

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 25 March 2009

Public Authority: Her Majesty's Court Service [an executive agency of the Ministry of Justice]

Address: Information Directorate
Ministry of Justice
First Floor – Zone C
102 Petty France
London
SW1H 9AJ

Summary

The complainant was the subject of a civil proceedings order issued under section 42 of the Supreme Court Act 1981. The complainant asked the public authority for a letter about him which was sent by the judges to the Attorney General's Office after his court case that initiated this order. The public authority did not initially issue a valid refusal notice and did not address his request correctly. The complainant therefore contacted the Commissioner at this point to complain about the public authority's failure to provide an adequate response. Following the Commissioner's intervention the public authority informed the complainant that it did not need to confirm or deny that the information was held and that it was exempt from disclosure under section 32(1)(c) of the Act (Court Records). The complainant contacted the Commissioner again to complain about one specific element of his request. The Commissioner has concluded that if this information was held it would be the personal information of the complainant and therefore exempt under section 40(1) of the Act (Personal Data). The public authority was therefore not obliged to confirm or deny whether it held the requested information by virtue of section 40(5)(a) of the Act. The Commissioner considers that the public authority should have treated the request as a subject access request under section 7 of the Data Protection Act 1998 (DPA). The Commissioner has also decided that the public authority breached section 17(1)(a), 17(1)(b), 17(1)(c) and 17(7) of the Act in relation to the manner in which it initially handled both his requests.

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.

2. The Commissioner notes that under the Act Her Majesty's Court Service [HMCS] is not a public authority itself. At the time of the request it was actually an executive agency of the Department of Constitutional Affairs. Therefore the public authority in this case was actually the Department of Constitutional Affairs not HMCS. For clarity in this notice the Commissioner refers to HMCS as if it were the public authority.
3. On 9 May 2007 the responsibilities of the Department of Constitutional Affairs were transferred to the new Ministry of Justice (MOJ). Therefore HMCS is now an executive agency of the MOJ which is why the Decision Notice is being served on the MOJ as the relevant public authority. For clarity in this notice while the request was made to HMCS, the Commissioner dealt with the Ministry of Justice who answered the questions in his investigation on behalf of HMCS.

The Request

4. On 18 October 2005 the complainant faxed a letter to the public authority and within it asked for two pieces of information under the Act:

1. In item one of the faxed request he asked for:

*'A copy of a letter which was sent to The Attorney General's Chambers, after a judgment given on [Date redacted] in [Case reference redacted].
[Complainant's case redacted],*

*Also,
[Complainant's case redacted].*

*The second case above concerns an application for permission to appeal in the Court of Appeal, against the judgment given before [Judge redacted] in the Chancery Division on [Date redacted], in claims numbered
[Claim numbers redacted].*

For clarity in this notice, the Commissioner read this item as a request for a copy of the letter which was sent to the Attorney General's Chambers after a judgment was given on [date redacted] in [case reference redacted] in the complainant's case.

2. The second part of the request was contained in item seven of the letter. The complainant asked to be provided with a list of the names of persons who have been declared vexatious litigants, and who have been refused permission to appeal by the Court of Appeal. This request covers the period 1991 to the present [18 October 2005].

5. The public authority did not realise that this request was made under the Act and did not issue an adequate refusal notice. Instead on 25 October 2005 in response to the request it simply stated:

'Judicial correspondence is private and will only be disclosed with the Court's Permission under CPR5.4. You may not have copies of anything for the court file without the Court's permission.... This office is not responsible for maintaining a list of vexatious litigants in any event.'

6. On 15 December 2005 the complainant contacted the Commissioner and informed him that he did not believe that this response was acceptable under the Act. The Commissioner initially investigated the complaint about the failure of the authority to consider the request under the Act under case reference FS50118290. Following his intervention the public authority considered the request under the Act and the matter was closed.
7. On 15 September 2006 the public authority wrote to the complainant. In relation to the first element of his request it informed him that section 32(1)(c) applied to this information. This states that information, *'which is held by a public authority only by virtue of it being contained in a document created by the court in the purpose of proceedings for a particular cause or matter is exempt from disclosure under section 32(1)(c) of the Freedom of Information Act'*. It also informed him that there was no duty for a public authority to confirm or deny that such information was held. It explained that it was a matter for the court to decide whether to inform the complainant if such a letter existed. It did not therefore confirm or deny whether the letter was held.
8. In relation to the second element of his request the public authority informed the complainant that a list of vexatious litigants was published online along with the date that the order designating them as such was made. This was available on its website at the following web address:
http://www.hmcourts-service.gov.uk/infoabout/vexatious_litigant/index.htm
9. The complainant contacted the Commissioner on five different occasions between 13 March 2007 and 4 June 2007 to inform him that he was dissatisfied with the public authority's substantive response to the first element of his original request. The Commissioner originally informed the complainant that he should allow the public authority to conduct an internal review, but the complainant informed the Commissioner that the public authority would not conduct one for him. In view of the background to this case the Commissioner has exercised his discretion to consider the complaint without an internal review having been completed.

The Investigation

Scope of the case

- 10 On 10 March 2008 the Commissioner wrote to the complainant to clarify the issues he wished to complain about and to explain the scope of his investigation. In particular the Commissioner clarified that unless he heard to the contrary his investigation would purely focus on the first element of his initial request. This concerned the letter that the complainant believed was written after his case. The complainant did not seek to widen the scope of the investigation and therefore this Decision Notice focuses on this first element as the outstanding information.
11. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act. The complainant also raised other issues about the handling of requests made to other authorities at different times. These are not part of this request and the Commissioner has not investigated these complaints within this investigation.

Chronology

12. On 5 March 2008 the Commissioner wrote to the complainant and informed him of the scope of his investigation. He also informed the complainant that there was a possibility that section 40 may be engaged in this case. He provided the complainant with a paper list of vexatious litigants to ensure that he had received this piece of information in an accessible format. The Commissioner also resent this letter to the complainant on the 10 March 2008 when he became aware that the complainant had moved house.
13. On 5 March 2008 the Commissioner also wrote to the public authority to inform it that the case had been allocated. He also enquired whether the public authority had considered treating the first element of the request as a Subject Access Request under section 7 of the Data Protection Act 1998 (DPA).
14. On 10 April 2008 the Commissioner wrote to the complainant to clarify the scope of his role was and to provide general advice about the Act.
15. On 16 April 2008, the public authority replied to the Commissioner's letter of 5 March 2008 providing answers to a number of his questions.
16. On 21 April 2008, the Commissioner telephoned the complainant and asked him for further information about the content and location of the letter he has requested.
17. Between 23 April 2008 and 19 May 2008 further correspondence passed between the Commissioner and the public authority about the requested letter. The Commissioner has also updated the complainant regularly throughout this investigation.

Findings of fact

18. The complainant is the subject of a civil proceedings order under section 42 of the Supreme Court Act 1981. This means he has been adjudged a vexatious litigant by the Court Service. He is unable to go to court without the permission of the High Court and is on the list of vexatious litigants maintained by the public authority.

Analysis

Procedural matters

19. In light of the Information Tribunal Decision in *King v Department for Work and Pensions* [EA/2007/0085] as there has been no internal review in this case, the Commissioner will consider procedural breaches at the end of the statutory time period for compliance (i.e. 20 days from the date of the request). For clarity the point of reference in this case is 17 November 2005.

Section 17

20. Section 17(1) of the Act states:

“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 this exemption applies.”

21. The Commissioner has taken the public authority's initial response on 25 October 2005 to be its refusal notice. This response did not comply with section 17(1). It failed to either provide the information or state that the information was exempt within twenty working days and therefore breached section 17(1)(a) of the Act. It also failed to specify any exemption, or the reasons why a particular exemption applied, within twenty working days and therefore breached section 17(1)(b) and 17(1)(c) of the Act.

22. Section 17(7) of the Act states:

‘A notice under subsection (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of request for information or state that the authority does not provide such a procedure, and
 - (b) contain particulars of the right conferred by section 50.
23. The Commissioner is also satisfied that the response dated 25 October 2005 breached section 17(7) of the Act as it did not provide particulars of the authority's complaint procedures or contain particulars of the right to contact the Commissioner.

Exemption

24. The Commissioner is the regulator of both the DPA and the Act. The wording of the Act ensures that the rights provided under it 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. While the House of Lords decided the case on the basis of the Freedom of Information (Scotland) Act 2002, the relevant provisions are so similar that the Commissioner believes that he can use the reasoning of this decision in considering the application of his Act.
25. 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.'

Section 40(1)

26. Under section 40(1) information that constitutes the applicant's 'personal data' is exempt information. This exemption is absolute and requires no public interest test to be conducted. In addition, in relation to such information public authorities are not obliged to comply with section 1(1)(a) by virtue of section 40(5)(a).

27. Section 40(1) states that:

"(1) 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".

Subsection (5)(a) states 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)”.

28. In order to rely on the exemption provided by section 40, the information being requested must constitute personal data as defined by the DPA. The DPA defines personal data as:

‘...data which relate to a living individual who can be identified

a) from those data, or

b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect to the individual’.

29. The Commissioner’s understanding of the nature of personal data is informed by the recent discussions by the Article 29 Working Party (a European advisory body on data protection and privacy). The Working Party worked to harmonize the definition of the nature of personal data.

30. In light of these discussions the Commissioner revised his guidance in August 2007. This guidance is designed to assist organisations and individuals to determine whether information may be classified as personal data. In order to do this the guidance asks a series of questions. The Commissioner has considered the nature of the information being sought by the complainant along side these questions.

31. The Commissioner’s Guidance can be viewed in full at the following link:

http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf

32. The Commissioner considers that the complainant would be the ‘data subject’ within the meaning of the DPA and the requested letter would be his personal data if it exists. This is because the Commissioner is satisfied that the information would identify him; it would be about his case, would be linked to him and would relate to issues involving his interaction with the Court Service.

33. In light of this the Commissioner is satisfied that if this letter exists it would be the complainant’s personal information and exempt under section 40(1) of the Act. This letter if it exists would have been about the complainant and his status as a vexatious litigant.

34. The Commissioner considers that, in view of the above, the public authority is not obliged to confirm whether or not it held the information sought by the complainant, by virtue of section 40(5)(a). However the request should have been treated as a subject access request under section 7 of the Data Protection Act 1998.

35. As the Commissioner has concluded that the withheld information, if held, would be exempt under section 40(1) and therefore on the basis of section 40(5) (a) the public authority was not obliged to confirm or deny whether it held the information he has not gone on to consider the application by the public authority of section 32(1)(c) of the Act.

The Decision

36. The Commissioner has concluded that in relation to the first element of the complainant's request the information, if held, would be exempt from disclosure on the basis of section 40(1) and the public authority should have identified this as a request that needed to be considered under the DPA.
37. The Commissioner has therefore also concluded that in respect of element one of the request the public authority was not obliged to comply with the requirements of section 1(1)(a) in relation to this particular information by virtue of section 40(5)(a)
38. The Commissioner has also identified a number of procedural breaches in relation to the public authority's handling of the request as a whole. The public authority breached section 17(1)(a), 17(1)(b) and 17(1)(c), and section 17(7) of the Act.

Steps Required

39. In light of the contents of this Decision Notice the Commissioner has not ordered any remedial steps to be taken.

Other matters

40. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
41. Section 7 of the DPA gives an individual the right to request copies of personal data held about them – this is referred to as a right of Subject Access. As the information being sought was in fact the complainant's personal data this request should have been dealt with as a subject access request rather than a request under the Act. The Commissioner encourages public authorities to consider requests under the correct regime in the first instance. In the Commissioner's opinion responsibility for applying exemptions and determining whether a request should be considered under the Act or the DPA rests with the public authority and not the requestor.

42. Under section 42 of the DPA the Commissioner can make an assessment of the public authority's compliance with the DPA. An assessment under section 42 of the DPA is a separate legal process than that under section 50 of the FOI Act. The Commissioner is in the process of undertaking such an assessment in respect of the public authority's handling of this request and will communicate the outcome of this assessment to the complainant in due course.

Right of Appeal

43. 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 25th day of March 2009

Signed

**Anne Jones
Assistant Commissioner**

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

Legal Annex

Freedom of Information Act 2000

Section 1 - General right of access to information held by public authorities

- (1) 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 10 - Time for compliance with request

- (1) 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.

...

Section 17 – 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(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 32 - Court Records

Section 32(1) provides that –

“Information held by a public authority is exempt information if it is held only by virtue of being contained in-

- (a) any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter,
- (b) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter, or
- (c) any document created by-
 - (i) a court, or
 - (ii) a member of the administrative staff of a court, for the purposes of proceedings in a particular cause or matter.”

Section 32(2) provides that –

“Information held by a public authority is exempt information if it is held only by virtue of being contained in-

- (a) any document placed in the custody of a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration, or

- (b) any document created by a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration.”

Section 32(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 this section.”

Section 40- 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), and
- (b) does not arise in relation to other information if or to the extent that either-
 - (i) he 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).

Data Protection Act 1998

Section 7 - Right of access to personal data

Section 7 of the DPA 1998 provides that -

(1) Subject to the following provisions of this section and to sections 8 and 9, an individual is entitled—

- (a) to be informed by any data controller whether personal data of which that individual is the data subject are being processed by or on behalf of that data controller,
- (b) if that is the case, to be given by the data controller a description of—
 - (i) the personal data of which that individual is the data subject,
 - (ii) the purposes for which they are being or are to be processed, and
 - (iii) the recipients or classes of recipients to whom they are or may be disclosed,

- (c) to have communicated to him in an intelligible form—
 - (i) the information constituting any personal data of which that individual is the data subject, and
 - (ii) any information available to the data controller as to the source of those data, and
- (d) where the processing by automatic means of personal data of which that individual is the data subject for the purpose of evaluating matters relating to him such as, for example, his performance at work, his creditworthiness, his reliability or his conduct, has constituted or is likely to constitute the sole basis for any decision significantly affecting him, to be informed by the data controller of the logic involved in that decision-taking.

Section 42 - Request for assessment

Section 42 of the DPA provides:

- ‘(1) A request may be made to the Commissioner by or on behalf of any person who is, or believes himself to be, directly affected by any processing of personal data for an assessment as to whether it is likely or unlikely that the processing has been or is being carried out in compliance with the provisions of this Act.
- (2) On receiving a request under this section, the Commissioner shall make an assessment in such manner as appears to him to be appropriate, unless he has not been supplied with such information as he may reasonably require in order to—
- (a) satisfy himself as to the identity of the person making the request, and
 - (b) enable him to identify the processing in question.
- (3) The matters to which the Commissioner may have regard in determining in what manner it is appropriate to make an assessment include—
- (a) the extent to which the request appears to him to raise a matter of substance,
 - (b) any undue delay in making the request, and
 - (c) whether or not the person making the request is entitled to make an application under section 7 in respect of the personal data in question.
- (4) Where the Commissioner has received a request under this section he shall notify the person who made the request—
- (a) whether he has made an assessment as a result of the request, and
 - (b) to the extent that he considers appropriate, having regard in particular to any exemption from section 7 applying in relation to the personal data concerned, of any view formed or action taken as a result of the request.’