

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 10 November 2009

Public Authority: Department for Environment, Food and Rural Affairs
Address: 3-8 Whitehall Place
London
SW1A 2HH

Summary

The complainant asked the Department for Environment, Food and Rural Affairs (DEFRA) for information about the legal qualifications of the policy advisors who provided the advice or opinion in respect of a previous communication between DEFRA and the complainant. DEFRA replied with some general information about legal qualifications for advisors, but refusing to disclose any information specific to the request, citing section 40 of the Freedom of Information Act 2000 ("the Act") stating that it regarded all information regarding qualifications of staff as personal information.

The Commissioner has investigated the complaint and has found that the requested information constitutes personal data and its disclosure would breach the first data protection principle of the Data Protection Act 1998 ("the DPA"), which requires that personal data be processed fairly and lawfully. The Commissioner believes that the information was exempt from disclosure under section 40(2) by virtue of section 40 (3) (a) (i).

However, the Commissioner has also decided that DEFRA is in breach of Section 10 (1) by failing to reply to the complainant within the required timeframe, as well as Section 17(1) (b), in that it did not fully cite the exemption it was seeking to rely upon.

The Commissioner requires no steps to be taken.

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.

The Request

2. On 4 April 2007, following a series of emails between the complainant and DEFRA, the complainant requested from the DEFRA the following information:

'the legal qualifications of the Policy Advisor(s) who provided the advice or opinion given to me by - - - in his communication of 21st February.'

3. DEFRA replied on 16 May 2007. It advised the complainant that policy advisors in DEFRA were not required to possess legal qualifications, although some of them may do so. It went on to state that it was not prepared to disclose any information about any legal or other qualifications held by those people involved in the matter. It held that such information constituted the personal data of the policy personnel in question and that DEFRA did not consider it fair to publish information about employees' qualifications in these circumstances. It cited section 40 of the Act as the grounds for exemption and advised the complainant that they could request an internal review, and had the right to complain to the Commissioner.
4. The complainant replied on 10 June 2007 stating that he had not asked for the identity of the advisors and seeking an explanation as to why the release of this information was unfair.
5. DEFRA replied on 16 November 2007, apologising for the delay in undertaking the Internal Review. It again refused to provide the information, confirming that it relied on section 40 of the Act. It confirmed that complainant had a right to complain to the Information Commissioner.

The Investigation

Scope of the case

6. On 5 December 2007 the complainant wrote to the Commissioner complaining about DEFRA's decision. He maintained that the information sought did not constitute personal information and that he was not seeking to identify the individuals who had provided the advice.

Chronology

7. On 3 September 2008, the Commissioner wrote to DEFRA seeking further clarification regarding DEFRA's position. He also requested an explanation as to why it took DEFRA over five months to undertake the internal review.

8. DEFRA wrote on 10 October 2008 apologising for the delay in providing a substantive response. They again wrote on 20 October stating that they were seeking an informal settlement by providing the complainant with sufficient information to satisfy his request while safeguarding DEFRA's concerns over the disclosure of personal information.
9. On 18 November 2008, DEFRA wrote to the Commissioner having concluded it was not possible to provide the complainant with any relevant information. DEFRA further expanded its reasoning in respect of its stance over personal information.

Analysis

Procedural matters

Sections 10 & 17

10. The Commissioner has initially considered whether DEFRA has complied with its obligations under sections 10(1) and 17(1) of the Act.
11. By not providing the requested information to the complainant within 20 working days of the request, the public authority breached section 10(1). By not providing it to the complainant by the time of the completion of the internal review, it breached section 1(1) (b)
12. Section 17(1) requires a public authority, which is relying upon an exemption in order to withhold requested information, to issue a refusal notice within the time for complying with section 1(1) (e.g. within twenty working days of receipt of the request), which –
 - states that fact,
 - specifies the exemption in question, and
 - states (if that would not otherwise be apparent) why the exemption applies.
13. DEFRA informed the complainant that it was relying upon section 40 to withhold the requested information. It did not quote the applicable sub-section. Section 40(2) states that information is exempt from disclosure if one of the conditions listed in sections 40(3)(a)(i), 40(3)(a)(ii), 40(3)(b) or 40(4) is satisfied. In order to cite this exemption fully, the Commissioner believes that the public authority should also cite which of the conditions it believes is satisfied (including citing the relevant sub-section number). In this case, although DEFRA informed the complainant that it believed that the information was exempt under section 40 and also stated that it believed that disclosure would be a breach of the data protection principles, it did not go on to cite which of the sub-sections it was seeking to rely upon (i.e. section 40(3)(a)(i)). For this reason the Commissioner believes that DEFRA did not comply with section 17(1) (b).

Exemption – section 40

14. The first point to consider is whether the educational qualifications of an individual are personal information. DEFRA has maintained that in the particular circumstances relating to the complaint, it would be impossible to preserve the anonymity of those who provided the information and that, consequently, section 40 was properly engaged. The Commissioner believes this to be so and agrees this is information that relates to a living, identifiable individual.
15. Having decided that this information is personal data, the Commissioner then considered whether disclosure would contravene the first Data Protection Principle, which states the following:
- “Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –
- (a) at least one of the conditions in Schedule 2 is met, and
 - (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met”.
16. The Commissioner has considered Schedule 2 Condition 6 of the DPA as the only condition likely to be relevant. This applies a three part test, which must be satisfied:
- there must be **legitimate interests** in disclosing the information;
 - the disclosure must be **necessary** for a legitimate interest of the public and;
 - even where the disclosure is necessary it nevertheless must not cause **unwarranted interference** (or prejudice) to the rights, freedoms & legitimate interests of the data subject.
17. It is unclear what the legitimate interest is in disclosing the information. The legal (or otherwise) qualifications of the advisors are likely to have been only a part of criteria used to appoint them and it does not appear that the possession of legal qualifications was essential. In addition, the request relates to advice given to support a decision made by an individual. There is no certainty that the individual accepted all, part or any of the advice he or she was given. The Commissioner is not persuaded that there is a legitimate interest in disclosure.
18. DEFRA recognised that there may be circumstances when there is a legitimate interest in knowing the advice of, or opinion of, a particular official – for example, in the case of misfeasance. Nevertheless, it maintained, civil servants are often asked for their opinions and advice on sensitive matters of policy. The constitutional foundation of the work conducted by officials is that, in most circumstances, they are not personally responsible for projects and policies on which they advise. Accountability for such projects and policies is (in most cases) properly at ministerial level, and there are other mechanisms in place for holding officials to account. In any case, attribution of opinions to individuals is highly unlikely to add to public understanding of Government's work or the mechanics of its reasoning.

19. DEFRA argued that even where there is a legitimate interest in releasing such attributable information, such processing is likely to be '*unwarranted ...by reason of prejudice to the rights and freedoms or legitimate interests of the data subject*'. It claimed that civil servants have a reasonable and clear expectation of anonymity when advising Ministers or expressing opinions, and that, as part of the constitutional necessity of an independent and politically neutral Civil Service, officials are not generally entitled either to defend publicly their actions, or to comment on the policies that they are obliged to implement. The Commissioner is persuaded by this line of argument.
20. The public authority maintained that it is for this reason that that junior officials, in particular, have a reasonable expectation of anonymity and conversely even less opportunity to defend their actions publicly. It maintained that to breach this expectation was neither 'fair' (as noted in the first data protection principle of the DPA), nor 'necessary' (as in the schedule 2 condition of the DPA) for the legitimate interest in accountability. It further reasoned that the Information Tribunal has found in past cases such as *McTeggart vs. ICO & DCMS (EA/2006/0084)* and *House of Commons vs. Baker (EA/2006/0015 & 0016)* that the starting point in such questions over personal data should be an assumption of privacy, with the onus being to prove the overriding public interest in order to warrant disclosure. DEFRA recognised that there was a public interest in ensuring transparency and correctness of decisions taken by Government, but held there was no such interest in this case.
21. As part of the overall consideration, the Commissioner is mindful of the Information Tribunal case, *The House of Commons v ICO & Leapman, Brooke, Thomas (EA/2007/0060 etc)*. In this case, the Tribunal said that the first thing to be considered when applying the sixth condition was to establish whether the disclosure was necessary for the legitimate purposes of the recipient (the public) and then to consider whether, even if the disclosure was necessary, it would nevertheless cause unwarranted prejudice to the rights & freedoms of the data subject. (Paras 59 onwards). In this case, given that the qualifications of civil servants are only part of the appointment process to an advisory role, and in light of the guidance given to the complainant about the redress available under the Highways Act 1980, the Commissioner does not consider disclosure to be "necessary". He has, therefore, not considered the second limb of the Tribunal's ruling.

The Decision

22. The Commissioner's decision is that the public authority was correct to withhold the requested information under section 40 (2) by virtue of section 40(3)(A)(I).
23. However the Commissioner also believes that DEFRA failed to meet the requirements of section 17(1) (b) of the Act, in that it did not fully cite the exemption it was relying upon.

Steps Required

24. The Commissioner requires no steps to be taken.

Other matters

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. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, 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 a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it took over 100 working days for an internal review to be completed, despite the publication of his guidance on the matter.

Right of Appeal

26. 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 10th day of November 2009

Signed

**David Smith
Deputy Commissioner**

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

Legal Annex

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) 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 33 A (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(DPA)

SCHEDULE 1 THE DATA PROTECTION PRINCIPLES

PART I THE PRINCIPLES

SCHEDULE 1 provides that –

'1 Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.'

SCHEDULE 2 CONDITIONS RELEVANT FOR PURPOSES OF THE FIRST

PRINCIPLE: PROCESSING OF ANY PERSONAL DATA

SCHEDULE 2 provides that –

'1 The data subject has given his consent to the processing.

2 The processing is necessary—

(a) for the performance of a contract to which the data subject is a party, or

(b) for the taking of steps at the request of the data subject with a view to entering into a contract.

3 The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.

4 The processing is necessary in order to protect the vital interests of the data subject.

5 The processing is necessary—

(a) for the administration of justice,

(b) for the exercise of any functions conferred on any person by or under any enactment,

(c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or

(d) for the exercise of any other functions of a public nature exercised in the public interest by any person.

6 (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

(2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.'