

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 22 March 2010**

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

### Summary

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The complainant requested information about the Leasehold Reform Act relating to the Isles of Scilly and the Duchy of Cornwall. At the internal review stage, the request having been narrowed, the MoJ told the complainant that it did not hold any relevant information. The Commissioner is satisfied that, at the time of the request, the MoJ did not hold information within the scope of the narrowed request. However, he finds procedural breaches in relation to the MoJ's handling of the original request.

### The Commissioner's Role

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

### Background

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2. Commonhold is a way of owning interdependent freehold properties, such as flats, shops and offices. It is an alternative to long leasehold ownership.
3. Commonhold and wide-ranging changes in leasehold law were introduced in England and Wales in the Commonhold and Leasehold

Reform Act 2002 which received Royal Assent on 1 May 2002. Earlier leasehold legislation was enacted in the Leasehold Reform Acts of 1967 and 1993.

4. The Duchy of Cornwall, (the Duchy), consists of around 54,424 hectares of land in 23 counties, mostly in the South West of England. The Isles of Scilly have been part of the Duchy of Cornwall since its foundation in the 14th Century.

## The Request

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5. The complainant wrote to the Department for Constitutional Affairs on 7 November 2006 with the following request:

*"....I write to request, using my rights under the Freedom of Information Act, that you supply me with background papers, copies of minutes of meetings, emails or any other documentation pertaining to the Isles of Scilly, the Duchy of Cornwall and any dialogue which took place between the Duchy of Cornwall and any Governmental department about the Leasehold Reform Bill (Act).*

*I would also appreciate receiving any background documents, exchange of letters or other communications between the Duchy of Cornwall, its lawyers, Farrer and Co, and Government departments which existed at that time under the name of the Lord Chancellor's Department and the Office of the Deputy Prime Minister".*

6. The Commissioner notes that the request was made to the Department for Constitutional Affairs (DCA). However, during the lifetime of the request, the DCA ceased to exist and its responsibilities were taken over by the newly-created Ministry of Justice (MoJ). As such, this Decision Notice will reference the MoJ as the public authority.
7. The public authority issued a refusal notice on 11 December 2006 in which it advised the complainant that the exemption at section 35 (formulation of government policy) applied but that it required more time to consider the public interest test. The MoJ advised the complainant that it hoped to respond by 12 January 2007. The Commissioner is aware that the complainant subsequently received a number of holding letters during the course of 2007.
8. The Ministry of Justice eventually responded on 12 February 2008 disclosing some information but withholding the remainder under sections 35 (formulation and development of government policy) and 37 (communications with the Royal household).

9. The complainant requested an internal review on 8 April 2008. The Commissioner understands that the complainant expressed his wish "*to be supplied with 'papers, minutes of meetings, emails or other documentation' related to Ministerial Statements .... about the rights of leaseholders on Scilly to enfranchise and/or to acquire a new or extended lease from the Duchy*". Having not received a reply after several months, the complainant sent a reminder to the MoJ.
10. The MoJ responded to this reminder on 8 August 2008, thanking the complainant for his correspondence of 1 August 2008 and apologising that it was unable to find any record of receiving the request for internal review dated 8 April 2008. However, it advised the complainant that he could now expect to receive a reply "*in the shortest time possible*".
11. On 12 December 2008, the complainant wrote to the Commissioner as he had not received any further correspondence from the MoJ. The Commissioner makes no criticism of the complainant for not following up the response sooner given the lengthy history of the handling of this matter. However, he notes the delay on behalf of the MoJ in responding once the request for internal review came to light.
12. Unaware that the complainant had contacted the Commissioner, the MoJ finally responded to the complainant on 14 January 2009, providing him with an interim response. In its correspondence, it confirmed that, having "*undertaken a preliminary survey of the papers we withheld when responding to the original request*", it held:  
  
*"no 'papers, minutes of meetings or other documentation related to Ministerial Statements on this subject, and that the remaining material being withheld from release all relates, as did the material disclosed, to the seeking and provision of Royal Assent to the Bill in 2001"*.
13. It therefore concluded "*the information we do hold does not appear to be the information [complainant] is interested in*". On this basis, it invited the complainant to confirm whether or not he wished the MoJ to continue with the review. This letter does not appear to have been received by the complainant.
14. Unfortunately, due to a backlog of complaints about compliance with the Act at the Commissioner's office, there was a delay of several months before his investigation got under underway, in July 2009. It was only at this stage that, as a result of the Commissioner's intervention, it became apparent that the MOJ's letter dated 14 January 2009 had never been received by the complainant. It was therefore not until an interval of several months had elapsed that the

complainant wrote to the MoJ on 8 October 2009 confirming that he wished to pursue the internal review.

15. The MoJ provided the complainant with its internal review response on 12 November 2009. In this correspondence, the MoJ confirmed that:

*"we hold no 'papers, minutes of meetings, emails or other documentation' related to Ministerial Statements about the rights of leaseholders on Scilly to enfranchise and/or to acquire a new or extended lease from the Duchy of Cornwall".*

16. The MoJ also confirmed that:

*"The material being withheld from release all relates to the seeking and provision of Royal Assent to the Leasehold Reform Act 2001. The reasons for withheld release have already been set out in previous correspondence".*

## The Investigation

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### Scope of the case

17. The complainant first contacted the Commissioner on 12 December 2008 in order to elicit a response from the MoJ to his request for an internal review. Having eventually received this response, the complainant contacted the Commissioner again on 14 December 2009, to complain about the way his request for information had ultimately been handled.

18. In further correspondence, dated 18 January 2010, the complainant provided the Commissioner with a timeline of the proceedings during the lifetime of the request. This highlighted delays both in the MoJ providing its initial response and in responding to the complainant's request for an internal review.

19. In this correspondence, the complainant told the Commissioner that:

*"Given that it was Mr Wills in the then Lord Chancellor's Department in 2001 whose Written Answer detailed the Duchy 'undertaking' excluding part of Scilly, I find it had to accept that the MoJ's files as successor department are empty of interest as far as the request is concerned."*

20. Accordingly, the Commissioner's investigation has focussed on whether or not the MoJ held information within the scope of the narrowed version of the request which was confirmed as the basis of the internal

review. He has also considered the timeliness with which the MoJ handled the request. He has not considered the application of exemptions to the information which the MoJ acknowledges it holds.

## Chronology

21. On 5 February 2010, the Commissioner contacted the MoJ asking it to provide him with further explanation as to the nature of the searches it had conducted in relation to this matter.
22. The MoJ responded on 19 February 2010, providing further clarification of its response on 23 February 2010.

## Analysis

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### Substantive Procedural Matters

*Is the information, or any part of it, held by the MoJ?*

23. In this case, the MoJ has advised the complainant that it does not hold information within the scope of the narrowed version of his request, as specified at the time of the internal review.
24. In the Commissioner's view, the normal standard of proof to apply in determining whether a public authority holds any requested information is the civil standard of the balance of probabilities.
25. This is in line with the approach taken by the Information Tribunal in the case of *Bromley & others v the Environment Agency* (EA/2006/0072), in which it stated:

*"...we must consider whether the Information Commissioner's decision that the Environment Agency 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..."* paragraph 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"* (paragraph 13).

26. In deciding where the balance lies, 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.

*The nature of the searches conducted*

27. The MoJ has told the Commissioner that the searches it undertook involved *"looking at the files pertaining to the Commonhold and Leasehold Reform Bill, as well as those files to do with the Duchy of Cornwall"*. It also confirmed that *"both the paper and electronic files were checked"*.
28. With respect to its search of electronic files, the MoJ has told the Commissioner it searched the software component of its electronic record management system. The Commissioner understands this consists of a shared information space in which documents and records are formally managed.

29. Regarding the electronic searches, which it describes as being *"comprehensive"*, the MoJ told the Commissioner:

*"The searches were conducted using the following search terms:*

*Duchy, Duchy tenants, Scilly, Leasehold Reform, Farrer, Prince of Wales, Enfranchisement, Crown Leaseholder, Leaseholders Association, Crown Estates"*.

30. The MoJ has advised the Commissioner that such searches *"would have been likely to retrieve any relevant information because, bearing in mind the naming conventions for MoJ electronic document records management, the search terms used would have revealed it had it been held"*.

31. With regard to the paper files, the MoJ told the Commissioner that:

*"We also requested any paper files on this bill, but only files relating to PQs [Parliamentary Questions] and royal consent for the Bill were held. Files pertaining to the Duchy and to leasehold reform were searched"*.

32. During his investigation, the Commissioner asked the MoJ whether there was any evidence that it had ever held the information requested. In response, the MoJ said

*"We found no record of information which had been destroyed or deleted in relation to this request"*.

*Is the MoJ likely to hold information relevant to the request?*

33. During his investigation, the MoJ provided the Commissioner with further information in support of its statement that it does not hold the requested information. It explained to the Commissioner:

*"The reason the Ministry of Justice do not have what the requester is looking for is because the DCLG [Department for Communities and Local Government] lead on common and leasehold matters and HMT [Her Majesty's Treasury] deal with the Duchy and how it works financially".*

34. The Commissioner is disappointed to note that the MoJ did not, at any time, provide the complainant with this explanation as to why it did not hold information relevant to the request. Instead, in its correspondence dated 12 November 2009, the MoJ referred the complainant to correspondence dated 27 September [2009] in which:

*"[complainant] acknowledges that the information he seeks is not likely to be held by the Ministry of Justice and this has proven to be the case. I am sorry that the Ministry has been unable to assist on this occasion".*

35. The Commissioner is not surprised that the complainant was understandably dissatisfied with this response, particularly given the inordinate length of time during which he had waited for the MoJ to respond to his request.

### *Conclusion*

36. Having considered the nature of the searches conducted by the MoJ, and having taken account of the its explanation for claiming that it does not hold relevant information in this case, the Commissioner has concluded, on the balance of probabilities, that it did not hold any relevant information.

## **Procedural Requirements**

### *Section 10 Time for compliance*

37. Section 1(1) states:

*"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".*

38. Section 10(1) states:

*"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."*

39. In this case, the complainant made his request on 7 November 2006 but the MoJ did not provide him with a decision until 12 February 2008. It therefore took more than 400 working days to respond to the information request.

40. Accordingly, the Commissioner finds that, in failing to confirm or deny within 20 working days whether it held the requested information, the MoJ breached the requirements of section 10(1).

#### *Section 17 Refusal of request*

41. Section 17 states:

*"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".*

42. The Commissioner notes that, in taking more than 400 working days to issue its refusal notice, the MoJ was clearly in breach of the statutory timescale.



## The Decision

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43. The Commissioner's decision is that the public authority dealt with the following element of the request in accordance with the requirements of the Act:
- on the balance of probabilities, the MoJ did not hold any relevant information.
44. However, the Commissioner has also decided that the following elements of the original request for information were not dealt with by the MoJ in accordance with the Act:
- it breached section 10(1) by not confirming to the complainant within the statutory timescale whether it held the requested information; and
  - it breached section 17(1) by failing to provide the complainant with a valid refusal notice within the statutory timescale.

## Steps Required

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45. The Commissioner requires no steps to be taken.

## Other matters

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

### *The section 45 Code of Practice*

47. Generally the code is about good practice by public authorities, rather than 'obligations' which arise through its links with the Act. Part II relates specifically to the duty to provide advice and assistance under section 16 of the Act; failure to comply with this part of the code can mean a breach of section 16. However Part I and Parts III to VI are **not** linked to section 16 in this way.
48. Part III of the Code is concerned with the transferring of requests for information. Within this section, paragraph 17 says:

*"If the authority has reason to believe that some or all of the information requested, but which it does not hold, is held by another*

*public authority, the authority should consider what would be the most helpful way of assisting the applicant with his or her request”.*

49. Paragraph 18 continues:

*“In most cases this is likely to involve:*

- contacting the applicant and informing him or her that the information requested may be held by another public authority;*
- suggesting that the applicant re-applies to the authority which the original authority believes may hold the information; and*
- providing him or her with contact details for that authority”.*

50. The Commissioner notes that, in his request for information, the complainant clearly stated that he was seeking correspondence *“between the Duchy of Cornwall and any Governmental department”*, as well as *“between the Duchy of Cornwall, its lawyers, Farrer and Co, and Government departments which existed at that time under the name of the Lord Chancellor’s Department and the Office of the Deputy Prime Minister”.*

51. In correspondence confirming that he wished the MoJ to continue with its internal review, the complainant expressed dissatisfaction that:

*“Somehow we seem to have been fobbed off with the MoJ and nothing else”.*

52. He was also of the view that:

*“the picture we have here is of MoJ civil servants taking a cursory look in cupboards they know are bare of anything relevant. Yet in reality they know perfectly well that the information being sought is sitting in a separate departmental cupboard across the road”.*

53. During his investigation, the complainant told the Commissioner:

*“I thought civil servants had a duty under the FOI [Freedom of Information] Act to provide advice and assistance in these matters. It has been conspicuous in its absence over our request, even though this was framed in a way that embraces all departments likely to have dealt with the Duchy...”.*

54. In this case, the Commissioner is satisfied that it was quite clear from the outset that the complainant was seeking information, some of which may have been held by public authorities other than the MoJ. He also notes that when requesting an internal review, the complainant was aware that the MoJ might not be the only public authority which held relevant information. In this respect, the Commissioner notes that while it is good practice to do so, an organisation in receipt of a request for information is not obliged to pass on such a request to the actual public authority concerned.
55. However, he would have expected the MoJ to follow the Code of Practice. In this case he considers it reasonable to expect the MoJ either to transfer the request or to advise the complainant, as it eventually advised the Commissioner, of the other public authorities likely to hold relevant information.
56. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it took over 190 working days for an internal review to be conducted, despite the publication of his guidance on the matter.

## Right of Appeal

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57. 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](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://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 22nd day of March 2010**

**Signed .....**

**Anne Jones  
Assistant Commissioner**

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