

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 20 September 2010

Public Authority: The Cabinet Office
Address: 70 Whitehall
London
SW1A 2AS

Summary

The complainant requested recorded information from the Cabinet Office. The Cabinet Office failed to issue an appropriate response for more than eleven months. The Commissioner has provided the Cabinet Office with a number of opportunities to issue an appropriate response and it has failed to do so.

The Commissioner finds that the Cabinet Office has breached a number of provisions of the Act. It has breached section 10(1) for failing to comply with its obligations under section 1 of the Act within the statutory timescales. It has breached section 17(1) in failing to issue a complete refusal notice in the statutory timescales. It has also breached section 17(1)(c) for failing to explain why the exemptions it cited applied. Finally, it breached section 17(3) for the unacceptable delay in communicating the results of its public interest determination.

The Cabinet Office is required to issue a refusal notice to the requestor explaining why any exemption is engaged and where it believes the balance of the public interest lies. If the public authority concludes that the balance of the public interest favours disclosing the information or no longer considers the exemption to apply, the 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. On 22 September 2009 the complainant requested that information of the following description was provided in accord with section 1(1) of the Act:

'I am requesting the following information, for the period from January 2005 to the present, under the Freedom of Information Act: Copies of all documents relating to the compensation of IRA victims by Libya.'

3. On 23 October 2009 the public authority wrote to the complainant. It explained that it held relevant information but required more time to consider the public interest test and this served as a notification of extension under section 10(3). It explained that it was considering the application of:

- Section 27¹ – International Relations;
- Section 35 – Formulation of Government Policy; and
- Section 42 – Legal Professional Privilege.

However, it explained that it aimed to issue a response by 20 November 2009.

4. On 20 November 2009 the public authority wrote another holding letter. It said the same and that it aimed to issue a response by 18 December 2009.
5. Similar letters were received by the complainant on 17 December 2009, 13 January 2010, 11 February 2010, 5 March 2010 and 31 March 2010. All explained that the response would take longer than expected to issue and extended the time required to a target that was not then satisfied.
6. As of the date of this Notice the public authority has not provided the Commissioner with confirmation that it has issued an appropriate response.

¹ All sections of the legislation referred to in this Notice can be located in full in the legal annex attached to the bottom of it.

The Investigation

Scope of the case

7. On 31 March 2010 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 delay that exceeded forty days in receiving a substantive response.

Chronology

8. 28 April 2010: The Commissioner wrote to the complainant and the public authority to explain that he had received an eligible complaint. He told the public authority to issue a response as soon as possible.
9. The Commissioner then contacted the public authority on 11 May 2010, 17 May 2010, 25 May 2010, 14 June 2010, 28 June 2010, 29 June 2010, 8 July 2010 and 14 July 2010. The purpose of these communications was to chase progress and secure a proper response for the complainant. Despite various assurances that the matter was being addressed by the appropriate senior staff, little or no progress was in fact made during this period.
10. Just before issuing this Decision Notice, the Commissioner telephoned the public authority again on 16 September 2010 to receive a final update about whether an appropriate response had now been issued. The public authority explained that it would telephone the Commissioner and confirm this point on 17 September 2010. The public authority failed to provide the promised update.
11. The public authority has therefore had ample opportunity to prove that it has issued an appropriate response to this request for information. It has not taken this opportunity up to the date of this Notice.

Analysis

Substantive Procedural Matters

Section 10(1)

12. Section 10(1) (full wording in legal annex) of the Act states the following:

"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."

13. By the date of this notice the public authority has failed to provide a substantive response to the complainant. It has therefore breached section 10(1).
14. The breach was due to its failure to confirm whether it held relevant recorded information within twenty working days in line with its obligations under section 1(1)(a). For failing to confirm or deny that information was held within the time limit, it breached section 10(1).

Section 17(1)

15. 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 in question is engaged. This notice must be issued within 20 working days of receipt of the request; there is no extension available to the time within which a notice identifying the exemption and stating why it is engaged must be provided.
16. In this case the original refusal notice did not offer the complainant any reason why the public authority believed the exemptions were engaged and it was issued later than the twenty working day limit.
17. The Commissioner finds a breach of section 17(1) for not issuing an appropriate notice in twenty working days. He also find a breach of section 17(1)(c) for failing to state why it believed that the exemptions were engaged.

Section 17(3)

18. Section 17(3) (full wording in the legal annex) does allow the public authority to provide its public interest determination in a separate notice 'within such time that is reasonable in the circumstances'. The Commissioner has issued publicly available Good Practice guidance on this point. This can be found at: http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/foi_good_practice_guidance_4.pdf.
19. This states the following:

*"...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."*

20. In this case the Commissioner notes that the public authority has exceeded the maximum of his guidance by more than a factor of three. The Commissioner believes this to be totally unacceptable. The Commissioner appreciates that the sensitivity of the information would mean that this could be regarded as an exceptionally complex case, but he believes that forty working days is the maximum time limit for all cases and any time taken beyond that is not reasonable.
21. The Commissioner therefore finds that the public authority has breached section 17(3) because it has not provided the complainant with its public interest determination within such a time as is reasonable.

The Decision

22. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act because it failed to issue an appropriate response. In this case this means that it has breached:
 - Section 10(1) as it failed to comply with section 1(1)(a) within twenty working days;
 - Section 17(1) because it failed to issue an appropriate refusal notice within twenty working days;
 - Section 17(1)(c) because it failed to explain adequately why it regarded the exemptions it was applying as being engaged; and
 - Section 17(3) because it failed to provide the complainant with its public interest determination within such a time as is reasonable.

Steps Required

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

Issue a notice compliant with section 17(3) that states why the exemptions are engaged and its conclusion about where the balance of the public interest lies. If the public authority concludes that the balance of the public interest favours disclosing the information or no longer considers the exemption to apply, the information should be provided to the complainant.

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

Failure to comply

25. 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

26. 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 20th day of September 2010

Signed

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

Legal Annex

Freedom of Information Act 2000

General right of access to information held by public authorities

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 with request

Section 10 provides that-

“(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.” ”

Refusal of request

Section 17 provides that -

(1) 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.

(2) 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.

(3) 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.

(4) A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

(5) A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.

(6) Subsection (5) does not apply where—

(a) the public authority is relying on a claim that section 14 applies,

(b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and

(c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.

(7) A notice under subsection (1), (3) or (5) must—

(a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and

(b) contain particulars of the right conferred by section 50.

International relations

Section 27 provides that

“(1) 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.

(2) 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.

(3) 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.

(4) 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.

(5) 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.”

Formulation of government policy etc

Section 35 provides that:

“(1) Information held by a government department or by the National Assembly for Wales is exempt information if it relates to—

(a) the formulation or development of government policy,

(b) Ministerial communications,

(c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or

(d) the operation of any Ministerial private office.

(2) Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded—

(a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or

(b) for the purposes of subsection (1)(b), as relating to Ministerial communications.

(3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).

(4) In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking.

(5) In this section—

“government policy” includes the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the National Assembly for Wales;

“the Law Officers” means the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland and the Attorney General for Northern Ireland;

“Ministerial communications” means any communications—

(a) between Ministers of the Crown,

(b) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or

(c) between Assembly Secretaries, including the Assembly First Secretary,

and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly, and proceedings of the executive committee of the National Assembly for Wales;

“Ministerial private office” means any part of a government department which provides personal administrative support to a Minister of the Crown, to a Northern Ireland Minister or a Northern Ireland junior Minister or any part of the administration of the National Assembly for Wales providing personal

administrative support to the Assembly First Secretary or an Assembly Secretary;

“Northern Ireland junior Minister” means a member of the Northern Ireland Assembly appointed as a junior Minister under section 19 of the [1998 c. 47.] Northern Ireland Act 1998.”

Legal professional privilege

Section 42(1) provides that:

“Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”