

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 29 January 2008

Public Authority: Ministry of Justice (formerly Department for Constitutional Affairs)
Address: 54-60 Victoria Street
London
SW1E 6QW

Summary

The complainant requested the responses sent to MoJ regarding the implementation of the Human Rights Act within departments. MoJ refused to disclose the information under section 35 of the Act. The Commissioner investigated and found that section 35 was not engaged as the information did not relate to the formulation or development of government policy. The Commissioner requires the public authority to disclose the information within 35 calendar days of this notice.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. The complainant had advised that on 2 May 2005 he made the following request for information to Lord Falconer, then Secretary of State for Constitutional Affairs and Lord Chancellor:

“1. Which legislation have the courts found to be incompatible with the Human Rights Act, what corrective action has been taken in each case, what period of time elapsed between the court finding and the implementation of the corrective action, and what justification has been given for those cases if any where no corrective action has been taken.

2. What reply did you receive from the Department of Work and Pensions and the Department for Constitutional Affairs to the questions ‘What are you doing to mainstream human rights in your department?’ which you told the Joint Committee on Human Rights in December 2003 you would put to each of the departments of state.”

3. The Department of Constitutional Affairs (now known as the Ministry of Justice and referred to as MoJ throughout this notice) responded on 1 June 2005. In respect of the first part of the request it enclosed a document listing the declarations of incompatibility made under s4 of the Human Rights Act 1998 (HRA). With regards the second part of the request MoJ informed the complainant that it considered section 35 (1) (a) ‘formulation of government policy’ applied and that it required more time to consider the public interest test, as permitted by section 10(3) of the Act and would respond substantively at a later date.
4. MoJ provided a substantive refusal on 1 August 2005 confirming that in relation to the second part of the request section 35 (1) (a) was being applied and that in considering the public interest test it had found that the public interest lay in maintaining the exemption. MoJ also explained that section 22 applied since the government intended to publish a summary of departmental responses to the review.
5. On 23 August 2005 the complainant responded requesting an internal review of the decision to withhold the information requested in part 2 of his request.
6. MoJ completed its internal review and responded to the complainant on 19 May 2006. MoJ acknowledged that section 22 should not have been applied as it had no intention of publishing the summary of responses to the review. MoJ considered that the exemption at section 35(1) (a) was still engaged but had found some information that should have been disclosed under section 35(4) as it is factual information about actions already taken to mainstream Human Rights compliance by the departments.
7. The complainant wrote to the Commissioner on 1 June 2006 informing him that he had now received the internal review and expressing his wish

that the Commissioner now investigate the MoJ's refusal to disclose the information requested. Included in the correspondence forwarded to the Commissioner was correspondence between the complainant and MoJ relating to a previous information request dated 16 December 2002.

The Investigation

Scope of the case

8. The complainant made his request on 2 May 2005 to the Secretary of State for Constitutional Affairs, Lord Falconer, and the public authority at the time of the request was therefore the Department for Constitutional Affairs. The Department for Constitutional Affairs was integrated into the new MoJ on the 9 June 2007, the Commissioner is satisfied that for the purposes of the Decision Notice the public authority is now the MoJ.
9. On the 13 March 2006 the complainant wrote to the Commissioner requesting a review of MoJ's refusal to disclose the requested information. Following receipt of the internal review decision on 19 May 2006 the complainant wrote again to the Commissioner. In his request the complainant asked the Commissioner to investigate two FOI requests, one dated 16 December 2002 and one dated 2 May 2005.
10. The Commissioner wrote to the complainant on 22 June 2007 explaining that he could not investigate the handling of the information request dated 16 December 2002 as this was made prior to the Act coming into force on 1 January 2005.
11. The complainant also wished to complain about the length of time taken by MoJ to complete the internal review. This has been addressed in the 'Other Matters' section of this notice.
12. The Commissioner's investigation therefore focused on the refusal to disclose the information requested in the second part of the complainant's request dated 2 May 2005 under section 35(1) (a) of the Act. The complainant did not complain about the handling of the first part of this request.

Chronology

- 13 On 29 June 2007 the Commissioner began his investigation by writing to the MoJ. In the letter the Commissioner asked for a copy of the information being withheld, further explanation regarding the application of

- the exemption and an expansion on the public interest arguments considered both for and against maintaining the exemption.
14. MoJ responded on the 24 August 2007 explaining in more detail why the exemption applied, expanding on the public interest arguments and providing a copy of the information being withheld.
 15. The Commissioner wrote to MoJ on 28 August 2007 asking further questions regarding the application of the exemption having now been able to view the information being withheld.
 16. MoJ responded on 5 October 2007 providing further information regarding the application of the exemption and the context and background to the generation of the information requested.

Findings of fact

17. The outstanding request is for the two responses sent by the former Department for Constitutional Affairs (DCA) and the Department for Work and Pensions (DWP) in respect of the strategic review of their arrangements for implementing the HRA.

Background Information

18. The Joint Committee on Human Rights (JCHR) is charged with considering human rights issues within the UK. Its terms of reference are to consider:
 - (a) matters relating to human rights in the United Kingdom (but excluding consideration of individual cases);
 - (b) proposals for remedial orders, draft remedial orders and remedial orders made under section 10 of and laid under Schedule 2 to the Human Rights Act 1998; and
 - (c) in respect of draft remedial orders and remedial orders, whether the special attention of the House should be drawn to them on any of the grounds specified in Standing Order 73 (Joint Committee on Statutory Instruments).
19. On 8 December 2003 Lord Falconer, then Secretary of State for Constitutional Affairs, gave oral evidence to the JCHR. The Committee outlined the purpose of the meeting stating that it wanted to take an early opportunity to examine Lord Falconer's thinking about human rights policy (as his Department had responsibility for its implementation), to find out where it was going, and his areas of responsibility. The Committee wished

to discuss the general strategic issue, looking at the role of the Department in relation to human rights, and asking what he saw as his priorities, and what the goals of his Department were in relation to its responsibility for human rights policy.

20. In his response Lord Falconer said:

“As far as Government is concerned, each Government Department should review what each individual Department is doing to ensure that its mainstreaming of human rights is part of Government activity. My Department is going to drive that through Government. I am pleased to say we have already taken steps towards that review. It will ask the question of Departments: “What are you doing to mainstream human rights in your Department?” (www.publications.parliament.uk Joint Committee on Human Rights – Minutes of Evidence)

Analysis

Exemption: Section 35 ‘Formulation and development of government policy’

21. Section 35(1) (a) of the Act provides that information is exempt if it relates to the formulation or development of government policy.
22. MoJ explained that the two responses were sent by the former DCA and the DWP in respect of the strategic review of their arrangements for implementing the HRA. This review was intended to assess the capability of Whitehall departments in fulfilling their responsibilities under the HRA, particularly in the guidance and training that is provided to staff and in the departmental policies on ensuring compliance with human rights. The responses were provided to the former DCA on the understanding that Departments could be free and frank.
23. MoJ explained that whilst the responses contain some discussion of policy formulation, they also contain a certain amount of factual information about measures that have already been put in place to embed the HRA. MoJ stated that as the report assessing the response and setting out recommendations for steps forward falls within the realm of policy formulation, and the responses only exist to inform that report. The exemption also applies to the information contained within the letters.
24. The responses fed into a strategic review which was later merged into the wider Review of the Implementation of HRA. The strategic review

- focussed on procedure while the Review also included consideration of outcomes in human rights compliance. MoJ argue that it is government policy that its policies should be compatible with Convention Rights and that the Convention should be mainstreamed within a culture of public service delivery. Both the strategic review and the Review of the Implementation of HRA informed the development and delivery of this policy and enabled an assessment by the former DCA of the future direction of the policy.
25. The Commissioner takes the view that the 'formulation' of government policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs and recommendations or submissions are put to a Minister. 'Development' may go beyond this stage to the processes involved in improving or altering already existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy. As a general principle, however, he considers that government policy is about the development of options and priorities for Ministers, who determine which options should be translated into political action. It is unlikely to be about purely operational or administrative matters, or a policy which has already been agreed or implemented.
 26. In this case, the information consists of two responses sent to the former DCA in response to the question; what are you doing to mainstream human rights in your department? The responses set out the situation, as regards the implementation in two government departments, DWP and the former DCA. In both cases they refer to the remit for human rights and where responsibility lies within the departments; training of staff on human rights legislation both currently and in the future; a high level overview of the content of the training; awareness of human rights within the department and an overview of how the department is ensuring they comply with human rights legislation.
 27. MoJ acknowledged that the strategic review involved assessing how well departments have put in place necessary procedures to implement the HRA and assessing any areas in which there could be failures.
 28. The Commissioner does not consider that the information itself relates to the formulation or development of government policy. The departments were asked what they were doing to ensure the implementation of a new piece of legislation and the responses therefore reflect procedures in place to do so. MoJ argue that it is government policy that policies should be compatible with human rights; the Commissioner acknowledges that the responses show the actions taken to adhere to this high level policy but the information requested does not relate to the formulation or development of this policy or any other specific government policy. The

information consists of procedures already in place within departments to implement legislation and a high level policy decision to ensure departments are adhering to the HRA.

29. Whilst the Commissioner accepts that the strategic review and later Review of the Implementation of Human Rights may fall within the exemption at section 35 he does not accept the argument that as the responses only exist to inform the review that the information contained within must also relate to the formulation or development of government policy.
30. The Commissioner finds that the exemption at section 35 of the Act is not engaged, there is therefore no requirement on him to go on to consider the public interest test.

The Decision

31. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act.

Steps Required

32. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
 - Disclose the information withheld under section 35 of the Act.
33. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Other Matters

34. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern. Section VI of the Code of Practice (provided for by section 45 of the Act) makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information. The Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that in the context of provisions in the

Act a reasonable time for completing an internal review is 20 working days from the date of the request for review. He accepts that, in exceptional circumstances, it may be reasonable to take longer, but the total time taken should not exceed 40 working days.

35. In this case the complainant requested an internal review on 23 August 2005. MoJ sent its internal review decision to the complainant on 19 May 2006. MoJ have provided no explanation for the delay in completing the review, either to the Commissioner or to the complainant. The Commissioner acknowledges however, that the request that is the subject of this decision notice was made during the relatively early stages of the Act's implementation and prior to the publication of his guidance on the matters.

Failure to comply

36. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

37. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

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

Dated the 29th day of January 2008

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

Formulation of Government Policy

Section 35(1) provides that –

“Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (a) the formulation or development of government policy,
- (b) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request or the provision of such advice, or
- (d) the operation of any Ministerial private office.

Section 35(2) provides that –

“Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded-

- (a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or
- (b) for the purposes of subsection (1)(b), as relating to Ministerial communications.”

Section 35(3) provides that –

“The duty to confirm or deny 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).”

Section 35(4) provides that –

“In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking.”

Section 35(5) provides that –

“In this section-

"government policy" includes the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the National Assembly for Wales;

"the Law Officers" means the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland and the Attorney General for Northern Ireland;

"Ministerial communications" means any communications-

- (a) between Ministers of the Crown,
- (b) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or

- (c) between Assembly Secretaries, including the Assembly First Secretary, and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly, and proceedings of the executive committee of the National Assembly for Wales;

"Ministerial private office" means any part of a government department which provides personal administrative support to a Minister of the Crown, to a Northern Ireland Minister or a Northern Ireland junior Minister or any part of the administration of the National Assembly for Wales providing personal administrative support to the Assembly First Secretary or an Assembly Secretary;

"Northern Ireland junior Minister" means a member of the Northern Ireland Assembly appointed as a junior Minister under section 19 of the Northern Ireland Act 1998."