

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 7 June 2010

Public Authority: House of Commons
Address: London
SW1A 1AA

Summary

The complainant made a request for information to the House of Commons via his account on the www.whatdotheyknow.com website. He requested a copy of a document, to be provided in electronic form. The public authority expressed its willingness to provide the information to the complainant by way of an alternative email address, however claimed that it would not be reasonably practicable for it to provide the information to the email address generated by the website, as to do so would raise copyright implications as the information provided to that address would be automatically published on the website. The Commissioner has investigated and considers that the public authority should provide the requested information to the complainant to the whatdotheyknow.com email address that was used to make the request.

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. On 21 July 2008 the complainant wrote to the House of Commons (the "House") and requested the following information under the Act:

"...electronic copies of documents produced by PICT discussing or evaluating the possible deployment of electronic petitioning systems in Parliament".

3. The House responded on 14 August 2008. It explained that the information was ready to be sent to the complainant however that it was "not appropriate for this to be automatically republished on your website". The House explained that the information was protected by Parliamentary copyright and that as such the information could not be posted on the www.whatdotheyknow.com website (the "website") without breaching copyright. The House asked the complainant to provide an alternative email address that would not automatically republish responses and attachments to the internet.
4. The complainant responded later the same day. He asked the House to either provide him with the requested information or to explain why, under section 11(4) of the Act, why it would not be "reasonably practicable" for the House to give effect to his request to receive information in a particular form.
5. The House responded again on 14 August 2008. It stated that, in its view, section 11(1) required public authorities to take into account preferences as to the form in which applicants wished to receive information, not the address to which responses should be sent.
6. The complainant responded again on the same day. He explained that it would be "dishonest and pointless" for him to provide an alternative email address, as he intended to publish the House's response on the internet in any event.
7. The House responded on 19 August 2008. It restated that the requested information was ready and would be sent to the complainant when an alternative address was provided.
8. The complainant wrote to the House again on 19 August 2008 to restate points he had previously made and to assure the House that he would not assume Parliament had licensed the documents for republication if they provided them to him via the website.
9. The House acknowledged this communication on 22 August 2008 and responded in full on 27 August 2008. It restated that the complainant must provide an alternative email address if he wished to receive the requested information.
10. On 28 August 2008 the complainant wrote to the House and requested an internal review of the decision to refuse to provide the information

via the website.

11. The House acknowledged the request for internal review on 1 September 2009. It updated the complainant a number of times on its progress. On 2 December 2008 the complainant wrote to the House and asked for an indication as to when the internal review may be completed. The House apologised for the delay and expressed its intention to update the complainant early in the New Year. The complainant chased progress again on 6 February 2009.
12. On 13 March 2009 the House wrote to the complainant with the outcome of its internal review into the handling of his request. The review recommended that the publishers of the website should be offered a licence to republish as much of the information requested as possible and to enable the House to agree to publication on the website of information requested by others, on a case-by-case basis. A copy of the proposed licence was provided for the complainant's consideration. The House insisted that it had not refused to provide the information requested, but that it was not reasonably practicable to provide the information in the form requested. Further, the House sought to apply section 43(2) to the requested information
13. On 16 March 2009 the House contacted the complainant again and provided further details that should have been provided to him at the same time as the outcome of the internal review. The information set out a chronology of the request to that point and the recommendations that led to the internal review decision.
14. On 19 June 2009 the complainant contacted the House and requested clarification of the House's reference to third party copyright in the internal review. He contacted the House again on 20 June 2009 to explain that the licence agreement had been rejected by the publishers of the website.
15. On 4 September 2009 the complainant wrote to the House again and queried whether it was likely the House would reach a different conclusion in respect of his request in light of the public debate related to MPs expenses.
16. The House acknowledged the communication on 7 September 2009 and agreed to consider the matter, though it suggested that it was unlikely the position had changed.

The Investigation

Scope of the case

17. In the meantime, on 2 November 2009, the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the House's refusal to supply the requested information to the address specified due to copyright considerations.

Chronology

18. The Commissioner wrote to the House on 25 November 2009 to explain that he had received the complaint.
19. On 4 December 2009 the case officer appointed in this case wrote to the House and explained that the issues raised would be considered by a panel of senior officers early in the New Year.
20. The House responded on 23 December 2009 and provided the Commissioner with a detailed account of the chronology of the request and its arguments for refusing to provide the requested information to the website.
21. On 21 January 2010 the Commissioner wrote to the House to explain that he had considered the matter and to outline his preliminary view. The Commissioner explained that he would formalise his conclusions in a Decision Notice.
22. The House contacted the Commissioner by email on 21 January 2009 and expressed the opinion that his preliminary view was incorrect and requested the opportunity to submit further arguments. The Commissioner agreed.
23. The House wrote to the Commissioner by letter dated 29 January 2010. It again set out reasons why, in its view, it was sufficient to provide the information, in electronic form, to an alternative email address, rather than to the email address connected to the website.

Analysis

Substantive Procedural Matters

Section 8: Request for information

24. The Commissioner has considered whether the complainant's request constitutes a valid request for the purposes of section 8 of the Act.
25. Section 8(1) provides that –

“In this Act any reference to a “request for information” is a reference to such a request which –

 - (a) is in writing,
 - (b) states the name of the applicant and an address for correspondence, and
 - (c) describes the information requested.”
26. The www.whatdotheyknow.com website¹ works by the user setting up an account and making an FOI request from the website. The website then sends the request by email to the public authority. The website automatically generates an email address e.g 5555@whatdotheyknow.com, which is unique to that request. When a public authority sends a response to that email address, the website automatically processes that response and publishes it to the website.
27. The Commissioner considers that, for the purposes of section 8(1)(b), the email address that was generated from the website and used for sending the request constitutes ‘an address for correspondence’ and that by making his request from this address, the implication was that the House should provide its response to it.
28. The House has refused to respond to the whatdotheyknow.com address, as responding to the address results in automatic publication and therefore a breach of copyright. The Commissioner does not believe that issues relating to how an email address is connected to a publishing mechanism are relevant in terms of considering whether a valid address has been stated for correspondence.

¹ Background about the website is available at: <http://www.whatdotheyknow.com/help/about>

29. The Commissioner notes that Section 50(1) of the Copyright, Designs and Patents Act 1988 provides that -

"Where the doing of a particular act is specifically authorised by an Act of Parliament, whenever passed, then, unless the Act provides otherwise, the doing of that act does not infringe copyright."

30. The Commissioner finds that responding to a valid address, in compliance with the Freedom of Information Act is not a breach of Copyright. The subsequent publication of the information by the website automatically can still be addressed separately by the House as a copyright issue, outside of the FOI jurisdiction.
31. The Commissioner therefore finds that the House was obliged to respond to address specified.

Section 11: Means by which communication to be made

32. The Commissioner has considered whether an issue with regard to the means of communication arises in this case.

33. Section 11(1) provides that –

Where, on making his request for information, the applicant expresses a preference for communication by any one or more of the following means, namely -

- (a) the provision to the applicant of a copy of the information in permanent form or in another form acceptable to the applicant...

the public authority shall so far as reasonably practicable give effect to that preference."

34. The complainant has asked to be provided with a copy of the information in electronic form. The public authority has stated that it is willing to provide the information in electronic form, albeit to an alternative address than that provided by the complainant. The Commissioner considers that, as no dispute arises as to the means of communication by which the information should be made available, there is no section 11(1) issue for him to consider. Section 11(1) concerns the means by which information should be made available, not the address to which that communication should be made. The House expressed its agreement with this view in its email to the complainant dated 14 August 2008, in which it states, "...we do not believe that... section [11(1)] extends to an obligation in terms of the address to which those communications should be sent."

Exemptions

Section 43: commercial interests

35. The House has argued that supplying the information in the form requested deprives it of its intellectual property right (parliamentary copyright) to prevent republication. Further, the House has explained that some of the requested information is subject to third party copyright (i.e. copyright which it does not own). The House has argued that for these reasons the information will be exempt under section 43(2) if it is decided that the information should be disclosed to the website and that the public interest in maintaining the exemption outweighs the public interest in disclosure.
36. Section 43(2) provides -

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”
37. The House has only sought to argue that section 43(2) applies in the event that the information requested must be disclosed to the whatdotheyknow.com email address. The House does not consider that the information would be exempt if it were to be provided to the complainant by way of an alternative email address or in hard copy.
38. The Commissioner considers that an exemption may only apply to the specific information in question and that the same conclusion must be reached regardless of the intended address for correspondence. As the House would not seek to apply the section 43(2) exemption to the information if disclosed to a different email address, it cannot apply to the information if this is to be communicated to the complainant via the whatdotheyknow.com email address. The Commissioner has therefore rejected the House’s application of section 43.

Procedural matters

Section 1: General right of access

39. In view of the above, the Commissioner has considered whether the House has complied with section 1 in respect of this request.
40. 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.
41. The complainant requested the information on 21 July 2008. The House confirmed that it held the requested information on 14 August 2008. It therefore complied with section 1(1)(a) in relation to the requested information. However, the House has not yet provided the complainant with this information. It has therefore breached section 1(1)(b) by failing to provide the complainant with information he is entitled to in the form requested and to the address provided.

Section 10: Time for compliance

42. The Commissioner has considered whether the House has complied with section 10(1).
43. Section 10(1) provides that –
- “Subject to subsections (2) and (3), a public authority must comply with section 1 promptly and in any event not later than the twentieth working day following the date of receipt.”
44. The complainant made his request for information on 21 July 2008 and the House has not yet provided the requested information in the form requested and to the address provided. It has therefore breached section 10(1) of the Act.

The Decision

45. The Commissioner’s decision is that the public authority did not deal with the request for information in accordance with the Act, in that it has breached sections 1(1)(b) and 10(1) of the Act.

Steps required

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

to provide the complaint with a copy of the requested information to the @whatdotheyknow.com email address from which he made his request for information dated 21 July 2008.

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

Failure to comply

48. 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.

Other matters

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

The complainant requested internal review on 28 August 2008. The House did not communicate the outcome of the internal review to the complainant until 11 March 2009 and 16 March 2009, when it provided supplementary material.

Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it took over six months for an internal review to be completed, despite the publication of his guidance on the matter.

Right of Appeal

50. 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 7th day of June 2010

Signed

Steve Wood
Head of Policy Delivery

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.”

Section 1(2) provides that –

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

Section 1(3) provides that –

“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.”

Section 1(4) provides that –

“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."

Section 1(5) provides that –

"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)."

Section 1(6) provides that –

"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"."

Request for Information

Section 8(1) provides that –

"In this Act any reference to a "request for information" is a reference to such a request which –

- (a) is in writing,
- (b) states the name of the applicant and an address for correspondence, and
- (c) describes the information requested."

Section 8(2) provides that –

"For the purposes of subsection (1)(a), a request is to be treated as made in writing where the text of the request –

- (a) is transmitted by electronic means,
- (b) is received in legible form, and
- (c) is capable of being used for subsequent reference."

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.”

Section 10(4) provides that –

“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.”

Section 10(5) provides that –

“Regulations under subsection (4) may –

- (a) prescribe different days in relation to different cases, and
- (b) confer a discretion on the Commissioner.”

Section 10(6) provides that –

“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.”

Means of communication

Section 11(1) provides that –

“Where, on making his request for information, the applicant expresses a preference for communication by one or more of the following means, namely –

- (a) the provision to the applicant of a copy of the information in permanent form or in another form acceptable to the applicant,
- (b) the provision to the applicant of a reasonable opportunity to inspect a record containing the information, and
- (c) the provision to the applicant of a digest or summary of the information in permanent form or in another form acceptable to the applicant.

The public authority shall so far as is reasonably practicable give effect to that preference.”

Commercial interests

Section 43(1) provides that –

“Information is exempt information if it constitutes a trade secret.”

Section 43(2) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

Section 43(3) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).”