

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 2 February 2010

Public Authority: Northern Ireland Office
Address: 11 Millbank
London
SW1P 4PN

Summary

The complainant made a request in May 2009 for information relating to the 1981 hunger strike in the Maze prison. The Northern Ireland Office ("NIO") acknowledged the request and subsequently replied in June 2009 that section 27 of the Freedom of Information Act 2000 (the "Act") applied to some of the information. It went on to inform the complainant that it would carry out a public interest determination within a target timeframe. The Commissioner finds that sections 17(1) and 10(1) of the Act were breached at this stage as the public authority failed to inform the complainant that all the requested information was subject to an exemption within 20 working days. Furthermore, where the NIO stated that section 27 did apply, it did not specify the relevant sub-section of the exemption or give reasons setting out why the exemption was engaged, thereby breaching sections 17(1)(b) and 17(1)(c). The NIO subsequently adjusted its time frame to provide a substantive response on a number of separate occasions. The Commissioner has found the delay in carrying out a public interest assessment to be in breach of section 17(3)(b) of the Act. He therefore requires the public authority to issue a notice explaining why section 27 is engaged and where it believes the balance of the public interest lies. If the NIO concludes that the balance of the public interest favours disclosure, the requested information should be provided to the complainant.

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 submitted the following request to the Northern Ireland Office (“NIO”) on 29 May 2009:

“I would like any documentation that refers to any offer made by the British Government during the 1981 hunger strike in the Maze prison and to any documentation recording any contacts made by your department with the Irish government or Sinn Fein, or IRA, prisoners or prisoners’ representatives, or Catholic church representatives on the issue of the hunger strike and any offer proposed by the government in the year 1981.”

3. The NIO acknowledged the request in correspondence dated 29 May 2009. On 25 June 2009, the NIO wrote to the complainant stating its belief that some of the requested information was covered by the exemption afforded by section 27 of the Act (international relations), although no explanation was given indicating why it thought it was engaged. The authority went on to inform the complainant that it was required to consider the public interest in disclosure, which had led to a delay in a response being finalised. Accordingly, it set a target response time of 27 July 2009 to complete the public interest determination.
4. The NIO wrote to the complainant again on 28 August 2009 to make him aware that a public interest assessment was yet to be concluded and would therefore need further time to respond. On 2 October 2009, the public authority advised that it had not been possible to meet the deadline but stated its hope to provide a substantive response by 23 October 2009.

The Investigation

Scope of the case

5. On 5 October 2009, the complainant contacted the Commissioner to complain about the unreasonable delays associated with the NIO responding to his information request of 29 May 2009.

Chronology

6. Apparently unaware that a complaint had already been lodged with the Commissioner, the NIO wrote to the complainant on 23 October. The authority stated that a further extension would be needed to consider the public interest in disclosure and suggested that it should be in a position to reply to the request by 20 November 2009.
7. The Commissioner wrote to the NIO on 2 November 2009 to indicate his position. He commented that although the Act allows that a response may be delayed while the balance of the public interest is considered, the Commissioner has

- published guidance that states that a public authority should delay its response by no more than a total of 40 working days from receipt of request. The Commissioner therefore requested that the NIO either provide the requested information or issue a refusal notice within 20 working days of receipt of the letter.
8. In correspondence of 13 November 2009, the NIO informed the Commissioner that the delay associated with the request was regrettable but not unreasonable due to it “having a number of unusual aspects.” The NIO went on to detail some of these, particularly the difficulty of consulting with the various interested stakeholders about the potential disclosure of information. It concluded its account by expressing its hope that a response could be provided to the complainant by 3 December 2009 but, in any event, by 4 January 2010.
 9. On 4 December 2009, the Commissioner telephoned the NIO for an update on its response. The public authority stated that although it was unable to comply with the 3 December 2009 deadline, it was still targeting 4 January 2010 as a realistic time frame.
 10. On 5 January 2010, the Commissioner called the NIO to confirm whether a response had been provided to the complainant. He was informed on the phone, and later in a detailed email, that the increased pressures on the freedom of information department and the delay in receiving guidance from other government departments had prevented it from meeting its deadline. However, the NIO suggested that it would aim to issue a response by 20 February 2010.
 11. On 13 January 2010, the Commissioner spoke to the complainant about the NIO’s handling of his request. The complainant informed him that, although the authority had initially suggested that section 27 only applied to some of the requested information, it later confirmed that it considered the exemption to be engaged in respect of all the information. The complainant subsequently emailed the Commissioner a copy of the NIO’s email to this effect, dated 6 August 2009.

Analysis

12. While the Commissioner has not had sight of the requested information, he understands that information about the 1981 hunger strike at the Maze prison may remain sensitive. Nevertheless, the Commissioner considers that the freedom of legislation can only prove effective if authorities ensure that any request for information is dealt with promptly.

Procedural Matters

Section 17 – refusing a request

Section 17(1)

13. Section 17(1) (full wording in the legal annex) requires that, where a public authority believes that any exemption from part II of the Act applies, it should

issue a notice stating why the exemption is engaged. This notice must be issued within 20 working days of receipt of the request as per section 10(1) of the Act; there is no extension available to the time within which a notice identifying the exemption and stating why it is engaged must be provided.

14. In this case, the NIO initially indicated that only some of the requested information was subject to an exemption which it later considered to apply to all. By failing to provide an appropriate response stating this fact within 20 working days, the Commissioner has determined the authority to be in breach of sections 17(1) and 10(1) of the Act.
15. Additionally, where the NIO did initially identify that information was caught by section 27, neither its original response nor the subsequent extension letters of the authority set out the relevant sub-section of section 27 which it considered applied or offered the complainant any reason why it considered section 27 to be engaged. The Commissioner therefore finds that the public authority has breached section 17(1)(b) and 17(1)(c) in failing to provide this information within 20 working days.

Section 17(3)

16. Section 17(3) (full wording in the legal annex) permits a public authority to provide its public interest determination in a separate notice within such time that is reasonable in the circumstances.
17. To assist authorities in this area, the Commissioner has issued publicly available guidance entitled “Good Practice Guidance No. 4 – Time limits on considering the public interest following requests for information under the Freedom of Information Act 2000”¹. This states:

“...our view is that public authorities should aim to respond fully to **all** requests within 20 working days. In cases where the public interest considerations are exceptionally complex it may be reasonable to take longer but, in our view, in no case should the **total** time exceed 40 working days.”
18. The Commissioner acknowledges the reasons given by the NIO to justify its delay in issuing a substantive response. However, the Commissioner is of the view that the time now taken to weigh up the public interest test is unwarranted, being well in excess of the prescribed 40 working day limit. The Commissioner therefore considers that the NIO has breached section 17(3)(b) because it has not provided the complainant with its public interest determination within such time as he believes to be reasonable.

¹ This guidance is available at:

http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/foi_good_practice_guidance_4.pdf

The Decision

19. The Commissioner finds the NIO in breach of sections 17(1) and 10(1) of the Act in its failure to inform the complainant that all the requested information was bound by the exemption afforded by section 27 within 20 working days.
20. In addition, the Commissioner's decision is that the public authority did not deal with the request for information in accordance with section 17(1)(b) and 17(1)(c) of the Act, in that it did not specify within 20 working days of receipt of the request the relevant sub-section of the exemption, nor provide an explanation setting out why the exemption was engaged.
21. The public authority has also breached section 17(3)(b) of the Act as it failed to complete its public interest determination and communicate the results to the complainant within a reasonable timescale.

Steps Required

22. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

The authority should issue a notice compliant with sections 17(1) & (3) of the Act, specifying the relevant sub-section of the exemption that applies and why the exemption is engaged, which in this case means stating why disclosure would, or would be likely to, prejudice international relations and its conclusion about where the balance of the public interest lies. If the public authority decides that the public interest favours disclosing the information or no longer considers the exemption to apply, the information should be provided to the complainant.

23. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

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

Right of Appeal

25. 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 served.

Dated the 2nd day of February 2010

Signed

**Steve Wood
Assistant Commissioner**

**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.”

Section 10(2) provides that –

“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.”

Section 10(3) provides that –

“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.”

Refusal of Request

Section 17(1) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 17(2) states –

“Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.”

Section 17(3) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

International Relations

Section 27(1) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) relations between the United Kingdom and any other State,
- (b) relations between the United Kingdom and any international organisation or international court,
- (c) the interests of the United Kingdom abroad, or
- (d) the promotion or protection by the United Kingdom of its interests abroad.”

Section 27(2) provides that –

“Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.”

Section 27(3) provides that –

“For the purposes of this section, any information obtained from a State, organisation or court is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.”

Section 27(4) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a)-

- (a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1), or
- (b) would involve the disclosure of any information (whether or not already recorded) which is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.”

Section 27(5) provides that –

“In this section-

"international court" means any international court which is not an international organisation and which is established-

- (a) by a resolution of an international organisation of which the United Kingdom is a member, or
- (b) by an international agreement to which the United Kingdom is a party;

"international organisation" means any international organisation whose members include any two or more States, or any organ of such an organisation;

"State" includes the government of any State and any organ of its government, and references to a State other than the United Kingdom include references to any territory outside the United Kingdom.”