

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 5 April 2011

Public Authority: Foreign and Commonwealth Office
Address: Old Admiralty Building
Whitehall
London
SW1A 2PA

Summary

In July 2010 the complainant requested information relating to a post which a British Ambassador published on an internet blogging site. The public authority relied on section 27 to refuse the request but by the date of this notice it had failed to make its substantive determination on the public interest test. The Commissioner found substantial procedural breaches and ordered the public authority to issue a refusal notice compliant with section 17(3) or, in the alternative, release the requested information to the complainant.

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. On 11 July 2010 the complainant wrote to the public authority as follows;

"Frances Guy, the British Ambassador to the Republic of Lebanon, published a post to her blog at <http://blogs.fco.gov.uk/roller/guy/entry> concerning the death of Sheikh Mohammed Hussein Fadlallah, a post that was later deleted.

Please provide electronic copies of all internal correspondence you hold related to this post, including (but not restricted to) reactions from colleagues and managers of Ms. Guy, whether directed to her or not; how the decision to delete the post was come to; and any correspondence relating to the decision of Ms. Guy to write a new blog post about the incident, published at <http://blogs.fco.gov.uk/roller/guy/entry...>"

3. On 9 August 2010 the public authority replied to the complainant, stating as follows;

"The FOI Act obliges us to respond to requests promptly and in any case no later than 20 working days after receiving your request. However, when a qualified exemption applies to the information and the public interest test is engaged, the Act allows the time for response to be longer than 20 working days, and a full response must be provided within such time as is reasonable in all circumstances of the case. We do, of course, aim to make all decisions within 20 working days, including in cases where we need to consider where the public interest lies in respect of a request for exempt information. In this case, however, we have not yet reached a decision on where the balance of the public interest lies.

In your case we estimate it will take up to an additional 20 working days to take a decision on where the balance of the public interest lies. Therefore, we plan to let you have a response by 6 September 2010. If it appears that it will take longer than this to reach a conclusion, we will of course keep you informed.

The exemption we are currently considering in relation to your request is section 27 (International Relations)."

4. The public authority informed the complainant that it needed further time to consider the public interest test in correspondence dated 9 August, 6 September, 4 October, 29 October and 11 November 2010.
5. On 6 September 2010 the complainant requested the public authority to review its handling of his request for information.
6. In an email dated 21 October 2010 the public authority replied as follows;

"I would like to apologise for the delay it has taken to respond to your request with the information requested. I have conducted a full examination of all the material of relevance to your request. As stated in our above mentioned letter, we have aimed to consider where public interest lies in respect of a request for exempt information. The Near East Group is an extraordinarily busy department and receives a large

volume of complex Freedom of Information requests, some of which, as you are aware, go to review and to the Information Commissioner's Office. To enable the department to respond to requests promptly, we have had to recruit a temporary officer to deal with these requests. Regrettably, in instances where requests cover sensitive issues that would or might affect relations between the UK and any other State, it is crucial that sufficient time is taken to reach the most appropriate conclusion. Unfortunately we haven't been able to reach a decision on where the balance of the public interest lies in this instance but will aim to do so as soon as possible."

The Investigation

Scope of the case

7. On 27 December 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled.

Chronology

8. The Commissioner wrote to the public authority on 18 February 2011. In his letter the Commissioner asked for a copy of the withheld information and for the public authority to specify its application of the Act. The Commissioner informed the public authority that he expected its substantive reply within 20 working days
9. In a letter dated 24 February 2011 the public authority wrote to the Commissioner as follows;

"You will no doubt be aware of recent developments in the Middle East and North Africa, as well other international crises. This has unfortunately placed an abnormally heavy workload on the FCO, which means that we currently have to reprioritise resources to effectively meet our international obligations. It would be really appreciated, therefore, if you could grant us a further 20 working day extension to allow us some space to give proper consideration to the points highlighted in your letter."
10. The Commissioner replied (correspondence dated 7 March 2011) that the information request made in July 2010 remained de facto unanswered and that the current disruptions in the Middle East were relatively new. The Commissioner advised the public authority that he was therefore not willing to agree to the requested further 20 working day extension.

Analysis

Substantive Procedural Matters

11. Section 10(1) requires the public authority to comply with section 1 of the Act within twenty working days of receipt of the request.
12. Section 1(1)(a) of the Act requires the public authority to inform the complainant in writing whether or not recorded information is held that is relevant to the request. The public authority has still not explicitly confirmed or denied whether it holds relevant recorded information. This is a breach of section 10(1).
13. Section 1(1)(b) requires that if the requested information is held by the public authority it must be disclosed to the complainant unless a valid refusal notice has been issued. The public authority has still failed to either disclose the requested information or provide a valid refusal notice. The Commissioner therefore finds the public authority in breach of section 1(1)(b) of the Act as it has failed to either provide the requested information or a valid refusal notice within the statutory time limits.
14. Section 17(1) requires that, where a public authority believes that any exemption from Part II of the Act applies, it should issue a notice stating why the exemption in question is engaged. This notice must be issued within 20 working days of receipt of the request; there is no extension available to the time within which a notice identifying the exemption and stating why it is engaged must be provided.
15. In this case the original refusal notice did not offer the complainant any reason why the public authority believed section 27 was engaged. The Commissioner therefore finds that the public authority has breached section 17(1)(c) in failing to state why it believed that the exemption was engaged within twenty working days.
16. Section 17(3) does allow the public authority to provide its public interest determination in a separate notice 'within such time that is reasonable in the circumstances'. The Commissioner has issued publicly available Good Practice guidance on this point. This can be found at:

http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/foi_good_practice_guidance_4.pdf.
17. It states the following:

"...our view is that public authorities should aim to respond fully to **all** requests within 20 working days. In cases where the public interest considerations are exceptionally complex it may be reasonable to take longer but, in our view, in no case should the **total** time exceed 40 working days."

18. In this case the Commissioner notes that the public authority has exceeded the maximum of his guidance by more than 100 working days. The Commissioner believes this to be unacceptable and in breach of section 17(3).

The Decision

19. The Commissioner's decision is that the public authority did not comply with section 10(1) of the Act as it failed to comply with section 1(1)(a) and 1(1)(b) of the Act within twenty working days.
20. The public authority did not deal with the request for information in accordance with section 17(1)(c) of the Act in that it did not explain within 20 working days of receipt of the request why the exemption was engaged.
21. The public authority has also breached section 17(3)(b) of the Act as it failed to complete its public interest determination and communicate the results of this to the complainant within a reasonable timescale.

Steps Required

22. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- Issue a notice compliant with sections 17(1) and 17(3) that states why the exemption is engaged, and its conclusion about where the balance of the public interest lies, or
 - If the public authority concludes that the balance of the public interest favours disclosing the information or no longer considers the exemption to apply, the information should be provided to the complainant.

Failure to comply

23. 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.
24. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Right of Appeal

25. 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

26. 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.
27. 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 5th day of April 2011

Signed

**Alexander Ganotis
Group Manager – Complaints Resolution
Information Commissioner’s Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

General Right of Access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him."

Time for Compliance

Section 10(1) provides that –

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

Section 10(2) provides that –

"Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt."

Section 10(3) provides that –

"If, and to the extent that –

- (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
- (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given."

Section 10(4) provides that –

“The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.”

Section 10(5) provides that –

“Regulations under subsection (4) may –

- (c) prescribe different days in relation to different cases, and
- (d) confer a discretion on the Commissioner.”

Section 10(6) provides that –

“In this section –

“the date of receipt” means –

- (e) the day on which the public authority receives the request for information, or
- (f) if later, the day on which it receives the information referred to in section 1(3);

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.”

Refusal of Request

Section 17(1) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 17(2) states –

“Where–

(a) in relation to any request for information, a public authority is, as respects any information, relying on a claim–

1. 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

1. that the information is exempt information only by virtue of a provision not specified in section 2(3), and

(b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.”

Section 17(3) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

Section 17(4) provides that -

“A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

Section 17(5) provides that –

“A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.”

Section 17(6) provides that –

“Subsection (5) does not apply where –

- (a) the public authority is relying on a claim that section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.”

Section 17(7) provides that –

“A notice under section (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.”

International Relations

Section 27(1) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (c) relations between the United Kingdom and any other State,
- (d) relations between the United Kingdom and any international organisation or international court,
- (e) the interests of the United Kingdom abroad, or
- (f) the promotion or protection by the United Kingdom of its interests abroad.”

Section 27(2) provides that –

“Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.”

Section 27(3) provides that –

“For the purposes of this section, any information obtained from a State, organisation or court is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.”

Section 27(4) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a)-

(g) would, or would be likely to, prejudice any of the matters mentioned in subsection (1), or

(h) would involve the disclosure of any information (whether or not already recorded) which is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.”

Section 27(5) provides that –

“In this section-

“international court” means any international court which is not an international organisation and which is established-

(i) by a resolution of an international organisation of which the United Kingdom is a member, or

(j) by an international agreement to which the United Kingdom is a party;

“international organisation” means any international organisation whose members include any two or more States, or any organ of such an organisation;

“State” includes the government of any State and any organ of its government, and references to a State other than the United Kingdom include references to any territory outside the United Kingdom.”