

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 1 June 2010

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

Summary

The complainant originally submitted a freedom of information request to the Master of the Rolls for a copy of what was referred to as a 'quite lengthy document' in a hearing at the Court of Appeal regarding the issue of the sealing of Royal Wills. The Master of the Rolls, as a member of the judiciary, is not a public authority for the purposes of the Act and instead the request was treated as having been submitted to the Ministry of Justice. The Ministry of Justice responded to the request by informing the complainant that the information was not held. Having investigated the complaint the Commissioner is satisfied that the information was not held and that in this respect the public authority dealt with the request in accordance with the Act. However the public authority had failed to respond to the request within 20 working days and so the Commissioner found that the public authority also breached section 10(1) (Time for compliance) of the Act. The Commissioner requires no steps to be taken.

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. The complainant originally submitted a freedom of information request to the Master of the Rolls, a member of the Judiciary. The request was sent on 5 March 2009 and was for the 'quite lengthy document' which had been referred to in a judgement of the Court of Appeal relating to the issue of Royal Wills and at which the Lord Chief Justice had presided.
3. The Office of the Master of the Rolls responded to the request on 17 March 2009 at which point it informed the complainant that no information was held and referred him to a member of the Court Service, an agency of the public authority.
4. On 23 March 2009 the complainant forwarded his request to the Ministry of Justice. It is only at this point that a valid freedom of information request was submitted and the Commissioner will return to this point below.
5. The request was submitted via email and the complainant received an 'auto' acknowledgement of his request from the public authority's email inbox. However, no substantive response was received and so the complainant forwarded the request to the public authority several more times, to which 'auto' acknowledgments were also received. It appears that the public authority experienced some problems recognising the complainant's correspondence as a new request for information under the Act.
6. On 17 November 2009 the complainant spoke to a member of staff at the public authority regarding its failure to respond to his request. It appears that the complainant had sent a significant number of emails and correspondence to the public authority and by speaking to this individual was able to clarify which particular request was outstanding. The public authority now suggested that it treat the complainant's request as having been submitted on 17 November 2009. The complainant said that he did not think that this was acceptable and provided the public authority with a schedule detailing his correspondence including the dates his request had been sent and re-sent.
7. On 30 November 2009 the public authority contacted the complainant to say that it did not have a record of the request which he originally submitted to the Master of the Rolls on 5 March 2009. It said that it appeared that there had been a 'misunderstanding about what correspondence the [public authority] received from you, and what FOI

- cases you had been referring to in your correspondence'. In considering the 'amount, and size, of the correspondence that we have received from [the complainant] over the last few months we believe it is reasonable for us to assume the date of receipt of this FOI request is the 17 November 2009'.
8. On 15 December 2009 the public authority wrote to the complainant with its response to the request. It again said that it had not been able to trace the complainant's request until it was re-submitted on 17 November 2009.
 9. The public authority noted that the request had initially been sent to the Master of the Rolls at the Royal Courts of Justice. It explained that the Master of the Rolls was not a public authority and therefore was not covered by the Act. Following further correspondence from the complainant it said that it had taken the request to have been submitted to the Courts Service, part of the public authority and that it had processed the request on this basis. However, it now informed the complainant that it did not hold the requested document which had been referred to in the Court of Appeal hearing.
 10. On 30 December 2009 the complainant asked the public authority to carry out an internal review of its handling of his request. In particular the complainant said that he considered it highly likely that a copy of the document was held and that he presumed that the public authority's response was framed in the way it was because it knew that 'the document is held by the Master of the Rolls, the Lord Chief Justice, the Senior District Judge, other judge, person or persons, or institution or institutions, acting on their behalf'. The complainant said that his grounds for appeal were that he objected to what he saw as the refusal to disclose the document he requested on the basis that it was held by the Master of the Rolls or another person deemed to fall outside of the scope of the Act. The complainant provided a detailed submission in support of his appeal.
 11. On 11 February 2010 the public authority contacted the complainant with the outcome of its internal review at which point it confirmed the earlier response that the requested information was not held. It explained that it had been unable to find any trace of the requested document and was satisfied it was not held.

The Investigation

Scope of the case

12. The complainant originally submitted a complaint to the Commissioner on 23 June 2009. At this point the complaint was limited to the public authority's failure to respond to the request.
13. After receiving a response to his request the complainant contacted the Commissioner again to complain about the decision to refuse the request on the basis that the information was not held. The complainant contacted the Commissioner at the same time as he submitted his internal review request to the public authority, 30 December 2009, informing the Commissioner that his grounds for appeal were as set out in his request for internal review. At this point the Commissioner decided, given the delay in the public authority responding to the request, to consider the complaint although an internal review had not yet been completed.

Chronology

14. On 18 February 2010 the Commissioner contacted the public authority with details of the complaint. Firstly the Commissioner said that there appeared to be some confusion about the date on which the request was received. On the basis of the papers available to him the Commissioner said that he was minded to conclude that the request was submitted to the public authority on 23 March 2009. The public authority was invited to make any representations on this point.
15. At this point the Commissioner was not aware if the public authority had yet completed its internal review. He noted that the complainant had submitted his request for internal review on 30 December 2009 and referred the public authority to his awareness guidance which states that a reasonable time for completing an internal review is 20 working days. The Commissioner asked the public authority to provide him with details of its internal review if this had now been completed.
16. In dealing with the substance of the complaint the Commissioner asked the public authority to outline what steps it had taken to search for the requested information with details of what areas, divisions or agencies of the public authority featured in this exercise. The complainant had argued that given the constitutional importance of the document he requested it must be held somewhere within the courts system and that if the information was held by the Master of the Rolls it would still be held by the public authority, or on behalf of the public authority, for

the purposes of the Act. The Commissioner asked for the public authority's comments on this point.

17. The public authority responded to the Commissioner on 8 April 2010 when it confirmed that an internal review had now been completed and provided the Commissioner with a copy. As regards the question of when the request was received, the public authority explained that the complainant had sent a great deal of correspondence including emails with up to 100 attachments and that this had had the effect of 'crashing' its inboxes. The complainant had been advised not to send such large emails but had continued to do so. It suggested that the complainant's request could have been part of one of these very large emails and that this may have been reason it had been missed. To illustrate the problems it had in dealing with the volume of correspondence sent by the complainant the public authority provided the Commissioner with a schedule detailing some of the correspondence it had received as well as details of other requests the complainant had submitted on a similar theme.
18. The public authority noted that the original request had been submitted to the Master of the Rolls who, as a member of the judiciary, is not subject to the Act. Given that the request had referred to the Courts Service it had taken the decision to accept the request as being directed to the public authority. The public authority now outlined what searches it undertook for the requested information.

Findings of fact

19. The 'quite lengthy document' requested by the complainant was referred to in a hearing before the Court of Appeal regarding the sealing of Royal wills. The following is an extract from paragraph 28 of that judgement.

'Before and after the death of Princess Margaret there were discussions between the Palace, Farrers, the Attorney General's Secretariat, and the Attorney General and the court which reviewed what Mr Hinks described as the practice of sealing Royal Wills. The Senior District Judge was involved who sought the views of the former President. Ultimately "a quite lengthy document" was agreed that was reviewed and approved by the former President. The process that this contained involved a system of "checks and balances" that was highly confidential. The primary object of the process was to protect the privacy of the Sovereign. Thus when two applications came before the

former President she had an understanding of the background that she would not otherwise have had'.¹

Analysis

Substantive Procedural Matters

When was the request received?

20. Clearly the large number of emails and attachments sent by the complainant to the public authority made it difficult for the public authority to recognise when the complainant had submitted a new request for information under the Act. It is also possible that some of the larger emails sent by the complainant had the effect of 'crashing' the public authority's inbox as it suggested. The Commissioner sympathises with the public authority. However, the Commissioner also considers that public authorities should have procedures in place to recover freedom of information requests received in such circumstances. On the basis of the information available to him the Commissioner must conclude that the complainant submitted his request on 23 March 2009 when he forwarded his original request to the Master of the Rolls (dated 5 March 2009) to the public authority.
21. The public authority did not acknowledge the request until 30 November 2009 and did not respond substantively until 15 December 2009. Consequently, the Commissioner must find the public authority in breach of section 10(1) for failing to inform the complainant that the information was not held within 20 working days.

Is the information held?

22. Firstly, the Commissioner would stress, for the sake of clarity, that the Master of the Rolls, as a member of the judiciary, is not a public authority and therefore is not covered by the Act. The complainant disputes this but also suggests that any information held by the Master of the Rolls or by other members of the judiciary would still be held by the public authority, or on its behalf, for the purposes of the Act.
23. In outlining the steps it took to search for the requested information the public authority said that, although the Court is not a public authority, it had contacted the Knowledge Information Liaison Officer

¹ [2008] EWCA Civ 56. Case No: B4/2007/1702/FAMF

at the Royal Courts of Justice and referred them to the Court of Appeal judgement in which the requested document had been mentioned. The Royal Courts of Justice then conducted the relevant searches which yielded no successful results. A Senior District Judge at the Royal Courts of Justice was subsequently consulted who confirmed that he did not know which document was being referred to.

24. The public authority said that because it could not identify the document referred to by the complainant it contacted Farrer & Co, the solicitors who had originally referred to the document in the Court of Appeal hearing, to ask which document it was referring to. The public authority was informed that the document was one that was dated 2002 and that the Attorney General held a copy. Having identified the document it said that it had re-searched for this within the public authority, including the Courts Service, but that it was informed that the document was not held. In light of the fact that the public authority had identified the requested information and that it was held by the Attorney General's Office, the Commissioner is satisfied, on the balance of probabilities, that the public authority had carried out an appropriate search within the public authority.
25. The Commissioner has considered the steps taken by the public authority to search for the information and has reviewed the judgement of the hearing in which the 'quite lengthy document' was originally referred to.
26. The Commissioner considers that there is nothing within that judgement that proves that the information is held by the public authority. Indeed the public authority has identified which document the complainant is referring to and has confirmed that it is held within Government, by the Attorney General's Office. It is not trying to deny the existence of the document; rather its position is that it is not held within the public authority or on its behalf. Given this fact it seems highly unlikely that the public authority would attempt to somehow conceal the fact that it holds the document. A thorough search of the public authority has failed to locate the document and without any evidence to the contrary the Commissioner must conclude, on the balance of probabilities, that the information requested by the complainant is not held.

The Decision

27. 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:
- The public authority does not hold the information requested by the complainant.
28. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- The public authority breached section 10(1) of the Act for failing to confirm or deny if the requested information was held within 20 working days.

Steps Required

29. The Commissioner requires no steps to be taken.

Other matters

30. Part I of the 'The Secretary of State for Constitutional Affairs' Code of Practice on the discharge of public authorities' functions under Part I of the Freedom of Information Act 2000' issued under section 45 of the Act, considers what action a public authority should take to assist an applicant if it does not hold requested information but has reason to believe that the information is held by another public authority. It suggests that 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
31. The Code of Practice also suggests that in some cases public authorities may consider transferring the request to the public authority that holds it if this is appropriate in the circumstances.

32. In this case the public authority established that the information requested by the complainant was held by the Attorney General's Office yet this was not communicated to the complainant. The Commissioner considers this a failure to conform to the Code of Practice.

Right of Appeal

33. 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 1st day of June 2010

Signed

**Gerrard Tracey
Principal Policy Adviser**

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

Legal Annex

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(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."