

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 16 December 2010**

**Public Authority:** The Adjudicator for the Inland Revenue and Customs and Excise.  
'The Adjudicator's Office'

**Address:** 8th Floor  
Euston Tower  
286 Euston Road  
London  
NW1 3US

### Summary

---

The complainant requested from the Adjudicator's Office (the 'public authority') a number of items of information regarding the process of 'ex gratia' payments and underpinning methodology. He was unhappy with one aspect of the response where the public authority claimed that it did not hold any recorded information. The Commissioner has determined that the public authority was correct that it did not hold the information, and that it also provided reasonable advice and assistance and so complied with its obligations under section 16(1) of the Freedom of Information Act 2000. Therefore, the Commissioner does not uphold the complaint and requires no remedial 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.

## Background

---

2. 'The Adjudicator's Office' is listed as a public authority in Schedule One of the Act - its full name is The Adjudicator for the Inland Revenue and Customs and Excise.
3. The complainant believes that he was not treated fairly in the quantum of 'ex gratia' payment that he received from the public authority. The public authority can award such payments when its service falls below what should be expected. He therefore made requests for information to gauge whether the treatment that he received differed from others.

## The Request

---

4. On 16 January 2010 the complainant explained that he was interested in making a request regarding the process of 'ex gratia' payments and the methodology that underpins it. He requested the following information to be provided in writing (the formatting of this request is the same as the complainant's):
  1. What is the *criteria* and how is *that criteria interpreted*?
  2. Is there a *'tariff'* system in operation?
  3. What is the **minimum and maximum amounts that have been paid out by the Adjudicators [sic] Office since its inception?** Also show the number of payments as appropriate.
  4. The *nature and content of the complaints supported by a resume of how the amounts paid out in those cases was arrived at.*
  5. ***The number of ex-gratia payments made year by year from day 1 to 2009, with payments shown for each year.***
  6. I would also like to receive a copy of the relevant section(s) of the legislation that forms the policy framework you operate under.'
5. On 27 January 2010 the public authority explained that it was answering the six requests under the Act.

1. It attached its criteria (this will be discussed further in the *Finding of facts* section of this Notice). It explained that each case was judged on its own merits taking into account the effect of its shortcoming on the individual concerned and their personal circumstances.
  2. It explained that there was no 'tariff' system. This was because a similar deficiency can have different effects on different individuals.
  3. It provided a table setting out the information for each financial year. A copy can be found in Appendix A.
  4. The table enclosed provided some information about the nature of complaints. It explained that due to confidentiality it was not prepared to provide more detailed information. This confidentiality was particularly acute given that the quantum of 'ex gratia' payments was connected to an individual's particular circumstances.
  5. The table provided this information.
  6. It explained that there was no such legislation. It provided a copy of its Service Level Agreements which defined its role with the organisations that it investigates.
6. On 10 February 2010 the complainant requested that the public authority conduct an internal review. He addressed the six requests in turn.
- 1, 2. No comment was made that the Commissioner believes was relevant in respect of a review request.
  3. The complainant explained that he regarded this part of the request as being satisfied.
  4. He expressed dissatisfaction about how this request was answered. He explained that he believed that more detail could be released about the individual cases without breaching it. He particularly expressed dissatisfaction at the lack of an explanation for the rationale given to substantiate the quantum of payments.
  5. He explained that he regarded this part of the request as being satisfied.

6. He explained that he regarded this part of the request as being satisfied.
7. On 8 March 2010 the public authority communicated the results of its internal review to the complainant. The public authority explained that the internal review would be conducted in respect of item 4 because items 3, 5 and 6 had been deemed satisfactory, and the only comments regarding items 1 and 2 were about the application of the guidelines to his case rather than about the information request. For item 4, it explained that the information in the table was information that existed as a summary on its electronic casework system, and that provision of a rationale and individual case summaries would involve the creation of new information, which it had no obligation to do. It also indicated that the costs limit would otherwise have been an issue. It then provided the Information Commissioner's details.

## **The Investigation**

---

### **Scope of the case**

8. On 21 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 following points:
  - he believed that he was treated less favourably than others by the public authority;
  - he believed that the work required to 'extrapolate' the information he requires would not exceed the costs limit (£600);
  - he did not believe that the public authority considered that he had a genuine and valid point about quantum and the reasons for it and this was not properly considered;
  - he believed that the right to know how a decision was made should be transparent, subject to confidentiality and identity restrictions;
  - he believed that the public authority was discriminating against him by not providing this information and attempting to mitigate its losses at the complainant's expense; and

- he believed that the decision by the public authority not to exercise its discretion and process the request irrespective of the costs limit was unfair.
9. On 9 July 2010 the complainant accepted the scope of the Commissioner's investigation, which included whether the public authority was correct that it did not hold the rationale or information about the way that the quantum of payments was arrived at.
10. The complainant has raised issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act. The Commissioner cannot consider the nature of 'ex gratia' payments. He is not a forum to adjudicate on the right amount of compensation that should be provided discretionarily.

### **Chronology**

11. The Commissioner wrote to the complainant and the public authority on 1 June 2010 to explain that he had received an eligible complaint. He asked the public authority to explain its position to him.
12. On 24 June 2010 the Commissioner received opening submissions from the public authority.
13. The Commissioner telephoned and wrote to the complainant on 2 July 2010 to explain the scope of his powers.
14. After further contact with the complainant, the Commissioner wrote to the public authority on 15 July 2010.
15. On 11 August 2010 the Commissioner received detailed submissions from the public authority.

### **Findings of fact**

16. The public authority follows the redress policy and guidance of Her Majesty's Revenue and Customs (HMRC).
17. The redress policy is not prescriptive in relation to determining the amounts awarded. The relevant part of the redress policy states:

*'Our payments for worry and distress are meant to be a token - a way of acknowledging that our mistakes and delays have affected someone badly. They are not akin to damages and payment does not, in any way, amount to an admission of any legal liability.'*

*The payments will usually range between £25 and £500. It is relatively difficult to give guidance on these payments now because we are looking more at the impact of our mistakes rather than the seriousness of the mistakes themselves. But in practise a decision is likely to be reached on the basis of both these factors and any other circumstances surrounding the case.*

*You should be prepared to make payments outside these limits. A payment of £10 may be appropriate in some cases, whereas a payment of £1000 may be right where there has been a very serious impact as a result of a very bad mistake. In between these there are endless possibilities and you should use your judgement and experience to come to a decision that is fair to the customer and broadly in line with other similar cases that your team and others in HMRC deal with'.*

18. In addition to this redress policy the public authority also considers:
- its guidance on handling complaints about itself, which it sent to the complainant on 27 January 2010;
  - the HMRC document C/FS 'Complaints and putting things right'; and
  - the HMRC policy on reimbursing direct costs.

## Analysis

---

### Substantive Procedural Matters

#### ***Does the public authority hold relevant recorded information?***

19. Section 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. It follows that it is necessary for information to be held in recorded form at the date of the request for it to be subject to the Act.
20. In *Linda Bromley & Others v Information Commissioner and Environment Agency* [EA/2006/0072], the Information Tribunal confirmed that the test for establishing whether information was held by a public authority was not one of certainty, but rather the balance of

probabilities. The standard of proof has been recently confirmed by the Tribunal decision of *Innes v Information Commissioner* [EA/2009/0046].

21. The public authority argued that it did not hold the relevant recorded information in this case. Its main argument was that the information was not held centrally and the only way it could obtain the information would be to check the individual files and conduct detailed analysis of those files. It explained that it believed that the process would amount to the creation of new recorded information and this was not required by the Act.
22. The complainant does not agree. He believes that the provision of the information that he was would be a simple extrapolation from the manual files and believes that the information is held.

*The Commissioner's view of the relevant law*

23. The Commissioner's position has been informed by comments from Lord Hope in *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47, who stated in respect of determining whether information can be extracted from its constituent parts that:

... '[t]his part of the statutory regime should... be construed in as liberal a manner as possible' (para 8).

24. It has also been informed by two particular Information Tribunal decisions which have considered what is meant by information being held. They are:
  - *Johnson v ICO and MOJ* [EA/2006/0085] 1; and
  - *The Home Office v ICO* [EA/2008/0027]2.
25. In the *Johnson* case the complainant had requested the number of cases struck out by specified judges. The public authority explained that it did not hold a central record of which Master struck out a case. Instead it was required to consider its electronic database and paper files in conjunction. In paragraph 45 the Tribunal explained that the

---

<sup>1</sup> ('Johnson'). The judgment can be found at the following link:  
[http://www.informationtribunal.gov.uk/Documents/decisions/mljohnson\\_v\\_infoComm\\_MoJ\\_13jul2007.pdf](http://www.informationtribunal.gov.uk/Documents/decisions/mljohnson_v_infoComm_MoJ_13jul2007.pdf)

<sup>2</sup> ('Home Office'). The judgment can be found at the following link:  
[http://www.informationtribunal.gov.uk/DBFiles/Decision/i203/homeOffice\\_webDecision\\_15Aug08.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i203/homeOffice_webDecision_15Aug08.pdf)

MOJ regarded this exercise as creating new information as it did not believe that simply holding the “building blocks” meant it held the final product. The Tribunal dismissed this argument and agreed with the Commissioner that the MOJ held the information in this case. It then explained its view on when information was and was not held (at paragraph 46):

*‘The question for the Tribunal is this: if the MoJ has to do something with the building blocks, does this mean that they do not hold the information? We consider that the answer lies in the extent to which something needs to be done to the building blocks, in order to comply with the request. At the hearing Ms Grey gave the hypothetical example of a public body which forecasts future oil prices. If it holds forecasts for oil prices in respect of countries A and B, and it receives a request for a forecast for country C, she says, and we agree, that that would not be information that is “held” by that public body. To arrive at a forecast for country C, the raw data that the public body holds (or the “building blocks” to use the MoJ’s terminology), would likely have to be subjected to complex mathematical formulae, and also, a high level of skill and judgement would likely be required, in order to take account of political and other considerations.’*

26. It then went on to say that, in the hypothetical example above, the information was therefore not held. From this decision, the Commissioner acknowledges that the test for information not being held was that the information would require a high level of skill and judgment to be generated from the “building blocks”.
27. In the *Home Office* case the complainant requested how many work permits were obtained in two calendar years by specified employers. The information about individual work permits was held on a database, but there was no direct record of the annual numbers. The Home Office argued that this meant that it did not hold the information. The Tribunal agreed with the Commissioner that the Home Office did indeed hold the information. It stated (at paragraph 13):

*‘It is quite clear... from the whole scheme of the Act and section 11 in particular that the legislation is concerned with information as an abstract phenomenon (ie facts which are recorded) and not with documents or records as such. Thus the fact that the total number of permits is not recorded anywhere as a number is in our view irrelevant: the number is implicit in the records of the relevant permits when put together and whether it comes in the*



*form of a list of individual work permits or a total figure seems to us to be simply a matter of the form.'*

The Tribunal explained that it would expect the people who answer requests to be skilled at what they are doing.

28. From this decision, the Commissioner has identified a number of factors to assist him in determining whether, in this case, it would require a high level of judgment to generate the information requested from the "building blocks".

*Application of the law to the facts of this case*

29. The first stage of the Commissioner's investigation was to consider whether the public authority held the information in a readily accessible format. He therefore made enquiries about whether information about how the quantum of ex gratia payments was held by the public authority. He was informed that the public authority had no business reason to hold this information and that there was no policy for case officers to include the rationale to substantiate the quantum of ex gratia payments. It also explained that there was also no information held centrally apart from that which has been provided in the *Table of cases* outlined in Appendix A. The Commissioner is satisfied that the public authority has conducted reasonable searches in this case and that its reasoning about why it does not hold this information in a reasonably accessible format is convincing.
30. The public authority has explained that the only way it could create a rationale to substantiate the quantum of payments in connection with the circumstances of the individual cases would be to process the individual manual case files and this would require a high level of judgment to enable the information to be generated from its "building blocks".
31. The Commissioner accepts that the information requested by the complainant was not held outside the individual manual case files at the date of the request. The more complex determination is to determine whether the recorded information requested was held within the individual manual case files. The Commissioner must consider whether it would require a high level of judgment to generate the rationale from the building blocks (the individual manual case files) in the circumstances of the individual cases. If it would, the recorded information is not held.
32. As a preliminary note, he accepts that the individual manual case files can be acquired from storage with little difficulty.

33. It is important therefore to establish what is meant by a high level of judgment. In the Commissioner's view a high level of judgment would be characterised by some or all of the following four qualities:
- a) the necessity for intellectual input to process the "building blocks", and the presence of discretion;
  - b) the inability for a lay person to extract the relevant information from all the other information;
  - c) the need for specialist knowledge about the way the business area operates that would not be known by other individuals; and
  - d) the application of that specialist knowledge and the need to construct the requested information from the "building blocks" using that specialist knowledge.
34. The public authority provided detailed arguments about why it believed that the generation of this information would require a high level of judgment. It provided both contextual and case specific arguments.
35. The contextual arguments it provided included the following.
- The decision whether to award 'ex gratia' payments involves the understanding and application of the guidance provided in the three documents outlined in paragraphs 16 to 18 above.
  - The guidance is not prescriptive in determining the amount of payment; instead, it is a matter of judgment of the relevant case officer.
  - There is no direct connection between the quantum and tangible losses suffered; instead, all the individual circumstances are taken into account in this judgment.
  - The guidance also requires the case officer to consider other cases the public authority has concluded.
  - An individual considering whether to award an 'ex gratia' payment and its quantum would require some experience of reviewing and evaluating HMRC's decisions and complaints generally.
  - The judgment requires an element of intuition, and to construct the requested information would therefore require second guessing what was in the mind of the case officer at the time.

- There is no general policy for case officers to include specific explanations of the quantum of compensation payments in the files, and in any event the final decision would be made by the Adjudicator, who does not need to specify her reasons for the quantum.
  - The Adjudicator's Office complaint file might prove inadequate by itself, since a complaint investigation would also consider the HMRC files, which are subsequently returned.
  - The judgment would also require understanding of how the public authority quantifies direct costs and its policy of reimbursing direct costs.
36. The public authority also performed a trial run of five files to explain to the Commissioner the level of judgment that would be required in practice. From these arguments, the following was clear to the Commissioner:
- It was clear considerable knowledge about how the Adjudicator's Office conducted its casework was required.
  - While the amount of compensation was obviously noted in the file, there was usually no explanation about how the amount was arrived at.
  - An explanation of the complainant's circumstances and further detail about what the Adjudicator's Office did wrong would not provide a rationale for the quantum of the payment (while it would involve disclosing confidential sensitive personal data).
  - The Adjudicator does exercise her power to increase compensation payments in some cases and provides no further rationale.
37. Having considered these factors, the Commissioner disagrees with the complainant's assertion that the information requested was easy to extrapolate from the files. Instead the information requested was not contained within the files and would require a high level of judgment to create. He does not believe it is certain that an accurate rationale would be possible to produce from the files given the way the policy operates and the amount of discretion that is allowed in individual cases.
38. In particular, in relation to the four qualities identified in paragraph 33 above, he finds that all four are satisfied by the facts of this case.

- a) It would be impossible to create a rationale for the quantum of compensation payments without material intellectual input and it would require an individual to try to work out the reason why another exercised their discretion.
  - b) It would be extremely difficult for a lay person to extract the relevant information from the files and if they did the resulting information might be incorrect.
  - c) There was a real need for specialist knowledge about the way the business area operates and this could not be known by a lay individual.
  - d) It would be necessary to apply specialist knowledge to construct the requested information and even then the resulting information not be correct.
39. Therefore, the Commissioner is of the view, on the balance of probabilities, that the public authority does not hold the relevant recorded information that has been requested. Accordingly, the public authority was correct to deny that it held this information in line with section 1(1)(a). Furthermore, the Act imposes no obligation to provide information that it does not hold to the complainant.
40. As the public authority does not hold the relevant recorded information, there is no need for the Commissioner to go on to consider the operation of section 12(1) in this case.

## **Procedural Requirements**

### *Section 16(1)*

41. The complainant expressed particular concern at the quality of the advice and assistance that he received in this case.
42. Section 16(1) provides an obligation for a public authority to provide advice and assistance to a person making a request, so far as it would be reasonable to do so. Section 16(2) states that a public authority is to be taken to have complied with its section 16 duty in any particular case if it has conformed with the provisions in the Section 45 Code of Practice in relation to the provision of advice and assistance in that case.
43. In his correspondence with the Commissioner the complainant expressed dissatisfaction at the public authority's view that he asked it

to work through all 26 files. He explained that the public authority should have provided advice and assistance and checked with him that this is the work that he wanted doing before raising the issue of section 12(1).

44. Paragraphs 8 to 11 of the Code outline the situations when a public authority would be expected to go back to the complainant and clarify his request for information. It states that this would be expected when the public authority is not able to identify and locate the information sought.
45. In this case, the Commissioner has considered the request objectively alongside the request for an internal review. In the Commissioner's opinion, at no stage would it have been apparent that the complainant wanted anything less than the rationale for compensation payments in all 26 files. There was never any doubt what information was being sought and therefore paragraphs 8 to 11 did not require the public authority to go back to the complainant.
46. As it did not hold the relevant recorded information, the public authority was not required to rely on the costs limits. However, the Commissioner asked the public authority whether it considered writing to the complainant to help narrow the request at the time when it was suggesting that section 12(1) might apply.
47. The public authority explained that as it believed it did not hold the information in the first place, any communication to try and narrow the scope of the request down would simply unreasonably raise the complainant's expectations in this case and not provide assistance. It contended that it would be unreasonable in these circumstances to ask the complainant to narrow his request.
48. The Commissioner is satisfied that the only time the complainant expressed an interest in narrowing his request was after the internal review had been conducted.
49. In addition, given the conclusion that the Commissioner has come to above, he accepts that the public authority did not hold the relevant recorded information, so in the event advice and assistance would have been irrelevant and would not have assisted the complainant.
50. The Commissioner has also carefully considered the content of all the correspondence exchanged in this request. The Commissioner believes that the public authority expressed its position clearly, in accordance with the Act, and tried to explain the reason for its position. It provided

all the information that it could. The complainant did not agree with its position and approached the Commissioner to adjudicate on the case.

51. The Commissioner is therefore satisfied that the public authority complied with all the provisions in the Section 45 Code of Practice and therefore with its obligations under section 16(1) of the Act.
52. Finally, the Commissioner notes that there are no other procedural provisions of the Act that have been breached in this case.

## **The Decision**

---

53. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act:
  - it was correct that it did not hold the outstanding information that was requested, because the only way it could answer it was by creating new information; and
  - it provided reasonable advice in this case, so complied with its obligations under section 16(1) of the Act.

## **Steps Required**

---

54. The Commissioner requires no steps to be taken.

## Right of Appeal

---

55. 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](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://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 16<sup>th</sup> day of December 2010**

**Signed .....**

**Jon Manners  
Group Manager  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Appendix A

**Table of cases** (The Commissioner has added the numbers columns to allow ease of reference)

### 2007/2008 (7 cases)

No	REASON FOR PAYMENT	AMOUNT (£)
1	3 month delay in dealing with case	25
2	Mistake in amount of compensation notified to complainant	45
3	Reimbursement of costs	94
4	Delay of over 2 months in sending compensation.	25
5	5 month delay in notifying HMRC of complaint	50
6	9 month delay in dealing with case £30 and reimbursement of costs £10.	40
7	2 month delay in dealing with case	50

### 2008/2009 (11 cases)

No	REASON FOR PAYMENT	AMOUNT (£)
8	7 month delay in dealing with case	25
9	Mistake in informing the complainant what we can deal with	25
10	4 month delay in dealing with case	30
11	Mistakes £50 and reimbursement of costs £20.70	70.70
12	4 month delay in dealing with case	50
13	9 month delay in dealing with case	60
14	19 month delay and lack of contact with the complainant	50
15	2 month delay in dealing with case £50 and reimbursement of costs £10	60
16	11 month delay in dealing with case	50
17	7 month delay in referring case to HMRC	30
18	6 month delay in referring case to HMRC	50

### 2009/2010 to date of request (8 cases)

No	REASON FOR PAYMENT	AMOUNT (£)
19	2 month delay in dealing with case	50
20	4 month delay in dealing with complaint £40	50



	and reimbursement of costs £10	
<b>21</b>	mishandling of complaint added to confusion	<b>50</b>
<b>22</b>	mistakes leading to 9 month delay in dealing with case	<b>40</b>
<b>23</b>	delay of over 12 months in informing the complainant that we could not investigate the complaint.	<b>50</b>
<b>24</b>	over 12 months in dealing with the case	<b>50</b>
<b>25</b>	mistakes and 15 month delay in dealing with case £100 + reimbursement of costs £10	<b>110</b>
<b>26</b>	10 month delay in responding to a letter	<b>250</b>

## Legal Annex

### The Freedom of Information Act 2000

#### Section 1 - General right of access to information held by public authorities

(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 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.

...

#### Section 12 – Exemption where cost for compliance exceeds the appropriate limit

(1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.

(2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.

(3) In subsections (1) and (2) “the appropriate limit” means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.

(4) The Secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority—

(a) by one person, or

(b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,

the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.

(5) The Secretary of State may by regulations make provision for the purposes of this section as to the costs to be estimated and as to the manner in which they are to be estimated.

### **Section 16 – Duty to provide advice and assistance**

(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.