

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 19 November 2009

Public Authority: Ministry of Justice
Address: 102 Petty France
London
SW1H 9AJ

Summary

The complainant requested from the public authority information to be found in the diary sheets and court files in a particular case before the Court of Protection. The public authority declined to meet the request on the grounds provided by section 32 (court records) of the Act. The Commissioner's decision, having viewed a sample of the withheld information, is that the public authority was correct in its use of section 32; however he found that they had breached section 17 by issuing a defective refusal 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.

Background

2. The Court of Protection at the material times carried out its legal functions under the Mental Health Act 1983 and the Enduring Powers of Attorney Act 1985. One of its functions was the protection and management of the property and affairs of persons under disability who were living in or held assets based in England and Wales. The Court of Protection was supported by the Public Guardianship Office (PGO) which implemented its orders and decisions.
3. The PGO was an executive agency of the Department for Constitutional Affairs (DCA). A function of the PGO was to support the Court of Protection in the appointment of Receivers and through the registration of Enduring Powers of

Attorney. On 9 May 2007 the DCA, including the PGO, became part of the then new Ministry of Justice (MOJ).

4. In October 2007, the PGO was replaced by the Office of the Public Guardian as a result of the coming into force of the Mental Health Act 2005.
5. The Commissioner notes that under the Act the PGO was not a public authority itself, but actually an executive agency of the then DCA which was responsible for the PGO and therefore, the public authority in this case for the purposes of the Act was actually the DCA. However, having regard to the fact that the DCA was replaced by the MOJ, this decision notice is served on the MOJ as the relevant public authority.

The Request

6. The complainant, on 17 April 2007, requested that the PGO provide her with copies of documents listed in a document attached to her request letter. The requested documents were, the complainant said, to be found in the diary sheets and court files in a Court of Protection case numbered 5025579T. A copy of the complainant's requests for information is provided in an annex accompanying this decision notice.
7. The PGO, on 3 May 2007, refused the request by relying on section 32(1) of the Act saying that, any

“...document filed with, or otherwise placed in the custody of a Court, along with any documents created by a Court, or a member of the administrative staff of a Court are exempt. Therefore I am unable to release the documents you have listed as per your request.

I have however, submitted your request to the Court of Protection, as to whether the documents held on the Court files can be released under Rule 75 of the Court of Protection Rules”.
8. The complainant, on 10 May 2007, asked the PGO to re-consider its decision not to release the requested information under the Act.
9. The PGO, on 23 May 2007, informed the complainant; “I note that you requested disclosure of documents held on the Public Guardianship Office file and not the court bundle. Please note the Public Guardianship Office file is the court file because the PGO is merely the administrative arm of the court so it still remains that the file is exempt from the provisions of the Freedom of Information Act” The PGO went on to say; “...I have put your request forward for a review of that decision to be held”.
10. The PGO next wrote to the complainant on 24 May 2007, saying that the case had been reviewed in the context of the Court of Protection rules and confirmed

that requested documents would not be released (under those rules) to the complainant. The letter however made no mention of the Act.

The Investigation

Scope of the case

11. On 30 May 2007 the complainant contacted the Commissioner to complain about the way her request for information had been handled.
12. The Commissioner notes that the above correspondence from the PGO indicates that the complainant's request for information was also considered under the Court of Protection own rules for the releasing of documents. As these rules are independent of the Act and outside the Commissioner's statutory ambit he will not comment on that process and its outcome any further.

Chronology

13. On 23 November 2007 the Commissioner commenced his investigation by writing to the PGO and the complainant. In his letter to the former he, amongst other things, asked that they provide him with a copy of the requested information and any further submissions they would wish to make.
14. The PGO, in a letter to the Commissioner dated 19 December 2007, stated that "All the papers in the Enduring Powers of Attorney ("EPA") file were court records because the court was at the time in question the registering authority for EPAs under the Enduring Powers of Attorney Act 1985 and PGO staff were simply court administrators". The letter also explained that the EPA file had been transferred to the new Court Of Protection by virtue of provisions in the Mental Health Act 2005.
15. The PGO in its letter dated 19 December 2007 expressed a reluctance to provide, to the Commissioner a copy of the information he had requested ;stating that they were of the view that the Commissioner should make an application under the Court of Protection Rules 2007 to obtain the information. The Commissioner pursued this issue until the Office of the Public Guardian (the PGO's successor body) in a letter dated 13 May 2009 provided the Commissioner with a sample of the information requested by the complainant. The sample consisted of copies of originating applications (documents that commence proceedings) and correspondence between the Court of Protection and the parties. The letter went on to say "There was no internal mechanism for any kind of formal review of the stance taken by the PGO that the court records exemption applied but the caseworker sought the advice of the PGO's legal adviser confirming that the PGO's files were exempt".

Analysis

Procedural Matters

16. The public authority failed to make the complainant aware, in its refusal notice, that it did not have a procedure for dealing with complaints about its handling of requests for information or contain particulars of the rights conferred on the complainant by section 50 (right of appeal to the Commissioner) as required by section 17 (7).
17. The Commissioner view is that where a public authority is relying upon a multiple limb exemption, such as section 32 here, there will be a breach of section 17(1)(b) where the public authority fails to provide the section and sub-section as without this level of detail, the complainant cannot be certain of the grounds on which the information is being withheld. The PGO, in its refusal notice merely made reference section 32(1) and accordingly breached section 17(1) (b) for the reasons laid out in the preceding sentence.

Exemptions

18. Section 1(1) of the Act imposes a general duty on public authorities to communicate information to individuals on request unless an exemption from that duty applies. As noted above the PGO's refusal notice refused the request by relying on section 32(1) of the Act saying that, any "...document filed with, or otherwise placed in the custody of a Court, along with any documents created by a Court, or a member of the administrative staff of a Court are exempt. Therefore I am unable to release the documents you have listed as per your request". The Commissioner extrapolates from this that the PGO were in fact relying on section 32(1)(a) and (c) of the Act which are set out below.
19. Section 32 (1) reads as follows:

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.
20. The Commissioner notes that the complainant delimited her information request to information to be found in the "diary sheets and court files" of a particular case. A viewing of the sample of information provided by the Office of the Public

Guardian (see paragraph 15 above) shows information contained in documents (including originating applications) that were generated by the administrative staff of the Court of Protection, or by the Court itself, sent to the Court of Protection or copied to the Court of Protection. These had either been placed in the custody of the Court of Protection (where they were held by the PGO as administrators of that court) and thereby engaged the exemption afforded by section 32(1)(a) or they were held in documents created by the Court of Protection and thereby engaged the exemption afforded by section 32(1)(c). As the exemption under section 32(1)(a) and (c) is engaged and as section 32 is an absolute exemption there is no public interest test to consider.

The Decision

21. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act as regards the application of section 32 but breached section 17 for the reasons given above.

Steps Required

22. The Commissioner requires no steps to be taken.

Other matters

23. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
24. In its letter to the Commissioner dated 13 May 2009, the PGO explained that at the time the complainant sought a review of its decision to withhold the requested information; the authority did not have an internal review procedure in place
25. Part VI of the section 45 Code of Practice 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, and that the procedure should encourage a prompt determination of the complaint.
26. If the authority has not already done so, the Commissioner recommends that it ensure provision is made for applicants to seek a review of the handling of their requests for information and that this procedure conforms to Part VI of the section 45 Code. The section 45 Code is accessible online at:

<http://www.justice.gov.uk/guidance/docs/foi-section45-code-of-practice.pdf>

Right of Appeal

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 19th day of November 2009

Signed

**Gerrard Tracey
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.”

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(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.”

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.”

Annex- Complainant's Information Request

The complainant requested copies of the documents to be found in the diary sheets and court files of the Court of Protection mattered numbered 5025579T.

- | | |
|----------|---|
| 21-01-99 | Mrs K's letter dated 19-12-98 |
| 22-02-99 | Original EP2 which predated EP1 to relative. Reply from (... <i>a firm of solicitors...</i>) concerning request for any evidence that D. intended to revoke the 1992 EPA when the 1997 EPA was made. |
| 23-04-99 | The emails refereed to in the note "(but look at the emails at the front!)" |
| 01-07-99 | Correspondence between PGO and ... <i>a firm of solicitors...</i> relating to ... <i>a named person</i> ... being in control of <i>his/her</i> affairs |
| 18-07-02 | letter from ... <i>a named person...</i> to PGO |
| 15-08-02 | letter from ... <i>a named person...</i> to PGO |
| 08-06-03 | letter from ... <i>a named person...</i> to PGO |

Could you also request that the PGO identify the authors of the various attendance notes in the blue sheets and state whether they are members of the judiciary or administrators?

Listed following the PGO's reply to my 79 questions

- | | |
|------|---|
| Q.20 | documents substantiating claim by PGO |
| Q.21 | documents or diary records recording date of proposed lifetime gift hearing in April\May 1999 |
| Q.43 | documents proving that the PGO did not know that the bundle was not an agreed bundle |
| Q.46 | documents showing directions from the judiciary that I should be excluded from correspondence as claimed by the PGO |
| Q.49 | documents proving the PGO's claim that "clarification" had been given on this point" |
| Q.51 | documents showing that the claim that facts "as presented by an independent government body "was accurate |
| Q.52 | Evidence that the COP has considered "whether the direction they had given had been compiled with |
| Q.53 | diary sheets substantiating the PGO'S claims |

- Q.55 the Court of Protection is part of the PGO, consequently disclosure of documents proving this claim should be disclosed
- Q.60 the undertaking from the applicants to copy correspondence to other parties
- Q.67 see Q.55 (ii) above
- Q.68 see Q.55 (ii) above
- Q.69 any proof at all apart from ... *two named persons*...claims
- Q.71; 72; 73; 74; 76
- Documents proving the PGO's claim that this was considered by the CoP and was a result of a judicial decision
- C. Listed following the PGO's reply to my further questions following examination of my chronological files:
- Q.1 documents showing that the PGO had a reasonable belief that Boodle Hatfield were acting for ... *a named person*...
- Q.2 & 3 documentary evidence that ... *a named member of the judiciary*... knew that further documentation was going to be filed that day
- Q.6 7; 8; 9 Any documentary evidence that the PGO (including the COP showed any concern about a firm of solicitors failure to comply with the directions of the Court of Protection.