

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 9 July 2009

Public Authority: The Parliamentary Commissioner for Administration
(Parliamentary and Health Service Ombudsman)

Address: Millbank Tower
Millbank
London
SW1P 4QP

Summary

The complainant requested a copy of actuarial advice the public authority had obtained in relation to an investigation it had conducted regarding the State Earnings Related Pension. The public authority withheld the requested information by virtue of the exemption at section 44(1)(a)(prohibitions on disclosure) and additionally sought to rely on the exemption at section 40(2) (personal information) during the course of the Commissioner's investigation. The Commissioner decided that the requested information was correctly withheld under section 44(1)(a) and therefore did not consider the applicability of section 40(2).

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 4 November 2006 the complainant wrote to the public authority requesting a 'copy of the professional advice (it had received from) *the Independent Actuary*' in relation to the amount in compensation for those who had been misinformed about changes affecting the amount of State Earnings Related Pension (SERPs) a surviving spouse would inherit.

3. The request, according to the complainant, was based on the information he had received from the Pension Service.¹ The words used in the letter from the Pension Service were;

'The Ombudsman sought professional advice from an independent Actuary. That Actuary suggested that the financial assumptions underlying actuarial basis for the Pension Service's calculations (referred to as the GAD factor) while more optimistic than he would have used in the current economic and investment conditions probably fell within a range most actuaries might consider reasonable. He concluded that the Pension Service's approach to calculating redress was reasonable.' (Quoted from paragraph 7 of the Information Tribunal's decision in case EA/2008/0056.)

4. The public authority responded on 9 November 2006. It explained that the PHSO had not taken any actuarial advice in relation to his previous complaint about the Pension Service but it had *'sought advice on some of the investigations....conducted into other complaints relating to SERPS.'* It then proceeded to withhold the 'advice' (i.e. in relation to other SERPs complaints) under section 44 of the Act.
5. On 22 November 2006 the complainant requested a review of the public authority's decision on the basis that he had been denied access *'to information.....where criticisms have been expressed by an independent actuary that the financial assumptions underlining the Pensions Services calculations were more optimistic than he would have used in the current economic and investment conditions.'* (i.e. the actuarial advice referred to by the Pension Service which was the subject of his original request and was withheld by the public authority).
6. The public authority completed its review and wrote to the complainant on 15 December 2006 with the details of its conclusions. The public authority referred to a letter (dated 24 November 2006) it had written to the complainant further to the refusal notice in which it explained that the actuarial advice referred to by the Pension Service was in relation to a specific complaint made by another individual in July 2004. It however concluded that the original decision was correct in that the actuarial advice in question was exempt from disclosure by virtue of section 44 of the Act.

The Investigation

Scope of the case

7. On 10 November 2008 the complainant formally contacted the Commissioner to complain about the way his request for information had been handled. The

¹ The same request was made to the Pension Service (a body under the Department for Work and Pensions) and subsequently resulted in a complaint to the Commissioner (FS50145475) whose decision was appealed to the Information Tribunal in case EA/2008/0056.

complainant specifically asked the Commissioner to review the public authority's decision not to disclose the actuarial advice he had requested.

8. It is at the Commissioner's discretion whether or not to consider a complaint where there has been an undue delay before it was made. In his initial contact with the Commissioner's office in a letter dated 16 December 2006, the complainant explained that he had sought the actuarial advice from both the Pension Service and the public authority. It was however only his complaint against the Pension Service which was processed and subsequently passed on to the relevant team for investigation. Therefore, although the formal complaint in this case was made nearly 2 years after the internal review was completed, the Commissioner was aware that the complainant had also sought to obtain the actuarial advice from the public authority and apologises for the error in not processing his complaint against the public authority at the time it was made in 2006. It is therefore in light of this error on the Commissioner's part that he decided to exercise his discretion to investigate the complaint after it was formally made in 2008.

Chronology

9. On 3 April 2009, the Commissioner wrote to the complainant to confirm the scope of the investigation.
10. On 1 May 2009 the Commissioner wrote to the public authority inviting its submissions on the application of the exemption at section 44.
11. The public authority responded on 22 May 2009. It confirmed that the actuarial advice in question was obtained on 8 July 2004 from (a named financial services company) in relation to a specific investigation regarding a complaint by (named person).
12. It explained that the actuarial advice therefore fell within section 11(2) of the Parliamentary Commissioner Act 1967 and was exempt by from disclosure under the Act by virtue of the provisions of section 44(1)(a).
13. The public authority further argued that the actuarial advice was also exempt from disclosure by virtue of section 40(2) as it constitutes the personal data of (named person) and he would have had a legitimate expectation that information obtained for the purposes of investigating his complaint would not be disclosed further than necessary. This was the first time it had cited this exemption.
14. On 8 June 2009, the public authority provided the Commissioner with a copy of actuarial advice requested by the complainant.

Analysis

15. A full text of all the statutory provisions referred to in this section can be found in the Legal Annex.

Exemption

Section 44(1)(a)

16. Information is exempt from disclosure under the above exemption if its disclosure by the public authority holding it is prohibited by or under any enactment.
17. As noted above, the public authority explained that the relevant statutory bar is section 11(2) of the Parliamentary Commissioner Act 1967 ('The PCA'), which states the following:

'Provision for secrecy of information.

(2) Information obtained by the Commissioner or his officers in the course of or for the purposes of an investigation under this Act shall not be disclosed except—

(a) for the purposes of the investigation and of any report to be made thereon under this Act;

(b) for the purposes of any proceedings for an offence under [^{F2}the Official Secrets Acts 1911 to 1989] alleged to have been committed in respect of information obtained by the Commissioner or any of his officers by virtue of this Act or for an offence of perjury alleged to have been committed in the course of an investigation under this Act or for the purposes of an inquiry with a view to the taking of such proceedings; or

(c) for the purposes of any proceedings under section 9 of this Act;'

18. Section 9 of the PCA relates to proceedings for obstruction and contempt brought before a court of law.
19. Having viewed the actuarial advice, the Commissioner is satisfied that it was obtained by the public authority for the purpose of an investigation regarding a complaint by (named person) against the Department for Work and Pensions. It is therefore information which was obtained by the Ombudsman for the purpose of an investigation under the PCA.
20. It is generally accepted that a disclosure under the Act is a disclosure to the world at large. In other words information must be suitable for disclosure to any member of the public and not only to an individual or a group of individuals. The exceptions in paragraphs (a) to (c) of section 11(2) are purpose specific and to that extent, it should be expected that any disclosure made pursuant to the exceptions would be made only to individuals or organisations that require the information for those specified purposes and not to the world at large in

responding to a freedom of information request. As such none of the exceptions to section 11(2) are met.

21. The Commissioner therefore finds that the public authority correctly withheld the requested information under section 44(1)(a) of the Act by virtue of the statutory bar contained in section 11(2) of the PCA.
22. In light of the above decision, the Commissioner has not gone on to consider the exemption at section 40(2) or addressed the issue of late reliance upon that section.

The Decision

23. 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:
 - It correctly withheld the actuarial advice in question by virtue of the exemption at section 44(1)(a).

Steps Required

24. The Commissioner requires no steps to be taken.

Right of Appeal

25. 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 9th day of July 2009

Signed

**Jo Pedder
Senior Policy Manager**

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

LEGAL ANNEX

Freedom of Information Act 2000

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.”

Prohibitions on disclosure.

Section 44(1) provides that –

“Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-

- (a) is prohibited by or under any enactment,

- (b) is incompatible with any Community obligation, or
- (c) would constitute or be punishable as a contempt of court.”

Section 44(2) provides that –

“The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).”

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 33A(1) of that Act were disregarded, or
 - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed)."

Section 40(6) provides that –

“In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.”

Section 40(7) provides that –

In this section-

- "the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;
- "data subject" has the same meaning as in section 1(1) of that Act;
- "personal data" has the same meaning as in section 1(1) of that Act.

Parliamentary Commissioner Act 1967 – Section 11

Provision for secrecy of information.

— (1)

(2) Information obtained by the Commissioner or his officers in the course of or for the purposes of an investigation under this Act shall not be disclosed except—

(a) for the purposes of the investigation and of any report to be made thereon under this Act;

(b) for the purposes of any proceedings for an offence under [the Official Secrets Acts 1911 to 1989] alleged to have been committed in respect of information obtained by the Commissioner or any of his officers by virtue of this Act or for an offence of perjury

alleged to have been committed in the course of an investigation under this Act or for the purposes of an inquiry with a view to the taking of such proceedings; or
(c) for the purposes of any proceedings under section 9 of this Act;
and the Commissioner and his officers shall not be called upon to give evidence in any proceedings (other than such proceedings as aforesaid) of matters coming to his or their knowledge in the course of an investigation under this Act.

(2A) Where the Commissioner also holds office as [Welsh Administration Ombudsman or] a Health Service Commissioner and a person initiates a complaint to him in his capacity as [Welsh Administration Ombudsman or a Health Service Commissioner] which relates partly to a matter with respect to which that person has previously initiated a complaint under this Act, or subsequently initiates such a complaint, information obtained by the Commissioner or his officers in the course of or for the purposes of investigating the complaint under this Act may be disclosed for the purposes of his carrying out his functions in relation to the other complaint.]

(3) A Minister of the Crown may give notice in writing to the Commissioner, with respect to any document or information specified in the notice, or any class of documents or information so specified, that in the opinion of the Minister the disclosure of that document or information, or of documents or information of that class, would be prejudicial to the safety of the State or otherwise contrary to the public interest; and where such a notice is given nothing in this Act shall be construed as authorising or requiring the Commissioner or any officer of the Commissioner to communicate to any person or for any purpose any document or information specified in the notice, or any document or information of a class so specified.

(4) The references in this section to a Minister of the Crown include references to the Commissioners of Customs and Excise and the Commissioners of Inland Revenue.

(5) Information obtained from the Information Commissioner by virtue of section 76(1) of the Freedom of Information Act 2000 shall be treated for the purposes of subsection (2) of this section as obtained for the purposes of an investigation under this Act and, in relation to such information, the reference in paragraph (a) of that subsection to the investigation shall have effect as a reference to any investigation.]

Parliamentary Commissioner Act 1967 – Section 9

Obstruction and contempt.

— (1) If any person without lawful excuse obstructs the Commissioner or any officer of the Commissioner in the performance of his functions under this Act, or is guilty of any act or omission in relation to an investigation under this Act which, if that investigation were a proceeding in the Court, would constitute contempt of court, the Commissioner may certify the offence to the Court.

(2) Where an offence is certified under this section, the Court may inquire into the matter and, after hearing any witnesses who may be produced against or on behalf of the person charged with the offence, and after hearing any statement that may be offered in defence, deal with him in any manner in which the Court could deal with him if he had committed the like offence in relation to the Court.

(3) Nothing in this section shall be construed as applying to the taking of any such action as is mentioned in subsection (4) of section 7 of this Act.