

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 2 February 2010

Public Authority: Ministry of Justice
Address: 102 Petty France
London
SW1H 9AJ

Summary

The complainant requested information relating to any review carried out or planned of the 2.5% expected rate of return from the investment of a sum awarded for damages set out in the Damages (Personal Injury) Order 2001. The public authority refused to confirm or deny whether it held information falling within the scope of the request and cited the exemption provided by section 35(3) (information relating to the formulation or development of government policy). The Commissioner finds that this exemption is engaged, but that the public authority concluded incorrectly that the public interest in the maintenance of this exemption outweighed the public interest in disclosure and, in failing to provide confirmation or denial within twenty working days of receipt of the request, failed to comply with the requirements of sections 1(1)(a) and 10(1). The Commissioner also finds that the public authority did not comply with the requirements of section 17(1) in that it failed to provide a valid refusal notice within 20 working days of receipt of the request. The public authority is required to provide to the complainant confirmation or denial of whether the requested information is held. For any information that is held, the public authority is required to either disclose this, or provide a reason valid under the Act for why this will not be disclosed.

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 14 January 2008 the complainants, a firm of solicitors, requested the following information:

“... to request the Secretary of State disclose to what extent the current rate of 2.5% [specified in the Damages (Personal Injury) Order 2001] has been reviewed, the advice and information he has based this on and whether there are any plans in the near future to amend the rate.”

3. The public authority responded to this initially on 12 February 2008 and stated that it would not be possible for it to respond within 20 working days of receipt of the request. The public authority confirmed that the information requested was held, but stated that this information may have been exempt under section 35 (formulation or development of government policy) of the Act. This response did not cite any subsection of section 35, confirm that this exemption was engaged, or provide any reasoning as to why this exemption was engaged.
4. The public authority provided a substantive response on 4 March 2008. The public authority altered its stance and stated that it now neither confirmed nor denied whether the requested information was held. The exemption provided by section 35(3) was cited with the explanation that the public authority believed that any information that it did hold that fell within the scope of the request would fall within the class specified in section 35(1)(a) (formulation or development of government policy).
5. The complainant responded to this on 23 April 2008 and requested the public authority to carry out an internal review of its handling of his request. As grounds for this review, the complainant stated that the public authority had mentioned no factors specific to the request in the reasoning for the public interest conclusion. The complainant listed factors that they believed were relevant to the balance of the public interest and stated that the conclusion of the public authority that the public interest favoured maintenance of the exemption was incorrect. The complainant also referred to section 35(4) and suggested that any factual information that had been used for decision taking and that fell within the scope of the request should be disclosed due to the particular public interest in this information.
6. Finally, the complainants referred to the holding reply of 12 February 2008 having confirmed that information falling within the scope of the request was held. Given that the public authority had changed its position by the time of the refusal notice to being that it neither confirmed nor denied whether it held information falling within the scope of the request, the complainant asked that the public authority clarify its position on this issue.
7. The public authority responded with the outcome of the internal review on 9 July 2008. The public authority clarified its reasoning for concluding that the public interest favoured the maintenance of the exemption, stating that a confirmation would effectively reveal that the discount rate had been reviewed and that this would have an effect on the markets. As the magnitude of the change to the discount rate would not be made clear through confirmation or denial, the public authority believed that this effect on the markets would be counter to the public interest.

8. The public authority also addressed the issue of it having confirmed that relevant information was held in its response of 12 February 2008. It stated that investigation of that response had revealed that the information referred to in that response did not, in fact, fall within the scope of the request and so that response should not be taken as having any bearing on the neither confirm nor deny stance.

The Investigation

Scope of the case

9. The complainants contacted the Commissioner initially on 22 July 2008 and specified the basis for their complaint as being that the public authority had failed to properly explain its reasoning for the refusal of the request and had applied the exemption provided by section 35(3) incorrectly. The complainants cited the following grounds for believing that the public interest favoured confirmation or denial:

“1. Claimants are already significantly under compensated by the 2.5% rate of return, as investment returns have fallen significantly since 28 June 2001. Within 5 years the real investment return will have fallen to between 1 and 1.5%.

2. The Lord Chancellor, in setting out his reasons dated 27 July 2001 for setting the discount rate at 2.5%, set an expectation that although he would not tinker with the rate frequently to take account of every transient shift in market conditions, he would ‘remain ready to review the discount rate’ whenever he found there was ‘a significant and established change in the relevant real rate of return to be expected’.

3. As a result of the serious impact on claimants of the failure to review the rate, and the expectation created that the rate would be reviewed in the event of a change in the expected real rate of return, there is a clear and pressing public interest in allowing affected individuals to understand the reasoning behind these decisions so that an informed debate can take place, decision-making is transparent and decision makers can be held accountable.”

10. The public authority believed that, for information to fall within the scope of the request, it would be necessary for this information to have been presented to the Lord Chancellor. Therefore, information relating to a review of the 2.5% rate, advice and information associated with such a review or a record of any plan to amend the rate would not fall within the scope of the request if it had not been viewed by the Lord Chancellor. According to this reading of the request, information that appeared to very clearly be within the scope of the request would, in fact, not be if it had not been presented to the Lord Chancellor.
11. The Commissioner does not agree with this interpretation of the scope of the request. For example, the Lord Chancellor may have delegated officials within the public authority to review the 2.5% rate. Alternatively, officials may have

undertaken this work without consultation with the Lord Chancellor but with a view to making a recommendation to the Lord Chancellor at the end of the process. In either of these examples, the Commissioner would not accept that information recorded as part of these processes would not fall within the scope of the request on the basis that it had not been viewed personally by the Lord Chancellor.

12. Where there is any question about the scope of an information request, the Commissioner will consider what would be an objective reading of the request. In this case the Commissioner considers that information conforming to the descriptions given in the request and recorded by the government department of which the Lord Chancellor is the head would fall within the scope of the request, even if the Lord Chancellor has not personally reviewed this information. Any information held by the public authority that records whether the 2.5% rate of return has been reviewed by it, the advice and information on which this review has been based and that records a plan by it to amend the rate would, therefore, fall within the scope of the request.

Chronology

13. The Commissioner contacted the public authority on 3 June 2009 for further explanations of its reasoning for the refusal of the request. The public authority responded to this on 18 August 2009. On the issue of why it believed that the exemption provided by section 35(3) was engaged, the public authority provided no description as to why it believed that any information falling within the scope of the request would conform to the class specified in section 35(1)(a). Instead, the public authority referred to prejudice, despite prejudice not being relevant to this class based exemption. The public authority also referred to prejudice it believed would occur through confirmation or denial when setting out its grounds as to why it believed that the public interest favoured the maintenance of the exemption. However, the public authority did not clearly explain how or why it believed that prejudice would occur through disclosure, although it did indicate that it believed confirmation or denial would have an 'effect' on the financial market and a 'direct effect' on parties in damages cases.
14. The basis for the stance of the public authority appeared to be that confirmation would reveal that the rate had been reviewed and that denial would suggest the opposite. The public authority believed that this would give an unclear signal and that this would result in a prejudicial effect upon the financial market.

Background

15. Section 1(1) of the Damages Act 1996 provides that, when awarding financial compensation for personal injury, the court shall take into account a rate of return to be expected from the investment of that sum prescribed by an order made by the Lord Chancellor. The Damages (Personal Injury) Order 2001 states the following:

"This Order prescribes 2.5% as the rate of return which, under section 1 of

the Damages Act 1996, courts are required to take into account when calculating damages for future pecuniary loss in an action for personal injury.”

Analysis

Exemptions

Section 35

16. Section 35(3) provides an exemption from the duty to confirm or deny in relation to information that does, or would if it were held, fall within any of the classes specified in section 35(1). This section of the Act is set out in full in the attached legal annex, as are all other sections of the Act referred to in this notice. This exemption is qualified by the public interest, meaning that the confirmation or denial in question should be disclosed if the public interest favours this, however clear it is that any information held that did fall within the scope of the request would conform to one or more of the classes specified in section 35(1).
17. The stance of the public authority here is that any information that it did hold that fell within the scope of the request would be within the class specified in section 35(1)(a). Section 35(1)(a) provides that information is exempt if it relates to the formulation or development of government policy. The task for the Commissioner here is, therefore, to reach a conclusion as to whether any information falling within the scope of the complainant's request would relate to the formulation or development of government policy.
18. When considering whether this exemption is engaged, it is first necessary to establish whether the public authority is amongst those to which this exemption is available. As the public authority in this case is a central government department, it is clear that this exemption is available to it.
19. Turning secondly to the issue of whether any relevant information held by the public authority would fall within the class specified in the exemption, the key question to consider here is whether the setting of an expected rate of return as provided by section 1(1) of the Damages Act 1996 constitutes government policy. If this does constitute government policy, the Commissioner would accept that the information specified in the request would relate to the formulation or development of this policy.
20. On the basis that the current expected rate of return is enshrined in statute in the form of The Damages (Personal Injury) Order 2001, it may appear that the setting of this rate is clearly government policy. However, it is important to differentiate between policy formulation or development and the implementation of an existing policy. Where the information would relate to the implementation of an existing policy, this would not fall within the class specified in section 35(1)(a).
21. A counter argument to the exemption being engaged in this case would be that

the setting of the rate of return is the implementation of a government policy enshrined in section 1(1) of the Damages Act 1996 and the formulation and development of this policy was completed with the passing of that Act. Information recording a review of the rate of return would, therefore, relate to the implementation of government policy and would not fall within the class specified in section 35(1)(a).

22. The view of the Commissioner here is that the expected rate of return would, itself, constitute government policy. The reasons for this are as follows. First, the setting of the rate of return requires a decision making process to be carried out. This is in contrast to where a previously formulated government policy prescribes the specific action to be taken in a particular circumstance. The Damages Act does not, for example, provide that the rate of return shall be amended if the Bank of England base rate reaches a specified level. Rather, it provides that the Lord Chancellor may prescribe the rate *"from time to time"*. The Damages Act does not provide a policy on when the rate should be reviewed and a review of the rate would not, therefore, constitute the implementation of any such policy.
23. Secondly, the Commissioner has considered what factors may be said to define government policy. Amongst these is any policy that may result in a political impact. The Commissioner would consider it possible that the rate of return may result in a political impact. If, for example, the rate was perceived to be set at an inappropriate level given current economic conditions, the opposition may seek to exploit this perception in order to gain a political advantage. Alternatively, the government may trumpet a perception that the rate was providing an advantage to the recipients of a sum awarded for damages in an attempt to gain a political advantage.
24. The Commissioner also considers that the process likely to be undertaken in setting the rate conforms to what would be expected of the formulation or development of government policy. It is likely that this process would include the participation of officials in gathering facts and evidence and in providing advice. The final decision on whether to amend the discount rate is, as stated in the Damages Act 1996, then taken by the Lord Chancellor; a member of the Cabinet and of the government. The Lord Chancellor then presents that decision to Parliament in the form of a new Order.
25. Section 35(2)(a) provides that statistical information used to provide an informed background to decision taking during the formulation or development of government policy is not to be regarded as within the class specified in section 35(1)(a) once the decision on government policy has been taken. The subject matter of the information requested suggests that it is possible that any information held by the public authority that falls within the scope of the request may include statistical information. In the event that the public authority does hold statistical information falling within the scope of the request, this information is not covered by the conclusion below on the application of section 35(3) if it was used as background to a decision that had been taken by the time of the request.
26. Apart from in relation to statistical information of the kind described above, the conclusion of the Commissioner is that the exemption provided by section 35(3) is

engaged. The basis for this conclusion is that the setting of the rate of return would constitute government policy and that, therefore, information about a possible review of this rate would relate to the formulation or development of government policy. Any information held by the public authority that falls within the scope of the request would, therefore, be within the class specified in section 35(1)(a).

The public interest

27. Having concluded that the exemption is engaged, it is necessary to go on to consider whether the public interest favours the maintenance of this exemption. In coming to this conclusion, the Commissioner has taken into account the factors cited by the complainant and by the public authority, as well as the general public interest in transparency in the area of formulation and development of government policy.
28. The position of the public authority is that confirmation that information is held that falls within the scope of the request would also act as confirmation that the government has reviewed the rate of return, and that denial would reveal that it has not been reviewed. For the purposes of this analysis of the balance of the public interest, the Commissioner accepts that confirmation or denial may well have the result predicted by the public authority.

Public interest arguments in favour of disclosing the requested information

29. The arguments advanced by the complainants in favour of disclosure are given above at paragraph 9. The argument made by the complainants is essentially that the 2.5% rate of return is no longer fair and that those awarded damages are disadvantaged as a result of this. As a result of this, the complainants believe that there is a public interest in knowledge of whether the rate of return has been reviewed. In order to assess the weight that should be afforded to the argument advanced by the complainants as a factor in the balance of the public interest, it is necessary to consider the validity of this argument.
30. The complainants argue that "*investment returns have fallen significantly since 28 June 2001*", when the 2.5% rate was set. This means that it is unfair on those awarded damages for courts to assume a rate of return of 2.5%. On the issue of whether the rate of return that can be expected from an investment has fallen since June 2001, the Commissioner notes that the Bank of England had begun cutting the base rate by the time of the request in January 2008. Whilst the very substantial cuts in the base rate that have taken place since postdate the request and so are not directly relevant here, the complainants also argued at the time of the request that the real rate of return was likely to fall further in future.
31. The Commissioner accepts that it is likely that the real rate of return from the investment of a sum awarded in damages was likely to have reduced between the time of the setting of the 2.5% rate and the date of the request. It was also the case that economic conditions at the time of the request suggested that it was likely to fall further.

32. The Commissioner considers that this is relevant to the public interest. The complainants note that the Lord Chancellor indicated that the expected rate of return would be reviewed when significant change to the real rate of return occurred. The economic conditions at the time of the request suggest that the real rate of likely return had reduced since the setting of the 2.5% rate. It is also the case that a reasonable expectation could have been held at that time that the real rate of return would fall further in future. Given these conditions and the previous indication from the Lord Chancellor that the expected rate would be reviewed when appropriate, the Commissioner believes that there is a valid public interest in disclosure of whether the expected rate of return has been reviewed. The Commissioner affords this factor significant weight in favour of disclosure.
33. The complainants also suggested that section 35(4) was relevant in this case. This provides that regard shall be had to the particular public interest in the disclosure of factual information used in the background to decision taking when considering the balance of the public interest in connection with this exemption. In this case, however, as neither confirmation nor denial would disclose factual information, the Commissioner does not believe that this factor is relevant.

Public interest arguments in favour of maintaining the exemption

34. The arguments advanced by the public authority as to why it believes that the public interest favours the maintenance of the exemption focuses on the harm it believes would occur through confirmation or denial. It has cited two parties subject to this harm:
1. the markets, and
 2. claimants for damages.
35. The public authority believed that this prejudice would result through the possibility of confirmation or denial sending an unclear message as to the actual likelihood of the rate being amended.
36. In order to assess what weight to afford to this argument as a factor in the balance of the public interest, it is necessary to address how likely it is that the prejudice predicted by the public authority would occur. The public authority has not clearly explained how confirmation or denial and any subsequent prejudice to the markets and claimants for damages would impact on the process of formulation and development of government policy. The harm that the public authority believes would result through confirmation or denial is not a public interest factor in favour of maintenance of the exemption to which the Commissioner affords any weight.
37. In *DfES v the Commissioner and the Evening Standard* (EA/2006/0006) the Information Tribunal provided guiding principles to be taken into account when considering the balance of the public interest in connection with section 35(1)(a). When considering whether the public interest favours the maintenance of the exemption to confirm or deny provided by section 35(3), the Commissioner will take into account any of the factors highlighted by the Tribunal in *DfES* that are relevant.

38. Amongst the key factors highlighted by the Tribunal in *DfES* are the importance of maintaining a safe space within which to enable civil service officials and politicians to consider all options thoroughly. The Tribunal also recognised the importance of maintaining the convention of collective Cabinet responsibility for decisions taken by the government. In this case the Commissioner does not believe that disclosure of the confirmation or denial would pose any threat to either the safe space for officials and politicians to consider options, or to the convention of Cabinet responsibility. Whilst confirmation or denial may reveal whether a review of the rate has taken place, it would not reveal what options were considered as part of that review, or what the outcome of this review was.

Balance of the public interest arguments

39. The conclusion of the Commissioner is that the public interest in the maintenance of the exemption does not outweigh the public interest in confirming or denying. The arguments made by the complainant were specific to the confirmation or denial in question here and relevant to the circumstances at the time of the request. These arguments convincingly demonstrated a specific public interest in confirmation or denial given the change in the economic circumstances since the rate of 2.5% was set. Combined with this factor specifically related to the confirmation or denial in question is the general public interest in transparency about the formulation and development of government policy.
40. The arguments advanced by the public authority in favour of maintenance of the exemption focussed on the harm it believed would occur as a result of confirmation or denial. The public authority did not, however, either clearly describe the harm in question, or provide a convincing explanation as to why this harm would be likely to occur through confirmation or denial. In the absence of more convincing arguments from the public authority, or any other factors related to this specific confirmation or denial, the Commissioner has recognised no valid public interest factors in favour of maintenance of the exemption.

Procedural Requirements

Sections 1 and 10

41. In failing to provide confirmation or denial of whether the information requested is held within 20 working days of receipt of the request on the basis of an exemption that the Commissioner has not upheld, the public authority has not complied with the requirements of sections 1(1)(a) or 10(1).

Section 17

42. As noted above at paragraph 3, the public authority responded initially and confirmed that it did hold information falling within the scope of the request. It later stated that this confirmation was an error and related to information that did not fall within the scope of the request. The substantive response in which the public authority first refused to confirm or deny and cited section 35(3) was dated 4 March 2008, outside twenty working days from receipt of the request. In failing to

provide this refusal notice within 20 working days of receipt of the request, the public authority did not comply with the requirements of section 17(1).

The Decision

43. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act in that it concluded incorrectly that the public interest in the maintenance of the exemption provided by section 35(3) outweighed the public interest in confirmation or denial and, in so doing, failed to comply with the requirements of sections 1(1)(a) and 10(1). The Commissioner also finds that the public authority failed to comply with the requirements of section 17(1) in failing to issue a valid refusal notice within 20 working days of receipt of the request.

Steps Required

44. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- provide to the complainants confirmation or denial of whether it holds information falling within the scope of the request, and
 - if relevant information is held, this should either be disclosed, or the complainants should be provided with a refusal notice valid for the purposes of section 17.
45. The Commissioner would stress that these steps should be based on the understanding of the scope of the request set out above at paragraphs 10 - 12, rather than on the basis of the scope of the request suggested by the public authority in its response to the Commissioner of 18 August 2009.
46. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

47. 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.

Other matters

48. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.
49. The Commissioner's published guidance on internal reviews states that a review should be conducted within 20 working days, unless there are exceptional circumstances, in which case the review period may be extended to 40 working days. In this case the Commissioner notes that there appeared to be no exceptional circumstances, but that the public authority failed to provide the outcome to the review within 20 working days. Neither did the public authority respond within 40 working days. The public authority should ensure that internal reviews are carried out promptly in future.

Right of Appeal

50. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

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 2nd day of February 2010

Signed

**Steve Wood
Assistant Commissioner**

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

Legal Annex

Freedom of Information Act 2000

Section 1

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 10

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 17

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 35

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.”

Damages Act 1996

Section 1

Section 1(1) provides that –

“In determining the return to be expected from the investment of a sum awarded as damages for future pecuniary loss in an action for personal injury the court shall, subject to and in accordance with rules of court made for the purposes of this section, take into account such rate of return (if any) as may from time to time be prescribed by an order made by the Lord Chancellor.”