

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 27 May 2010

Public Authority: The Information Commissioner
Address: Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Note: The complaint in this case was made against the Information Commissioner. Since the Commissioner is himself a public authority for the purposes of the Freedom of Information Act 2000 (the "Act"), he is unusually under a duty to make a formal determination of a complaint made against himself. It should be noted, however, that the complainant has a right of appeal against the Commissioner's decision, details of which are given at the end of this Notice.

Summary

The complainant requested information from the Information Commissioner which related to his investigation into case FS50165372. The Commissioner confirmed that he held the relevant information however refused to provide it on the grounds it was exempt from disclosure under section 44(1)(a) of the Freedom of Information Act 2000 (the "Act"), by virtue of section 59(1) of the Data Protection Act 1998. This Decision Notice upholds the Commissioner's use of section 44(1)(a). However, it finds the Commissioner in breach of sections 10(1) and 17(1) of the Act for failing to respond within the statutory time limit.

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.

Background

2. The complainant made a request to the Commissioner following an earlier complaint he had made. This case culminated in a Decision Notice being served under reference FS50165372. The Decision Notice is available online at the following link:

http://www.ico.gov.uk/upload/documents/decisionnotices/2008/fs_50165372.pdf

3. In that case (the "Cabinet Minutes case"), the Commissioner ordered disclosure, with minor redactions, by the Cabinet Office, of minutes of two Cabinet meetings where the Attorney General's legal advice concerning military action against Iraq was considered and discussed. The Cabinet Office appealed the Decision Notice to the Information Tribunal (the "Tribunal"), where a majority of the Tribunal upheld the Commissioner's decision (references EA/2008/0024 and EA/2008/0029). The decision can be read online at the following link:

[http://www.informationtribunal.gov.uk/DBFiles/Decision/i288/Cabinet%20Office%20v%20IC%20&%20C%20Lamb%20\(EA-2008-0024,29\)%20-%20Decision%2027-01-09.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i288/Cabinet%20Office%20v%20IC%20&%20C%20Lamb%20(EA-2008-0024,29)%20-%20Decision%2027-01-09.pdf)

4. Following the promulgation of the Tribunal's decision but prior to the information being disclosed, the Secretary of State for Justice signed a certificate pursuant to section 53(2) of the Act, stating that in his view there had been no breach of section 1(1)(b) of the Act and therefore disclosure was not required.
5. The complainant continued to be interested in the Cabinet minutes and went on to request certain information held by the Commissioner. The handling of this request is the subject of this Decision Notice.
6. The issuing of a certificate under section 53(2) of the Act is referred to throughout this Decision Notice as "the Ministerial veto".

The Request

7. On 19 March 2009 the complainant wrote to the Commissioner and made the following request for information:

"Under the terms of the Freedom of Information Act 2000 I request disclosure of any copy of the minutes for the Cabinet meetings of 13 and 17 March 2003 held by the Information Commissioner's Office with all background papers produced by ICO staff relating to, and pursuant of, its visit to the Cabinet Office on 19 September 2007 for the purpose of viewing the "withheld information" in situ. In particular, this request is targeted at background papers which show the processes of thought behind the Information Commissioner's conclusion that the Cabinet minutes in question should be disclosed".

8. The Information Commissioner's Office (ICO) wrote to the complainant, on the Commissioner's behalf, on 23 April 2009. It confirmed that the Commissioner did not hold a copy of the Cabinet minutes themselves and summarised the information it did hold which fell within the scope of the complainant's request as follows:
 1. Handwritten notes made by Richard Thomas, Information Commissioner, when viewing the minutes.
 2. Handwritten notes, made by the case officer, when discussing the case with Richard Thomas.
 3. The confidential annex to the Decision Notice, sent to the Cabinet Office and outlining the reasons for the decision.
 4. Exchange of correspondence between the case officer and the Cabinet Office, arranging for Richard Thomas to view the information in situ.
 5. Decision Notice sign off form.
 6. Draft Decision Notice.
9. The ICO withheld items 1, 2 and 3 in their entirety, citing section 44 of the Act. However, it provided redacted copies of the information at items 4, 5 and 6. The redactions were made on the basis that sections 40(2) and 44 of the Act applied to the redacted information. The ICO explained that section 44 applied by virtue of section 59(1) of the Data Protection Act 1998 (the "DPA").
10. On 24 April 2009 the complainant wrote to the ICO and requested an internal review of the decision to withhold items 1, 2 and 3 from him.
11. The ICO wrote to the complainant on 29 May 2009. It agreed to provide some additional information (from item 2) to him, but confirmed its original decision in respect of the remaining withheld information.

The Investigation

Scope of the case

12. On 6 June 2009 the complainant contacted the Commissioner, under section 50(1) of the Act, to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider his view that section 59(2)(e) of the DPA gave the Commissioner 'lawful authority' to disclose the information he had requested. The complainant wrote to the Commissioner again on 22 June 2009, 28 June 2009 and 15 August 2009 to elaborate on his reasons for requesting disclosure of the information.
13. The complainant had requested an internal review only of the withholding of items 1, 2 and 3. Therefore, items 4, 5 and 6 fall outside the scope of this Decision Notice. Nevertheless, during the course of the investigation further information from these items was provided to the complainant on a discretionary basis. In addition, a small amount of information was provided to the complainant from item 3. The information disclosed from item 3 has therefore not been considered in this Decision Notice.
14. The remaining disputed information, to which this Decision Notice relates, is as follows:
 1. handwritten notes made by Richard Thomas;
 2. four bullet points of handwritten notes made by the case officer;
and
 3. the confidential annex which accompanied the Decision Notice except for one disclosed paragraph.
15. The scope of this Decision Notice is therefore to consider the application of section 44 to this information, as section 40(2) is not at issue as regards the remaining disputed information.

Chronology

16. On 27 August 2009 and 9 September 2009, the ICO set out in writing, to allow discussions to facilitate internal discussions, the reasons for the information having been withheld. This was supplemented with additional written information on 12 October 2009 and by way of a meeting of key individuals concerned with this complaint on 8 December 2009.

Findings of fact

17. The complainant requested a copy of the Cabinet minutes, to which the veto had been applied, from the ICO. The information the Commissioner holds that falls within the scope of the request is set out at paragraph 8. The Commissioner does not hold a copy of the Cabinet minutes themselves.

Analysis

18. Extracts of the relevant legislation are set out in the legal annex to this notice.

Exemptions

19. The Commissioner has considered whether the requested information is exempt under section 44(1)(a) of the Act.

20. Section 44(1) provides that –

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

(a) is prohibited by or under any enactment”.

21. The relevant enactment is section 59(1) of the DPA.

Section 59(1) of the Data Protection Act 1998

22. Section 59, as amended by schedule 2 part II of the Act, provides –

(1) No person who is or has been the Commissioner, a member of the Commissioner’s staff or an agent of the Commissioner shall disclose any information which –

(a) has been obtained by, or furnished to, the Commissioner under or for the purposes of the information Acts,

(b) relates to an identified or identifiable individual or business, and

(c) is not at the time of the disclosure, and has not previously been, available to the public from other sources,

unless the disclosure is made with lawful authority.

23. In an earlier Decision Notice, issued under reference FS50126668, the Commissioner described section 59(1)(a) as referring to "...all information held by the Commissioner for the purposes of and in relation to investigations that he conducts following complaints about compliance with the legislation over which he has jurisdiction" (paragraph 21).
24. In relation to section 59(1)(a), whilst the requested information held by the Commissioner was generated by the Commissioner himself or his staff (and therefore the *documents* have not been "obtained by or furnished to" him), the withheld documents record *information* provided to the Commissioner when inspecting the Cabinet minutes and therefore the information was provided to him for the purpose of allowing the Commissioner to conduct an investigation under the Act.
25. With regard to section 59(1)(b), section 59(1) applies to both of the information Acts (the Freedom of Information Act 2000 and the Data Protection Act 1998) and therefore the meaning of the word "business" must be assessed in the context of those Acts to include public authorities. In this case, the Cabinet Office is the identifiable business in question.
26. In relation to section 59(1)(c), the Cabinet Minutes in question have not been disclosed to the public, nor has the information held by the Commissioner concerning them been made available.
27. The Commissioner is therefore satisfied that section 59(1) applies to the requested information.

Section 59(2) of the Data Protection Act 1998

28. Section 59(2) provides for a number of scenarios in which information falling within the description of section 59(1) may be disclosed. The complainant has suggested that section 59(2)(e) is relevant in this case.

29. Section 59(2)(e) provides –

"For the purposes of subsection (1) a disclosure of information is made with lawful authority only if, and to the extent that –

- (e) having regard to the rights and freedoms or legitimate interests of any person, the disclosure is necessary in the public interest".

30. It should be noted that, when assessing whether disclosure is “necessary in the public interest”, the Commissioner is not restricted to consider only the factors he would be able to take into account if he were conducting a public interest test under section 2 of the Act. He has therefore considered all factors relevant to this particular case.
31. The Commissioner acknowledges that there is a public interest in disclosure of the requested information; indeed in the Cabinet Minutes case the Commissioner concluded that the public interest in disclosing the minutes outweighed the public interest in withholding them. However, the Commissioner has explained to the complainant that the threshold as to what constitutes a “necessary” disclosure is very high. This is unlike the public interest test under section 2 of the Act which requires only that the public interest in maintaining the exemption does not outweigh the public interest in disclosure. He has therefore considered the arguments put forward by the complainant, as well as re-examining his earlier arguments in the Cabinet Minutes case and comments made by the Tribunal in the appeal relating to that case. In addition, the Commissioner has considered whether any new legitimate interests have arisen in relation to the requested information.

Is disclosure ‘necessary in the public interest’? – the complainant’s view

32. The complainant has explained that he considers that disclosure of the requested information would inform the public whether the Government complied with international humanitarian law when making the decision to go to war. Further, he has explained that disclosure of the requested information would allow the public to assess the operation of the convention of collective Cabinet responsibility.
33. The Commissioner is not able to comment on the extent to which the factors of interest to the complainant would or would not be met by provision of the requested information, without revealing the withheld information itself. The Commissioner has set out in a confidential schedule to this Decision Notice, his comments on these factors.

Is disclosure ‘necessary in the public interest’? – the Commissioner’s view

Factors in favour of disclosing the information

34. In the Cabinet Minutes case, the Commissioner recorded the following factors in favour of disclosure of the Cabinet minutes (with minor redactions):
- the gravity and controversial nature of the subject matter;
 - accountability for government decisions;

- transparency of decision making; and
 - public participation in government decisions.
35. The Commissioner considered each of the points set out above in the Decision Notice in that case. He does not intend to repeat the arguments here. The Commissioner recognises that the same public interest factors would be relevant in this case, particularly as the complainant's attempt to obtain the Cabinet minutes has been frustrated by the use of the veto. However, the Commissioner does not consider that this change in circumstances means that the public interest in disclosure is any greater than at the time the Decision Notice in the Cabinet Minutes case was served on the parties.
36. The Commissioner recognises that there is a general public interest in the transparency of the way the he conducts his investigations and carries out his functions. The Commissioner has reviewed the specific information in question. He does not consider that disclosure of the information would particularly enlighten the public as to how effectively he carries out his functions. Therefore, whilst he has afforded some weight to the general public interest in openness and transparency, he affords no additional weight specific to the disclosure of the particular information in this case.

Factors in favour of withholding the information

37. In the Cabinet Minutes case, the Commissioner gave weight to the following factors in favour of maintaining the exemption:
- the importance of Cabinet's ability to freely consider the most important and sensitive policy issues without inhibition; and
 - the protection of the convention of collective Cabinet responsibility.
38. Since that Decision Notice was served, the Commissioner considers that a number of further factors in favour of withholding the information are now relevant:
- the nature of the information requested;
 - the exercise of the Ministerial veto by the Secretary of State for Justice; and
 - the fact the information is being requested from a public authority that was only granted access to it for certain purposes.

Nature of the information in question

39. The withheld information in this case constitutes largely illegible, handwritten notes taken by the Information Commissioner when viewing the Cabinet minutes in situ, similar notes taken by the case

officer when discussing the visit with the Commissioner on his return to the office and the confidential annex to the Decision Notice in the Cabinet Minutes case (except for one disclosed paragraph), which was served on the Cabinet Office alone.

Notes taken by the Commissioner

40. The notes contain some incomplete sentences and abbreviations, but at times quote the Cabinet minutes verbatim. Where this occurs, the quotations largely relate to information which the Commissioner decided should be redacted from the minutes which he considered should be disclosed. The arguments in favour of withholding the information are therefore particularly strong, given that the Commissioner, and later the Tribunal, had determined that it was not in the public interest for this information to be disclosed. The Commissioner does not consider there has been any change in circumstances that would warrant a different conclusion being reached in respect of this information.
41. Further, the Commissioner would emphasise that the notes served only as an 'aide memoire'. They were made for the purposes of acting as a personal reminder as to what was contained in the information he had viewed in situ, which would later enable a Decision Notice in the case to be drafted. This argument is substantiated by the fact that the case officer in the Cabinet Minutes case was not provided with a copy of the Commissioner's notes, but met with the Commissioner to discuss the case and took his own notes at the time. The notes have been held securely by the Commissioner since the inspection of the minutes.
42. As part of its consideration of the Cabinet Minutes case, the Tribunal considered whether the complainant should be provided with informal records of the Cabinet discussions and deliberations, as these had been deemed to fall within the scope of his request.
43. The Tribunal outlined its conclusions as regards disclosure of this information at paragraph 95 of its decision. It explained that disclosure of the notes was likely to have a greater impact on Cabinet debates and the manner in which they are recorded, than disclosure of the minutes themselves. It also argued that disclosure "could have a further damaging effect in that the manner in which an individual takes contemporaneous notes is likely to be idiosyncratic and could well give a false impression as to the weight an importance that should be attributed to a particular part of the debate or the tone in which the points of discussion were expressed".
44. The Commissioner would not usually accept such arguments. Instead, he would encourage public authorities to disclose the requested

information and provide additional material or explanation to allow the information disclosed to be assessed in context. Further, the Commissioner would expect public authorities to make arguments as regards non-disclosure that are specifically linked to the content of the withheld information in question.

45. The Commissioner believes that the point expressed at paragraph 43, that disclosure of notes of the minutes may give a false impression of what is in fact contained within the minutes, is valid in this case. The Commissioner considers that harm would be likely to arise as a result of disclosure of the information he holds. Disclosure of the Commissioner's notes would demonstrate what he considered to be the relevant points for the purposes of allowing him to make a decision as regards disclosure under the Act, but do not provide a complete account of what is contained within the minutes themselves. In respect of such sensitive and controversial subject matter as the decision to go to war, the Commissioner considers that only disclosure of the Cabinet minutes themselves, subject to the prescribed redactions, would fully inform the public debate.
46. In any event, the Commissioner does not consider that he could provide additional information to put the requested information in context because the withheld information is all the relevant recorded information he holds.

Notes taken by the case officer

47. The notes taken by the case officer when discussing the Cabinet Minutes case with the Commissioner constitute four bullet points of handwritten notes. One bullet point summarises briefly the scope of the minutes, while the remaining three record the Commissioner's arguments (but not the conclusions) on the disclosure of the minutes.
48. The Commissioner considers the arguments set out at paragraphs 43 to 45 to be equally relevant here.

Confidential annex to the Decision Notice in the Cabinet Minutes case

49. The annex is made up of two parts. The first part ("A") elaborates as to the Commissioner's analysis of the public interest test. The second part ("B") sets out the information the Commissioner considered should be redacted from the minutes.
50. To disclose this information would be tantamount to disclosing extracts from the Cabinet minutes themselves. This is because the points made by the Commissioner in the annex summarise and make reference to information contained within the minutes.

51. For the reasons set out in this notice, the Commissioner does not consider it appropriate for him to disclose information he has been provided with in the course of his investigation. This is particularly relevant with regard to part B of the annex: information which the Commissioner did not believe should be disclosed at the time of issuing the Decision Notice in the Cabinet Minutes case. The Commissioner's views have not changed as regards this particular information. It should be noted that the Tribunal ordered "slightly more extensive" redactions in its decision than the Commissioner had.

Purpose for which access to the requested information was granted

52. The Commissioner was granted access to the Cabinet minutes to enable him to adjudicate on a complaint made to him under section 50 of the Act, and for no other purpose. It is the Commissioner's standard procedure to ask to be provided with the information that has been withheld from the complainant, when carrying out an investigation. The Commissioner is concerned that, should he disclose information which is intrinsically linked to the withheld information, public authorities would refuse to comply with his requests to be provided with information withheld from requesters. This would compromise the Commissioner's ability to adjudicate upon complaints in the future and would frustrate the operation of the ICO in respect of freedom of information matters generally. The Commissioner does have powers under section 51 of the Act to compel public authorities to engage with him on freedom of information matters. However, he considers that, should a public authority be reluctant to provide information to the Commissioner for the purpose of his investigation, it would make the process slower and more resource intensive. This would clearly not be in the public interest.

Exercise of the veto by the Secretary of State

53. At the time of the previous case, the Secretary of State had not yet exercised his powers to veto the disclosure of the requested information. However, by issuing a certificate under section 53 of the Act, the Secretary of State has made it absolutely clear that he considers the public interest in maintaining the exemption outweighs the public interest in disclosure. That this case concerns the operation of the Ministerial veto under section 53 of the Act affords this factor significant weight. The effect of the veto is that the Government has the 'final say' on the issue of disclosure of information and this position should not be undermined. There is a clear public interest in maintaining this constitutional arrangement and not circumventing the operation of an Act of Parliament. As this Decision Notice concerns information which is intrinsically linked with the information to which

the Ministerial veto applies, the Commissioner considers the public interest in withholding the information to have increased.

54. Following receipt of the Secretary of State's certificate under section 53, the Commissioner took legal advice on the likely success of a legal challenge to the certificate. The Commissioner has published the advice online at the following link:

http://www.ico.gov.uk/upload/documents/library/freedom_of_information/research_and_reports/ico_report_on%20iraq_minutes_ministerial_veto.pdf

55. The advice explained that the Commissioner could challenge the certificate, by way of an application for judicial review; however that such a challenge was unlikely to succeed. The Commissioner therefore considers that the process by which the Cabinet minutes could be obtained has been exhausted and that it should not be possible to subvert this process by allowing access to what information the Commissioner does hold by another means. In his view, that cannot have been Parliament's intention.

Procedural Requirements

56. Section 10 of the Act requires that public authorities comply with section 1 of the Act within twenty working days following the date of the request.
57. The Commissioner received the request on 19 March 2009. He responded on 23 April 2009, 21 working days following the date of the request. The Commissioner has therefore breached section 10(1) of the Act by failing to confirm to the complainant that he held information of the description specified in the request on time.
58. Similarly, section 17(1) obliges the Commissioner to issue a refusal notice in line with section 17, where the information is exempt from disclosure, within twenty working days following receipt of a request. The Commissioner issued a refusal notice 21 working days following the date of the request. The Commissioner has therefore breached section 17(1) in this case.

The Decision

59. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

He correctly applied section 44(1)(a) of the Act to the requested information.

However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

Sections 10(1) and 17(1), in that the Commissioner responded to the request, and provided a refusal notice, late.

Steps Required

60. The Commissioner requires no steps to be taken.

Right of Appeal

61. 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 sent.

Dated the 27th day of May 2010

Signed

**Graham Smith
Deputy Commissioner and Director of Freedom of Information**

**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.”

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.”

Prohibitions on disclosure

Section 44(1) provides that –

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

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

Exception from duty to comply with decision notice

Section 53(2) provides that –

“A decision notice or enforcement notice to which this section applies shall cease to have effect if, not later than the twentieth working day following the effective date, the accountable person in relation to that authority gives the Commissioner a certificate signed by him stating that he has on reasonable grounds formed the opinion that, in respect

of the request or requests concerned, there was no failure falling within subsection (1)(b)."

Data Protection Act 1998

Confidentiality of information

Section 59 provides –

- (1) No person who is or has been the Commissioner, a member of the Commissioner's staff or an agent of the Commissioner shall disclose any information which –
 - (a) has been obtained by, or furnished to, the Commissioner under or for the purposes of the information Acts,
 - (b) relates to an identified or identifiable individual or business, and
 - (c) is not at the time of the disclosure, and has not previously been, available to the public from other sources,

unless the disclosure is made with lawful authority.

- (2) For the purposes of subsection (1) a disclosure of information is made with lawful authority only if, and to the extent that –
 - (a) the disclosure is made with the consent of the individual or of the person for the time being carrying on the business,
 - (b) the information was provided for the purpose of its being made available to the public (in whatever manner) under any provision of the information Acts,
 - (c) the disclosure is made for the purposes of, and is necessary for, the discharge of –
 - (i) any functions under the information Acts, or
 - (ii) any Community obligation,
 - (d) the disclosure is made for the purposes of any proceedings, whether criminal or civil and whether arising under, or by virtue of, the information Acts or otherwise, or

- (e) having regard to the rights and freedoms or legitimate interests of any person, the disclosure is necessary in the public interest.
- (3) Any person who knowingly or recklessly discloses information in contravention of subsection (1) is guilty of an offence.