

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 5 May 2010

Public Authority: King's College London
Address: Strand
London
WC2R 2LS

Summary

The complainant requested calibration data for a sample test carried out on a specific date in 1997. This information was initially withheld by the public authority under section 38. During the investigation of this case the public authority claimed that the information required by the complainant was not held. After investigating the case the Commissioner is satisfied that the information is not held by the public authority. However, as the public authority did not inform the complainant that it did not hold the information within the statutory time limit the Commissioner believes that it acted in breach of sections 1(1)(a) and 10(1) of the Act. As the public authority does not hold the information in question the Commissioner has not ordered that any further steps are 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 contacted King's College London ("KCL") on 13 March 2006 and requested the following under the Act,

"1. The calibration curves and calibration data for my test results dated 21/06/1997 ATN [Athlete Training Number] 010830.

2. The contract for doping control/analysis of urine between UKS [UK Sport] and DCC [Drug Control Centre] King's College...

3. The tender document supplied by UKS for doping control / analysis from which the contract followed."

It is the first part of this request that forms the basis of the case. The other two parts of the request have previously been dealt with by the Commissioner under case reference FS50130225.¹ For ease of reference, the requested information will be referred to as "calibration data" throughout the rest of this Notice.

3. KCL responded to this request on 3 April 2006 and stated that,

"...we will not provide you with this information, as the exemption contained in Section 38 [...] 'Health and Safety' will apply. This allows us to refuse this request on the basis that such disclosures may also endanger the physical health of an individual."

4. The complainant emailed KCL on 20 April 2006 and requested an internal review of this decision.

5. KCL carried out an internal review and responded to the complainant stating that it still believed that this information was exempt under section 38.

The Investigation

Scope of the case

6. The complainant complained to the Commissioner on 10 July 2006 to complain about the way that his request for information had been handled. As noted above, some aspects of his complaint were dealt with under case reference FS50130225. The Commissioner took an initial view that the part of the request relating to calibration data was actually a request for the complainant's personal data, and therefore this part of the complaint was initially investigated under section 42 of the Data Protection Act 1998 (the "DPA"). However, after carrying out

¹ http://www.ico.gov.uk/upload/documents/decisionnotices/2009/fs_50130225.pdf

an investigation under the DPA the Commissioner reached a view that the calibration data did not constitute the complainant's personal data. Therefore this aspect of the complaint has now been investigated as a request for information under the Act; under the new case reference number FS50266856.

7. Therefore this case has focused on the complainant's request for,

"The calibration curves and calibration data for my test results dated 21/06/1997 ATN number 010830."

The Commissioner has interpreted the complaint as being about the lack of calibration data dated 21 June 1997. In a letter to the complainant dated 4 January 2010 he made this clear, and also informed the complainant that whilst it appeared that KCL held calibration data for other dates in 1997, he did not believe that this was material that the complainant had complained about. During the investigation of this case the complainant did not contradict this view.

8. Although not referred to by the complainant, the Commissioner has also considered KCL's compliance with the requirements of section 10 of the Act.

Chronology

9. As noted above, certain aspects of the complaint were previously dealt with under case reference FS50130225. Although the request for calibration data was not considered in that case, during that investigation KCL referred to this aspect of the request in a letter to the Commissioner dated 5 December 2007. In this letter it stated that it now believed that the calibration data was the complainant's personal data, but if the Commissioner took the view that it was not, it instead believed that it would be exempt from disclosure under section 31(1)(a), sections 38(1)(a) and (b), sections 40(2) and 40(3)(a)(i).
10. The Commissioner's investigation under the DPA led to a long exchange of communications between his office and KCL. Crucially, during this investigation the Commissioner received an email from KCL dated 5 May 2009 in which it stated,

"I have [...] established that we did not run calibration data contemporaneously as part of the formal protocol for either the A-sample or the B-sample. This was not a requirement at the time. The data that we do hold are the calibrations run closest to the samples under consideration."

Therefore, KCL's position by this date was that it did not actually hold the calibration data dated 21 June 1997.

11. The Commissioner wrote to KCL in an email dated 12 November 2009. He noted the complex history of this case, and in particular noted the email from KCL dated 5 May 2009 (see previous paragraph). He stated that there were two fundamental issues in this case. Firstly, did KCL actually hold the calibration data, as specified in the request; and secondly, if so, what exemptions was KCL relying upon to withhold it.
12. In relation to the first point, the Commissioner noted that the email of 5 May 2009 stated that KCL did not actually hold the calibration data dated 21 June 1997. Given the wording of the request, he pointed out that it was essential to establish whether it held the relevant data for the relevant date. Therefore, he asked it to confirm whether it held calibration data for the relevant equipment for 21 June 1997. If it did not hold this information, he also asked for further submissions as to why this was so, and to expand upon its email of 5 May 2009.
13. KCL responded in an email dated 16 December 2009. In this email it confirmed that it did not hold calibration data dated 21 June 1997. It stated that,

"King's holds calibration data obtained on 17 July 1997 and calibration data started on the 16 September 1997..."

King's holds a file note dated 14/10/1999 [which states] that we do not have contemporaneous calibration data but data from follow-up work prior to B-sample analysis.

King's cannot find any earlier calibration data that we could link to the instrument used for the initial analysis i.e. any data that specifically covers this request.

It is assumed that this would have been routinely destroyed, according to King's College records disposition schedule as it is King's normal practice to only retain this data for eight years...

King's does not consider that it holds the required data for the relevant equipment for the date originally specified."

14. In response to the Commissioner's request that it expand upon its earlier statement that it was not a requirement at the time to run contemporaneous calibration data as part of the formal protocol, it informed him that,

“Kings Drug Control Centre (DCC) operates according to World Anti-Doping Agency (WADA) procedures, protocols and policies. This is also a requirement of our contract with UK Sport. When the policies of WADA change the DCC amend their procedures to ensure that they are in accordance with the requirements of WADA and all other contractual obligations. In 1997 contemporaneous calibration data was not part of the required protocol. Therefore King’s did not, at that time, run contemporaneous calibration data on any athlete samples.”

15. The Commissioner wrote to the complainant in a letter dated 4 January 2010. In this letter he referred the complainant to the email from KCL dated 5 May 2009, and quoted the text of it to him. He stated that this email had raised a fundamental question, namely whether KCL actually held the calibration data dated 21 June 1997. He informed the complainant that he had now written to KCL again, asking it to confirm whether it held calibration data for the 21 June 1997, and that it had stated that it did not. He also quoted the explanations given by the KCL, as referred to at paragraphs 13 and 14 above. Given these explanations, the Commissioner informed the complainant that it was his initial view that KCL did not hold calibration data for 21 June 1997. Bearing this in mind, he asked the complainant whether he wished to withdraw his complaint. If he did not wish to withdraw his complaint, he asked the complainant to provide him with any further evidence he had to show that KCL did hold calibration data for 21 June 1997.
16. In a telephone conversation on 15 January 2010 the complainant informed the Commissioner that he did not wish to withdraw his complaint, and that he would provide copies of evidence that he believed showed that KCL did hold the calibration data in question.
17. In an email dated 31 January 2010 the complainant confirmed that he wished to proceed with his complaint, and provided the Commissioner with copies of four letters as supporting evidence. One of these was KCL’s initial refusal notice dated 3 April 2006 (see paragraph 3 above). The other three letters pre-dated this, and contained references to calibration data in relation to the complainant’s sample tests – although the Commissioner has noted that they do not specify what date this ‘calibration data’ relates to.
18. The Commissioner contacted KCL by way of a telephone call on 15 March 2010. He explained that the complainant wished to proceed with his complaint, and had provided further evidence. He would forward this information to KCL, and would be asking it for further submissions. During this conversation KCL again stated that although it held calibration data for other dates, which had only been retained due to

the complainant's ongoing dispute, it did not hold data dated 21 June 1997.

19. The Commissioner wrote to KCL on the same day, and provided it with a copy of the documents that the complainant had sent to him. He noted that these did contain references to calibration data relating to the complainant's sample tests (although he acknowledged that these references did not state what date the data related to). Bearing in mind the contents of these documents, he asked it to provide a further explanation as to why KCL had initially implied that it did hold the relevant calibration data, but had now changed its position. He also asked it to provide a further explanation as to the contents of one of the documents provided by the complainant – specifically, he asked it whether the calibration data referred to in this document was in relation to other sample tests relating to the complainant, other than the test specified in his request.
20. KCL responded in an email dated 16 April 2010. In relation to the initial refusal notice it believed that it had previously used a blanket application of section 38, instead of explaining that the calibration data for that specific date was not held. In relation to the contents of the other documents forwarded by the Commissioner it noted that although they referred to calibration data, they did not specify a date that that data related to. It went on to state that,

“[KCL] has never denied that it holds calibration data for this equipment regarding ATN number 010830. What we do dispute is that we hold any data that is dated 21 June 1997...While we do not hold the calibration data for this date we have retained the calibration data from 17 July 1997 and 16 September 1997...”
21. The Commissioner spoke to the complainant in a telephone call on 20 April 2010, and explained that KCL had again stated that it did not hold calibration data for 21 June 1997. He also explained in detail the passage of KCL's letter as quoted in the previous paragraph. He explained that KCL had admitted taking a blanket approach to his initial request – by relying upon an exemption rather than establishing (and admitting) that it did not hold data for the relevant date. He also told him that in relation to the other documents the complainant had provided, KCL had stated that the references to calibration data were for dates other than that specified in the request. The Commissioner clarified that KCL held calibration data in respect of equipment regarding ATN number 010830 but the complainant indicated that as that data was not dated 21 June 1997 it was not the material he required. The Commissioner informed the complainant that whilst some of KCL's explanations were indicative of poor practice he also found

them persuasive. Therefore, he again asked the complainant whether he wished to proceed to a formal Decision Notice. The complainant informed him that he would consider what the Commissioner had said, and would contact him again.

22. The complainant contacted the Commissioner again on 22 April 2010 and informed him that he wished to proceed to a formal Decision Notice for this case. He did not provide any further evidence to the Commissioner.

Analysis

Substantive Procedural Matters

Section 1 – Is the requested information held?

23. Section 1(1) of the Act states 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.”

The full text of section 1 can be found in the Legal Annex at the end of this Notice.

24. In this case the Commissioner has had to consider whether KCL holds the calibration data dated 21 June 1997. Although it initially relied upon an exemption to withhold the information in question, KCL's position is now that it does not hold this information. Therefore the Commissioner has to decide whether KCL has complied with section 1(1)(a) of the Act by stating that it does not hold the calibration data in question.
25. In this case KCL has acknowledged that it does hold calibration data for dates in July and September 1997, although not for 21 June 1997. The Commissioner notes, however, that despite the complainant being informed of this on several occasions during this investigation the focus of the complainant's complaint has always been that he requires

calibration data dated 21 June 1997. Therefore he is satisfied that the other calibration data referred to by KCL falls outside the scope of the complaint.

26. In approaching cases such as this, where the fundamental question is whether a public authority holds requested information, the Commissioner is guided by the views of the Information Tribunal in *Bromley & others v ICO & Environment Agency* [EA/2006/0072], which stated that in cases such as this,

“The standard of proof to be applied in that process is the normal civil standard, namely the balance of probabilities...”²

27. Further to this, the Tribunal also went on to state that,

“...there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere with a public authority...”³

28. In reaching a view on the balance of probabilities the Commissioner should take into account a number of factors, including evidence of the scope and quality of the searches carried out by the public authority. The Commissioner has also noted the views of the Tribunal in *Fowler v ICO & Brighton and Hove City Council* [EA/2006/0071] which suggested that such evidence may include,

“...evidence of a search for the information which had proved unsuccessful: or some other explanation for why the information is not held. This might be evidence of destruction, or evidence that the information was never recorded in the first place....”⁴

29. Therefore the Commissioner has considered whether, on the balance of probabilities, KCL holds the calibration data for 21 June 1997. In doing so he has particularly borne in mind any explanation as to why the specified information is not held.

30. In reaching a decision on this case the Commissioner has considered KCL's responses as listed at paragraphs 10, 13, 14, 18 and 20 above. In particular he has noted that:

- KCL's explanation that it was not required at the time to run calibration data contemporaneously with sample tests.

² EA/2006/0072, para 10.

³ EA/2006/0072, para 13.

⁴ EA/2006/0071, para 24.

- Its repeated statement that it does hold calibration data for other dates in 1997, together with the dates for which this data is held.
 - KCL's acceptance that its initial response to the complainant's request was confusing and an example of poor practice.
 - Its explanation that the earlier references to calibration data were actually to data relating to dates other than that specified by the complainant in his complaint.
31. The Commissioner has carefully considered the evidence provided by the complainant. In particular he has noted the various references to 'calibration data' made by KCL, and the contents and tone of the refusal notice and the internal review (see paragraphs 3 and 5 above). He has also noted the letter from KCL to the Commissioner dated 5 December 2007 (see paragraph 9 above), which also implied that it held the information in question. Given the contents and tone of this documentation he sympathises with the complainant, and understands why he believes that the data in question is held. However, having considered the information other than the refusal notice and the internal review, he has been unable to find an actual reference to calibration data for 21 June 1997. This tallies with KCL's explanation at paragraph 20 above, that these references, whilst misleading, are actually references to calibration data relating to dates other than that specified by the complainant in his complaint.
32. Therefore, although the Commissioner understands why the complainant believes that KCL does hold calibration data for 21 June 1997, he has also noted that the complainant has not been able to provide any evidence to directly show that this specific information is held by KCL.
33. Having considered the responses of the KCL to his questions the Commissioner believes that they are reasonable and persuasive. Given this, and as the complainant has not been able to provide any evidence to the contrary, the Commissioner is satisfied that on a balance of probabilities KCL does not hold calibration data for 21 June 1997.

Procedural Requirements

Section 10

34. Section 10(1) of the Act requires that 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 of the request.

35. In this case KCL failed to inform the complainant that it did not hold the information (as is required by section 1(1)) within the time specified by section 10. Therefore, the Commissioner believes that it failed to meet the requirements of section 10.
36. The full text of section 10 can be found in the Legal Annex at the end of this Notice.

The Decision

37. The Commissioner's decision is that KCL did not deal with the request for information in accordance with the Act in that:
 - by failing to inform the complainant that it did not hold the information he had requested, it failed to meet the requirements of section 1(1)(a) and section 10(1).

Steps Required

38. The Commissioner requires no steps to be taken.

Other matters

39. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.
40. The Commissioner would like to record his concerns in relation to KCL's reliance upon section 38. It would appear that when applying this exemption, KCL had not actually located (or viewed) the information requested and sought to refuse this request on a general basis. A failure to obtain or consider the actual information requested could result in an inaccurate response and as such the Commissioner considers that this is extremely poor practice. KCL has confirmed to the Commissioner that, subsequent to handling this request, it has reviewed and updated its policies and procedures in relation to replying to requests.
41. Paragraph 39 of the section 45 Code of Practice encourages authorities to

"....provide a fair and thorough review of handling issues and of decisions taken pursuant to the Act, including decisions taken about where the public interest lies in respect of exempt information. It should enable a fresh decision to be taken on a reconsideration of all the factors relevant to the issue.'⁵

The outcome of the review in this case, as communicated to the complainant, was very limited and did not demonstrate that a full reconsideration of the factors had taken place. The Commissioner, therefore, advises that KCL ensures that future internal reviews are carried out in accordance with the guidelines in the section 45 Code of Practice and communicated in full.

⁵ The section 45 code of practice is published online here:
<http://www.justice.gov.uk/guidance/docs/foi-section45-code-of-practice.pdf>

Right of Appeal

42. 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 5th day of May 2010

Signed

**Jo Pedder
Group Manager**

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

Legal Annex

Section 1

(1) 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.

(2) Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.

(3) Where a public authority –

- (a) reasonably requires further information in order to identify and locate the information requested, and
- (b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.

(4) The information –

- (a) in respect of which the applicant is to be informed under subsection (1)(a), or
- (b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.

(5) A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).

(6) In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.

Section 10

- (1)** 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.
- (2)** Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.
- (3)** If, and to the extent that –

 - (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
 - (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.
- (4)** The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.
- (5)** Regulations under subsection (4) may –

 - (a) prescribe different days in relation to different cases, and
 - (b) confer a discretion on the Commissioner.
- (6)** In this section –

“the date of receipt” means –

 - (a) the day on which the public authority receives the request for information, or
 - (b) if later, the day on which it receives the information referred to in section 1(3);

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the

Banking and Financial Dealings Act 1971 in any part of the United Kingdom.