

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 15 February 2011

Public Authority: Warwickshire County Council
Address: P.O. Box 9
Shire Hall
Warwick
CV34 4RR

Summary

The complainant requested six years of information from the public authority concerning the gender and wages (separating out bonuses paid) of each member of six job classes. The public authority stated that it believed that the information was exempt by virtue of section 43(2) (prejudice to its commercial interests). Three internal reviews were conducted and each refused to disclose the information on the same basis.

The case was referred to the Commissioner and the public authority explained that it was unable to provide the withheld information within the costs limits and therefore it could also refuse the request through the section 12(1) exclusion. It also explained that it was relying on section 40(2) (third party personal data) and section 42(1) (legal professional privilege). The Commissioner considered the case carefully and finds that some information was the complainant's personal data and should have been considered under the Data Protection Act 1998. This information has now been provided to the complainant. For the remaining information, he has determined that section 12(1) has been applied correctly. He has decided that further advice and assistance was required and that the public authority breached section 16(1). He has also found procedural breaches of section 10(1) and section 17(5).

He requires the public authority to contact the complainant and discuss how her request can be narrowed down to come within the costs limit.

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 background of this case is that the public authority has been subject to a large number of claims under the Equal Pay Act 1970. The claims were made on the basis that its female staff had done work of broadly equal value to male workers, yet did not receive the same remuneration (in particular bonuses were available to male dominated professions and not female dominated ones).

The Request

3. On 27 March 2009 the complainant requested the following information in accordance with section 1(1) of the Act:

'Request for Information under the Freedom of Information Act

I write to obtain information under the above act in respect of an equal pay claim I am making for the time I spent working for you as a Kitchen Assistant / F S A [Food Service Assistant] at [School redacted] up to April 2006. My payroll number was [number redacted].

The information I require relates to the trades listed below and needs to show any difference in pay between male and female staff doing the same work year by year for the last six year[s] of my employment. It should also show any bonuses paid by this I mean anything which was paid in addition to the basic wage.

*Kitchen Assistant
Food Service Assistant
Cook
Labourer
Driver
Gardener*

I look forward to receiving your reply within the next 21 days.'

4. On 31 March 2009 the public authority acknowledged receiving the request for information on 30 March 2009.
5. On 13 May 2009 the complainant wrote to the public authority to chase a response.
6. On 29 May 2009 the public authority issued its response. It said that it believed that section 43 of the Act applied to the requested information. It explained that it believed that the disclosure of the information would prejudice the public authority's commercial interests as it may provide claimants with a platform to make speculative claims against it. It stated that it believed that the disclosure would circumvent the ordinary Tribunal disclosure process which would require a more proportionate disclosure of information. It explained that it believed that the public interest favoured the maintenance of the exemption because it would minimise the cost to the Council of defending speculative litigation, when there is a clear alternative Tribunal process of disclosure that would provide adequate information to make the claim. It also explained that any complaint would be dealt with under its corporate complaints procedure.
7. On 2 June 2009 the complainant requested an internal review to be conducted. She also made a formal complaint. She complained that she had not received the information that she had requested and that the public authority took over 20 working days to provide a response.
8. On 8 June 2009 the public authority acknowledged receipt of the letter dated 2 June 2009 and explained that there were three stages. The first would be for the complaint to be considered by the responsible officer (stage one) and this would be the manager of the person who dealt with the request. If this did not resolve the complaint, then the complaint would be considered by the Departmental Complaints Officer (stage two). Should this fail, the complaint will be considered by the Corporate Complaints Officer (stage 3) and a response would be issued by its Chief Executive. It explained that this would be its final response. Finally, it explained that it was open for the complainant to go to the Information Commissioner should she be dissatisfied with its final response.
9. On 23 June 2009 the public authority communicated the results of its first internal review (as part of stage 1 of its complaints process). It apologised for the delay in issuing its response and acknowledged that it was outside the time limit. In respect to the withheld information, it explained that it had reviewed its position. It explained that it was satisfied that the decision to apply section 43(2) was the correct one and that the public interest favoured withholding the information. It

- repeated its previous arguments and stated that it believed there was also a real possibility that speculative claims would have a direct impact on the process of settling of legitimate claims. It explained that the Employment Tribunal was the correct forum for legitimate claims and will order disclosure of necessary information.
10. On 27 June 2009 the complainant wrote back to the public authority. She explained that in her view her claim was not speculative. She explained that the reasoning was unsatisfactory and was in her view not compliant with the legislation. She stated that she was looking to pursue the claim through the County Court and required the information to put a correct value on it. She also explained that the apology about the delay was inadequate. She asked the public authority to reconsider its position.
 11. On 21 July 2009 the public authority communicated the results of its second internal review (as part of stage 2 of its complaints process). It was conducted by a different member of staff. It explained that it had considered the matter and agreed that the decision to refuse disclosure was correct as it may prejudice its commercial interests and the public interest weighs in favour of maintaining the exemption. It explained that it has a duty to ensure that public funds are used appropriately and in the best way possible to deliver the services. It stated that in the current economic climate it feared that the disclosure of the information would lead to speculative claims that would cost it money and resources to defend. It explained that it sometimes had to take regrettable decisions in individual cases to accord with the wider public interest. It apologised again for the delay in providing a response and stated that it endeavoured to respond within the statutory timeframe in all cases. It explained that the reason for the delay was that the request required input from its Human Resources department and staff changes within it led to a longer delay than usual. In addition the public authority had focussed its resources on the current Tribunal litigation that had reached a crucial stage and this contributed to the delay. It explained that this was no excuse but was simply an explanation. It explained that the complainant did have a right to appeal to the Information Commissioner at this stage and/or she could appeal through the public authority's Stage 3 process.
 12. On 27 July 2009 the complainant made a further complaint and asked for it to be passed to stage 3 of its complaints process. She explained that the public authority could pay the money she believed was due to her and she would withdraw the complaint. On 29 July 2009 this letter was acknowledged by the public authority.

13. On 3 August 2009 the public authority wrote to the complainant to ask if she had any further representations to add before the investigation into the stage 3 complaint. On 13 August 2009 the complainant replied and said that she did not. On 24 August 2009 the public authority agreed to now conduct the investigation into the stage 3 complaint.
14. On 3 October 2009 the public authority communicated the results of its third internal review (as part of stage 3 of its complaints process). It explained that it had interviewed the relevant people and considered all the evidence. It explained that it was satisfied that the reasoning to refuse the request was sound. It provided a summary of its reasons:
 - The information that was requested was commercially sensitive and its release would operate to the disadvantage of the Council.
 - There is a real prospect that the disclosure of the information would encourage speculative claims and public funds would have to be spent to defend them.
 - Any speculative claims that may be made would have a direct impact on the process of settling legitimate claims and potentially disrupt this process.
 - There is an established process via the Employment Tribunal by which claims can be lodged and any necessary disclosures can be ordered by the Tribunal.
 - In terms of whether the public interest favours the withholding or disclosing of the information, Legal Services feel that the public interest favours withholding the information so that public funds are used appropriately and not for the defence of speculative claims.
 - There is a legal route available for legitimate claims.
15. It also responded to the complainant's point that in its view she was unable to bring a claim at the Employment Tribunal. It explained that this was its view but that it was open to her to obtain independent legal advice about this matter. It provided further reasons about the reason why the original response was delayed. It explained that the request required input from two departments at a busy time for it and this was the reason for the delay. It apologised for both the delay and for not providing an explanation about it until now. Finally, it explained that it was now open to the complainant to appeal this decision to the Commissioner and provided his details.

The Investigation

Scope of the case

16. On 26 October 2009 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - *The public authority wrongly refused to provide the relevant recorded information to her.*
 - *It also took over twenty working days to provide an appropriate response under the Act.*
 17. During the course of the Commissioner's investigation the following matter was resolved informally:
 - *The public authority disclosed the complainant's personal data on 1 March 2010. The Commissioner believes that this information should have been considered under the Data Protection Act 1998 (the DPA) at first instance and that section 40(1) should have been applied under the Act. He will not consider this issue in detail in the substantive part of this Notice, but he has chosen to make further comments about it in the Other Matters section below.*
 18. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act. For clarity, the Commissioner has no jurisdiction to judge the merits or otherwise of a claim under the Equal Pay Act 1970.
 19. All information released under the Act is released to the public at large. It is not a private disclosure regime. It may be possible to obtain appropriate information privately through the court process of disclosure. This is not an issue that the Commissioner has jurisdiction over either.
- ### Chronology
20. On 25 November 2009 the Commissioner wrote to the public authority to confirm that he had received an eligible complaint. He asked for the public authority to provide him with the withheld information and its submissions about why it had relied on section 43(2).

21. On 23 December 2009 the public authority called the Commissioner and explained that it required an extension in time to provide a full response.
22. On 12 January 2010 the Commissioner telephoned the public authority to enquire about its progress in providing him with a response. It explained that the response was being finalised. The Commissioner also used the opportunity to clarify some points with the public authority and to discuss whether there was a possibility of an informal resolution in this case. There was not.
23. On 13 January 2010 the Commissioner received the public authority's opening submissions. It explained its understanding of the request and the appropriate background. The public authority explained its arguments about why it believed section 43(2) applied in this case. It also explained that it was unable to provide the Commissioner with a copy of the withheld information as to do so would involve it undertaking a quantity of work that would exceed the costs limit of the Act. It explained that it wished for the Commissioner to revise his request for the information. It also explained that it was reluctant to provide the Commissioner with a subset of relevant information as it was worried about waiving its confidentiality. It explained that it was now also prepared to rely on section 12 (the costs limit) and section 40(2) (third party personal data) as alternatives to section 43(2). It also explained that it believed that the subset of information was protected by section 42(1) (legal professional privilege).
24. Also on 13 January 2010 the Commissioner telephoned the complainant. He explained that there was a possibility of section 12(1) applying in this case and asked the complainant whether there was any possibility to narrow down the request in order to enable the possibility of an informal resolution. The complainant confirmed that information about just the Kitchen Assistants and the Food Service Assistants over the whole six years would be sufficient if this was all that could be provided within the costs limits. The Commissioner failed to achieve this informal resolution. The complainant also confirmed that she sought her own personal data.
25. The Commissioner then telephoned the public authority to explain the structure of the investigation and that some information will need to be considered under the DPA. He explained that a detailed letter would follow addressing all the necessary points.
26. On 14 January 2010 the Commissioner wrote to the public authority with a detailed letter.

27. On 12 February 2010 the Commissioner chased the public authority for a response. The public authority emailed him on the same day to explain that it required a few more days.
28. On 17 February 2010 the public authority provided the Commissioner with a response to some of his enquiries dated 14 January 2010. It explained in detail how it holds this sort of information and provided some detail about why it was relying about section 12(1). It informed the Commissioner that it was not keen on his approach about requiring the data to be generated before applying exemptions to it (the Commissioner has decided to comment about this in the Other Matters section of this Notice). It explained its view on the advice and assistance that it provided and stated that it was happy to provide the complainant with her personal data as soon as it had the chance to collate it.
29. On 23 February 2010 the Commissioner called the public authority. He asked further questions about the nature of the paper records and received answers to them. He explained that he still required further arguments about the application of section 12(1) and a copy of the personal data sent to the complainant.
30. On 22 March 2010 having not heard from the public authority the Commissioner wrote to it to explain that he still required the information that he asked for on the telephone on 23 February 2010. He provided a telephone note of what was asked for to ensure clarity.
31. On 1 April 2010 the Commissioner received a response. It provided the further arguments asked for about the application of section 12(1) and also provided the Commissioner with evidence that it had sent the complainant her personal data.
32. Between the 7 April 2010 and 22 April 2010 the Commissioner explored further whether there were any possibilities to provide advice and assistance in this case.

Analysis

Substantive Procedural Matters

33. The first issue the Commissioner will consider is how the request for information should be read as he believes that out of context it is ambiguous. The second issue will be to consider whether the costs limit applies to the initial request, if it does then no other exemptions need

to be considered in respect to the information. The third issue will be to consider whether appropriate advice and assistance has been provided. Finally, the Commissioner will consider the procedural matters such as the delays.

How must the request be read?

34. In the Commissioner's view the request is worded in a way that it could be seen to be ambiguous to a general reader. Therefore the Commissioner will explain the interpretation he has made of the request in its context. He believes the information requested has the following characteristics:
1. It is for the amount of money paid annually to the each person that falls within the six classes of employee. This must be broken down into hourly rate and any bonuses (or other remittances) paid must be separated from the hourly rates.
 2. Each employee should be identified as being male or female.
 3. There should be six years of figures for each employee. Therefore the data should be provided for each of the following financial years 2000 – 2001, 2001 – 2002, 2002-2003, 2003-2004, 2004-2005 and 2005-2006.
35. This Decision is made on the above understanding of the request and this understanding was confirmed with the complainant. The public authority also confirmed during the investigation that it understood the request in this way.

Exclusion

Section 12

36. As explained above the public authority was unable to provide the Commissioner with a copy of the information without undertaking considerable work to obtain it. The public authority therefore applied section 12 (the costs limit) and the Commissioner was prepared to consider section 12 first given the circumstances of the case.
37. Section 12(1) indicates that the public authority is not required to comply with a request for information if the authority estimates that the total cost of complying with the request would exceed the 'appropriate limit'.

38. Section 12(2) provides that a public authority can refuse a request if the cost of complying with section 1(1)(a) alone (that is the cost of confirming or denying whether the information of the description specified in the request is held) would exceed the 'appropriate limit'.
39. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the "Regulations") provide that this cost limit for non-central government public authorities is £450. This is calculated at the rate of £25 per hour, providing an effective time limit of 18 hours. If a public authority estimates that complying with a request would exceed 18 hours, or £450, section 12(1) provides that the request may be refused.
40. The Information Tribunal (the 'Tribunal') in *Quinn v Information Commissioner & Home Office* [EA/2006/0010] explained this point in this way (at paragraph 50):

'The fact that the rules drafted pursuant to s.12 have the effect of defining what is a reasonable search and the amount of time and money that a public authority are [sic] expected to expend in order to fulfil their obligations under the Act, serves as a guillotine which prevents the burden on the public authority from becoming too onerous under the Act.'
41. In this case the public authority's position is that it certainly holds some information of the description specified in the request. However, it does not hold a complete set of information and the only way it can confirm exactly what it holds and provide appropriate information is to check all the individual records. Its position therefore is that in order to process the request it would take work beyond the costs limit. Its view therefore is that section 12(1) applies and no work should be required to be done.
42. The Commissioner is therefore required to consider the application of section 12(1) in this instance.
43. The Commissioner's investigation into the application of section 12(1) in respect to this case has three parts. The first part considers whether the requests should be aggregated or considered individually for the purposes of section 12(1). The second part considers how the information was held, whether it was reasonable for the public authority to base its estimate on obtaining information from its various records (including considering possible reasonable alternatives). If it was, then the third part would consider whether the section 12(1)

estimate was reasonable and therefore whether the exclusion was correctly applied.

Should the requests be aggregated or considered individually for the purposes of section 12?

44. When considering whether requests can be aggregated or need to be considered individually the Commissioner is guided by Regulation 5 of the Statutory Instrument 2004 No. 3244 "The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004" which states that:

'5. - (1) In circumstances in which this regulation applies, where two or more requests for information to which section 1(1) of the 2000 Act would, apart from the appropriate limit, to any extent apply, 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 total costs which may be taken into account by the authority, under regulation 4, of complying with all of them.

(2) This regulation applies in circumstances in which-

(a) the two or more requests referred to in paragraph (1) relate, to any extent, to the same or similar information, and

(b) those requests are received by the public authority within any period of sixty consecutive working days.'

45. In order to aggregate the requests for the purposes of section 12(1) the Commissioner must determine whether they relate to any extent, to the same or similar information. The interpretation of this part of the Fees Regulations has been considered by the Information Tribunal in *Ian Fitzsimmons v Department for Culture, Media and Sport* [EA/2007/0124]. The Tribunal made the following general observation at paragraph 43:

“The test in Regulation 5 of the Fees Regulations seems to us to be very wide; the requests need only relate *to any extent* to the same or *similar* information [Tribunal emphasis]”.

46. The Commissioner has considered all the parts of the request in this case. He has concluded that they are similar to an extent as they all relate to information about the pay and gender of six classes of employees. As the complainant made a multi-part request in a single piece of correspondence the 60 day period is not an issue in this case.
47. The Commissioner considers that the test is satisfied and the time taken to answer all parts of the request can be added together in this instance.

An overview of how the information can be searched for

48. The public authority has explained that there were two ways that it could embark on finding this data from its manual records:
 - i. Checking each individual's personnel files.
 - ii. Using the manual payroll system.
49. Both ways required it to know who was employed over the period 2001 – 2006 in the six categories. It explained that it did not store the information by job title and until 2006 did not store the information electronically. It explained that there is likely to be a considerable attrition rate and that it would be very difficult for it to identify every individual employed over that period of time. The Commissioner has also received confirmation that the information cannot be searched by there being common elements in payroll codes. In addition it is the case that catering contracts are frequently won and lost and clearly this would make the search even more complex. In addition some catering employees work directly for the public authority while others do not.
50. It explained that it may be able to identify the labourers and gardeners for 2003 and 2004 because it outsourced this work. However, this would not enable it to know who was employed in those roles from 2001 to 2002, or 2005 to 2006.
51. However the only way it could be certain exactly who it employed for the time period in question for the six job descriptions would be to check every record. The Council has 18,000 employees employed at any one time. The number of records that would need to be checked would be more than this as it is necessary to account for people

leaving and entering the public authority within the six years. The Commissioner is content that the only way to identify every individual would be to:

- (1) Use the electronic system to identify those individuals employed in the role in 2006.
 - (2) Search every manual record from 2001 to 2005 as there is no way to cut the numbers down.
52. Once it had found out who it had employed in each category then the most expedient way was likely to be checking their personnel file. This file was likely (but not certain) to include their bonuses.
53. The other alternative would be to check the manual payroll records. These are on A3 sheets bound into books showing pay for the employees on a four weekly basis. For most employees the public authority would need to check 13 time sheets per year for each employee. In only some cases will there be a summary total at the end of the year which identifies the total work done and what was paid and for those only 6 sheets would need to be checked for the six years. This information is not catalogued through A to Z. Instead it is divided into payroll codes. The Council would therefore be required to know each individual's payroll code before finding the information. However, even checking through the manual payroll records may not work as they can be incomplete.
54. The public authority provided an example to demonstrate how long the process of extraction would take. It did this for the complainant's own data. It explained that this was made easier by knowing the complainant's name and payroll number. It still took 15 minutes to find the relevant information for just her.

Reasonable alternatives

55. The complainant has argued that the reliance on the costs limit was neither credible nor well considered. She explained that the information would have been required to have been generated in order for the public authority to consider its liability for other Equal Pay claims and that this information should therefore be provided to her.
56. When considering this issue the Commissioner has received guidance from the Information Tribunal in the case *Alasdair Roberts v the Information Commissioner* [EA/2008/0042]. In this case, the complainant offered a number of suggestions as to how the requested information could be extracted from a database that contained the

elements of what was requested. The Tribunal concluded that none of the ways suggested would have brought the request under the costs limit. However at paragraph 15, the Tribunal also made the following more general comments on alternative methods of extraction:

"(a)...the complainant set the test at too high a level in requiring the public authority to consider all reasonable methods of extracting data;

(b) that circumstances might exist where a failure to consider a less expensive method would have the effect of preventing a public authority from relying on its estimate... "

57. Those circumstances were set out at paragraph 13 where it was said:

"...it is only if an alternative exists that is so obvious to consider that disregarding it renders the estimate unreasonable that it might be open to attack. And in those circumstances it would not matter whether the public authority already knew of the alternative or had it drawn to its attention by the requestor or any other third party..."

58. The Commissioner has therefore considered whether there is an alternative that exists that is so obvious to consider that it renders the estimate unreasonable in this case.

59. The Commissioner firstly investigated the complainant's concerns about whether the public authority held the information that she requested in order to deal with Equal Pay claims. The public authority explained to the Commissioner that it did not generate the information in the format that has been requested for this purpose.

60. Instead it used its own knowledge of past claims and was able to assess its position in respect to potential liability to equal pay claims through using a much smaller subset of data than that which has been requested in this case. It knew that bonuses were only paid in exceptional circumstances and that it believed (although was not certain) that bonuses were not paid to Kitchen Assistants, Food Service Assistants or Cooks. Only one comparator was required. It therefore assessed its liability by assessing the bonuses paid to some male staff members over one year. This information did not contain all the information that was sought and did not constitute a reasonable alternative under section 12(1).

61. The Commissioner then investigated whether the information was possible to be generated using its electronic systems and therefore not

requiring the manual work to be undertaken by the public authority. The public authority explained that its present electronic system that went live in 2005 which was called HMRS. It explained that the majority of the staff had not been added to it until 2006 and that the system is unlikely to hold historic bonus data. In addition the system does not hold information about the outsourced workers on its electronic system as it had no reason at all to do so. The previous system was unable to assist as it did not hold bonus data in a way that made it identifiable individually even if a report was made.

62. The Commissioner asked that the public authority what sort of reports could be drawn from HMRS in an effort to see if there was any way of providing some data that would assist the complainant within the costs limit. The public authority explained that it had four ways of writing reports through Structured Query Language [SQL] and explained how these reports interacted with the contents of the database:

- Stream of SQL – this produces data in a technical format that would be only useful to the HMRS support team as it would be difficult to understand.
- Discovery report – this can make the SQL information in a readable report format (although it may lack detail).
- Oracle 5 which uses the reports database on SQL and produces data in a PDF file. This report would be capable of producing some data that would be relevant to the request for the limited periods where the base data was present.
- PLC/SQL this is another form of reporting system, which would be of equal utility to Oracle 5 in this context.

63. The public authority also confirmed that the data would be relatively easy to generate where it has the base data (so from 2005). However, this data may be unreliable because it is only as good as the information that was input into it. It explained that it was possible that the bonus heading was used for payments that were not really a bonus and/or bonuses might be recorded under inappropriate headings that would not be picked up by the search terms. The Commissioner is not generally concerned with the reliability of data where held. He considers that such concerns can be addressed by the provision of a written explanation alongside the information. The principle reason why the electronic database is not a reasonable alternative as there is no way that it can obtain **all** the information that was requested by the complainant in this case. The only thing it could do is provide some information for the years 2005 and 2006 (which may still be exempt)

and this would not assist the complainant in making a claim about the whole six year period.

64. The Commissioner notes that it would not be possible in this case to allow the complainant to check the records by herself. The records contain personal information of many third party individuals and it is important that the public authority can be certain that the information maintains its integrity. It would also not be possible to copy the records as this would also exceed the costs limits.
65. The Commissioner is satisfied that there are no obvious alternatives to obtain **all** the information asked for in request besides manually checking through the records. The Commissioner is content that there are no obvious alternatives in this case that would render the estimate unreasonable. The Commissioner is therefore satisfied that it was reasonable in this case to rely on an estimate based on obtaining information through checking those records.

Was the estimate reasonable in this case and was section 12(1) therefore applied correctly?

66. The issue of what constitutes a reasonable estimate was also considered in the Tribunal case of *Alasdair Roberts v the Information Commissioner* [EA/2008/0042] and the Commissioner endorses the following points made by the Tribunal at paragraphs 9 -13 of the decision:
- *"Only an estimate is required"* (i.e. not a precise calculation);
 - The costs estimate must be reasonable and only based on those activities described in Regulation 4(3);
 - Time spent considering exemptions or redactions cannot be taken into account;
 - Estimates cannot take into account the costs relating to data validation or communication;
 - The determination of a reasonable estimate can only be considered on a case-by-case basis; and
 - Any estimate should be *"sensible, realistic and supported by cogent evidence."*

67. The activities referred to in Regulation 4(3) are:

"(a) determining whether it holds the information,

(b) locating the information, or a document which may contain the information,

(c) retrieving the information, or a document which may contain the information, and

(d) extracting the information from a document containing it."

68. The approach outlined above (and particularly the point about not being allowed to charge for the time spent considering exemptions or redactions) was recently confirmed by the High Court in *The Chief Constable of South Yorkshire v Information Commissioner* [2011] EWHC 44¹. This reaffirmation was particularly persuasive as it constituted the only issue that the High Court was asked to consider in that case.
69. As noted above the only way to obtain all the information that the complainant has requested would be to identify the individuals that worked for the public authority in those roles in the first place. As explained in paragraphs 49 to 51 above, this is not a straightforward task. It would be necessary to:
- (1) Use the electronic system to identify those individuals employed in the role in 2006.
- (2) Search every manual record from 2001 to 2005 as there is no way to reduce the number of records that would require searching.
70. The Commissioner believes that the electronic system could be used fairly easily to obtain those individuals employed in the roles at 2006 (apart from those labourers and gardeners who had been outsourced before then). He therefore believes that this task would take a total reasonable estimate of about 30 minutes.
71. The Commissioner accepts that there is no easy way to identify the individuals from 2001 to 2005 other than checking the paper personnel files. There are more than 18,000 such files. He believes a reasonable estimate to check one file for the occupation of the person – in order to see if they fall within one of the complainant's is two minutes. That would mean the process would take 600 hours (based on the minimum number of files that is 18,000). He believes that the time taken identifying the relevant individuals is time that can be included under activity (b) of the Fees Regulations.
72. The Commissioner therefore accepts that just to identify the members of staff that fall within the six classes of staff for the six years would

¹A copy of this judgment can be found at the following link:
<http://www.bailii.org/ew/cases/EWHC/Admin/2011/44.html>

take more than 600 hours. This is considerably more than the 18 hour limit and therefore section 12(1) has been appropriately applied in this case.

Section 16(1)

73. Section 16(1) (full text in the legal annex) 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.
74. The Commissioner is satisfied that the request was clear in its context and its nature has been commented about in paragraph 34 above. Therefore paragraphs 8 to 11 of the Code did not require additional assistance to be provided in this case.
75. Whenever the cost limit has been applied correctly, the Commissioner must consider whether it would be possible for the public authority to provide advice and assistance to enable the complainant to obtain information without attracting the costs limit in accordance with paragraph 14 of the Code. In this case the Commissioner has considered whether it would have been reasonable for the public authority to have advised the complainant to reduce the scope of her request.
76. The public authority has informed the Commissioner that it did not believe it could provide any advice or assistance in this case as it was unable to suggest how the request could be narrowed down and so fall within the costs limit.
77. The Commissioner does not think that this approach was reasonable in this case. He believes that there were a number of potential options in this case that would have been reasonable, but that it was important that the complainant and the public authority has proactive dialogue to explore if there was any way of providing necessary information. He does appreciate that this case is unusual in that the public authority failed to apply section 12(1) at the outset and instead explained why it believed that the information that it held was exempt. The Commissioner has identified four forms of reasonable advice and assistance, although there may be more when the two sides talk. The four the Commissioner has identified are:

1. Contacting the complainant and asking what the minimum information that would be acceptable in this case.
2. Identifying a specific class of employees at one time period and asking whether this would be acceptable in this case.
3. Explaining that it held a subset of information that it used to determine claims and asking whether the complainant wanted this to be considered under the Act.
4. Explaining that it held a second subset of information concerning the average percentage bonuses paid for specified manual roles over a year period and asking whether the complainant wanted this to be considered as well or instead.

78. The Commissioner has found that the public authority has breached the requirements of section 16(1) and will require a remedial step to be undertaken to remedy this breach.

Procedural Requirements

Section 10(1)

79. Section 10(1) of the Act (full wording in the legal annex) provides that the public authority must comply with sections 1(1)(a) and 1(1)(b) within twenty working days. In this case the public authority took considerably more than 20 working days in this case and therefore breached section 10(1) twice.

Section 17(5)

80. Section 17(5) of the Act (contained in the legal annex) provides that when a public authority is relying on section 12(1) it should provide a refusal notice stating that fact within 20 working days. In this case the public authority failed to consider section 12(1) until the Commissioner's investigation and failed to issue a notice within 20 working days of receiving the request for information. It therefore breached section 17(5).

The Decision

81. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- *It applied section 12(1) correctly to the request.*

82. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- *It has breached section 10(1) twice by failing to issue a response within 20 working days.*
- *It has breached section 16(1) by failing to provide appropriate advice and assistance to the complainant after applying section 12(1).*
- *It has breached section 17(5) by failing to cite section 12(1) within twenty working days.*

Steps Required

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

- The public authority should contact the complainant to offer appropriate advice and assistance in accordance with the section 45 Code of Practice in order to comply with its obligations under section 16(1) of the Act.

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

Failure to comply

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

Other matters

86. Although they do not form part of this Decision Notice, the Commissioner wishes to highlight four matters that have concerned him in this case.
87. The first matter of concern is that exemptions were applied to information without reference to the information that was held. The Commissioner believes that it is important to consider whether there is prejudice and the balance of the public interest test against the exact information requested. He believes that the public interest in maintaining an exemption should be assessed in all the circumstances of the case. It is for this reason that the public authority should consider section 12(1) first in cases such as this one. He believes he has received assurances that the public authority will amend its process in future.
88. The reason for this approach is that a public authority is not permitted to maintain a blanket refusal to disclose all information of a particular type or nature. The question to be asked is not; is the balance of public interest in favour of maintaining the exemption in relation to this type of information? The question to be asked is; is the balance of public interest in favour of maintaining the exemption in relation to *this* information, and in the circumstances of *this* case? The public authority may well have a general policy that the public interest is likely to be in favour of maintaining the exemption in respect of a specific type of information. However such a policy must not be inflexibly applied and the authority must always be willing to consider whether the circumstances of the case justify a departure from the policy².
89. The second matter of concern relates to the public authority's internal review procedure. Part VI of the section 45 Code of Practice recommends that complaints procedures (internal reviews) 'should be as clear and simple as possible'. In his Good Practice Guidance No.5, the Commissioner qualifies this further by explaining that he does not expect an internal review to have more than one stage. In this case he has been concerned that there were three stages to the public authority's internal review procedure as it was dealt with in line with its normal complaints procedures. He has now received repeated assurances from the public authority that it has adopted a single stage internal review procedure. He has been informed that this policy has been published and that every member of staff that deals with

² This approach has been confirmed by the Information Tribunal in *Hogan and Oxford City Council v the Information Commissioner* ([EA2005/0026](#) & [EA/2005/0030](#))

requests for information is now aware of this change. He is therefore satisfied that this matter has now been addressed.

90. The third matter of concern is connected to the second. That is that the three stage review procedure led to a considerable delay in providing the complainant with a final verdict. 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 80 working days for an internal review to be completed, despite the publication of his guidance on the matter.
91. The fourth matter of concern relates to the fact that this request was a hybrid request. It was a hybrid request because it requested a data set of which the complainant's data was a part. Section 7 of the DPA gives an individual the right to request copies of personal data held about them – this is referred to as a right of Subject Access. As this part of the information being sought was in fact the complainant's personal data this part should have been automatically dealt with as a Subject Access Request. The Commissioner encourages public authorities to consider requests under the correct regime in the first instance. In the Commissioner's opinion responsibility for applying exemptions and determining whether a request should be considered under the Act or the DPA rests with the public authority and not the requestor. As explained above, the Commissioner has now ensured that the public authority has provided all the relevant personal data to the complainant and is therefore satisfied that this matter has now been addressed.

Right of Appeal

92. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 15th day of February 2011

Signed

**Gerrard Tracey
Principal Policy Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

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 10 - Time for compliance with request

(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 is paid 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 [1971 c. 80.] Banking and Financial Dealings Act 1971 in any part of the United Kingdom

...

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.

Section 17 - Refusal of request

(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.

Section 40 – Personal information

(1) 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.

(2) 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.

(3) 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 [1998 c. 29.] 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 [1998 c. 29.] Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the [1998 c. 29.] 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).

(5) 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 [1998 c. 29.] 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 [1998 c. 29.] 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).

(6) 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 [1998 c. 29.] Data Protection Act 1998 shall be disregarded.

(7) In this section—

- “the data protection principles” means the principles set out in Part I of Schedule 1 to the [1998 c. 29.] 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.

Section 42 – Legal professional privilege

(1) 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.

...

Section 43 – Commercial interests

(1) Information is exempt information if it constitutes a trade secret.

(2) 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).

(3) 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).

Data Protection Act 1998

Section 1 - Basic interpretative provisions

(1) In this Act, unless the context otherwise requires—

- “data” means information which—
 - (a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,
 - (b) is recorded with the intention that it should be processed by means of such equipment,
 - (c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, or
 - (d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68;

- “data controller” means, subject to subsection (4), a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed;
 - “data processor”, in relation to personal data, means any person (other than an employee of the data controller) who processes the data on behalf of the data controller;
 - “data subject” means an individual who is the subject of personal data;
 - “personal data” means data which relate to a living individual who can be identified—
 - (a) from those data, or
 - (b) 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;
 - “processing”, in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including—
 - (a) organisation, adaptation or alteration of the information or data,
 - (b) retrieval, consultation or use of the information or data,
 - (c) disclosure of the information or data by transmission, dissemination or otherwise making available, or
 - (d) alignment, combination, blocking, erasure or destruction of the information or data;
 - “relevant filing system” means any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible.
- (2) In this Act, unless the context otherwise requires—

(a) "obtaining" or "recording", in relation to personal data, includes obtaining or recording the information to be contained in the data, and

(b) "using" or "disclosing", in relation to personal data, includes using or disclosing the information contained in the data.

(3) In determining for the purposes of this Act whether any information is recorded with the intention—

(a) that it should be processed by means of equipment operating automatically in response to instructions given for that purpose, or

(b) that it should form part of a relevant filing system,

it is immaterial that it is intended to be so processed or to form part of such a system only after being transferred to a country or territory outside the European Economic Area.

(4) Where personal data are processed only for purposes for which they are required by or under any enactment to be processed, the person on whom the obligation to process the data is imposed by or under that enactment is for the purposes of this Act the data controller.

Section 7 – Right of Access to personal data

(1) Subject to the following provisions of this section and to sections 8 and 9, an individual is entitled—

(a) to be informed by any data controller whether personal data of which that individual is the data subject are being processed by or on behalf of that data controller,

(b) if that is the case, to be given by the data controller a description of—

(i) the personal data of which that individual is the data subject,

(ii) the purposes for which they are being or are to be processed, and

(iii) the recipients or classes of recipients to whom they are or may be disclosed,

(c) to have communicated to him in an intelligible form—

(i) the information constituting any personal data of which that individual is the data subject, and

(ii) any information available to the data controller as to the source of those data, and

(d) where the processing by automatic means of personal data of which that individual is the data subject for the purpose of evaluating matters relating to him such as, for example, his performance at work, his creditworthiness, his reliability or his conduct, has constituted or is likely to constitute the sole

basis for any decision significantly affecting him, to be informed by the data controller of the logic involved in that decision-taking.

(2) A data controller is not obliged to supply any information under subsection (1) unless he has received—

(a) a request in writing, and

(b) except in prescribed cases, such fee (not exceeding the prescribed maximum) as he may require.

(3) A data controller is not obliged to comply with a request under this section unless he is supplied with such information as he may reasonably require in order to satisfy himself as to the identity of the person making the request and to locate the information which that person seeks.

(4) Where a data controller cannot comply with the request without disclosing information relating to another individual who can be identified from that information, he is not obliged to comply with the request unless—

(a) the other individual has consented to the disclosure of the information to the person making the request, or

(b) it is reasonable in all the circumstances to comply with the request without the consent of the other individual.

(5) In subsection (4) the reference to information relating to another individual includes a reference to information identifying that individual as the source of the information sought by the request; and that subsection is not to be construed as excusing a data controller from communicating so much of the information sought by the request as can be communicated without disclosing the identity of the other individual concerned, whether by the omission of names or other identifying particulars or otherwise.

(6) In determining for the purposes of subsection (4)(b) whether it is reasonable in all the circumstances to comply with the request without the consent of the other individual concerned, regard shall be had, in particular, to—

(a) any duty of confidentiality owed to the other individual,

(b) any steps taken by the data controller with a view to seeking the consent of the other individual,

(c) whether the other individual is capable of giving consent, and

(d) any express refusal of consent by the other individual.

(7) An individual making a request under this section may, in such cases as may be prescribed, specify that his request is limited to personal data of any prescribed description.

(8) Subject to subsection (4), a data controller shall comply with a request under this section promptly and in any event before the end of the prescribed period beginning with the relevant day.

(9) If a court is satisfied on the application of any person who has made a request under the foregoing provisions of this section that the data controller in question has failed to comply with the request in contravention of those provisions, the court may order him to comply with the request.

(10) In this section—

“prescribed” means prescribed by the Secretary of State by regulations;

“the prescribed maximum” means such amount as may be prescribed;

“the prescribed period” means forty days or such other period as may be prescribed;

“the relevant day”, in relation to a request under this section, means the day on which the data controller receives the request or, if later, the first day on which the data controller has both the required fee and the information referred to in subsection (3).

(11) Different amounts or periods may be prescribed under this section in relation to different cases.