

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 17 March 2011

Public Authority: National Audit Office
Address: 157 – 197 Buckingham Palace Road
Victoria
London
SW1W 9SP

Summary

The complainant requested information from the National Audit Office (NAO) to support its statement that steps had been taken to improve its internal procedures for handling complaints. The NAO initially responded by stating that it did not hold any information covered by the request, although a diary entry was provided at the internal review stage which it considered constituted all the relevant information. The Commissioner has investigated and is satisfied on the balance of probabilities that the NAO does not hold any information in addition to that which had previously been provided. The Commissioner does not therefore require the NAO to take any steps. The Commissioner, however, has found that the NAO breached section 10(1) by its handling of the request.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. In 2008 the complainant asked the National Audit Office (NAO) to consider the alleged failure of the Independent Police Complaints Commissioner (IPCC) to investigate fully complaints made to it. The complainant subsequently complained about the contradictory

information he had received from the NAO and the delays associated with the NAO responding to his correspondence. As part of its review stemming from the complainant's comments, the NAO informed the complainant that steps had been taken to improve its internal procedures for handling complaints and correspondence.

The Request

3. Following previous communications with the NAO, on 25 February 2010 the complainant emailed the NAO to request the following information (this has been broken down into three parts for ease of reference):

With reference to a letter sent to the complainant by the NAO on 10 December 2009 -

- A. *"Please provide all internal information, steps taken, information in relation to improved procedures and any other formal/official documentation relevant to the entry on page one in that, **"steps that have been taken to improve internal procedures for handling complaints to ensure this situation does not recur".**"*

Regarding the discussions between the Comptroller and Auditor General and the Chief Operating Officer referred to in the letter of 10 December 2009 -

- B. *"Please include in response to this part of the request all internal or external correspondence used or produced during or due to these discussions. Please also supply all correspondence or internal information relevant in any way to the outcomes and result of these discussions. Please include all internal e-mails, faxes, file notes, letters, scribbled notes, requests for information from other public authorities in relation to these discussions, all internal notes and memos, transcriptions of telephone conversations, records of meetings or discussions generated internally as result of due to his discussion(s). Please also include all correspondence sent to any other persons due to these discussions or in the aftermath of this meeting via email, letter, phone transcript or via any other medium."*
- C. *"Please also indicate all improvements identified by the Chief Operating Officer that have been or will be made to **"processes for handling correspondence and complaints to address the weaknesses that occurred in our responses to you".**"*

4. The NAO responded on 29 March by stating that it did not hold any information relating to the request.
5. On 29 March 2010 the complainant asked that the NAO review its response. Among other points, the complainant referred to an internal NAO briefing note given to the Comptroller and Auditor General about his complaint.
6. The NAO provided the complainant with the findings of its internal review on 20 May 2010. Having reconsidered the request, the NAO provided a copy of a diary entry relating to internal discussions that had taken place. The NAO also admitted, and apologised for, breaching the Act by its failure to respond to the requests within the statutory time limit.

The Investigation

Scope of the case

7. On 14 July 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled.

Chronology

8. Between 2 November 2010 and 2 March 2011, the Commissioner asked for and received clarification from the NAO with respect to its position in the case. As part of his submissions, the Commissioner asked the NAO to address a number of arguments put forward by the complainant to support his view that additional information would be held.

Analysis

9. The legal provisions relevant to the determination are set out in the Legal Annex to the Decision Notice.

Procedural Matters

10. With reference to part B of the request, the Commissioner notes that one limb of the request asks for all information 'used' during the discussions between the Comptroller and Auditor General and the Chief Supporting Officer. The Commissioner has been informed by the NAO that the discussions were based on information arising from the

complaint made to the authority by the complainant, being steered by a briefing note of 2 December 2009.

11. The Commissioner considers that the information used during the discussions between the Comptroller and Auditor General and the Chief Operating Officer would constitute the complainant's personal data. Where information relates to an applicant and would therefore constitute the applicant's personal data, the information would be exempt from disclosure under section 40(1) of the Act. Instead, the request should be handled as a subject access request under section 7 of the Data Protection Act 1998 (DPA).
12. In this case, however, the NAO has confirmed that the complainant has already been provided with all the information that it holds that is covered by this limb of the request. The Commissioner has not therefore pursued this point further but has instead considered whether the NAO holds any information covered by the other elements of the complainant's request that should have been provided under the Act.

Is any additional information held by the public authority?

13. Section 1(1) of the Act states 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."*

14. Where there is any disagreement about whether or not information is held by a public authority, the Commissioner has been instructed by the approach adopted by the Information Tribunal in the case of *Linda Bromley & Others and the Information Commissioner v the Environment Agency* (EA/2006/0072).
15. The Tribunal observed that there can seldom be absolutely certainty that requested information does not remain undiscovered somewhere within an authority's records. The Tribunal therefore indicated in *Bromley* that the test to be applied was not one of certainty but rather should be the civil standard of the balance of probabilities. The Commissioner will therefore take into account the scope, quality, thoroughness and results of the searches carried out by a public

authority, as well as considering any other reasons offered by the authority to explain why the requested information is not held.

16. In making his decision, the Commissioner has not deemed it necessary to address each part of the request in turn. This is because each item refers to information on a related subject and therefore the Commissioner considers it reasonable that, unless specified, the NAO's submissions would apply equally to all.
17. To support his view that additional information is held that has yet to be identified, the complainant has referred the Commissioner to correspondence, both internal and external, that had been produced by the NAO. This includes, the Commissioner understands, a letter of 27 January 2010 which was sent to the complainant via his MP.
18. In its correspondence the NAO admitted to certain failures associated with its processing of the complaint about the IPCC and the issues arising from this. The NAO went on to state that steps had been taken to improve its correspondence and complaint handling. In the internal briefing note of 2 December 2009 the Chief Operating Officer also recommended that a wider review be carried out into the NAO's handling of correspondence, with the possibility that it update its existing guidance.
19. In view of the NAO's comments, the Commissioner considers that there would be an entirely reasonable expectation that the NAO holds recorded information that documented the steps referred to in its correspondence. The complainant has also argued that, as the NAO's role is to scrutinise the choices made by other government departments and bodies, it would recognise the importance of documenting the decisions it makes itself.
20. In reply, the NAO has confirmed that discussions did take place with respect to the management of the complaint about the IPCC. This was evidenced both in the letter of the Comptroller and Auditor General of 10 December 2009 and in the diary entry of 30 November 2009 that was provided to the complainant as part of the NAO's response to his request.
21. However, the Commissioner has been advised by the NAO of its finding that any failures were not due to a flaw in existing policies or procedures but in the way that these policies and procedures were implemented. Consequently, while it was agreed by those involved that the relevant NAO policies should be more rigorously adhered to, it was not felt necessary to document the discussions as it was not planned to update the NAO policy and guidance already in place. For the

avoidance of doubt, the NAO confirmed that no notes or minutes were taken of any internal discussions. The NAO also asserted that wider staff at the authority were not informed of the agreement that the policies in place should be followed more closely.

22. As evidence of an existing mechanism designed to improve its case handling, the NAO has referred the Commissioner to a system by which teams were reminded of outstanding correspondence. This was said to be introduced in July 2009. The system itself consisted of a weekly reminder email being disseminated by the private office of the Comptroller and Auditor General.
23. The NAO argued that this system was not implemented as a result of its handling of the complaint about the IPCC. It therefore considered that any information relating to the system would not be covered by the scope of any item of the request.
24. The Commissioner, however, disagreed with the NAO's interpretation of the request. This is because he considered that, if no steps were taken as a result of its review into the NAO processing of the complaint about the IPCC, the improvements cited by the NAO must include the steps that had already been taken, which would include the reminder system. The Commissioner also considered that, from an objective reading of the request, the steps referred to by the complainant do not have to relate directly to the subject complaint; that is, steps could have been taken in general terms, the effect of which was that the procedure for dealing with complaints would be improved.
25. The Commissioner therefore informed the NAO of his view that information relating to the reminder system would be covered by the request. The NAO subsequently agreed to reconsider the request in this context but still found that it did not hold any information relating to the reminder system that pre-dated the request.
26. The NAO explained that the reminder system was never construed as being a formal policy change and so no associated documentation was produced that would document its introduction; the date of its implementation was only known because of the recollection of a staff member. The NAO also clarified that the weekly emails sent by the Comptroller and Auditor General's private office were regularly deleted as there was no business requirement to hold them.
27. The complainant has subsequently questioned the date that the system was introduced because, firstly, no reference was made to it as part of the correspondence he had received from the NAO and, secondly, of the continued failure of the NAO to respond in a timely manner to

correspondence following July 2009. Due to the lack of recorded information, however, the Commissioner is unable to comment further on this point.

28. The Commissioner is prepared to accept generally the reasons offered by the NAO to explain why it does not hold information directly pertaining to the request. However, for the avoidance of doubt, the Commissioner has asked the NAO to clarify the nature of the searches it had undertaken in response to the request.
29. The NAO stated that a member of the team with responsibility for dealing for information requests under the Act and a departmental records officer, who had detailed knowledge of the complaint, has searched all relevant electronic and hard-copy files. As part of its broader electronic searches, the NAO used the following search terms: the complainant's name; the complainant's email address; 'IPCC' and 'complaint'; the complainant's surname and 'complaint'; 'correspondence' and 'complaints'; and 'complaints procedure'.
30. In addition to the search of all corporate information stores, staff at the NAO who had handled the complaint submitted by the complainant were consulted. These staff members were also required to search all electronic devices to which they had access.
31. Based on the steps taken by the NAO, the Commissioner is satisfied that the extent and direction of its searches to locate information were appropriate.
32. As indicated previously, the Commissioner recognises there are strong grounds for assuming that additional information would be held by the NAO. He acknowledges that the NAO's reference to 'steps have been taken' in its letter of 10 December 2009 strengthens this assumption. However, as detailed above, the NAO has explained to the Commissioner why this statement was not supported with any additional information falling within the subject of the complainant's request. The Commissioner is mindful that his decision need only be determined on a balance of probabilities. Based on the explanations offered by the NAO, the Commissioner has decided that, on balance, the NAO did not hold further information at the time that the request was made.

Procedural Requirements

Section 10(1) – time for compliance

33. Section 10(1) requires a public authority to respond to an information request within 20 working days following the date of its receipt. The Commissioner finds that the NAO breached section 10(1) on two counts:
- By failing to inform the complainant whether it held the requested information in accordance with section 1(1)(a) within the statutory timeframe.
 - By failing to comply with section 1(1)(b) by not providing requested information, namely the diary extract referred to at paragraph 6, within 20 working days.

The Decision

34. The Commissioner's decision is that, at the time the request was made, the NAO did not hold any additional information covered by the scope of the request that should have been provided under the Act.
35. However, the Commissioner has also determined that the NAO breached section 10(1) both by its failure to respond to the request and in failing to provide information, within the statutory time limit.

Steps Required

36. The Commissioner requires no steps to be taken.

Other matters

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

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 had 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 has not seen any evidence to suggest that the circumstances in this case were exceptional. The Commissioner is therefore concerned that it took over the recommended 20 working days for an internal review to be completed, despite the publication of the guidance on the matter.

Right of Appeal

38. 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: 0300 1234504

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 17th day of March 2011

Signed

**Pamela Clements
Group Manager, Complaints Resolution**

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

Legal Annex

Freedom of Information Act 2000

S.1 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.

S.10 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.

Data Protection Act 1998

Basic interpretative provisions

Section 1(1) provides that –

“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.”

Right of access to personal data

Section 7 of the DPA 1998 provides that -

(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.

Request for assessment

Section 42 of the DPA provides:

‘(1) A request may be made to the Commissioner by or on behalf of any person who is, or believes himself to be, directly affected by any processing of personal data for an assessment as to whether it is likely or unlikely that the processing has been or is being carried out in compliance with the provisions of this Act.

(2) On receiving a request under this section, the Commissioner shall make an assessment in such manner as appears to him to be appropriate, unless he has not been supplied with such information as he may reasonably require in order to—

- (a) satisfy himself as to the identity of the person making the request, and
- (b) enable him to identify the processing in question.

(3) The matters to which the Commissioner may have regard in determining in what manner it is appropriate to make an assessment include—

- (a) the extent to which the request appears to him to raise a matter of substance,
- (b) any undue delay in making the request, and
- (c) whether or not the person making the request is entitled to make an application under section 7 in respect of the personal data in question.

(4) Where the Commissioner has received a request under this section he shall notify the person who made the request—

- (a) whether he has made an assessment as a result of the request, and
- (b) to the extent that he considers appropriate, having regard in particular to any exemption from section 7 applying in relation to the personal data concerned, of any view formed or action taken as a result of the request.'