

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 17 February 2009**

**Public Authority:** The Priory Group  
**Address:** Priory House  
Randalls Way  
Leatherhead  
Surrey  
KT22 7TP

### Summary

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The complainant made a request under the Freedom of Information Act 2000 (the "Act") to the Priory Group (the "Priory") for information relating to the total amount of funding that the NHS has paid to Dr Veale's Body Dysmorphic Disorder (BDD) treatment programme at the Priory Hospital from 2000 to the time of the request. In particular the complainant asked for the yearly breakdown and the cost per day and per night to the NHS for inpatient and outpatient care for BDD. The Priory failed to respond to the complainant as there was uncertainty as to whether it was a public authority for the purposes of the request. Upon the Commissioner's involvement the Priory accepted that it was in fact a public authority for the purposes of the request. The Priory therefore disclosed some of the requested information to the complainant. However the Priory withheld information relating to the cost to the NHS per day and per night for inpatient and outpatient care. The Priory asserted that this information was exempt from disclosure by virtue of section 43(2) of the Act as it would be likely to damage the commercial interests of the Priory. The Commissioner does not consider that this exemption has been correctly engaged in this case. Furthermore the Commissioner considers that the Priory breached section 1(1)(a), 1(1)(b), 10(1) and 17(1)(a),(b) and (c) in handling this request.

### The Commissioner's Role

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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

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2. The Complainant made a request to the Priory on 10 December 2007 for information relating to the total amount of funding that the NHS had paid to Dr Veale's BDD treatment programme at the Priory Hospital since 2000 to present. The complainant also asked for the yearly breakdown and the cost per day and or night to the NHS for inpatient and outpatient care for BDD.
3. The Priory did not respond to the complainant's request.

## The Investigation

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### Scope of the case

4. On 10 January 2008 the complainant made a formal complaint to the Information Commissioner's Office as she had not received a response to her request for information.

### Chronology

5. On 12 February 2008 the Commissioner wrote to the Priory to explain that a complaint had been received from the complainant that no response had been received to an information request submitted to it on 10 December 2007. The Commissioner noted that the request related to NHS funded work at the Priory. The Commissioner wished to establish whether or not the Priory would be classed as a public authority under the Act for the purposes of the complainant's request.
6. As the Priory did not respond to the Commissioner he wrote again on 18 June 2008, referring the Priory to his letter of 12 February 2008, and requesting a response.
7. On 18 July 2008 the Priory responded to the Commissioner. It explained that the Priory has a contract via the National Commissioning Group (NCG). It explained that this contract provided BDD services for NHS Trusts. It clarified that Dr Veale is the lead consultant for this programme. It explained that the Priory was in the process of trying to ascertain if the contract stipulated that it should comply with the Act or if the Priory was a public authority for the purposes of the request or if it was the NCG or the individual Trusts which would be classed as the public authority. The Priory confirmed that, if it was subject to the Act, the annual breakdown of funding would be provided. However in relation to the cost per day to the NHS for

inpatient and outpatient care for BDD, it stated that this was specific PRIORITY pricing information and would not be accessible under the Act.

8. During a telephone call on 31 July 2008 between the Information Commissioner's Office (ICO) and the PRIORITY, the PRIORITY confirmed that having taken legal advice it was happy to proceed on the basis that it was a public authority for the purposes of the request. The Commissioner assumes that the PRIORITY has been advised that it is treated as a public authority by virtue of Part III of Schedule 1 to the Act.
9. On 7 August 2008 the PRIORITY wrote to the Commissioner to confirm that it was collating the information relating to the total amount of funding the NHS had paid to the PRIORITY for the BDD programme from 2000 onwards together with the annual breakdown, in order to release that information to the complainant. In relation to the cost per day to the NHS for inpatient and outpatient care for BDD, it stated that this was highly commercially sensitive and therefore exempt from disclosure under section 43(2) of the Act on the basis that it would cause or be reasonably likely to cause it commercial prejudice.
10. On 12 August 2008 the PRIORITY wrote to the complainant and disclosed part of the information requested by the complainant, namely the annual breakdown of funding as mentioned in paragraph 9. It also explained that it was withholding the information relating to the cost per day/night for inpatient and outpatient care for the BDD programme for commercial reasons.
11. On 13 August 2008 the Commissioner wrote to the complainant to determine whether she was now satisfied with the extent of disclosure or whether she wished the PRIORITY's decision to withhold the information relating to the cost per day/night to the NHS for inpatient and outpatient care due to commercial reasons.
12. On 19 August 2008 the complainant wrote to the Commissioner to confirm that she was dissatisfied with the extent of disclosure and wished the Commissioner to continue the investigation.
13. On 8 October 2008 the Commissioner wrote to the PRIORITY in order to obtain its more detailed arguments as to why its application of the section 43(2) exemption should be upheld in this case.
14. The Commissioner clarified that it would seem to be the PRIORITY's commercial interests which were of concern in this case, however he asked it to clarify whether those commercial interests "would" or "would likely to" be prejudiced. The Commissioner explained that under section 43(2) information is exempt if its disclosure would, or would have been likely to, prejudice the commercial interests of any person. The PRIORITY was asked to confirm whether it was arguing that disclosure of the withheld information "would have prejudiced its commercial interests" or whether it "would have been likely to prejudice its

commercial interests". If it is the Priory's view that disclosure would have prejudiced its commercial interests this would place a much stronger evidential burden on it than if it were relying on the other limb of the test that disclosure would have been likely to prejudice its commercial interests. However, if the "would have prejudiced" part of this test were established it would lead to a greater weight being given to the potential prejudice to the Priory's commercial interests in the application of the public interest than would be given if the "would be likely to prejudice" limb of the test were established.

15. The Priory was also asked to respond to the following points:-

- i. It was asked to provide a copy of the relevant contract between the Priory and the National Commissioning Group.
- ii. It was asked to confirm whether this is the only contract the Priory has with the NHS relating to BDD, that is it was asked to confirm that there were no separate contracts with any of the various Primary Care Trust's (PCTs).
- iii. It was asked to confirm whether the Priory held any similar contracts or was in the process of negotiating any similar contracts, to provide services in relation to the BDD programme for other bodies (including bodies within the private sector), at the time of the request.

When considering this it was asked to take into account justifiable differences between the contract which is relevant in this case and other similar contracts or negotiations. This may include the length of time the contract was agreed to run for. It may also include the amount of work the contract is providing. If differences between similar contracts or negotiations can be justified it is less likely the Priory would be able to successfully argue that its commercial interests would or would likely to be prejudiced.

- iv. It was asked if there are any private sector bodies who may pose competition to the Priory. That is are there private sectors bodies who may wish to compete with the Priory to obtain a contract with the NHS to provide the BDD programme to NHS patients? Were there any ongoing negotiations between the NHS, The Priory and the NHS and any competitors to the Priory at the time of the request?
- v. The Commissioner noted that as the information the complainant has requested goes back to 2000, it is likely that the cost to the NHS was different at the time of the request than in 2000. It is less likely that the Priory would be able to successfully argue that disclosure of historical daily costs to the NHS for inpatients/outpatients in relation to the BDD

programme would prejudice its commercial interests. The Priory was asked to respond to this.

- vi. The Commissioner also noted that the Priory's costs charged to private individual patients for the initial consultation and subsequent appointments in relation to BDD are published and therefore asked why the daily cost to the NHS cannot be published.
- vii. The Priory was asked to explain the consequences that would or would likely occur if the requested information were disclosed and explain why those consequences would or would likely occur.
- viii. Finally the Commissioner highlighted that section 43 is a qualified exemption and therefore requires consideration of the public interest. The Priory was asked to explain why the prejudicing of the Priory's commercial interests in this case would not be in the public interest. That is, why any of the consequences or likely consequences of disclosure would not be in the public interest.

16. On 20 November 2008 the Priory responded to the Commissioner. With regard to the section 43(2) exemption, it explained that it would be relying on the "would be likely to" test. However it questioned whether, in fact, it could rely on the section 43(1) test in that the information "constitutes a trade secret". It asked the Commissioner to consider this and also asked whether or not it could rely on the section 41 exemption relating to information provided in confidence.

17. The Priory explained that it did not seek to protect its day rates for inpatient and outpatient care for BDD which were in the public domain but wished to protect the confidential pricing privately agreed with the NCG for NHS patients in respect of its BDD service. It explained that the rates were based on certain volumes being guaranteed and were discounted compared to the day rates published on its website. It explained that the BDD service agreed with the NCG was a highly specialised and tailored offering, it provided specific types of treatment for BDD and severe OCD and the prices agreed reflected that service whereas the published inpatient and outpatient day rates for BDD reflected a more "off-the-shelf" service.

18. The Priory explained that its concern was that if the discounted rates for its BDD service were made public, this would be misleading for customers and it is more likely than not that there would be an adverse market reaction. That is customers or potential customers would use this information to drive day rate prices down or business would be lost if it was unable to offer discounted rates to private individual customers. It also explained that it would also enable PCTs who offer similar services to access its pricing structures for this to its detriment.

19. It responded to the Commissioner's particular questions raised as follows.-

- i. The Priory provided a copy of the contract it entered into with NCG.
- ii. It explained that this is the only contract with the NCG for BDD and there were no separate contracts with any of the various PCTs.
- iii. It explained that this is the only contract the Priory has entered into for BDD and that there have been no negotiations for similar contracts.
- iv. It stated that it was not aware of any private sector bodies who may pose it competition but it does not actively monitor this. As this is such a specialised service, there were no negotiations between the NHS and the Priory's competitors.
- v. It explained that it was happy to disclose its published private prices for BDD services for the period 2000 – 2006 if that is required. However prior to 2007, there was no agreement between Priory and the NCG for BDD.
- vi. It conceded that the private day rate price is published and in the absence of the NCG agreement this would be the "daily charge to the NHS", that is what an NHS patient would pay. What is not published is the discounted rate agreed between Priory and the NCG as part of the agreement privately concluded between them.
- vii. It referred the Commissioner to the response to vi above.
- viii. As a commercial organisation it explained that it was very reluctant to disclose its confidential pricing structures with NCG which have been agreed on the basis of guaranteed volumes of work and in respect of a very specialised service for people with highly complex mental disorders. Though the public have a right to determine whether independent treatment centres offer value for money, it questioned whether the disclosure of pricing would assist in that determination given the lack of similar services by which to benchmark this specialised service and how it is priced.

20. It concluded that it may be that the complainant may just want details of its published day rates for BDD which are freely available. However, the NCG agreement falls within the services provided by the Priory to the NHS for BDD services and it is in respect of that private agreement that it wished to rely on the relevant exemptions under the Act.



21. On 24 November 2008, the Commissioner responded to the Priory. He provided some explanation as to the application of section 43(1) which relates to trade secrets and section 41 which relates to information provided in confidence. The Commissioner asked the Priory to provide further arguments in relation to either of these exemptions if it wished to rely upon them.
22. The Commissioner noted that the Priory wished to rely upon the “would be likely to” test in relation to its application of section 43(2). The Commissioner clarified that the Priory had stated that this is the only contract that the Priory has with the NCG for BDD and there are no separate contracts with any of the other PCT’s. He also noted that this was the only contract the Priory has entered into for BDD and there have been no negotiations for similar contracts. Finally the Priory is not aware of any private sector bodies who may pose competition and furthermore to its knowledge as it is such a niche area there were no negotiations between the NHS and any of the Priory’s competitors. Therefore the Commissioner asked how the Priory’s commercial interests would be likely to be prejudiced by releasing this information when it would seem to be the only possible provider of this service. The Commissioner explained that if there are no other possible providers of this highly specialised service it adds weight to the argument that releasing this information would not be likely to prejudice the Priory’s commercial interests.
23. The Commissioner also noted that the Priory was concerned that if the discounted BDD service rates were made public, it would be misleading for its private patients, and cause an adverse market reaction in that private customers would attempt to drive rates down. The Commissioner suggested that the rates under the contract could be differentiated to the private patient rates. This is because when something is provided in bulk under a contract, in this case the NHS were providing patients to the Priory, it is extremely common that a discounted rate may apply. The Priory’s concerns could be overcome by releasing alongside the information, an explanation as to why it was possible for it to provide the NHS with a discounted rate (because it was supplying patients in bulk) and therefore why it was unable to offer this favourable rate to individual private patients.
24. Finally the Commissioner noted that the Priory also stated that disclosure of the information would enable PCTs, who offered similar services, to access the Priory’s pricing structures which would be likely to prejudice the Priory’s commercial interests. Therefore the Commissioner asked in its letter of 24 November 2008 whether the various PCT’s were in direct competition with the Priory in relation to the service that the Priory currently provided under the contract.
25. On 8 December 2008 the Priory wrote to the Commissioner and stated that it was minded to disclose the discounted rates but wanted to check

with the National Commissioning Group that this was acceptable before the information was released. It did not provide any further arguments to suggest it wished to rely on the exemptions contained at section 43(1) or section 41 of the Act. Furthermore the Priory did not address the Commissioner's question as to whether the various PCT's were in direct competition with the Priory in relation to the service that the Priory currently provided under the contract it holds with the NCG for NHS patients. The Commissioner had asked this question as the Priory had briefly raised this issue in its response to the Commissioner of 20 November 2008 and which is detailed at paragraph 20 of this Notice. As the Priory provided no further arguments in relation to this or in relation to its suggestion that it may be able to rely on the exemptions contained at section 43(1) or section 41 of the Act the Commissioner did not consider these issues any further.

26. On 10 December 2008 the Commissioner wrote to the Priory to ask when it would be able to confirm that the information would be disclosed.
27. As the Commissioner did not receive a response from the Priory, he wrote to the Priory again on 8 January 2009, he asked it to confirm whether or not it was willing to release the withheld information within 10 working days of receipt of this letter. The Priory did not respond to this letter. The Commissioner has therefore proceeded on the basis of the arguments that have been provided by the Priory in relation to its application of section 43(2).

## **Finding of Fact**

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28. The role of the NCG is to oversee the national commissioning of highly specialised healthcare services. The NCG was established in April 2007 and is a responsibility of the ten Strategic Health Authorities (SHAs). Severe obsessive compulsive disorder (OCD) and Body Dysmorphic Disorder (BDD) service is one of the services nationally commissioned by the NCG.
29. The Priory has a set of prices for its BDD service which are published on its website. These prices apply to privately funded patients who wish to access this service. The Priory has separate discounted prices which it has agreed with the NCG for treatment of NHS patients which are referred to the Priory for the BDD treatment programme. For all NHS patients, the cost to the NHS is the discounted prices agreed under the contract with the NCG and those prices are not publicly available.



## Analysis

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### Procedural

#### Section 1

30. Section 1(1) of the Act states 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.”*

31. The Commissioner has considered whether the Priory has complied with section 1(1) (a) and (b) of the Act.
32. In this case the Priory did not confirm that it held the information relevant to the scope of the request within the statutory time for compliance.
33. Furthermore the Priory failed to provide the information held within the statutory time for compliance.
34. The Commissioner is therefore satisfied that the Priory did not respond to the complainant’s request in accordance with section 1(1)(a) and (b) of the Act.

#### Section 10

34. Section 10(1) of the Act states 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.”*

35. The Commissioner has considered whether the Priory has complied with section 10(1) of the Act.
36. In this case the Priory did not provide a response to the complainant within twenty working days of the date of the request.
37. The Commissioner is satisfied that the Priory did not confirm or deny whether or not there was information held relevant to the scope of the request nor did it disclose the information held within twenty working days of the date of the request. Therefore the Priory breached section 10(1) of the Act.

## Section 17

38. Section 17(1) states 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.”*

39. The Commissioner has considered whether the Priory has complied with section 17(1)(a), (b) and (c) of the Act.

40. In this case the Priory did not state that it wished to rely upon the section 43(2) exemption until after the Commissioner's involvement in relation to some of the requested information. In its letter of 12 August 2008 to the complainant, it stated that the information relating to the prices per day for inpatient and outpatient care were exempt for commercial reasons. It did not specify which exemption it was relying upon nor did it explain why.

41. As the Priory did not state that it wished to rely upon an exemption, state which exemption that was or explain why, prior to the Commissioner's involvement, the Commissioner considers the Priory to have breached section 17(1)(a), (b) and (c) of the Act.

## Exemption

### Section 43

42. Section 43(2) provides an exemption from disclosure for information which would or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

43. In this case the Priory has stated that disclosure of the prices for its BDD programme under the contract it holds with the NCG for NHS patients would be likely to prejudice the commercial interests of the Priory. Those prices are the discounted outpatient and inpatient daily rates. Therefore in order to determine whether the exemption is engaged the Commissioner has first considered whether the prices contained within the contract between the Priory and the NCG relate to the Priory's commercial interests.

44. The term 'commercial interests' is not defined in the Act. However the Commissioner has considered his awareness guidance on the application of section 43. This comments that,
- “...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services. “
45. The Commissioner has also noted guidance issued by the Scottish Information Commissioner in relation to commercial interests and section 33(1)(b) of the FOI (Scotland) Act 2002. This guidance states that,
- “...commercial interests will specifically relate to any commercial trading activity it undertakes, e.g. the ongoing sale and purchase of goods and services, commonly for the purpose of revenue generation. Such activity will normally take place within a competitive environment.”
46. The Commissioner considers that the provision of the Priory's BDD treatment programme to its private patients in return for money is a commercial activity. Upon consideration of this and the definitions contained at paragraphs 46 and 47, the Commissioner considers that the prices contained within the contract between the Priory and the NCG relate to the Priory's commercial interests.
47. The Commissioner has therefore gone on to consider whether or not the Priory's commercial interests would be likely to be prejudiced if the prices contained within the contract between the Priory and the NCG were disclosed. The Priory had argued that disclosure of the withheld information would have been likely to prejudice its commercial interests. In dealing with the issue of the likelihood of prejudice, the Commissioner notes that in the case of *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)*, the Information Tribunal confirmed that “the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk” (para 15). He has viewed this as meaning that the risk of prejudice need not be more likely than not, but must be substantially more than remote.
48. During the investigation of this case the Commissioner asked the Priory to demonstrate how any prejudice to its commercial interests would be likely to be caused by the disclosure of the prices contained within the contract between itself and the NCG for NHS patients for the BDD treatment programme at the Priory.
49. In support of its use of this exemption the Priory stated that:
- Publishing the discounted rates may mislead customers which would lead to an adverse market reaction, that is customers may

try to drive individual private patient rates down and/or business may be lost.

- It conceded that though the public have a right to determine whether independent treatment centres offer value for money, it questioned whether the disclosure of pricing would assist in that determination given the lack of similar services by which to benchmark this specialised service and how it is priced.

50. However the Priory also stated that:-

- The contract with the NCG for NHS patients for the treatment of BDD at the Priory is the only contract that the Priory has with the NCG for BDD and there are no separate contracts with any of the other PCT's.
- It is the only contract the Priory has entered into for BDD and there have been no negotiations for similar contracts (with private or public bodies).
- Finally the Priory is not aware of any private sector bodies who may pose competition and furthermore to its knowledge as it is such a niche area there were no negotiations between the NHS and any of the Priory's competitors at the time of agreeing the contract.

51. The Priory has provided no further arguments other than those outlined above.

52. The Priory has argued that private paying customers may be misled if they were to become aware of the discounted prices agreed under the contract with the NCG for NHS patients, however the Commissioner considers that this concern could be counter balanced with the release of a clear explanation as to why the Priory is able to offer those reduced prices in relation to NHS patients. That is the NCG provides the Priory with patients 'in bulk' and this attracts certain discounts depending on the number of patients referred. This is not an unusual concept and the Commissioner considers that it is common that discounted rates for goods or services are offered under a contract where those goods or services are to be provided in bulk.

53. Furthermore the Commissioner is of the view that if the Priory's BDD treatment programme is such a niche area as it has stated, a private patient would not have the option to obtain the treatment elsewhere nor be in a strong position to drive the individual prices down.

54. The Commissioner does not consider that private patients would be able to drive prices down as it would take a great number of patients to be able to exert enough pressure upon the Priory for this to occur and this would be unlikely due to the sensitive nature of the treatment programme.

55. Furthermore the Commissioner considers that whilst customers of other products/services may be able to stop buying those products/services where the price is significant it would not be as easy to reject treatment for a serious mental health issue on the basis of the price. Particularly when taking into account the fact there seems to be a lack of alternative providers.
56. Bearing the above points in mind, the Commissioner considers that whilst the prices contained within the contract with the NCG for NHS patients to receive treatment on its BDD programme relates to the Priory's commercial interests, he is not persuaded that those commercial interests would be likely to be prejudiced in this case. The Commissioner is therefore of the view that section 43(2) is not engaged in this case and does not provide an exemption from disclosure.
57. As the Commissioner has concluded that the exemption is not engaged he has not gone on to consider the public interest test in this case.
58. The full text of section 43 can be found in the Legal Annex at the end of this Notice.

## The Decision

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59. The Commissioner's decision is that the exemption contained at section 43(2) is not engaged in this case.
60. The Commissioner's decision is that the Priory did not deal with the request for information in accordance with section 1(1)(a) of the Act as it failed to respond to the complainant to confirm or deny whether there was any information held prior to the Commissioner's involvement.
61. Furthermore the Commissioner considers that the Priory did not deal with the request in accordance with section 1(1)(b) of the Act as it failed to provide all of the information held relevant to the scope of the request as it incorrectly relied upon the section 43(2) exemption.
62. As the Priory also failed to comply with the requirements of section 1(1)(a) and 1(1)(b) within twenty working days it also breached section 10(1) of the Act.
63. The Commissioner also considers that the Priory breached section 17(1)(a), (b) and (c) as it failed to state that it was relying upon an exemption, it failed to specify the exemption in question, nor did it provide any explanation to the complainant as to why it believed the exemption applied.

## Steps Required

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64. The Commissioner requires the Priory to take the following steps to ensure compliance with the Act:

The requested information should be disclosed to the complainant within 35 calendar days of the date of this notice. The outstanding requested information is the prices contained within the contract between the Priory and the NCG for NHS patients to receive the BDD treatment programme at the Priory.



## Right of Appeal

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65. 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](mailto: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 17th day of February 2009**

**Signed .....**

**Richard Thomas  
Information 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”.

### **Time for Compliance**

**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 10(2)** provides that –

“Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.”

**Section 10(3)** provides that –

“If, and to the extent that –

- (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
- (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.”

**Section 10(4)** provides that –

“The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.”

**Section 10(5)** provides that –

“Regulations under subsection (4) may –

- (a) prescribe different days in relation to different cases, and
- (b) confer a discretion on the Commissioner.”

**Section 10(6)** provides that –

“In this section –

“the date of receipt” means –

- (a) the day on which the public authority receives the request for information, or

- (b) if later, the day on which it receives the information referred to in section 1(3);

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.”

### **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.”

**Commercial interests.**

**Section 43(1)** provides that –

“Information is exempt information if it constitutes a trade secret.”

**Section 43(2)** provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

**Section 43(3)** provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).”