (see below). The refusal notice provided information about the right to seek an internal review of the decision to withhold some of the requested information.

3. Relevant Statutory Obligations

3.1 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.”

3.2 Section 10(1) provides that –

“...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”.

3.3 Section 17(1) provides that –

“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.”

3.4 Section 17(7) provides that –

“A notice under subsection (1)... must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information...”



3.5 **Section 44(1)** provides that –

“Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it ... is prohibited by or under any enactment.”

3.6 **Schedule 2 (Part 11, paragraph 19)** provides that section 59 of the Data Protection Act 1998 is amended to the effect that the provisions of that section apply also to the Freedom of Information Act.

3.7 **Section 59 of the Data Protection Act 1998** provides that –

“(1) No person who is or has been the Commissioner, a member of the Commissioner's staff or an agent of the Commissioner shall disclose any information which-

(a) has been obtained by, or furnished to, the Commissioner under or for the purposes of this Act,

(b) relates to an identified or identifiable individual or business, and

(c) is not at the time of the disclosure, and has not previously been, available to the public from other sources,

unless the disclosure is made with lawful authority.

2) For the purposes of subsection (1) a disclosure of information is made with lawful authority only if, and to the extent that-

(a) the disclosure is made with the consent of the individual or of the person for the time being carrying on the business,

(b) the information was provided for the purpose of its being made available to the public (in whatever manner) under any provision of this Act,

(c) the disclosure is made for the purposes of, and is necessary for, the discharge of-

(i) any functions under this Act, or

(ii) any Community obligation, (d) the disclosure is made for the purposes of any proceedings, whether criminal or civil and whether arising under, or by virtue of, this Act or otherwise,

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(e) having regard to the rights and freedoms or legitimate interests of any person, the disclosure is necessary in the public interest.”

4. Review of the case

Handling of the Case

- 4.1 Since the complaint was made against the Commissioner himself, the case was allocated to a senior member of staff, an Assistant Commissioner.
- 4.2 The Assistant Commissioner obtained copies of all the documents held in connection with the original complaint made by the complaint against the DTI from which the information request to the Commissioner arose. He also obtained a copy of the manual file held in relation to the request for an internal review of the refusal of the request submitted on 19 December 2005.
- 4.3 He did not seek access to any legal analysis of how s.59 of the Data Protection Act 1998, as amended by the FOI Act 2000 applied to this particular request. This approach was indicated by section 51(5) of the Act which exempts communications between a professional legal advisor and his client (here the Commissioner) as to compliance with the Act from the scope of any information notice that the Commissioner may serve.
- 4.4 Having conducted his investigation of the complaint, the Assistant Commissioner submitted a draft Decision Notice for approval by the Commissioner.

Scope of the review

- 4.4 In investigating the complaint, the Assistant Commissioner considered the following issues:
 - The extent to which the request for information submitted on 13 December 2005 constituted a request under the Act;
 - The extent to which the response to the request for information submitted on 13 December was handled in accordance with section 10 of the Act;
 - The extent to which the response to the request given on 14 December 2005 and 10 April 2006 met the requirements of section 17 of the Act;
 - the extent to which the Commissioner was entitled under section 44 to withhold some of the requested information;
 - the extent to which information communicated to the complainant on 10 April 2006 met the requirements of section 1 of the Act
- 4.5 Although not a possible contravention of Part 1 of the Act, the Assistant Commissioner also considered:



- The extent to which the internal review of the refusal of the request of 13 December was handled in accordance with the requirements of the Section 45 Code of Practice

4.6 No issues arising in relation to the information which was provided to the complainant, that is copies of correspondence to the DTI and records of telephone conversations have been considered.

5. The Commissioner's Decision

5.1 The extent to which the request for information submitted on 13 December 2005 constituted a request under the Act

5.1.1 Although the request for information submitted by the complainant on 13 December 2005 did not make explicit that it was a request under s.1 of the Act, this is not a requirement of the Act. It is clear that the request fulfilled the basic requirements of section 8 of the Act in that it was submitted in writing, stated the name of the applicant and provided an address for correspondence.

5.2 The extent to which the response to the request for information submitted on 13 December was handled in accordance with section 10 of the Act

5.2.1 Although it is clear that the case officer who received the request did not recognise it as a request under the Act, he did provide a prompt response, albeit that this was a refusal of the request.

5.3 The extent to which the responses to the request given on 14 December 2005 and 10 April 2006 met the requirements of section 17 of the Act

5.3.1 Section 17 of the Act requires that, where an information request is refused, the reasons for that refusal are set out by reference to exemption in the Act in the form of a refusal notice. The notice must also provide details of any right of appeal offered by the public authority.

5.3.2 It is clear the response of the case officer of 14 December 2005 did not satisfy the requirements of section 17.

5.3.3 Internal advice given to ICO staff on the handling of requests for information distinguishes between requests made and answered in the normal course of business and requests which may be for more extensive information or which may be refused on the grounds of an exemption. Had the request of 13 December been answered positively, the failure to identify it as a request under the Act would not have been significant. However, in this particular case, the failure led to non-compliance with section 17.



- 5.3.4 Given that the request did not identify itself as such, the failure is perhaps understandable. However, the request for an internal review made on 19 December clearly indicated that the complainant considered his request to have been submitted under the Act and that a response in accordance with the requirements of section 17 was expected. Given that only six days had elapsed between the submission of the original request and the request for a review, there was clearly ample opportunity for the original error to have been rectified and for a refusal notice to have been issued within the timescale provided by section 10.
- 5.3.5 A refusal notice identifying the exemption relied upon and providing details of the opportunity to seek an internal review of the partial refusal of the request was given on 10 April 2006. Although the complainant appears to express some surprise at the content of this, namely that reliance is placed upon s.44 of the Act, whereas this was not mentioned in the communication from the case officer on 13 December, the Commissioner is satisfied that, albeit belatedly, an attempt was being made to meet the full requirement of section 17.
- 5.3.6 The extent to which the Commissioner was entitled to rely upon section 44 of the Act is considered later. However, section 17 provides that where it is not apparent that an exemption applies, the refusal notice should provide an explanation. Although it is clear that if section 44 of the Act applies then the requested information is exempt, no explanation is given in the refusal notice of why the Commissioner has taken the view that information received from a public authority cannot be disclosed by virtue of s.59 of the Data Protection Act. There is a tacit admission that s.59 is not necessarily easy to understand in the fact that the Commissioner has recently obtained Counsel's Opinion on the matter. The Commissioner accepts that, without disclosing privileged information, the refusal notice given on 10 April could have provided some further explanation of why s.44 applies in this particular case. It may also have been helpful to the complainant to have explained that, by coincidence, the advice from Counsel was obtained after his request was submitted but before the refusal notice of 10 April was given.
- 5.4 The extent to which the Commissioner was entitled under section 44 to withhold some of the requested information
- 5.4.1 Section 44 of the Act provides that information is exempt from disclosure under the Act if there is a statutory bar on disclosure.
- 5.4.2 The Commissioner is satisfied that in this case section 59 of the Data Protection Act as amended by the FOI Act operates as a statutory bar on the disclosure of information provided to him by the DTI. Although the words employed in section 59 are "relates to an identified ... business," suggesting perhaps that the DTI as a public authority is excluded, the Commissioner is satisfied that in this context the term "business" includes public authorities.



5.4.3 The Commissioner is also satisfied that no consent to disclosure has been given and that the information was not provided to him with the intention that it should be disclosed. The Commissioner is also satisfied that disclosure is not required for the discharge of his functions and that disclosure would be likely to inhibit other public authorities from volunteering information to him in the future and that this would not be in the public interest,

5.5 The extent to which information communicated to the complainant on 10 April 2006 met the requirements of section 1 of the Act

5.5.1 The complainant's request was for information contained in documents and for "further details" of the "Commissioner's thinking" in relation to the complainant's case involving the DTI. The Commissioner is satisfied that no recorded information exists which indicates his (or the case officer's) thinking on the case although it is easy to see how the complainant may have gained this impression from the wording of the case officer's letter. The Commissioner accepts that a full response to the request should have included a statement clarifying the position and indicating, in effect, that the requested information was not held.

5.6 Other matters

5.6.1 The provision of an internal review and the manner in which internal reviews are to be conducted are not specified the Act. However, public authorities including the Commissioner, are expected to comply with a Code of Practice issued by the Secretary of State under section 45 of the Act.

5.6.2 Among other things the Code states:

"In all cases, complaints should be acknowledged promptly and the complainant should be informed of the authority's target date for determining the complaint. Where it is apparent that determination of the complaint will take longer than the target time (for example because of the complexity of the particular case), the authority should inform the applicant and explain the reason for the delay."

5.6.3 It is clear that in this particular case, although the request for an internal review was acknowledged promptly and a target date given, there was a considerable and unexplained delay in completing the internal review. The Commissioner acknowledges this failing and has reminded the relevant staff of the need to advise those seeking an internal review of any unexpected delay in completing those reviews.

5.6.4 The complainant draws attention to the fact that the response to his request for an internal review was dated the day before he had occasion to send a chaser to the Commissioner. The Commissioner is satisfied from an examination of the internal



emails generated by the appeal and chaser that the response to the request of a review was indeed dispatched before the chaser was received. While the Commissioner understands why the complainant may have received the impression that the chaser prompted the response, he is satisfied that this is not the case.

6. Action Required

In the light of the fact the Commissioner does not consider that there is any outstanding issues of compliance, this Notice does not specify any further steps to be taken.

7. Right of Appeal

7.1 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

7.2 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 31st day of May 2006

Signed

**Richard Thomas
Information Commissioner**

Information Commissioner

Reference: FS50116262



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