

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 28 September 2011

Public Authority: Department for Business, Innovation and Skills
Address: 1 Victoria Street
London
SW1H 0ET

Summary

The complainant made two requests under the Freedom of Information Act 2000 ("the Act") to the Department for Business, Innovation and Skills ("BIS") concerning how it dealt with a complaint that she made to it.

For the first request, BIS explained that the information was first party personal data and was exempt by virtue of section 40(1). It later revised its position and confirmed that it held no relevant recorded information. For the second request, BIS provided the information that it had under the DPA.

The Commissioner finds that BIS was wrong that it did not hold any relevant recorded information for request one and finds breaches of section 1(1)(a) and 10(1). However, the Commissioner also finds that all the information held was first party personal data and was exempt by virtue of section 40(1). He requires no remedial steps to be taken.

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 Act. This Notice sets out his decision.

Background

2. The complainant has a dispute with the University of Edinburgh. She wrote to BIS about her concerns and her request concerned how it handled that correspondence.

The Requests

3. On 25 November 2010 the complainant requested the following information and directly stated that she sought the information under the Act:

'All communications the Ministry of Business and Innovations made with the University of Edinburgh and/or other parties regarding my problem at the University of Edinburgh. I was a PhD student at the University of Edinburgh and encountered several difficulties' (request one).

4. On 2 December 2010 BIS issued a preliminary response. It explained that the information requested appeared to be her own personal data, so it was applying section 40(1) and considering it under the Data Protection Act 1998 (the "DPA"). It also asked for the complainant to help by outlining the sort of information that BIS might hold.
5. On the same day, the complainant replied, insisting BIS dealt with the request under the Act and not the DPA. She said that the request may cover further information that was not her personal data.
6. On 4 January 2011 BIS issued its response. It confirmed that it held no relevant recorded information for this request.
7. On the same day, the complainant requested an internal review. Firstly, she expanded her request to cover

'any records the department holds in relation to me' (request two).

She also asked that the request was dealt with under both pieces of legislation, and explained that she believed that further information was held.

8. On 11 February 2011 BIS issued its response under the DPA. It provided a number of items of information that it believed were relevant to request two.

The Investigation

Scope of the case

9. On 15 March 2011 the complainant contacted the Commissioner to complain about the way her request for information had been handled. She specifically asked the Commissioner to consider:
 - that she made her request under the Act and wanted her request to be considered under it;
 - whether the response to the second request showed the response to the first request was incorrect; and
 - that BIS held the information she requested in her first request.
10. Section 7 of the DPA gives an individual the right to request copies of personal data held about them – this is referred to as the right of subject access. The Commissioner has made an assessment under section 42 of the DPA into BIS' compliance with the DPA, and provided the complainant with a copy. That assessment does not form part of this Decision Notice.
11. On 17 July 2011 the complainant agreed with the Commissioner that his investigation would consider the following three things:
 - [1]** Whether BIS held relevant recorded information for the request dated 25 November 2010 (and the expanded request dated 4 January 2011).
 - [2]** If so, to consider whether this information can be disclosed to the public under the Act.
 - [3]** Any procedural issues that arose in this case.
12. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act. In particular, the Commissioner cannot consider the complainant's concerns about the University of Edinburgh.

Chronology

13. On 4 April 2011 the Commissioner wrote to BIS and the complainant to explain that he had received an eligible complaint. He said that he would consider the operation of the DPA first and asked BIS to provide him with a copy of any withheld information along with an explanation about why it was being withheld.

14. On 27 April 2011 BIS responded. It provided a detailed overview of the history of the complainant's correspondence, an explanation of its position and an outline of the searches it had undertaken.
15. On 11 July 2011 the Commissioner communicated the result of his DPA assessment to both parties.
16. On 14 July 2011 the Commissioner wrote to the complainant to confirm the scope of his investigation under the Act. On 17 July 2011 he received a response.

Analysis

Substantive Procedural Matters

What recorded information was held?

17. Section 1¹ 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 recorded information of the description specified in the request and (b) if that is the case to have that information communicated to him. It follows that it is necessary for information to be held in recorded form by BIS at the date of the request for it to be subject to the Act.
18. The standard of proof that the Commissioner uses to determine whether relevant recorded information is held was confirmed by the Tribunal in *Linda Bromley & Others v Information Commissioner and Environment Agency* [EA/2006/0072] (*'Bromley'*). It said that the test for establishing whether information was held by a public authority was not one of certainty, but rather the balance of probabilities.
19. 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, the 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 further recorded information is not held.

¹ All sections of the Act that are cited in this Notice can be found in full in an attached legal annex.

20. The Commissioner has considered the arguments of both sides and considered the factors specified in *Bromley*.
21. The Commissioner considers that there are two requests that require separate consideration in this Notice:
 - (I) the request dated 25 November 2010 ('request one'); and
 - (II) the expanded request dated 4 January 2011 ('request two').

Request one

22. For this request, the complainant contended that further relevant recorded information must be held. From the correspondence he has been provided with, the Commissioner has identified the following arguments:
 - she had been notified by another Department that her communications had been passed to BIS and therefore information must be held;
 - request two generated some information that was relevant to request one;
 - the complainant believes she had raised important concerns;
 - she was '*semi-certain that the University had sent fabricated stories to the Secretary of State to justify their unacceptable position against [her]*'; and
 - she believed that information about 'policy and decision making' may be caught by the Act and not by the DPA.
23. The Commissioner has carefully considered the way the request was worded. It asks for communications that BIS 'made' with other parties about her complaint. In the Commissioner's view this means that the communications must have been internally generated by BIS and sent to someone else.
24. The Commissioner has considered the complainant's submissions about correspondence being passed to BIS and whether the information provided as a result of request two was also relevant to request one. He finds that BIS held copies of communications it had sent to the complainant and that these were caught by both requests. BIS breached sections 1(1)(a) and 10(1) in denying that it held this information. This will be discussed further in the procedural matters section of this Notice below.

25. The Commissioner then considered whether there is further relevant recorded information held for request one that goes beyond what was provided for request two.
26. BIS provided the Commissioner with its internal communications about how it searched for information for both of the requests. From those communications, the Commissioner is satisfied that BIS searched in the right locations for the right things. He is content that had there been further relevant recorded information it would have been found.
27. BIS also explained that it had no business reason to hold further relevant recorded information. It has consistently told the complainant that universities are independent autonomous bodies responsible for managing their own affairs. While it provides some money for universities, it has no power to get involved in disputes students may have with universities and it respects the independence of universities in such matters. Complaints about how academic complaints were handled by universities should be made to the Office of the Independent Adjudicator. It follows that BIS has no role in considering the sort of issues that the complainant raised.
28. The Commissioner has considered the other arguments raised by the complainant about her issues being important and that she was semi-certain that the University would have justified its position in relation to her to the Secretary of State. The Commissioner accepts that the complainant's concerns are important to her. However, as they relate to something that BIS is not responsible for, they cannot be said to be important to BIS. The Commissioner is content that BIS did not write to the University about her concerns, and that the University would not have written to BIS about them either. It follows that these arguments are not convincing about why more information is held.
29. The Commissioner does not consider that any policy about handling matters that do not fall within BIS' remit would be embraced by the wording of her request, whatever act it was considered under. Therefore, this factor is not relevant either.
30. Having considered the arguments of both sides, he is satisfied that, on the balance of probabilities, BIS held no further relevant recorded information relevant to the first request.

Request two

31. The revised request asked for everything BIS held about the complainant.

32. The Commissioner is satisfied that BIS held no further relevant recorded information for request two for the same reasons as he is satisfied that it held no further relevant recorded information for request one, as outlined in paragraphs 25 to 30 above.

Exemption

33. Although there is no further relevant recorded information held, the complainant repeatedly demanded that her requests were considered under the Act rather than the DPA.
34. In the Commissioner's view this approach was somewhat misguided. The DPA provides the data subject with a private right of access to her personal data. This is different from the Act which provides a public right of access to relevant recorded information.
35. First party personal data is absolutely exempt from disclosure under the Act by virtue of section 40(1).
36. Personal data is defined in section 1 of DPA as 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.'

37. The Commissioner has considered the information that was provided in relation to request two under the DPA and considers that it all constitutes the complainant's own personal data. That is because it all relates to something of biographical significance to the complainant – how her allegations about a University have been handled. It follows that all the information caught by the two requests constituted first party personal data and BIS was correct that it could be withheld from disclosure to the public under section 40(1).
38. The Commissioner believes that BIS acted appropriately when it told the complainant that it would move to consider the requests under section 7 of the DPA as this was the appropriate regime.

Procedural issues

39. Section 10(1) requires that a public authority complies with section 1 of the Act in 20 working days. Section 1(1)(a) requires that a public authority confirms or denies whether it holds relevant recorded information.
40. BIS wrongly denied that it held relevant recorded information for request one when it held some. This constituted a breach of section 1(1)(a) and 10(1).

The Decision

41. 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 correctly identified all the relevant recorded information that it held by the time of the Commissioner's investigation; and
 - it correctly explained that all of this information was exempt from disclosure by virtue of section 40(1).
42. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
 - it wrongly denied that it held relevant recorded information for request one and this was a breach of section 1(1)(a); and
 - it breached section 10(1) because it failed to comply with section 1(1)(a) within 20 working days of receiving request one.

Steps Required

43. The Commissioner requires no steps to be taken.

Right of Appeal

44. 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,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

45. 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.
46. 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 28th day of September 2011

Signed

**Faye Spencer
Group Manager
Information Commissioner's Office
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Legal Annex

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.”

Section 40(1) – Personal information

“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.”