

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 11 December 2008

Public Authority: Plymouth Teaching Primary Care Trust
Address: Mount Gould Admin Block
Mount Gould Hospital
Plymouth
Devon
PL4 7QD

Summary

The complainant made three requests (dated 14, 15 and 16 May 2007) under the Freedom of Information Act 2000 (the "Act") to the Plymouth Teaching Primary Care Trust (the "Trust") for correspondence and other information relating to suspensions from the Trust. The Trust dealt with the request of 14 May 2007 under the Data Protection Act 1998 (the "DPA") and therefore this request was not considered under the Act. In relation to the request dated 15 May 2007, the Trust responded to the requirement of section 1(1)(a) of the Act in confirming or denying whether the information was held. In relation to the request of 16 May 2007 the Trust applied section 12 as it explained that the cost of providing the information would exceed the cost limit. Furthermore the Trust sought to rely upon the exemption contained at section 40(2) of the Act as it stated that to provide the information requested would breach the data protection principles. The Commissioner concluded in relation to the request of 15 May 2007, that if the information was held it would be exempt for disclosure on the basis of section 40(1) of the Act and that the Trust was not obliged to confirm or deny whether or not the information was held by virtue of section 40(5) of the Act. The Commissioner believes that the Trust should have treated this request as a subject access request under section 7 of the DPA. In relation to the request of 16 May 2007 the Commissioner upheld the Trust's application of section 12.

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 Act. This Notice sets out his decision.
2. In considering this case, the Commissioner has also taken into account his dual role as regulator of the Data Protection Act 1998 ("DPA"). As a

result the approach he has adopted in this case together with his findings encompasses and reflects his remit under both pieces of legislation.

The Request

3. On 14 May 2007 the complainant made a request for various pieces of correspondence. On 22 May 2007 the Trust refused to disclose the information requested under the Act on the basis of the exemption contained at section 40(1). The Trust explained that the information requested constituted personal data of which the applicant (the complainant) is the data subject. The Trust therefore dealt with this request as a subject access request under the DPA. As this request was dealt with outside of the Act the Commissioner has not considered it within the scope of this investigation.
4. On 15 May 2007 the complainant made a request for the following information:-
 - i. Copies of all letters, internal emails, and records of conversations and meetings between 1 February 2007 and 15 May 2007 inclusive.

To and from:
[named individual], HR Department and [named individual], Counter Fraud Office.

To and from:
[named individual], *Counter Fraud Office* and [named individual], HR Department.

Subject [complainant].
5. On 16 May 2007 the complainant made a request for the following information:
 - i. The total number of Plymouth Primary Care Trust staff that had been suspended from work with pay for over 30 days between 1 May 2006 and 30 April 2007.
 - ii. The reason as to why the staff had been suspended with pay.
 - iii. The total number of Plymouth Primary Care Trust staff that had been suspended from work without pay for over 30 days between 1 May 2006 and 30 April 2007.

- iv. The reason as to why the staff had been suspended without pay.
6. The Trust replied to the request of 15 May 2007 on 22 May 2007, by responding to the Act's section 1(1)(a) requirement to confirm or deny whether the information was held
7. The Trust also provided a response to the request of 16 May 2007 on 22 May 2007. The Trust refused the complainant's request. The Trust asserted that the information requested was not held by the Trust under section 1(1)(a) of the Act.
8. The complainant requested an internal review of the Trust's decision on 23 May 2007. The Trust wrote to the complainant with the details of the result of the internal review it had carried out on 24 May 2007. It responded to the complainant as follows:-

Request of 14 May 2007: the Trust reiterated its earlier response that the information requested constituted personal data of which the applicant is the data subject and therefore is exempt under Section 40(1) of the Act. The Trust dealt with this request in full under the DPA.

Request of 15 May 2007: the Trust confirmed or denied whether the information was held under section 1(1)(a) of the Act.

Request of 16 May 2007: the Trust reiterated that the information requested is not held by the Trust. To retrieve it would mean sifting through individual HR files which the Trust believed would be a breach of the data protection principles. Furthermore the Trust asserted that the cost of retrieving the information would exceed the cost limit as set out by Section 12 of the Act. The Commissioner's comments in relation to this ambiguous response are outlined in paragraph 11.

The Investigation

Scope of the case

9. On 30 July 2007 the complainant contacted the Commissioner to complain about the way her request for information had been dealt with. The complainant specifically asked the Commissioner to investigate whether the Trust had complied with the Act in dealing with her requests for information. As previously stated as the request of 14 May 2007 was dealt with outside of the Act the Commissioner has only considered the requests of 15 and 16 May 2007 within the scope of this investigation.

Chronology

10. The Commissioner contacted the Trust on 16 June 2008 in order to discuss its handling of the complainant's request. The Commissioner asked the Trust to respond to a number of queries in relation to the request of 16 May 2007. Furthermore the Commissioner wished to obtain a copy of the complainant's request dated 15 May 2007 as a copy of this request had not been provided at that point.
11. Upon consideration of a letter from the Trust to the ICO dated 13 September 2007 (sent prior to the commencement of the Commissioner's formal investigation), the Commissioner was able to conclude that the Trust does hold the information requested on 16 May 2007 (albeit this information may be onerous to collect). The Commissioner was able to reach this conclusion as whilst the Trust stated that it did not hold the information in the form of a list it went on to describe the steps that it would be required to take to gather the information in order for it to be able to answer the request. The Commissioner therefore initially wished to establish whether or not the cost limit set out under section 12 would be exceeded in retrieving this information before considering the exemption cited by the Trust. The Trust was asked to clarify how complying with the complainant's request would exceed the cost limit of £450 set by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the "Regulations"). It was asked to provide a breakdown of the cost of complying with the request in relation to:-
 - determining whether the Trust holds the information,
 - locating the information, or a document which may contain the information,
 - retrieving the information, or a document which may contain the information, and
 - extracting the information from a document containing it (including editing or redacting the information).
12. On 15 July 2008 the Trust provided the Commissioner with a copy of the complainant's request dated 15 May 2007.
13. On 24 July 2008 the Trust wrote again to the Commissioner, explaining that the information requested on 16 May 2007 was not a stand alone document. It was information detailing staff suspensions, which is written in and stored in hard copy files. These files vary in size depending on the length of service and issues arising in employment. All staff files relating to this request are stored in two rooms within the organisation. The Trust's staff records are ordered chronologically and there is no defined area of a personnel file allocated to disciplinary/suspension issues. Furthermore it clarified that to locate this type of information would equate to an average time spent of 5 minutes per file. Within the time frame of the request the figure would be approximately 3000 employee files. The Trust therefore calculated

that this would equate to an estimated 250 hours work to retrieve the information held. Depending on the number of cases identified, further processing would be required to extract the data such as cross checking with payroll. The Trust therefore asserted that this would exceed the appropriate cost limit.

14. The Trust also explained within its response that it could not carry out an electronic search for the information because the request timeframe covers 2 electronic pay systems entitled Cyborg and ESR. The Trust did not record suspensions in the first system and in the second system the recording of employee relation details were not commenced until April 2007. The change from Cyborg (system 1) to ESR (system 2) occurred in September 2006, mid point for the applicant's request. The Trust asserted therefore that the system did not hold the information for the time period of the request.
15. On 29 July 2008 the Commissioner wrote again to the Trust with a number of further enquiries in relation to the complainant's request of 16 May 2007. In particular the Trust had referred to cross checking the payroll system, the Commissioner asked whether it would be possible to retrieve any or some of the requested information just by checking the payroll system therefore without having to check through all of the individual HR files.
16. On 1 August 2008 the Trust responded to the Commissioner's further enquiries. In relation to the request of 16 May 2007 the Trust explained that the first electronic payroll system (named Cyborg), as discussed in its response of 24 July 2008, could not extract the information as the word "suspension" had a different meaning on that system than the meaning contained within the complainant's request. Therefore this system did not record suspensions as stated in the Trust's response of 24 July 2008. Furthermore the Trust confirmed that the information was not stored in the new system until after the date of the request period.
17. On 11 August 2008 the Commissioner wrote to the Trust to obtain more information in relation to how it had dealt with the complainant's request of 15 May 2007.
18. On 27 August 2008 the Trust responded to the Commissioner in relation to how it had dealt with the request of 15 May 2007.

Analysis

Request dated 15 May 2007

Exemption

Section 40

19. The Commissioner considers that if the information were held it would be exempt from disclosure on the basis of section 40(1) of the Act.
20. Section 40(1) of the Act states 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.
21. Section 40(5)(a) states 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)
22. A full text of section 40 is available in the Legal Annex at the end of this notice.
23. The information requested on 15 May 2007 under the Act was requested as a result of issues arising between the complainant and the Trust relating to the complainant's employment. This prompted the Commissioner to consider whether the Trust would have been automatically excluded from the duty imposed upon it by the provisions of section 1(1) (a) by virtue of the provisions of section 40(5)(a).
24. From the outset, it is important to point out that the Act except in very few scenarios (none of which are applicable in this case) is applicant blind. In other words, a disclosure made under the Act is in effect to the world at large, as every other applicant would be entitled to that information upon request.
25. Generally, the provisions of section 40 subsections 1 to 4 act to exempt personal data from disclosure under the Act. In relation to a request which constitutes the personal data of the applicant, section 40(5)(a) further excludes a public authority from complying with the duty imposed by section 1(1)(a) to confirm or deny whether or not the information is held.
26. In this instance the information requested on 15 May 2007 is various correspondence or notes of meetings/telephone calls between named

individuals about the complainant. Upon this basis the Commissioner has concluded that if the requested information was held it would contain the personal data of the applicant.

27. 'Personal data' as defined under section 1(1) of the DPA is data which relate to a living individual who can be identified from those data or from those data and other information which is in the possession of the data controller or is likely to come into the possession of the data controller.
28. The Commissioner is satisfied that if the information was held the complainant would be clearly identifiable as the request was for correspondence, telephone or meeting notes of which the subject matter is the complainant.
29. In light of the above findings, the Commissioner considers that if the information were held it would be exempt under section 40(1) as it would constitute the personal data of the complainant. Furthermore the Commissioner has decided that when responding to the request, the public authority was excluded from the duty to confirm or deny whether or not the information was held under section 1(1)(a) by virtue of section 40(5)(a) of the Act. The Commissioner believes that the Trust should have treated this request as a subject access request under section 7 of the DPA.

Request dated 16 May 2007

Procedural

Section 12

30. Section 12 of the Act states that:

"Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit."

The Regulations set the appropriate limit at £450 for the public authority in question.

31. Under Regulation 4(3) "a public authority may for the purposes of its estimate, take account only of the costs it reasonably expects to incur in relation to the request in-
 - a. determining whether it holds the information,
 - b. locating the information, or a document which may contain the information,
 - c. retrieving the information, or a document which may contain the information, and

- d. extracting the information from a document containing it.”
32. Under Regulation 4(4), “to the extent to which any of the costs which a public authority takes into account are attributable to the time which persons undertaking any of the activities mentioned in paragraph 3 on behalf of the authority are expected to spend on those activities, those costs are to be estimated at a rate of £25 per person per hour.”
 33. To determine whether the Trust applied section 12 of the Act correctly (and in accordance with the Regulations) the Commissioner has considered the Trust’s response as set out at paragraphs 12, 13 and 15 above.
 34. From the Trust’s explanation of its application of section 12, the Commissioner does not consider that the cost limit would be exceeded in determining whether or not the information is held, in locating the information or in retrieving the documents which contain it. The Commissioner was able to come to this conclusion as the Trust stated that the information was held in staff files stored within two rooms in the organisation.
 35. The Commissioner does however consider that to extract the information from the documents containing it would exceed the £450 cost limit. The Commissioner accepts that the Trust’s electronic payroll system does not hold the requested information for the time period specified. Therefore the Commissioner considers that the only way to retrieve the information would be to sift through the manual staff files. The Trust has explained that it would take it approximately 5 minutes to look through each file, and there are approximately 3000 relevant files it would be required to sift through in order to answer the request. The Trust calculated that this would take approximately 250 hours to complete this search. The Regulations allow for a charge of £25 per hour to be attributed to time spent complying with a request for information. Therefore a charge of £25 per hour amounts to 18 hours work up to the £450 cost limit. Due to the number of manual files (approximately 3000), along with the time it would take the Trust to scrutinise each of those files, the Commissioner believes that this task would greatly exceed the £450 cost limit in relation to extracting the requested information. Furthermore the Commissioner considers that 5 minutes to scrutinise each manual file would seem to be a reasonable estimate and even if the time was reduced by 2 or 3 minutes it would still greatly exceed the cost limit.
 36. In relation to extraction of the information, the Trust suggested that depending on the number of cases identified from the individual HR files, further processing would be required to extract the data such as cross checking with payroll. However the Commissioner does not consider that it would be necessary to cross check the information retrieved from the individual HR files with payroll. This is because the complainant’s request was to determine how many suspensions there

were and whether the decision was that they should be paid or unpaid and the reasons why rather than whether those suspended were actually paid or not by payroll.

37. The Commissioner has concluded that section 12 was correctly engaged by the Trust as to retrieve the requested information would exceed the £450 cost limit. Therefore the Trust was not obliged to provide the information requested.

Section 16

38. Section 16(1) of the Act requires a public authority to provide reasonable advice and assistance to persons who make a request. Section 16(2) outlines that any public authority which, in relation to the provision of advice and assistance in any case, conforms with the code of practice under section 45, is to be taken to comply with the duty imposed by section 16(1).
39. The code of practice outlines that where an authority is not obliged to comply with a request for information because the cost of complying would exceed the "appropriate limit" (i.e. cost threshold) the authority should consider providing an indication of what, if any, information could be provided within the cost ceiling. The authority should also consider advising the applicant that by reforming or re-focusing their request, information may be able to be supplied for a lower or no fee.
40. In the case of *Barber v The Information Commissioner* (EA2005/0004) the Tribunal stated that it will generally be appropriate for the Commissioner to consider whether it was reasonable to expect a public authority to have provided more advice and assistance and, if had it done so, whether this might have had an impact upon how the request was handled.
41. Under the circumstances of this case the Commissioner does not consider that the Trust would have been able to provide the complainant with advice and assistance as it would not be possible to refine this particular request to bring it within the cost limit. This is due to the nature of the request and the steps that would be required to be taken to extract the information even if the request were refined.
42. The Commissioner therefore considers that the Trust did not breach section 16 of the Act by failing to provide advice and assistance to the complainant as it would have had no impact upon how the request was handled.

Section 17

43. In relation to the complainant's request of 16 May 2007, within the Trust's response at internal review it sought to rely upon the exemption

contained at section 40(2) of the Act, however it failed to comply with sections 17 (a), (b) and (c) of the Act in doing so. Section 17(1) of the Act states that when a public authority is seeking to rely upon an exemption contained at Part II of the Act it must (a) state that fact, (b) specify the exemption(s) in question and (c) state (if it would not otherwise be apparent) why the exemption applies.

44. In this case the Trust explained that to retrieve the requested information would mean sifting through individual HR files which it stated would be a breach of the data protection principles. It did not state which exemption it was relying upon or in fact that it was relying upon an exemption. Furthermore it did not explain its reasons as to why providing the information would be a breach of the data protection principles.
45. Therefore the Commissioner considers that the Trust did not comply with its obligations under section 17(1)(a), (b) and (c) of the Act despite the fact that the section 40(2) exemption was not considered further by him.

The Decision

46. In relation to the request of 15 May 2007, the Commissioner's decision is that if any information was held which fell within the scope of this request it would be exempt from disclosure on the basis of section 40(1). However the Commissioner has concluded that the Trust was not obliged to comply with the requirements of section 1(1)(a) of the Act by virtue of section 40(5)(a).
47. The Commissioner has decided that the Trust correctly applied section 12 to the request of 16 May 2007.
48. The Commissioner finds that the Trust did not breach section 16 of the Act by failing to provide advice and assistance to the complainant in relation to the request of 16 May 2007.
49. The Commissioner finds that the Trust did breach section 17(1) (a), (b) and (c) of the Act in relation to the request of 16 May 2007.

Steps Required

50. The Commissioner requires no steps to be taken.

Right of Appeal

51. 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.

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 11th day of December 2008

Signed

**Anne Jones
Assistant Commissioner**

**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”.”

Exemption where cost of compliance exceeds appropriate limit

Section 12(1) provides that –

“Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.”

Section 12(2) provides that –

“Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.”

Section 12(3) provides that –

“In subsections (1) and (2) “the appropriate limit” means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.”

Section 12(4) provides that –

“The secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority –

- (a) by one person, or
- (b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,

the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.”

Section 12(5) – provides that

“The Secretary of State may by regulations make provision for the purposes of this section as to the costs to be estimated and as to the manner in which they are estimated.

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”.

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.”

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(2) provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

Section 40(3) provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

Section 40(4) provides that –

“The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).”

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), and
- (b) does not arise in relation to other information if or to the extent that either-
 - (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or

- (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed)."

Section 40(6) provides that –

“In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.”

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.