

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 29 June 2011

Public Authority: The Parliamentary and Health Service
Ombudsman
(‘The PHSO’)

Address: Millbank Tower
Millbank
London
SW1P 4QP

Summary

The complainant requested, under the Freedom of Information Act 2000 (‘the Act’), information about the consideration of complaints that he and his daughter had submitted to the PHSO. He did not receive all the information that he requested.

The complainant referred the case to the Commissioner and narrowed his complaint to consider the recorded information about the involvement of any of the PHSO’s Directors with the complaints. The Commissioner found that the PHSO had failed to clearly indicate what recorded information it held or provide it and that it had breached section 1(1)(b). During the course of his investigation, the PHSO provided the relevant information that was held to the complainant.

The complainant also asked the Commissioner to consider the PHSO’s compliance with section 10(1) of the Act. The Commissioner has found that the PHSO breached section 10(1) because it failed to comply with section 1(1) in twenty working days. He does not require remedial steps to be taken in this case.

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 2003 the complainant complained about the care and treatment received by his wife from a named Trust.
3. He was unhappy with how this complaint was dealt with and referred this matter to the Healthcare Commission who had the powers to conduct an independent review of how his complaint is handled.
4. He was also became unhappy with how the Healthcare Commission dealt with her complaint and complained to the PHSO.
5. The complainant's daughter also made a complaint to the PHSO about the Trust and the Healthcare Commission in her name. The PHSO combined the two cases and decided that they would not take them forward. It reiterated its position on review. The complainant has made a number of requests for information to understand better the reasons for these decisions and who decided them.

The Requests

6. The complainant made a number of requests for information to the PHSO. The following table outlines the dates of the ones that were referred originally to the Commissioner:

No	Request	Response	Internal review request	Internal review response
1	27 February 2010	28 May 2010	21 August 2010	18 October 2010
2	3 March 2010	28 May 2010	21 August 2010	18 October 2010
3	30 April 2010	28 May 2010	21 August 2010	18 October 2010
4	12 May 2010	28 May 2010	21 August 2010	18 October 2010

7. Further correspondence was exchanged and this led to these requests being internally reviewed for a second time on 25 February 2011.
8. Within this correspondence, there was one set of requests on which the complainant agreed the Commissioner was to focus. The Commissioner has therefore outlined the relevant parts of the correspondence below:
 1. On 30 April 2010 the complainant requested ... '(ii) the names and titles of personnel involved [in considering his complaint] and (vi) what was the involvement of Ann Abrahams (the Ombudsman herself)';
 2. On 28 May 2010 the PHSO provided a response. It detailed some of the individuals who were involved, but did not offer a comprehensive record or explain the involvement of the Ombudsman;
 3. On 21 August 2010 the complainant requested an internal review. He was not happy with the response he had received;
 4. On 18 October 2010 the PHSO issued its internal review. For item (vi) it stated *'I can confirm that Ann Abraham or Kathryn Hudson, Deputy Ombudsman, and PHSO directors will have been involved in the decision taken...'*;
 5. On 23 October 2010 the complainant explained that the information wasn't clear and asked for more details about Executive involvement in the cases; and
 6. On 25 February 2011 the PHSO issued its second internal review. It explained that on 18 October 2010 it meant to say that the Ombudsman, Deputy Ombudsman or a Director of the PHSO would have been involved with the handling of the complaints. It apologised for its lack of clarity and then appeared to confirm that only a one Director was involved in the handling of these complaints. However, it was not definitive whether this was restricted to only the review of the decision, or was true for the whole of its complaints process.

The Investigation

Scope of the case

9. The complainant first contacted the Commissioner on 20 February 2011. He was dissatisfied with how the PHSO had handled his requests for information.

10. On 12 May 2011 the complainant agreed that the Commissioner should look at:
 1. The recorded information held about which PHSO director or directors were involved in investigating his and his daughter's complaints; and
 2. Any issues concerning the PHSO's timeliness about this matter.
11. The complainant also previously 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 cannot adjudicate on the public authority's processes regarding how it handles complaints. All he can consider in this Notice is its compliance with the Act. The Act only applies to relevant information that is held in recorded form.

Chronology

12. On 28 March 2011 the Commissioner confirmed to the complainant and the PHSO that he had received an eligible complaint. He asked the PHSO to explain its position in this case.
13. On 26 April 2011 the PHSO explained its handling of the relevant requests to the Commissioner.
14. On 9 May 2011 the Commissioner wrote to the complainant to determine the scope of his complaint. He also spoke to the complainant on the telephone to explain the options that were available to him.
15. On 12 May 2011 the complainant confirmed the scope of Commissioner's investigation in writing and the Commissioner replied on 15 May 2011 to explain how the investigation would proceed.
16. Also on 15 May 2011 the Commissioner made further enquiries of the PHSO and received a response to his enquiries on 20 May 2011.
17. On 20 May 2011 the PHSO also confirmed its position in relation to the outstanding substantive issue to the complainant. It provided a copy of that letter to the Commissioner.

Analysis

Exemptions

Does the public authority hold further relevant recorded information that is relevant to part of the request that has been referred to the Commissioner?

18. Section 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.
19. It follows that it is necessary for information to be held in recorded form at the date of the request for it to be subject to the Act.
20. It is important to note the standard of proof that the Commissioner uses to determine whether relevant recorded information is held. In *Linda Bromley & Others v Information Commissioner and Environment Agency* [EA/2006/0072] ('Bromley'), the Information Tribunal confirmed that the test for establishing whether information was held by a public authority was not one of certainty, but rather the balance of probabilities.
21. He has also been assisted by the Tribunal's explanation of the application of the 'balance of probabilities' test in *Bromley*. It explained that to determine whether information is held requires a consideration of a number of factors including the quality of the public authority's final analysis of the request, scope of the search it made on the basis of that analysis and the rigour and efficiency with which the search was then conducted. It also requires considering, where appropriate, any other reasons offered by the public authority to explain why the information is not held.
22. The PHSO explained that it knew who from its executive team had considered the complaints from looking at the case handling parts of its file. It was certain that only two specified individuals from its executive team had considered the issues that were raised. The first individual took the original decision not to investigate them and the second reviewed that decision within the complaints process.
23. It explained that this accorded with its normal process because there was no value in work being duplicated by individuals of senior rank.
24. It also explained that it apologised for being unclear in the first instance and has on the Commissioner's advice written to the complainant to clarify what it said.
25. The Commissioner has been satisfied on the balance of probabilities that the only recorded information that is held by the PHSO about this matter is that the complaints were only considered by two named directors.
26. It follows that the Commissioner is satisfied that no further relevant recorded information is held that is relevant to the part of the request that he has been referred.

Procedural Requirements

Section 1(1)(b)

27. Section 1(1)(b) requires that non-exempt recorded information is communicated to the complainant by the date of the internal review.
28. The PHSO had failed to explain itself clearly with respect to the relevant part of the request that the Commissioner has been referred despite conducting two internal reviews.
29. In the Commissioner's view the PHSO therefore failed to comply with section 1(1)(b) in this case.
30. The Commissioner does not require any remedial steps to be taken in relation to this breach because the PHSO has now clarified the situation to the complainant on the Commissioner's request.

Section 10(1)

31. Section 10(1) requires that the public authority complies with section 1(1) within twenty working days (except for limited exceptions that are not relevant to this case).
32. The PHSO failed to comply with section 1(1) in twenty working days and therefore also breached section 10(1).

The Decision

33. The Commissioner's decision is that the public authority did not deal with the part of the request for information that the Commissioner was referred in accordance with the Act. It failed to offer a clear response and breached section 1(1)(b) and it failed to comply with section 1(1) in twenty working days, so breached section 10(1).

Steps Required

34. The Commissioner requires no steps to be taken as the identified information was provided to the applicant during the course of the investigation.

Right of Appeal

35. 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

36. 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.
37. 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 29th day of June 2011

Signed

**Andrew White
Group Manager**

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

Legal Annex

Freedom of Information Act 2000

Section 1 - General Right of Access

Section 1 of the Act provides that:

- (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 the 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.”
- (4) The information –
 - (a) in respect of which the applicant is to be informed under subsection (1)(a), or
 - (b) which is to be communicated under subsection (1)(b),is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.”
- (5) A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).”

- (6) In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.

Section 10 - Time for Compliance

Section 10 of the Act provides that:

(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 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.”

(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 Banking and Financial Dealings Act 1971 in any part of the United Kingdom.”