

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 16 February 2009

Public Authority: Cabinet Office
Address: 70 Whitehall
London
SW1A 2AS

Summary

The complainant wrote to the Cabinet Office to request various pieces of information relating to the review by Richard Thomas and Dr Mark Walport on the use and sharing of personal information in the public and private sectors. The Cabinet Office informed the complainant the requested information was exempt from disclosure under section 35 of the Act (Formulation of Government Policy) but that it needed extra time to consider where the balance of the public interest lies in this case. Seven months after submitting her request, the complainant had still not received a substantive response and complained to the Commissioner about the Cabinet Office's handling of her request.

The Commissioner has found that the Cabinet Office breached section 17 of the Act, in particular section 17(3), as it failed to complete its public interest determination within a reasonable timescale, and has still not done so. The Cabinet Office also breached section 10(1) of the Act as it took longer than 20 working days to confirm whether information falling within the scope of the request was held.

The Commissioner requires the Cabinet Office to issue a notice compliant with sections 17(1) & (3) that states why the exemption under section 35 is engaged, and its conclusion about where the balance of the public interest lies. If the Cabinet Office concludes that the balance of the public interest favours disclosing the information or no longer considers the exemption to apply, the Commissioner requires it to provide the information to the complainant. The Cabinet Office must take the steps required by this notice within 35 calendar days of the date of this notice.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 29 May 2008, the complainant wrote to the Cabinet Office to request the following information, relating to the review by Richard Thomas and Dr Mark Walport on the use and sharing of personal information in the public and private sectors:
 1. A copy of the letter sent from the Prime Minister to Richard Thomas and Dr Mark Walport inviting them to conduct the data sharing review.
 2. Copies of all communications between the Prime Minister's Office (and / or Cabinet Office) and Richard Thomas and / or the Information Commissioner's Office regarding the Review.
 3. Copies of all communications between the Prime Minister's Office (and / or Cabinet Office) and Dr Mark Walport or his representatives regarding the Review.
 4. Copies of all communications between the Prime Minister's Office (and / or Cabinet Office) and the Ministry of Justice (and its former incarnation as the Department of Constitutional Affairs) regarding the Review.
3. On 2 June 2008, the Cabinet Office wrote to the complainant and stated that her request was received on 30 May 2008 and that it was being dealt with under the terms of the Act.
4. On 2 July 2008, the Cabinet Office wrote to the complainant and confirmed that it "does hold information falling within the terms of [the] request. However, it stated that the exemption under section 35 of the Act applies to this information. The Cabinet Office explained that this is a qualified exemption and estimated that it required "an additional 20 days to take a decision on where the balance of the public interest lies". The Cabinet Office informed the complainant that it planned to provide a response by 25 July but that, if it appeared that it will take longer than this to reach a conclusion, it will keep the complainant informed.
5. On 24 July 2008, the complainant wrote to the Cabinet Office and stated the following:

"I note that tomorrow is the 25th of July, the date you are meant to get back to me with your response. If you plan on being any later due to your extensive deliberation on the public interest test, please could you forward to me all the criteria which comprise this test."
6. On 25 July 2008, the Cabinet Office wrote to the complainant and informed her that it had not yet finished its considerations of where the balance of the public interest lies in this case. It estimated that it will take an additional 20 days to take a decision on where the balance of the public interest lies and therefore plans to provide a response by 22 August. The Cabinet Office further stated that if it appears that it will take longer than this to reach a conclusion, it will keep the

complainant informed. With regard to the complainant's request for the criteria which comprises the public interest test, the Cabinet Office stated the following:

“The Freedom of Information Act obliges us to look at the public interest in 'all the circumstances of the case' and we treat each request on its individual merits. These will obviously vary according to the particular facts of the case. However, the Ministry of Justice provides guidance on the way Government departments should approach the public interest test in general, and it is published here: <http://www.justice.gov.uk/guidance/foi-exemptions-public-interest.htm>. It also gives specific guidance on the exemption at section 35, and you may find this useful background as to the public interest considerations that are often pertinent in these cases. You can find the guidance here: <http://www.justice.gov.uk/docs/foi-exemption-s35.pdf> and our working assumptions on policy advice here: <http://www.justice.gov.uk/guidance/foi-assumptions-policy.htm> I hope you find this information useful. May I reassure you that your case is being considered and we hope to have a response to you as soon as is possible.”

7. On 22 August 2008, the Cabinet Office wrote to the complainant as follows:

“The Cabinet Office has not yet finished its considerations of where the balance of the public interest lies in this case. We do, of course, aim to make all decisions within 20 working days, including in cases where we need to consider where the public interest lies in respect of a request for exempt information. In this case, however, we have not yet reached a decision on where the balance of the public interest lies. In your case we estimate that it will take an additional 20 days to take a decision on where the balance of the public interest lies. Therefore, we plan to let you have a response by 19 September. If it appears that it will take longer than this to reach a conclusion, we will of course keep you informed.”

8. On 19 September 2008, the Cabinet Office wrote to the complainant using the same text as that in its email of 22 August 2008, but stated that it planned to provide a response by 17 October.
9. On 17 October 2008, the Cabinet Office wrote to the complainant using the same text as that in its email of 22 August 2008, but stated that it planned to provide a response by 14 November.
10. On 14 November 2008, the Cabinet Office wrote to the complainant using the same text as that in its email of 22 August 2008, but stated that it planned to provide a response by 12 December.
11. On 12 December 2008, the Cabinet Office wrote to the complainant using the same text as that in its email of 22 August 2008, but stated that it planned to provide a response by 14 January.
12. On 14 January 2009, the Cabinet Office wrote to the complainant using the same text as that in its email of 22 August 2008, but stated that it planned to provide a response by 11 February.

13. On 12 February 2009, the Cabinet Office wrote to the complainant using the same text as that in its email of 22 August 2008, but stated that it planned to provide a response by 12 March.

The Investigation

Scope of the case

14. On 14 January 2009 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider the delay in responding to her request.
15. As the Cabinet Office had not responded to the complainant's request, in accordance with the Act, over seven months since it was submitted, the Commissioner considered it reasonable to accept the complaint and not require the complainant to request that the Cabinet Office carries out an internal review of its handling of the case.

Chronology

16. On 23 January 2009 the Commissioner wrote to the Cabinet Office and, in relation to the complainant's request, stated the following:

"Given the long length of the delay, I am writing to ask that the Cabinet Office provides [the complainant] with a substantive response by Friday 30 January [2009], copying [the Commissioner] in. If this response is not provided by that date [I] will then proceed to issuing a Decision Notice formally requiring the Cabinet Office to do so."
17. The Commissioner did not receive a response from the Cabinet Office by 30 January 2009 and he therefore proceeded to issue a Decision Notice accordingly.
18. On the day on which this Notice was served, the Cabinet Office had still not provided a substantive response to either the complainant or the Commissioner.

Analysis

Procedural matters

19. The full wording of each of the sections of the Act referred to below can be found in the legal annex.

Section 10(1)

20. Section 1(1)(a) of the Act states that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request. Section 10(1) states that a public authority must comply with section 1(1) not later than the twentieth working day following the date of receipt.
21. The Cabinet Office did not inform the complainant that it held information falling within the scope of her request until 2 July 2008, which was 23 working days from the day following the date of receipt of the request. In addition, no reason was provided for this delay. This constitutes a breach of section 10(1).

Section 17(1)

22. Section 17(1) requires that, where a public authority believes that any exemption from part II of the Act applies, it should issue a notice stating why the exemption in question is engaged. This notice must be issued within 20 working days of receipt of the request; there is no extension available to the time within which a notice identifying the exemption and stating why it is engaged must be provided.
23. In this case the complainant was not informed within 20 working days of the request that section 35 was being applied to the requested information. Nor did it explain which subsection of section 35 was being applied, and why. The Commissioner therefore finds that the public authority has breached section 17(1)(c) in failing to state, within twenty working days of the request, why the exemption is engaged. In addition, the Commissioner notes that the Cabinet Office has still not supplied this detail to the complainant.

Section 17(3)

24. Section 17(3) allows a public authority to provide its public interest determination in a separate notice 'within such time that is reasonable in the circumstances'. The Commissioner has issued publicly available Good Practice guidance on this point. This can be found at: http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/foi_good_practice_guidance_4.pdf. This states the following:

“...our view is that public authorities should aim to respond fully to **all** requests within 20 working days. In cases where the public interest considerations are exceptionally complex it may be reasonable to take longer but, in our view, in no case should the **total** time exceed 40 working days.”
25. In this case the Commissioner notes that the public authority has considerably exceeded the maximum time for responding to the request. The Commissioner believes this to be totally unacceptable.
26. The Commissioner therefore finds that the public authority has breached section 17(3) because it has not provided the complainant with its public interest determination within such time as is reasonable. As stated in the Commissioner's

guidelines, he considers forty working days to be a reasonable time for carrying out a public interest determination. In addition, the Cabinet Office has provided the complainant with no explanation as to why there has been such an excessive delay in this case.

The Decision

27. The Commissioner has decided that the following elements of the request were not dealt with in accordance with the Act:
- i. The public authority did not deal with the request in accordance with section 10(1) of the Act as it took longer than 20 working days to confirm to the complainant that it held information falling within the scope of her request.
 - ii. The public authority did not deal with the request for information in accordance with section 17(1)(c) of the Act as the complainant was not informed, within 20 working days of her request, what exemption was being applied, and why.
 - ii. The public authority has also breached section 17(3) of the Act as it failed to complete its public interest determination within a reasonable timescale, and has still not done so.

Steps Required

28. The Commissioner requires the Cabinet Office to take the following steps to ensure compliance with the Act:

Issue a notice compliant with sections 17(1) and (3) that states why the exemption under section 35 is engaged, and its conclusion about where the balance of the public interest lies. If the Cabinet Office concludes that the balance of the public interest favours disclosing the information or no longer considers the exemption to apply, the information should be provided to the complainant.

29. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

30. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session

in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

31. 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 16th day of February 2009

Signed

**Gerrard Tracey
Assistant Commissioner**

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

Legal Annex

General Right of Access

Section 1(1) provides that -

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

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.”

Formulation of Government Policy

Section 35(1) provides that –

“Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (a) the formulation or development of government policy,
- (b) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request or the provision of such advice, or
- (d) the operation of any Ministerial private office.

Section 35(2) provides that –

“Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded-

- (a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or
- (b) for the purposes of subsection (1)(b), as relating to Ministerial communications.”

Section 35(3) provides that –

“The duty to confirm or deny 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).”

Section 35(4) provides that –

“In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking.”

Section 35(5) provides that –

“In this section-

"government policy" includes the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the National Assembly for Wales;

"the Law Officers" means the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland and the Attorney General for Northern Ireland;

"Ministerial communications" means any communications-

- (a) between Ministers of the Crown,
- (b) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or
- (c) between Assembly Secretaries, including the Assembly First Secretary, and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly, and proceedings of the executive committee of the National Assembly for Wales;

"Ministerial private office" means any part of a government department which provides personal administrative support to a Minister of the Crown, to a Northern Ireland Minister or a Northern Ireland junior Minister or any part of the administration of the National Assembly for Wales providing personal administrative support to the Assembly First Secretary or an Assembly Secretary;

"Northern Ireland junior Minister" means a member of the Northern Ireland Assembly appointed as a junior Minister under section 19 of the Northern Ireland Act 1998.”