

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 18 November 2010

Public Authority: Equality and Human Rights Commission
Address: 3 More London Riverside
Tooley Street
London
SE1 2RG

Summary

The complainant requested a copy of the investigation report into allegations made against a senior official of the public authority. The public authority withheld the report on the basis of the exemptions at sections 31(1)(g), 38, 40(2), and 41 of the Act. During the course of the investigation, the public authority agreed to disclose the outcome of the investigation but continued to withhold the report on the basis of all the exemptions cited. The Commissioner found that the report was correctly withheld by virtue of the exemption at section 40(2) of the Act.

The Commissioner's Role

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

1. In late 2009 a number of media outlets¹ reported that the public authority was conducting an internal investigation into allegations that

¹ See for example; <http://www.timesonline.co.uk/tol/news/politics/article6945883.ece> and <http://blogs.telegraph.co.uk/news/georgepitcher/100019093/equality-watchdog-ran-a-bnp-sting-after-all/>

one of its senior officials had instructed a number of its employees to encourage individuals from ethnic minority groups to apply to join the British National Party (BNP). The intended aim (it was alleged) was to gather evidence to prove that the BNP discriminates against non – caucasians by refusing membership to some ethnic minorities.

The Request

2. On 10 February 2010 the complainant requested:

'.....a copy of the Investigation Report into the allegations made against a Director at the Commission that he had issued an improper instruction in relation to membership of the BNP.'
3. On 05 May 2010 the public authority issued a refusal notice in which it withheld the report in question on the basis of the exemptions at sections 41, 40(2), 38, and 31(1)(1)(g).
4. The complainant did not request a review of the public authority's decision. The Commissioner however accepted the complaint because given the previous contact between the complainant and the public authority, of which the Commissioner's office was aware, he was satisfied that the complainant had in effect exhausted the public authority's complaints procedure.

The Investigation

Scope of the case

5. On 07 July 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 make a decision on whether the report ('the disputed information') he had requested had been correctly withheld under the Act.
6. He also asked the Commissioner to consider if the disputed information could have been disclosed with names redacted.

Chronology

7. On 05 August 2010 the Commissioner wrote to the complainant. The Commissioner set out his understanding of the scope of the complaint

- and invited the complainant to comment if necessary. The complainant did not write back to the Commissioner.
8. On 09 August 2010 the Commissioner wrote to the public authority and requested a copy of the disputed information. He also invited the public authority to make additional representations if necessary to support the application of exemptions.
 9. On 11 August 2010 the public authority provided the Commissioner with a copy of the report in question. The public authority also reserved its right to make additional representations to the Commissioner during the course of the investigation.
 10. Following a telephone conversation on 01 September 2010 the public authority additionally provided the Commissioner with copies of all the documents attached to the report and which formed part of the evidence considered during the internal investigation.
 11. The report and all of the documentation attached to it therefore constitute the disputed information for the purposes of the Commissioner's investigation.
 12. On 14 September 2010 the Commissioner wrote to the public authority specifically regarding the application of the exemption at section 40(2).
 13. On 28 September 2010 the public authority responded.
 14. On 07 October 2010 the Commissioner recommended that the public authority disclose the outcome of the investigation to the complainant.
 15. On 11 October 2010 the public authority provided the relevant information to the complainant. This matter has therefore not been addressed in this Notice.

Analysis

Exemptions

16. Texts of the statutory provisions referred to below can be found in the legal annex.

Section 40(2)

17. The Commissioner first considered whether the exemption at section 40(2) of the Act was correctly engaged by the public authority.
18. Information is exempt on the basis of section 40(2):
 - If it constitutes the personal data of which the applicant (i.e. the individual requesting information under the Act) is not the data subject (commonly referred to as third party personal data), and
 - Either the first or second condition in sections 40 (3) and (4) is satisfied.
19. The first condition partly stipulates that the disclosure of third party personal data to a member of the public would contravene any of the data protection principles or section 10 of the Data Protection Act 1998 ('the DPA').

Is the disputed information personal data?

20. Section 1(1) of the DPA defines personal data as;

'data which relate to a living individual who can be identified from those data, or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.'
21. The public authority explained that the disputed information relates to the individual who was investigated and to a number of other employees. The public authority further explained that the disputed information relates to internal matters and contains evidence from witnesses and the person investigated about the allegations against him, as well as those who participated in the teleconference about which the allegations were made. The public authority therefore concluded that the disputed information is the personal data of the person who was investigated and of witnesses who gave evidence or those who were otherwise involved in the investigation.
22. Having carefully considered the disputed information, the Commissioner is satisfied that it relates to the individual who was investigated both specifically and in the context of the investigation conducted into the allegations made against the individual. The

Commissioner is also satisfied that part of the disputed information also relates to parties other than the individual who was investigated.

23. The Commissioner therefore finds that the disputed information constitutes the personal data (within the meaning of section 1 of the DPA) of the individual investigated and other parties who provided witness statements or were otherwise involved in the investigation (i.e. the data subjects).

Would the disclosure of the disputed information also contravene any of the data protection principles?

24. The first data protection principle states that personal data shall be processed fairly and lawfully and in particular shall not be processed unless one of the conditions in schedule 2 is met and schedule 3 in the case of sensitive personal data. Sensitive personal data is defined in section 2 of the DPA. The Commissioner is satisfied that investigation report does not constitute sensitive personal data within the meaning in section 2 of the DPA.
25. The Commissioner therefore first considered whether the disclosure of the disputed information would have been unfair to the data subjects (i.e. the individual investigated and the other employees).
26. In considering the fairness element of the first data protection principle the Commissioner took into account a number of factors including the reasonable expectations of the data subjects (including their right to privacy), and the circumstances in which the personal data was provided.
27. The public authority explained that the data subjects' reasonable expectations about the use and subsequent release of the disputed information were based on provisions in its disciplinary guide as to confidentiality. According to the public authority, the guide expressly states that records of meetings, including investigatory meetings and disciplinary hearings will be kept confidentially. The public authority also noted that there is a recognised expectation that internal disciplinary matters in relation to both junior and senior members of staff will be private and not normally made available to the public.
28. The public authority therefore argued that the disclosure of the disputed information would represent a significant invasion of the privacy of the individual who was investigated and would therefore be unfair. In addition, the third parties who provided information in the context of the investigation would not have expected that the

information provided would subsequently be made public and disclosure would therefore also be unfair to them.

29. The Commissioner is persuaded that the disclosure of the disputed information which was provided in the context of a disciplinary investigation would have been unfair to the data subjects. The Commissioner agrees that the data subjects would have reasonably expected that the information they provided in the course of the investigation would be held in confidence and not made available to the public.
30. The public authority made it explicitly clear in its disciplinary guide that the records generated from internal disciplinary investigations would be held in confidence. It is therefore reasonable to infer that the data subjects would have been as candid as possible when providing their statements to the person(s) conducting the investigation given their belief that those statements would not find their way into the public domain. The Commissioner agrees therefore that to subsequently make the statements publicly available would have been unfair to the data subjects.
31. The Commissioner also especially agrees that disclosure would have constituted a significant invasion into the privacy of the individual who had been investigated. There is an expectation that some information about the performance of senior public officials may generally be made available to the public. However, given the nature of the allegations, the Commissioner is of the view that the disclosure of the details of the investigation would have constituted a significant intrusion into the private life of the individual under investigation. The Commissioner acknowledges that the allegations made were serious and there was a considerable level of legitimate public concern and interest about understanding what had (or hadn't) happened. However, he is not satisfied that in the circumstances of this case, the legitimate public interest in transparency and accountability of public officials would have justified the disclosure of the details of the investigation against the named individual. As far as the Commissioner can see, there is nothing to suggest that the allegations were not properly investigated such that the disclosure of the report was arguably necessary, notwithstanding the significant intrusion into the private life of the individual who was investigated. The Commissioner also considers that the subsequent disclosure of the outcome of the investigation also serves to satisfy the public interest in informing the public that the allegations were taken seriously and consequently investigated by the public authority.

Redaction

32. The Commissioner also considered whether the report could have been sufficiently redacted to disclose information which would not constitute the personal data of the relevant data subjects. Having carefully reviewed the report, the Commissioner finds that the level of redaction required to ensure that personal data within the meaning of the DPA was not disclosed would have rendered the report meaningless. The identities of the data subjects, their statements, the evidence considered, and opinions about them are very much inextricably linked and redaction would have produced an incoherent document difficult to reconcile with the complainant's request.
33. In view of the above, the Commissioner finds that the disclosure of the disputed information would have contravened the fairness element of the first data protection principle and section 40(2) of the Act was therefore correctly engaged. The Commissioner has therefore not considered the other exemptions which the public authority relied upon.

Procedural Matters

34. A public authority is required by virtue of the provisions of section 17(1) to issue a refusal notice within 20 working days following a request.
35. The Commissioner therefore finds the public authority in breach of section 17(1) for responding to the complainant's request outside the statutory limit.
36. Section 10(1) provides that a public authority should inform an applicant in writing within 20 working days whether it holds requested information.
37. The Commissioner consequently finds the public authority in breach of section 10(1) for informing the complainant of this fact on 05 May 2010, more than 20 working days after he made his request.

The Decision

38. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act because the disputed information was correctly withheld from disclosure by virtue of the exemption at section 40(2).

Steps Required

39. The Commissioner requires no steps to be taken.

Right of Appeal

40. 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 18th day of November 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”.”

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."

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."

Section 17(4) provides that -

"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.

Section 17(5) provides that –

"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."

Section 17(6) provides that –

"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."

Section 17(7) provides that –

"A notice under section (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."

Personal information.

Section 40(1) provides that –

"Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject."

Section 40(2) provides that –

"Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied."

Section 40(3) provides that –

"The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

- (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded."

Section 40(4) provides that –

"The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data)."

Section 40(5) provides that –

"The duty to confirm or deny-

- (a) 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), and
- (b) does not arise in relation to other information if or to the extent that either-
 - (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
 - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed)."

Section 40(6) provides that –

"In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded."

Section 40(7) provides that –

In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act; "data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act.