

Freedom of Information Act 2000 (Section 50)

Decision Notice

9 March 2009

Public Authority: Department for Business, Enterprise and Regulatory Reform
Address: 1 Victoria Street
London
SW1H 0ET

Summary

The complainant made a request to the Department for Business, Enterprise and Regulatory Reform for information on the number of freedom of information requests it had ongoing; a description of each request; and, for requests submitted by organisations, the name of each organisation. The public authority provided the complainant with a list of requests it had received which were ongoing, as per the request. However the public authority refused to disclose the name of a special interest group that had submitted one of the requests that featured in the list. The public authority explained that the request was made in confidence and that therefore the information was exempt under section 41 of the Act (information provided in confidence). The Commissioner has investigated the complaint and has upheld the public authority's application of the section 41(1) exemption. However, the Commissioner also found that the public authority breached section 10(1) (time for compliance with request) in its handling of the request but 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 Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 11 August 2007 the complainant wrote to the public authority to request information on the number of ongoing freedom of information requests it had received up until the point his own request was received. By "ongoing" the complainant explained that he meant requests which had been received and for which a refusal notice had not yet been issued. The complainant said that he also wanted to know details of cases under consideration by the Information

Commissioner's Office and the Information Tribunal. For each request it had received, the complainant asked to be provided with a description of the subject or topic of the requested information and, if submitted by an organisation, the name of the organisation.

3. The public authority responded to the request on 11 September 2007. It said that as of 11 August 2007 there were 53 freedom of information requests ongoing, of which 3 were internal reviews of original requests. It said that there were no cases being considered by the Information Commissioner's Office or the Information Tribunal.
4. The public authority outlined what information was being sought in each request but explained that it was withholding the identities of the requestors under the exemption in section 40(2) of the Act. In explaining its application of section 40(2) the public authority, with reference to the first data protection principle, said that disclosure of the identities of the requestors would not be fair and would not meet one of the conditions in schedule 2 of the Data Protection Act 1998. However, for each request the public authority confirmed whether it was made by an individual or an organisation and described the type of organisation such as "a special interest group", "media", "commercial company", "MP's" etc.
5. The complainant wrote to the public authority on 18 September 2007 to ask that it carry out an internal review of its handling of his freedom of information request. The complainant set out his arguments, on why section 40 did not apply to organisations, in detail.
6. On the same day the complainant wrote to the public authority again to say that he thought that the names of the MP's, given their position as prominent public officials, should be released. A number of the requests in the list provided by the public authority concerned requests for information regarding companies. The complainant asked for these companies to be identified. Another request in the list, referred to as "request 24", was received from a media organisation and was for information about meetings between the Government's Energy Minister and a person or body whose identity had been withheld. The complainant said that he wanted the names of this person and the Minister to be disclosed.
7. The complainant wrote to the public authority again on 3 November 2007 as he had not received a response to his two previous letters. He asked it to acknowledge receipt of his request for internal review and also reiterated his argument that the names of organisations are not personal data as they do not relate to living individuals.
8. The complainant contacted the Commissioner on 16 December to complain that the public authority had failed to carry out an internal review. As a result the Commissioner wrote to the public authority to say that he considered a reasonable time limit for completing internal reviews to be 20 working days and that only in exceptional circumstances may it be necessary to extend the time limit to 40 working days. The Commissioner explained that he had issued guidance on this issue and drew it to the attention of the public authority.

9. After further correspondence from the Commissioner the public authority finally completed its internal review on 6 August 2008. At this point the public authority disclosed the names, with one exception, of the organisations that had made the various requests. The one exception was the name of a special interest group that had made a single request listed as “request 43”. The name of the special interest group was withheld under section 41 of the Act as the public authority explained that this requester had specifically said that its request was made in confidence and it would not consent to its identity being disclosed. The public authority said that in its opinion this gave rise to an obligation of confidence and it could see no public interest in disclosure that would justify this obligation being disregarded.
10. The public authority went on to say that in its initial response it had included details of two requests in error and that having looked in to the case again it had found that the requests were not ongoing on 11 August 2008. The public authority apologised for this and they were removed from the new list that was supplied to the complainant.

The Investigation

Scope of the case

11. After receiving the internal review the complainant contacted the Commissioner on 26 August 2008. The complainant specifically asked the Commissioner to consider the public authority’s initial response to the request as well as the public authority’s refusal to disclose the name of the special interest group under section 41 of the Act. The complainant also asked the Commissioner to address the public authority’s failure to respond to his request of 18 September 2007 for further details regarding “request 24”.
12. The complainant asked the Commissioner to consider, what he saw as, the public authority’s failure to carry out an internal review within a reasonable time. This aspect of the complaint is not addressed in this Notice because this is not a requirement of Part 1 of the Act. However, the Commissioner has commented on this point in the “other matters” section, below.

Chronology

13. In response to the internal review the complainant also said that he still wanted to see information regarding request 24 which the public authority said had been included in the original list in error. This request was for information about meetings between the government’s Energy Minister and a person or body whose identity had been withheld. The complainant said that he still wanted to know the name of the organisation that submitted the request, the name of the Energy Minister and the identity of the person(s) meeting with the Energy Minister. The public authority agreed to make this additional information available to the complainant. This information was subsequently disclosed to the complainant by letter on 2 October 2008.

14. The Commissioner contacted the public authority on 10 September 2008 to ask for further information regarding its application of the section 41 exemption in respect of the identity of the special interest group that had submitted request 43. The Commissioner asked the public authority to explain why disclosure of the identity of the special interest group would constitute an actionable breach of confidence. In doing so the Commissioner also asked the public authority to provide him with its comments on what detriment it believed would be caused to the special interest group were its identity disclosed.
15. The public authority responded to the Commissioner on 12 September 2008.
16. The public authority maintained that the identity of the special interest group that submitted request 43 is exempt from disclosure under section 41 of the Act because at the time it made the request it specifically stated that the freedom of information request was being made in confidence and that it would not consent to disclosure. The public authority provided the Commissioner with an excerpt from a letter from the requestor which it had interpreted as giving rise to a duty of confidence.
17. The public authority subsequently contacted the special interest group to ask whether it would consent to its identity being revealed. On 7 October 2008 the public authority provided the Commissioner with a copy of the response it received which makes it clear that the special interest group would not consent to its identity being revealed. The special interest group also outlined what detriment it believed it would suffer as a result of disclosure. The public authority also said that it was aware that there is a public interest defence to an action for a breach of confidence and it had considered whether in this case there is a public interest in disclosure that would justify breaching the obligation of confidence. The public authority concluded that there was no public interest in disclosure and the name of the special interest group should continue to be withheld.

Findings of fact

18. The public authority disclosed to the complainant a summary of request 43 which was as follows:

“Star Energy’s presentation to DTI re: use of the Gas Act 1965 and meeting notes.”

Analysis

19. A full text of the relevant provisions of the Act referred to in this section is contained within the legal annex.

Procedural matters

20. The public authority initially withheld the names of organisations that had submitted requests by relying on the exemption in section 40(2) of the Act. It was only after the much delayed internal review that it acknowledged that this exemption did not apply and agreed to make the information available to the complainant. Furthermore, because the public authority originally included information in error the information that was initially disclosed did not meet the terms of the complainant's request. By failing to address these errors until the internal review stage the public authority breached section 10(1) of the Act, which requires that a public authority comply with section 1(1) promptly and in any event within 20 working days of receipt.
21. On 18 September 2007, the same day as he requested an internal review, the complainant wrote to the public authority to make what was in effect a new freedom of information request when he asked for further details regarding "request 24". When it finally presented the findings of the internal review the public authority explained that request 24 was included within the original list in error and so this information was not included. It was only on 2 October 2008, after the Commissioner reminded the public authority that this request had not been addressed, that this information was disclosed to the complainant. Consequently the public authority breached section 10(1) by failing to make this information available to the complainant within 20 working days.

Exemption

Section 41 – Information provided in confidence

22. The information which the public authority has continued to withhold is the name of the special interest group that submitted request 43. This information has been withheld under section 41 of the Act, which provides for an exemption for information provided in confidence. However, section 41 will only apply if the information has been obtained by the public authority from another person and disclosure would constitute an actionable breach of confidence.
23. The Commissioner is satisfied that the name of the special interest group that submitted request 43 was obtained from another person, pursuant to section 41(1)(a) of the Act. Clearly the public authority only obtained this information as a result of the special interest group submitting a freedom of information request. The Commissioner wishes to stress that for the purposes of section 41(1)(a) "person" also includes legal persons such as companies and other organisations.

24. Information obtained from another person will only engage the section 41 exemption if disclosure of that information would constitute a breach of confidence actionable by that or any other person. The most commonly cited statement of the constituent elements of an 'actionable breach' is the judgment of Megarry J in the case of *Coco v Clark*¹. The Commissioner is aware that this is not the only approach to the analysis of confidentiality, however in the present case he considers it an appropriate test to use. Under this test a breach of confidence will be actionable if:

- The information has the necessary quality of confidence;
- The information was imparted in circumstances importing an obligation of confidence; and
- There was an unauthorised use of the information to the detriment of the confider.

Necessary quality of confidence

25. The Commissioner has carefully considered whether the withheld information had the necessary quality of confidence at the time the complainant made his request. Information will have the necessary quality of confidence if it is not otherwise accessible or if it is more than trivial.

26. The fact that the public authority has received a freedom of information request for information regarding "Star Energy's presentation to DTI re: use of the Gas Act 1965 and meeting notes" has been disclosed and is therefore in the public domain. However, the identity of the group that submitted this request has not been disclosed and having carried out enquiries the Commissioner has not seen any evidence to suggest that this information is in the public domain.

27. At first glance, the fact that a group or organisation has submitted a particular freedom of information request to a public authority does not seem sufficiently important that it would attract the necessary quality of confidence. However the Commissioner understands that in this case were the name of the organisation disclosed its activities could be undermined. Furthermore, information will not, generally speaking, be considered trivial if it is of importance the confider of the information. Having read the submission from the organisation to the public authority it is clear that it considers the fact that it submitted request 43 to be important so much so that it has argued that its activities would be undermined were its identity disclosed. The fact that the organisation considers the information to not be trivial is sufficient to give it the necessary quality of confidence.

Obligation of Confidence

28. Even if information might otherwise be regarded as confidential, a breach of confidence will not be actionable if it was not communicated in circumstances

¹ *Coco v AN Clark (Engineers) Ltd* 1969 RPC 41

giving rise to an obligation of confidence. An obligation of confidence can be expressed either explicitly or implicitly.

29. In this case the public authority explained that at the time it made the request the special interest group said specifically that it was making the request in confidence. The public authority said that it had interpreted this as giving rise to an obligation of confidence. Furthermore, when contacted by the public authority, as a result of the Commissioner's investigation, the special interest group said that it would not consent to disclosure of the information requested by the complainant. The Commissioner feels that this can be seen as a further indication of the organisation's expectation when it made the request, that its identity would remain confidential.

Detriment to the Confider

30. The final element of the test provides that a breach of confidence will only be actionable if its unauthorised disclosure would cause a detriment to the confider of the information. In this case the public authority contacted the organisation concerned to seek its opinion on what detriment would be caused as a result of disclosure. In particular the organisation has argued that were its identity disclosed this would ignore its right to make representations without fear that those representations may be released without authorisation. It suggested that this would be contrary to the democratic and human rights of its members. Having reviewed the organisation's submission the Commissioner is also satisfied that its activities would be undermined were the information disclosed.
31. The Commissioner has attached particular weight to the above arguments as they are arguments advanced by the special interest group itself rather than speculative arguments advanced on its behalf by the public authority. The Commissioner is unable to repeat the specific arguments put forward as to do so would risk identifying the organisation.
32. The Commissioner is satisfied that a detriment would be caused to the confider as a result of disclosure and therefore finds that all three elements of the test of confidence have been met.

A public interest defence?

33. Section 41 is an absolute exemption and therefore there is no public interest test to apply under the Act. However, under the common law of confidence there is a public interest defence to a claim of breach of confidence. The Information Tribunal described the effect of this in the case of *S v The Information Commissioner and the General Register Office*:

*"Disclosure will not constitute an actionable breach of confidence if there is a public interest in disclosure which outweighs the public interest in keeping the information confidential."*²

² S v The Information Commissioner and the General Register Office [EA/2006/0030]

34. The test to be applied in deciding if a duty of confidence can be overridden differs from the public interest test normally applied under the Act. The public interest test normally applied under the Act assumes that information should be disclosed unless the public interest in maintaining the exemption exceeds the public interest in disclosure. The test applied in respect of the duty of confidence assumes that information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence.
35. The Commissioner believes that there is a public interest in knowing whether, and to what extent, a public authority is meeting its obligations under the Act. However the Commissioner does not accept that the disclosure of the identity of a single organisation that submitted a particular freedom of information request would reveal anything about the public authority's performance with regard to freedom of information. Moreover the Commissioner considers that, in the context of this case, the public interest lies in the transparency and accountability of the public authority's activities rather than the activities of a private organisation whose only accountability is to its members.
36. The Commissioner has concluded that a public interest defence could not be established in this case.

The Decision

37. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
 - The public authority correctly refused to disclose the identity of the special interest group that submitted request 43 under section 41(1) of the Act,
38. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
 - The public authority breached section 10(1) of the Act by failing to release the disclosable information falling within the scope of the 11 August 2007 request within 20 working days.
 - The public authority additionally breached section 10(1) of the Act by failing to disclose information regarding "request 24" within 20 working days.

Steps Required

39. The Commissioner requires no 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:

Part VI of the section 45 Code of Practice³ 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. As he has made clear in his *'Good Practice Guidance No 5'*⁴, 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 considers 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 220 working days for an internal review to be completed, despite the publication of his guidance on the matter.

During the course of his investigation, the Commissioner has encountered considerable delay on account of BERR's reluctance to meet the timescales for response set out in his letters. Accordingly the Commissioner does not consider that BERR's approach to this case has been particularly co-operative, or within the spirit of the Act. As such he will be monitoring BERR's future engagement with the ICO and would expect to see improvements in this regard.

³ <http://www.justice.gov.uk/guidance/foi-code-of-practice.htm>

⁴ http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/foi_good_practice_guidance_5.pdf

Right of Appeal

41. 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 9th day of March 2009

Signed

**Anne Jones
Assistant Commissioner**

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

Legal Annex

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 2(2) provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

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 41(1) provides that –

“Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”