

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 9 June 2011

Public Authority: Ministry of Justice
Address: 102 Petty France
London
SW1H 9AJ

Summary

The complainant requested information relating to the Inquiries Bill, which became the Inquiries Act 2005. The public authority refused to disclose this information and cited the exemption provided by section 35(1)(a) (formulation or development of government policy) of the Act. The Commissioner finds that this exemption is engaged, but that the public interest in the maintenance of this exemption does not outweigh the public interest in disclosure. The public authority is therefore required to disclose the information requested.

The Commissioner's Role

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

The Request

2. The complainant made the following information request on 11 June 2010:

"Please could you provide me with the information contained in files created by the (then) Bill team for the Inquiries Bill about the part of the now Act headed "Inquiry procedure", covering sections 17 to 23."

3. The response to this request was dated 7 July 2010. The request was refused, with the public authority citing the exemption provided by section 35(1)(a) (formulation or development of government policy).
4. The complainant responded to this on 10 July 2010 and requested that the public authority carry out an internal review. The complainant argued that the public interest factors set out by the public authority, which were essentially that disclosure could inhibit participants in the policy-making process, had not been tied to the specific information requested and that the prejudice predicted by the public authority would not result due to the policy-making process relating to the Inquiries Act 2005 having been completed well before the date of the request.
5. The public authority responded with the outcome of the internal review on 28 July 2010. The review upheld the application of section 35(1)(a). The position of the public authority was that the arguments cited previously were relevant as the process of post-legislative scrutiny was ongoing at the time of the request.

The Investigation

Scope of the case

6. The complainant contacted the Commissioner's office on 28 July 2010. The complainant indicated at this stage that he did not agree with the reasoning given by the public authority for the refusal of his request.

Chronology

7. The Commissioner contacted the public authority initially on 4 September 2010 and asked that it respond with a copy of the information withheld from the complainant. It responded with this information on 6 September 2010. The public authority later confirmed that it did not wish to advance any further arguments to those included in the refusal notice and internal review response.

Background

8. The request refers to the Inquiries Bill. This became the Inquiries Act 2005, which received Royal Assent on 7 April 2005 and came into force on 7 June 2005.

Analysis

Exemptions

Section 35

9. The public authority has cited the exemption provided by section 35(1)(a). This provides that information relating to the formulation or development of government policy is exempt. Consideration of this exemption is a two-stage process; first, the exemption must be engaged as a result of the information in question conforming to the class described in the exemption. Secondly, this exemption is qualified by the public interest, which means that the information must be disclosed if the public interest in the maintenance of this exemption does not outweigh the public interest in disclosure.
10. Covering first whether the exemption is engaged, the approach of the Commissioner to the term 'relates to' as it is used in this exemption is that this can safely be interpreted broadly. This is in line with the approach taken by the Information Tribunal in the case *DfES v the Information Commissioner & the Evening Standard* (EA/2006/0006) in which it stated:

"If the meeting or discussion of a particular topic within it, was, as a whole, concerned with s35(1)(a) activities, then everything that was said and done is covered. Minute dissection of each sentence for signs of deviation from its main purpose is not required nor desirable." (paragraph 58)

11. The information in question here relates to the process of the development of the Inquiries Bill, a process that resulted in the Inquiries Act 2005. The information records various drafts of clauses to the Bill and exchanges between officials about these.
12. The Commissioner considers it clear that this information can be accurately characterised as relating to the formulation or development of government policy, with the policy in question ultimately expressed in the Inquiries Act 2005. The exemption provided by section 35(1)(a) is, therefore, engaged.

The public interest

13. Having concluded that the exemption is engaged, it is necessary to go on to consider whether the balance of the public interest favours the maintenance of this exemption. In forming a conclusion the Commissioner has taken into account factors that relate specifically to the exemption cited, also focusing on the information in question,

including the arguments advanced by the public authority and by the complainant, as well as the general public interest in disclosure on the grounds that this would improve the transparency and openness of the public authority.

14. The mere fact that the information is within the class specified in the exemption is not, however, of relevance to the balance of the public interest. This is in line with the approach taken by the Information Tribunal in *DfES v the Commissioner & the Evening Standard* (EA/2006/0006), where it stated in connection with section 35(1)(a):

“The weighing [of the public interest] exercise begins with both pans empty and therefore level.” (paragraph 65)

15. Covering first those factors that favour maintenance of the exemption, the public authority has argued that disclosure would result in harm to the policy-making process in that the participants in this process would be inhibited if they were aware that the record of their contributions may later be subject to disclosure via the Act. In *DfES v the Commissioner and the Evening Standard* (EA/2006/0006) the Information Tribunal provided a number of guiding principles for consideration of the balance of the public interest in connection with section 35(1)(a). The arguments of the public authority about disclosure resulting in inhibition to participants in the policy-making process are relevant to two factors highlighted by the Tribunal: ‘safe space’ and ‘chilling effect’.
16. The term ‘chilling effect’ refers to an adverse effect on the frankness and candour of participants in the policy making process. Arguments about ‘safe space’ are related to chilling effect arguments but distinct, as the need for a safe space within which to debate policy exists regardless of any chilling effect that may result through disclosure. The basis of safe space arguments is that an erosion of the safe space for policy making would have a detrimental impact on the quality of the policy-making process. Safe space arguments are relevant where disclosure would erode the safe space in relation to an ongoing policy making process.
17. The weight that the Commissioner affords to chilling effect arguments will depend on factors such as content of the information and the circumstances at the time of the request. For example, an argument that disclosure would result in a chilling effect on policy making in general may often be less persuasive than an argument that a chilling effect would result to the specific policy area to which the information relates. ‘Chilling effect’ arguments should not be dismissed out of hand as “ulterior considerations” but should be given appropriate weight in the public interest test dependent on the circumstances of the case and the information in question. The term ‘chilling effect’ can cover a

number of related scenarios, which argue a progressively wider impact on the frankness and candour of debate. As the impact of the 'chilling effect' argued gets progressively wider, the Commissioner considers that it will be more difficult for convincing arguments of this nature to be sustained. Also key is the stage reached in the policy-making process at the time of the request. Policy formulation/development is a series of separate decisions rather than a continuous process of evolution. Once a decision has been made, the sensitivity of the information relating to it will generally start to wane. In general a chilling effect is less likely once a decision has been made.

18. In this case, at the refusal notice stage the public authority did not link the chilling effect arguments to the content of the information in question. The complainant raised this when requesting an internal review and also correctly referred to the policy-making process to which the information in question relates having been complete for several years prior to the date of the request, this completion having occurred at the stage when the Inquiries Act received Royal Assent in April 2005.
19. To the extent that the arguments advanced by the public authority are general and not linked to the policy-making process recorded within the information in question, the view of the Commissioner is that this factor carries significantly reduced weight in favour of maintenance of the exemption than would have been the case had this argument been linked to the information in question and the policy-making process to which it relates. The remaining weight that this factor would carry would relate to a future general chilling effect that may occur to any policy-making process.
20. Part of the reasoning for the Commissioner affording to this factor only minimal weight in favour of maintenance of the exemption is the duty that applies to civil servants to provide advice that is as full and uninhibited as necessary. In order for the Commissioner to accept that a civil servant would allow a chilling effect to compromise their advice, there would have to be specific evidence relating to the information in question and its context that suggested that this would be a likely result of disclosure.
21. At internal review stage, the public authority argued that the information was part of an ongoing policy-making process in that post-legislative scrutiny of the Inquiries Act 2005 was ongoing at the time of the request. This scrutiny process was started when a memorandum to the Justice Select Committee¹ was published by the public authority in

¹ <http://www.justice.gov.uk/downloads/publications/policy/moj/2010/Post-Legislative-Assessment-Inquiries-Act.pdf>

October 2010. Whilst the Commissioner recognises that this process was ongoing at the time of the request, the public authority has not explained how disclosure here would result in a chilling effect to this process. In the internal review response, the public authority explained that:

"[post legislative scrutiny] involves the assessment and summarising of the objectives of the Act drawn from all the documentation and commitments made during the passage of the Bill."

22. This process does not, however, alter the fact that the information in question was recorded more than five years prior to the request. Had the request been for information recording during the development and formulation stage of the post-legislative scrutiny process, an argument that a chilling effect would result to that process through disclosure whilst it was ongoing may have carried weight. In the event, however, this is not the argument advanced by the public authority.
23. The Commissioner also notes that the Memorandum to the Justice Select Committee states that the operation of the Inquiries Act 2005 was assessed by reference to Inquiries set up under this Act. No mention is made of having assessed the Act by reference to previous policy options (which may be contained in the Bill documents). The Commissioner has also noted the general document: Post-legislative Scrutiny - the Government's Approach². The document states at page 12 that the post legislative scrutiny system 'should avoid re-running what are basically policy debates already conducted during passage of the Act'. The Commissioner does not, therefore, accept that the chilling effect argument carries additional weight as a result of the post-legislative scrutiny process having been ongoing at the time of the request.
24. A counter argument to the chilling effect can also be made that anticipation of disclosure could improve the quality of the policy making process as the participants in this process would be aware of the possibility of scrutiny. However, the Commissioner does not dismiss the chilling effect argument entirely, due to the content of the information. This sets out in considerable detail policy options and the intentions of the Bill. Parts of this information are attributable to individual officials.. The Commissioner accepts that this content is suggestive that it would have required free and frank contributions from officials. Given this content, the Commissioner also accepts that the chilling effect argument carries some weight in favour of maintenance of the exemption, but

² <http://www.official-documents.gov.uk/document/cm73/7320/7320.pdf>

significantly less than would have been the case had the public authority advanced convincing arguments on this point that related to the specific information in question and the policy-making process to which this information relates.

25. In terms of safe space arguments the Commissioner does not accept that disclosure of the information in question would have significantly impacted on the safe space required for officials and ministers to contribute to the post legislative scrutiny process. The link between the requested information and the process is not clear. This argument can only be accorded a limited amount of weight.
26. Turning to those arguments that favour disclosure of the information, brief research reveals that the Inquiries Act 2005 has been the subject of significant public debate. This debate appears to primarily relate to the perception that a result of this Act is that Inquiries have been placed under the control of the Executive. The sections of this Act specified by the complainant in his request include provisions that grant powers to Ministers in relation to Inquiries, and so the information in question here would be directly relevant to this area of debate.
27. The Commissioner has commented previously in this Notice on the level of detail included within this information. That this information sets out to this level of detail the reasoning for the inclusion in this Act of the sections specified by the public authority means that disclosure of this information would contribute substantively to public understanding about these provisions and to the debate about this. The Commissioner considers this to be a public interest factor in favour of disclosure of significant weight.
28. The Commissioner has recognised a valid factor in favour of maintenance of the exemption on the basis of the chilling effect argument advanced by the public authority. This factor carries reduced weight, however, as a result of it not being clearly argued in respect of the information in question and not closely related to an ongoing policy making process. The Commissioner has also given little weight to the safe space arguments. Given this reduced weight, the view of the Commissioner is that the public interest in disclosure on the basis that this would increase public understanding of the reasoning behind the relevant sections of the Inquiries Act 2005 and inform the debate about this legislation, which has been the subject of criticism and controversy, combined with the general public interest in improving the openness and transparency of the public authority, is not outweighed by the public interest in the maintenance of the exemption. The conclusion of the Commissioner is, therefore, that the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.

Procedural Requirements

Sections 1 and 10

29. In failing to disclose within twenty working days of receipt of the request information which the Commissioner has now concluded should have been disclosed, the public authority did not comply with the requirements of sections 1(1)(b) or 10(1).

The Decision

30. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act in that it concluded incorrectly that the public interest in the maintenance of section 35(1)(a) outweighed the public interest in disclosure and, in so doing, did not comply with the requirements of sections 1(1)(b) or 10(1).

Steps Required

31. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- disclose to the complainant all information falling within the scope of his request.
32. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

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

Right of Appeal

34. 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

35. 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.
36. 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 9th day of June 2011

Signed

Steve Wood
Head of Policy Delivery
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Legal Annex

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 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 35(1) provides that –

"Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (a) the formulation or development of government policy,
- (b) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request or the provision of such advice, or
- (d) the operation of any Ministerial private office."