

Freedom of Information Act 2000 (Section 50)

Decision Notice

27 October 2008

Public Authority: Department for Children, Schools and Families
Address: Sanctuary Buildings
Great Smith Street
London
SW1P 3BT

Summary

The complainant requested copies of correspondence to and from the (then) Department for Education and Skills (DFES) (now the Department for Children, Schools and Families (DCSF)) concerning correspondence with him. The public authority provided some information, but withheld other information citing the exemption in section 42 (legal professional privilege). The Commissioner finds that the public authority was not obliged to comply with section 1(1) of the Act on the basis of the exemption contained at section 40(1) and (5). The Commissioner also found that the public authority had breached sections 10(1) and 17(1) of the Act by late disclosure of some of the requested information and by failing to issue a refusal notice within 20 working days of receiving the request.

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 legal provisions relevant to the decision are set out in detail in the Legal Annex to the Notice.

The Request

2. On 22 January 2007 the complainant asked DFES (now DCSF, which term is used throughout this Notice for ease of reference) for 'copies of correspondence to and from [DCSF], including all internal correspondence, from and including 30/10/05 to 18/1/07, that concerns correspondence with me'. He said that direct correspondence with him was excluded, but all other correspondence generated

in connection with correspondence with him, including any correspondence where his name was mentioned or he was referred to, was included.

3. On 24 January 2007 DCSF acknowledged the information request, saying that its target for responding to FOI requests was 20 working days. On 15 February 2007 DCSF emailed the complainant to say that it would be unable to deal with his request within that timescale, but it expected to be able to reply by 2 March 2007.
4. On 1 March 2007 DCSF provided the complainant with much of the information he sought (redacted to remove officials' names), but withheld some of the information under the exemption in section 42, arguing that it was protected by legal professional privilege and the balance of the public interest lay in withholding that information. Also on 1 March 2007 the complainant sought a review of that decision, disputing the redaction of names and that section 42 was appropriate.
5. On 31 March 2007 he complained to the Commissioner that the initial response to his information request had been delayed and he had been given no reason, and that he had had no acknowledgement of his review request.
6. On 13 April 2007 DCSF completed its review. It agreed to release the names of officials but maintained its position that the remaining information should be withheld under the exemption in section 42.

The Investigation

Scope of the case

7. On 26 April 2007 the complainant wrote to the Commissioner to complain about the way his request for information had been handled and to reiterate his concerns about DCSF's reliance on section 42.

Chronology

8. On 27 November 2007 the Commissioner asked DCSF for its relevant papers including the withheld information. DCSF responded on 28 December 2007 and in doing so provided the Commissioner with a copy of the withheld information.

Analysis

Procedural matters

9. The complainant has complained that DCSF delayed unduly in replying to his information requests under the Act. Under section 10(1), a public authority must inform a person making a request for information whether it holds the information requested, and communicate that information to the applicant, no later than the

twentieth working day following the date of receipt. Under section 17(1) of the Act, a public authority that is to any extent relying on a claim that any information is exempt information must, within the time limit set out in section 10(1), give the applicant a notice that states that fact, specifies the exemption in question, and states why the exemption applies.

10. The complainant initially sought information on 22 January 2007. On 15 February 2007 DCSF told the complainant that it expected to be able to reply by 2 March 2007 (and in fact responded substantively on 1 March 2007). DCSF has therefore exceeded the time limit set out in section 10(1) of the Act for providing the full substantive responses outlined above, and it has therefore acted in breach of the requirements of sections 10(1) and 17(1) of the Act.

Exemption

11. The Commissioner is the regulator of both the Data Protection Act 1998 ('the DPA') and the Act. The wording of the Act ensures that the rights under the Act cannot prejudice or take precedence over a data subject's rights under the DPA. This interpretation was confirmed in the recent House of Lords decision: *Common Services Agency (Appellants) v Scottish Information Commissioner (Respondent) (Scotland)* [2008] UKHL 47.

12. In *Bowbrick v Information Commissioner* in paragraph 51 the Information Tribunal confirmed that the Commissioner had discretion under the Act to look at section 40 issues when considering cases under the Act:

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

13. In this case the DCSF has cited the exemption at section 42 as its basis for withholding the information requested by the complainant. However, the Commissioner has examined the terms of the complainant's information request and the withheld information and is satisfied that it would all constitute personal data relating to the complainant, and that the exemption in section 40(1) of the Act relating to personal information is engaged. Under section 40(7) the expressions 'data subject' and 'personal data' are held to have the same meaning in the Act as they have in the DPA.
14. The Commissioner's reasons for deciding that the withheld information contains the personal data of the complainant are that:
 - the complainant can be identified from the withheld information;
 - the information in question is linked to his complaint, the handling of it and how the relevant legislation relates to his circumstances; and

- the information could be said to have been used to inform or influence actions or decisions affecting him.
15. The Commissioner therefore concludes that the information identifying the complainant is personal data relating to the complainant and is exempt from disclosure under section 40(1). In reaching this conclusion the Commissioner has taken into account his guidance about what is personal data, in particular questions 1 to 5 of that guidance. This can be viewed on his website via the following link:
http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf.
Section 40(1) is an absolute exemption and therefore is not subject to the public interest test.
16. The Commissioner also wishes to highlight the fact that under section 40(5) 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 section 40(1). Therefore in this case the public authority did not have a duty to confirm or deny whether the information requested was held.
17. Since the Commissioner has concluded that the exemption at section 40(1) and (5) applies to all of the withheld information he has not gone on to consider whether or not the exemption at section 42 of the Act likewise applies to that information.

The Decision

18. The Commissioner's decision is that the public authority:
- breached sections 10(1) and 17(1) of the Act by failing to either provide the information or to issue a refusal notice within 20 working days of receiving the information request; and
 - did not have an obligation to comply with section 1(1) of the Act on the basis of the exemption contained at section 40(1) and (5).

Steps Required

19. The Commissioner requires no steps to be taken.

Other matters

20. Although it does not form part of this Decision Notice the Commissioner wishes to highlight the following matters.

The Commissioner takes the view that it is appropriate for public authorities to identify information within a request which is subject to section 40(1) or (5) when it is received. It should then consider access to that information under the DPA subject to the applicant providing the applicable £10 fee and any identification that may be required to prove that they are the data subject. Public authorities should then go on to consider any of the outstanding elements of a request under the Act. At that stage consideration could be given to any of the other aspects of Part I of the Act that may mean it is not obliged to comply with section 1(1).

Right of subject access

21. As regards the personal information to which section 40(1) and (5) has been held to apply, section 7 of the DPA gives an individual the right to request copies of personal data held about them – this is referred to as the right of subject access. The Commissioner has made an assessment under section 42 of the DPA as to whether the information in question in this case should have been disclosed to the complainant under this access right, and the complainant has been notified of the outcome. However, that assessment does not part of this Decision Notice.

Right of Appeal

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

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

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

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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

Dated the 27th day of October 2008

Signed

**Nicole Duncan
Head of FOI Complaints**

**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.”

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.”

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.”

Personal information.

Section 40(1) provides that –

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

Section 40(5) provides that –

“The duty to confirm or deny:

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

Section 40(7) provides that –

In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act.

Legal Professional Privilege

Section 42(1) provides that –

“Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”