

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 22 July 2010

Public Authority: Home Office
Address: Seacole Building
2 Marsham Street
London
SW1P 4DF

Summary

The complainant made a four part request for information relating to the 2007 police pay settlement. In response to parts 1 and 3 of this request the public authority denied it held any relevant information and in response to parts 2 and 4 the public authority confirmed that information was held, but cited the exemptions provided by sections 36(2)(b)(i) and (ii) (inhibition to the free and frank provision of advice and exchange of views). The Commissioner finds that the public authority stated correctly that no information was held that fell within the scope of parts 1 and 3 of the request. In connection with parts 2 and 4 of the request the Commissioner finds that the exemptions provided by sections 36(2)(b)(i) and (ii) are not engaged and the public authority is required to disclose the information falling within the scope of these parts of the request. The Commissioner also finds that the public authority delayed responding to the request for a grossly excessive period and, in so doing, failed to comply with the requirements of sections 10(1) and 17(1).

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 13 January 2008, the complainant made the following information requests:

"1. Details of any e mail headers or e mail title lines relating to the 2007 Police Pay settlement between [names redacted] of the Police Reform and Resources Directorate of the Home Office covering the period 1.1.2007 to 31.12.2007.

2. Any e mails or research material received by [name redacted] that led him to recommend that the Home Secretary 'maintain the Home Office's current tough position', in particular, that which related to undermining the counter-terrorism CSR bid.

3. Copies of any e mails sent by [name redacted] to ACPO or the APA representatives prior to the 10th July Meeting mentioned in his memo of the 29th June 2007 if not covered by 1 above.

4. Copies of any e mails sent by [name redacted] to anybody with regard to his leaked memorandum of the 29th June 2007."

3. After a very lengthy delay and following the intervention of the Commissioner, the public authority responded substantively to the request on 3 December 2008. Whilst other correspondence had been sent to the complainant by the public authority between the date of the request and the date of the eventual substantive response stating that the public authority was considering the balance of the public interest, at no point did the public authority confirm that any exemption was engaged, or provide reasoning for this.
4. In response to requests 1 and 3, the public authority stated that no information was held. In response to requests 2 and 4, the public authority confirmed that the information requested was held, but refused to disclose this, citing the exemption provided by section 36(2)(b) (inhibition to the free and frank provision of advice and inhibition to the free and frank exchange of views for the purposes of deliberation).
5. The complainant responded to this on 15 December 2008 and requested that the public authority carry out an internal review. After a further very lengthy delay, the public authority responded with the outcome of the review on 23 September 2009. The public authority maintained that the information falling within the scope of requests 1 and 3 was not held and that the information falling within the scope of requests 2 and 4 was exempt by virtue of section 36(2)(b). The public

authority now stated specifically that it believed that both sections 36(2)(b)(i) and 36(2)(b)(ii) were engaged.

The Investigation

Scope of the case

6. The complainant contacted the Commissioner initially on 2 November 2008. At that stage the complainant raised the issue of the failure by the public authority to respond substantively to the request by that time. The Commissioner intervened at that point to ensure that the public authority provided a substantive response to the request without further delay.
7. The complainant contacted the Commissioner again on 15 July 2009. He asked that the Commissioner accept his complaint at that stage despite the internal review not having been completed, owing to the excessive delay in the completion of this review. The Commissioner accepted the complaint at that stage and pursued the public authority for completion of the internal review. The public authority continued to fail to complete the review and the Commissioner progressed the case without waiting for the outcome of the review. As noted above, the public authority eventually replied with the outcome of the internal review on 23 September 2009, after the Commissioner had begun his investigation.
8. The Commissioner contacted the complainant on 23 September 2009 in order to establish the scope of his complaint. The complainant responded to this on 30 September 2009 and confirmed that the public authority had responded with the outcome of the internal review; and that his complaint covered both the statement by the public authority that information falling within the scope of the first and third parts of his request was not held and the citing of the exemptions provided by sections 36(2)(b)(i) and (ii).

Chronology

9. The Commissioner contacted the public authority on 7 October 2009 in connection with this case. The public authority was asked to respond with further explanation for its conclusions that some of the information requested was not held and for the citing of the exemptions provided by sections 36(2)(b)(i) and (ii). It was also asked to provide to the Commissioner copies of the information falling within the scope of requests 2 and 4 that was considered exempt.

10. The public authority responded to this on 3 November 2009. In connection with requests 1 and 3 the public authority provided explanations for its conclusion that no relevant information was held. In connection with requests 2 and 4 it confirmed who had acted as the qualified person and the reasons for the opinion that sections 36(2)(b)(i) and (ii) were engaged. It also provided a copy of the information withheld from the response to requests 2 and 4.

Analysis

Substantive Procedural Matters

Section 1

11. The stance of the public authority is that it holds no information that falls within the scope of requests 1 and 3. The task for the Commissioner here is to reach a conclusion as to whether the public authority is accurate in stating that this information is not held. The standard of proof that the Commissioner has applied here is the balance of probabilities. This is in line with the approach taken by the Information Tribunal in the case *Linda Bromley & others and the Environment Agency* (EA/2006/0072) in which it stated:

"...we must consider whether the IC's decision that the EA did not hold any information covered by the original request, beyond that already provided, was correct. In the process, we may review any finding of fact on which his decision is based. The standard of proof to be applied in that process is the normal civil standard, namely, the balance of probabilities..." (para 10)
because *"...there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records..."* (para 13)

12. In reaching a decision as to whether, on the balance of probabilities, the public authority is accurate in stating that no information is held, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority as well as considering, where appropriate, any other reasons offered by the public authority to explain why the information is not held.
13. Covering first the description provided by the public authority of its attempts to locate relevant information and what this suggests about the scope, quality and thoroughness of those efforts, the public authority has stated that searches were carried out of both manual and electronic records. These searches were conducted of several different

areas within the public authority which were considered most likely to hold relevant information and covered the *“electronic corporate file plan”*, personal e mail folders and personal drives. In addition to these electronic searches, within the Police Protective Capabilities Unit, the area considered most likely to hold information falling within the scope of the requests, manual records were also searched. The searches were carried out by members of staff based within each of the areas searched.

14. As well as describing the searches carried out for relevant information, the public authority has also provided reasoning as to why it would not hold relevant information. In connection with request 1, the official who was named in the request stated that it would have been inappropriate for him to have sent e mails on this subject to the other individuals named in the request due to the sensitivity of this issue and to the positions held by the other individuals named in the request, hence no such e mails were sent to those individuals. Also, in connection with both requests 1 and 3, the named official has stated that he has a policy of keeping e mails only for a short period of time. Given the period of time between the dates of any e mails relating to the 2007 police pay settlement and the time of the request, this official stated that relevant e mails would have been deleted by the time of the request.
15. The Commissioner accepts that, on the balance of probabilities, the public authority was correct in stating that no information falling within the scope of requests 1 and 3 was held at the time of the request. This conclusion is based on the description that the public authority has given of the steps that were taken to locate relevant information and, in connection with request 1, the further reasoning as to why this information was not held (i.e. given the sensitivity of the issue, the first official named in the request would not have sent e mails about this to the others named in the request).
16. The Commissioner does not, however, accept the further explanation relating to the time between the 2007 police pay settlement and the date of the request: that because of this passage of time any relevant e mails would have been deleted. Although the public authority delayed for almost 11 months by not responding to the request until December 2008, the request was made in January 2008. This request specified a time period of the whole of 2007. Given this, the Commissioner does not accept that it is reasonable to assume that any relevant e mails would have been deleted by the time of the request. However, on the basis of the other explanations, this does not impact on the Commissioner's overall conclusion that, on the balance of probabilities, relevant information was not held at the time of the request.

Exemptions

Section 36

17. The public authority has cited the exemptions provided by sections 36(2)(b)(i) and 36(2)(b)(ii) in relation to requests 2 and 4. Section 36(2)(b)(i) provides an exemption for information the disclosure of which would, or would be likely to, inhibit the free and frank provision of advice. Section 36(2)(b)(ii) provides the same for information the disclosure of which would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation.
18. These exemptions can only be cited where the opinion of a specified 'qualified person' (QP) is that the inhibition described in these sections would be at least likely to result through disclosure. The QP for each public authority is either specified in the Act, or is authorised by a Minister of the Crown. Consideration of these exemptions is a two stage process; first it must be established that the citing of the exemptions is based on the opinion of the specified QP for the public authority in question and that the opinion of the QP is objectively reasonable. Secondly, these exemptions are subject to the public interest test. This means that the information, if exempt, should nevertheless be disclosed if the public interest in the maintenance of the exemptions does not outweigh the public interest in disclosure.
19. Turning first to whether these exemptions are engaged, in order to establish this the Commissioner will consider the following:
 - whom the Act or a Minister of the Crown specifies as QP for this public authority;
 - whether the QP gave an opinion in this case;
 - when this opinion was given;
 - whether the opinion given was objectively reasonable in substance and reasonably arrived at.
20. Section 36(5)(a) provides that the QP for central government is any Minister of the Crown. In this case Vernon Coaker MP, who was a Home Office Minister at the time of the refusal of the request, acted as QP and the public authority has stated that his opinion was given on 2 December 2008. The Commissioner accepts, therefore, that an appropriate person acted as QP in this case and that this person did give an opinion on the citing of this exemption.
21. At internal review stage the public authority referred to its stance being that inhibition *would* occur, rather than that it *would be likely* to occur. Although this point was not specified at the time that the QP gave his

opinion, the Commissioner has taken this as clarification that the opinion of the QP was that inhibition *would* occur.

22. Turning to whether this opinion was reasonable, the Commissioner has considered first whether it was reasonably arrived at. The public authority has stated that the opinion of the QP was based on a submission that he was provided with to assist with the formation of his opinion. This submission was dated 27 November 2008 and a copy of this has been provided to the Commissioner. The public authority was asked specifically if the QP had viewed the information in question. The public authority did not state that the QP had viewed this information and so the Commissioner has proceeded on the basis that he did not.
23. Where the QP relies entirely on a submission as the basis for their opinion, rather than reviewing the content of the information in question, the Commissioner regards it as essential that this submission sets out the reasoning for the suggested citing of section 36 clearly and in detail. The Commissioner does not believe that to have been the case here, however. This submission does not set out arguments relevant to sections 36(2)(b)(i) and (ii) in any detail. Instead, only general factors relating to the importance of officials providing uninhibited advice and exchanging uninhibited views are set out. This submission also fails entirely to relate those factors that are set out to the specific content of the information in question here. The view of the Commissioner is that this submission should have explained how inhibition relevant to sections 36(2)(b)(i) or (ii) would have resulted through disclosure of the content of the information in question.
24. The Commissioner notes that the submission referred the QP to draft responses to the request that were provided to the QP with the submission. These draft responses do not, however, provide any significant further detail as to the reasoning for the suggested citing of these exemptions.
25. On the basis of the inadequacy of the submission and the representations from the public authority suggesting that this formed the entirety of the basis for the QP's opinion, the Commissioner cannot be satisfied that this opinion was reasonably arrived at. However, the approach of the Commissioner is that an opinion arrived at through a flawed process may still be accepted as reasonable if it was overwhelmingly reasonable in substance. This is in line the approach taken by the Information Tribunal in *McIntyre vs the Information Commissioner and the Ministry of Defence* (EA/2007/0068) in which it stated:

"...where the opinion is overridingly reasonable in substance then even though the method or process by which that opinion is arrived at is flawed in some way this need not be fatal to a finding that it is a reasonable opinion." (paragraph 31)

26. In this case, the Commissioner has considered the content of the information in question and what this suggests about the reasonableness, or otherwise, of the QP's opinion. If the Commissioner considers that the opinion was overridingly reasonable in substance, having taken the content of this information into account, he will conclude that the exemption is engaged despite the flaws in the process of the formation of the opinion.
27. Although it is not clearly set out in the submission, it is apparent that the reasoning for the QP's opinion was that disclosure would inhibit officials when providing advice and when exchanging views. In the absence of argument from the public authority that relates specifically to the content of this information, the Commissioner is not convinced that the opinion of the QP was reasonable.
28. Whilst this information falls within the scope of a request that referred to the 2007 police pay settlement, an issue of considerable controversy, the content of the information in question relates only tangentially to that pay settlement. As a result, the Commissioner would not accept an argument that suggested that inhibition would occur as a result of disclosure because the information in question relates to an issue of such controversy as the 2007 police pay settlement.
29. Some of the content of the information in question is of a free and frank nature. This does not necessarily suggest, however, that it is reasonable to hold the opinion that inhibition would result in future were this information to be disclosed. The Commissioner notes that the issue of the 2007 police pay settlement was, in large part, resolved by the time of the request, albeit that a legal challenge to this settlement was not resolved until after the time of the request. This indicates that the opinion of the QP is likely to have been that disclosure would result in a general inhibitory effect in the future, rather than on any specific issue or topic.
30. As to whether it is reasonable to hold the opinion that disclosure here would be likely to cause a general inhibitory effect in future, such as to the candour of officials, the Commissioner does not believe that the content of the information in question is sufficiently free and frank that it would support this suggestion. Whilst the information does contain content that could be described as free and frank, the majority of this content is benign. The Commissioner also notes the following comment

made by the Information Tribunal in the case *Department for Education and Skills v the Information Commissioner* (EA/2006/0006) in response to the suggestion that disclosure of information would result in an inhibitory effect to the candour of officials:

" [principle] (vii) In judging the likely consequences of disclosure on officials' future conduct, we are entitled to expect of them the courage and independence that has been the hallmark of our civil services since the Northcote – Trevelyan reforms." (paragraph 75)

31. The Commissioner does not, therefore, consider the QP's opinion to have been overridingly reasonable in substance, despite the flaws in the process of the application of the exemption. On the basis that the opinion was neither reasonably arrived at, nor overridingly reasonable in substance, the Commissioner concludes that the opinion of the QP that disclosure of the information in question here would result in inhibition to the free and frank provision of advice and to the free and frank exchange of views for the purposes of deliberation was not reasonable. The exemptions provided by sections 36(2)(b)(i) and (ii) are not, therefore, engaged. As this conclusion has been reached at this stage it has not been necessary to go on to consider the balance of the public interest.
32. The Commissioner notes that at internal review stage a further opinion on the continued use of section 36 was sought from Phil Woolas MP, another Home Office minister. When asked to specify who acted as QP in this case, the public authority specified Mr Coaker; it did not state that the original opinion had been replaced at internal review stage. For this reason, the Commissioner considers the QP to have been the minister who gave the opinion at refusal notice stage and that the role of Mr Woolas was to provide oversight of the internal review, rather than to formally act as a replacement QP. In any event, the Commissioner notes that Mr Woolas was referred to the submission provided to Mr Coaker at refusal notice stage in explanation for the use of this exemption, so the substance of the Commissioner's decision would be unchanged were Mr Woolas to be considered the QP for the present purposes.

Procedural Requirements

Sections 1, 10 and 17

33. The public authority responded substantively to the request dated 13 January 2008 on 3 December 2008. Whilst the public authority may argue that several responses were sent in the interim advising the complainant that the delay was due to time spent considering the

balance of the public interest and that section 17(3) allows that the time for providing a response setting out the balance of the public interest may be extended, the public authority should note that such an extension is *only* available in relation to a response setting out the balance of the public interest. There is no extension available for a response setting out which exemptions are believed to be engaged and the reasons for this.

34. Whilst the public authority did refer to sections 35 and 36 in its interim responses, it did not confirm that it believed that these exemptions were engaged, or provide any reasoning for this. It is also notable that, whilst it referred to section 35 in these interim responses, this exemption was not cited in the eventual substantive response. Also, the eventual response of the public authority to requests 1 and 3 was that no relevant information was held, no mention of this having been made in the earlier responses. No extension beyond twenty working days is available for establishing whether relevant information is held. It is clear, therefore, that the interim responses did not fulfil any of the requirements of section 17, or section 1(1)(a).
35. In any event, the Commissioner's published guidance on this issue states that a public interest extension should not exceed an additional 20 working days. The Commissioner would stress that he considers an approximately 11 month delay to be grossly excessive and that in no circumstance would he consider this reasonable.
36. In failing to provide a substantive response to the request within 20 working days of receipt, the public authority failed to comply with the requirements of sections 10(1) and 17(1).
37. In failing to disclose within 20 working days of receipt of the request information that the Commissioner now finds was not exempt, the public authority did not comply with the requirements of sections 1(1)(b) or 10(1).

The Decision

38. The Commissioner's decision is that the public authority did not deal with the request in accordance with the Act in that it refused to disclose the information requested on the basis of sections 36(2)(b)(i) and (ii), which the Commissioner now finds were not engaged and, in so doing, failed to comply with sections 1(1)(b) and 10(1). The public authority also breached sections 10(1) and 17(1) by failing to respond substantively to the request within 20 working days of receipt.

39. However, the Commissioner also finds that the public authority complied with section 1(1)(a) in relation to requests 1 and 3 in that it stated correctly that information falling within the scope of these requests was not held.

Steps Required

40. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- disclose to the complainant the information it holds that falls within the scope of requests 2 and 4.
41. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

42. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Other matters

43. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

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 it took the public authority approximately nine months to provide the outcome of the review. The public authority should ensure that internal reviews are carried out promptly in future and should note that the Commissioner would not consider a nine month delay to the internal review to be reasonable in any circumstance.

Right of Appeal

44. 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.

45. 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 22nd day of July 2010

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

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 36

Section 36(2) provides that –

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

- (a) would, or would be likely to, prejudice-
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
 - (iii) the work of the executive committee of the National Assembly for Wales,
- (b) would, or would be likely to, inhibit-
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.”