

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 30 July 2007

Public Authority: Ministry of Justice
Address: Selborne House
54-60 Victoria Street
London
SW1E 6QW

Summary

The complainant requested a copy of the information created as result of his correspondence with the Magistrates' Court Service Inspectorate concerning the Chester, Ellesmere Port and Neston Magistrates' Court during the period 2003/2004. The public authority provided the complainant with some information in full, further information in redacted form and withheld the remainder. The public authority explained that the information withheld was exempt under sections 21 and 36. The Commissioner notes that in dealing with the request, the public authority breached sections 10 and 17 of the Act by failing to respond in time and not giving a full explanation. Having investigated the application of the exemptions, the Commissioner is satisfied that the exemptions cited were properly applied and that the information is therefore exempt.

The Commissioner's Role

1. The Commissioner's role 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 has advised that on 1 January 2005 the following information was requested from the Magistrates' Court Service Inspectorate (MCSI). Please note that the MCSI has been superseded by Her Majesty's Inspectorate of Court Administration (HMICA). It should be further noted that MCSI now HMICA were part of the Department for Constitutional Affairs (DCA) for the purposes of the Act. The Department for Constitutional Affairs has now been replaced by the Ministry of Justice (MOJ). The request is as follows:

“That material created as a result of my correspondence with you in 2003/2004 touching the manner in which the Chester, Ellesmere Port and Neston Magistrates’ Court deals with its business. This includes, but is not limited to, any notes of conversations or meetings”.

3. The information concerns the monitoring of the performance of the Chester, Ellesmere Port and Neston Magistrates’ Court. In particular the complainant, who appeared before the bench on numerous occasions in a professional capacity, was concerned about the court’s delays in dealing with cases where the complainant felt the court was either doing nothing or proceeding very slowly.
4. On 2 March 2005, the MCSI (which was an associated office of the DCA and its role was to inspect the systems that support the Magistrates’ Courts in England and Wales) responded to the complainant’s request. It enclosed some information, which it explained was being disclosed in accordance with both the complainant’s right under the Data Protection Act 1998 (“the DPA”) and the Act.
5. The complainant was also advised of the existence of correspondence which the MCSI were not disclosing to him as he already had copies. This information was effectively being withheld under the provisions of section 21 of the Act, although this was not explained to the complainant.
6. It further advised that some information was being withheld as it was exempt from disclosure under both the DPA and the Act. This included exchanges between MCSI inspectors and Magistrates Court Committee (“MCC”) officials about how to deal with the substance of the complainant’s correspondence in 2003/2004. That information was exempt as its disclosure would be likely to either prejudice the free and frank provision of advice or the effective conduct of public affairs – section 36(2)(b) and (c) of the Act. The MCSI did not believe that disclosing the information was in the public interest. If the Government was to operate effectively then it was important that officials and stakeholders should be able to have a free and frank exchange of views about particular courses of action and options open to them. It was important that the content of such discussions was accurately recorded and that the candour of the deliberation was not compromised for fear that the contents would be subsequently disclosed.
7. The complainant was advised that if he wished to request a review he should contact the Department for Constitutional Affairs (“DCA”). The complainant requested such a review on 26 March 2005. He stated the MCSI had not responded to his request until 2 March 2005, which was later than had been promised, and that he would like an explanation of that. Further, he did not feel that section 36(2) had been properly applied to the information he had requested.
8. On 17 June 2005, the then Minister of State at the DCA, the Rt Hon Harriet Harman QC MP (“the Minister of State”) advised the complainant of the outcome of the internal review, which had been completed by the DCA. The substantive decision was confirmed by the Minister of State. It was however acknowledged that the time limits had not been complied with, and an apology was proffered.

9. The Minister of State advised the complainant that he had received all the personal data to which he was entitled under the DPA. The provisions of section 21 were explained to him. He was further advised that the balance of material had been appropriately withheld under section 36(2)(b) and (c). The Minister of State advised that if public authorities were to operate effectively then officials needed to be able to have a free and frank exchange of views about particular courses of action and options open to them. If officials considered that such exchanges were to be routinely disclosed then there was a real risk that the content of those discussions might not be recorded. Keeping only a partial record, particularly in relation to the handling of complaints, would prejudice the Department's ability to show how it reached decisions. That would ultimately prejudice the Department by leaving it open to claims of maladministration which would not be in the public interest.

The Investigation

Scope of the case

10. On 26 June 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the exemption at section 36(2) (b) and (c) had been properly applied as he could not see how release of the information would cause any prejudice. He therefore doubted the exemption was engaged.

Chronology of the case

11. In his investigation of the complaint, on 6 March 2006 the Commissioner contacted the DCA to request a copy of the withheld information. This was provided to the Commissioner on 5 May 2006. In a letter dated 22 June 2006, the DCA expanded on the basis upon which it was relying on section 36 and also explained that some information had been withheld as it constituted the personal data of a third party.
12. The Commissioner made further enquiries concerning the use of section 36, and also the implication that section 40(2) applied to the personal data of certain individuals included in the information. The DCA provided its detailed views in a letter dated 2 August 2006.
13. During his investigation, the Commissioner noted that one item of the correspondence which had been withheld under section 21 had not actually been forwarded to the complainant. On noticing the oversight and at the Commissioner's request, the DCA provided the complainant with a copy under cover of letter dated 23 November 2006.

Analysis

14. The Commissioner has considered the public authority's response to the complainant's request for information. The full text of sections 21, 36 and 40 of the

Act is given in the legal annex. The Commissioner's decision deals only with information which has been withheld under the Act rather than any of the complainant's personal information that may have been withheld under the DPA and which is exempt under section 40(1) of the Act. The Commissioner was not specifically asked to consider the procedural breaches of the Act but, given that these are referred to in the narrative and that DCA has apologised for them, they are briefly referred to in the Commissioner's decision.

Exemptions

Section 36(2)

15. The public authority states that disclosing the information sought would, or would be likely to inhibit the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation or would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs. Consequently, subject to the public interest test, the information is exempt as provided for by section 36(2)(b)(i) and (ii) and section 36(2)(c).
16. Section 36 requires the production of a reasonable opinion by the appropriate qualified person that the release of the information would or would be likely to cause prejudice to the effective conduct of public affairs as set out in the Act and explained in the Commissioner's Awareness Guidance No 25. The initial refusal letter of 2 March 2005 confirmed the opinion to be that of the Secretary of State. The DCA have since confirmed the opinion was that of Chris Leslie, then Parliamentary Under Secretary of State, and the reference to the Secretary of State was an error. Nevertheless, as a Minister of the Crown, the Parliamentary Under Secretary of State was a qualified person for the purposes of the Act. When the issues were considered again on 17 June 2005 in the context of the internal review, it was clearly expressed that section 36 was engaged by the then Minister of State, Harriet Harman. As the opinion of the qualified person that the disclosure of the information would or would be likely to result in the prejudice as outlined above appears to be objectively reasonable, the Commissioner accepts that section 36 is engaged.

Public Interest Test

17. Section 36 is a qualified exemption. That is, once the exemption is engaged, the release of the information is subject to the public interest test. The test involves balancing factors for and against disclosure to decide whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
18. The Commissioner has considered the withheld information and the arguments put forward by the DCA and the MCSI. The Commissioner has also considered the decision of the Information Tribunal in *Guardian and Brooke -v- The Information Commissioner & the BBC* where the Tribunal found that the reasonable opinion, "does not necessarily imply any particular view as to the severity or extent of such inhibition [or prejudice] or the frequency with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant". The Commissioner will therefore give due weight to the reasonable opinion of the qualified person when assessing the public interest and will consider the severity, extent and frequency of

prejudice or inhibition to the free and frank provision of advice, the free and frank exchange of views for the purposes of deliberation or the effective conduct of public affairs

19. The Commissioner recognises that there is an inherent public interest in ensuring that public authorities are transparent in the decisions they take in order to promote accountability. He also accepts that there is a strong public interest in disclosing information where to do so would help determine whether public authorities are acting appropriately. Disclosing information about the conduct of business in the courts may provide court users with confidence in the legal system and allow the public to be satisfied that the legal system is operating effectively.
20. However, when considering issues relating to the discharge of responsibilities for the administration of justice and in the particular circumstances of this case, the Commissioner does not believe that releasing any of the redacted information would satisfy the interests outlined in the above paragraph. The withheld information is case specific and consequently the Commissioner does not believe that releasing the withheld information would usefully broaden public knowledge or widen public debate on these issues.
21. Further, having seen the requested information, the Commissioner accepts that for the inspectorate of the courts to operate effectively, a distance must be maintained between its deliberations, decisions reached and any party interested in the outcome of the deliberations. The Commissioner notes that the requested information relates to specific problems in a specific court and that renders the withheld information sensitive particularly where individuals and their personal views are involved. In these circumstances the Commissioner accepts that protecting private space to pursue deliberations is important. He accepts that the deliberations of the appraisers of the system should be confidential as disclosing information concerning the manner in which decisions are reached would be more likely to undermine confidence in the administration of justice and, consequently, the ability of individuals to perform effectively in their important public roles.
22. Collectively, the Commissioner accepts that the withheld information shows the internal thinking of how a complaint is addressed. In the circumstances of this case, the Commissioner accepts that the inspectorate would be less likely to enter into the free and frank exchange of views about particular courses of action and options open to them if they thought those views were likely to be subject to public scrutiny.
23. The Commissioner believes that in all the circumstances of this case the prejudice caused by the release of the information, whilst not in his view severe, is sufficiently significant to justify maintaining the exemption and withholding the information for the reasons set out in paragraphs 20, 21 and 22. Balancing the reasons for and against disclosure, it is the Commissioner's decision that the public interest factors in favour of disclosure are outweighed by the public interest factors for maintaining the exemption and that the information has therefore been correctly withheld.

Section 21

24. Information which is reasonably accessible to the complainant otherwise than under the Act is exempt. The information to which this exemption relates is correspondence which has passed between the complainant and the public authority, which clearly is accessible to him, and so is exempt under the Act. The exemption has therefore been properly applied.

Section 40(2)

25. Since the Commissioner finds that the information not already accessible to the complainant is exempt under section 36(2) and has been appropriately withheld, he has not considered whether section 40(2), cited by the DCA during the course of the investigation, applies.

The Decision

26. The Commissioner's decision is that the public authority did deal with some areas aspects of the request for information in accordance with the Act, but failed to deal correctly with others.

27. The Commissioner confirms that the public authority did not deal with the request in accordance with the time limits imposed by section 10 of the Act. He does however note that this has been accepted by the DCA and an apology made in its letter dated 17 June 2005. The Commissioner also confirms that the refusal notice dated 2 March 2005 was inadequate, and thus the DCA was in breach of section 17 of the Act as an appropriate explanation of section 21 was not provided. Again, he notes that this has since been rectified in the DCA's letter dated 17 June 2005.

28. The Commissioner finds that the exemption in section 36 has been applied appropriately and the information to which it was applied correctly withheld.

Steps Required

29. The Commissioner requires no steps to be taken.

Right of Appeal

30. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 30th day of July 2007

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

Information Accessible by other Means

Section 21(1) provides that –

“Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.”

Section 21(2) provides that –

“For the purposes of subsection (1)-

- (a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and
- (b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.”

Section 21(3) provides that –

“For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.”

Investigations and proceedings conducted by public authorities.

Section 30(1) provides that –

“Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-

- (a) any investigation which the public authority has a duty to conduct with a view to it being ascertained-
 - (i) whether a person should be charged with an offence, or
 - (ii) whether a person charged with an offence is guilty of it,
- (b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or
- (c) any criminal proceedings which the authority has power to conduct.”

Section 30(2) provides that –

“Information held by a public authority is exempt information if-

- (a) it was obtained or recorded by the authority for the purposes of its functions relating to-
 - (i) investigations falling within subsection (1)(a) or (b),
 - (ii) criminal proceedings which the authority has power to conduct,
 - (iii) investigations (other than investigations falling within subsection (1)(a) or (b)) which are conducted by the authority for any of the purposes specified in section 31(2) and either by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under any enactment, or
 - (iv) civil proceedings which are brought by or on behalf of the authority and arise out of such investigations, and
- (b) it relates to the obtaining of information from confidential sources.”

Section 30(3) provides that –

“The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1) or (2).”

Section 30(4) provides that –

“In relation to the institution or conduct of criminal proceedings or the power to conduct them, references in subsection (1)(b) or (c) and subsection (2)(a) to the public authority include references-

- (a) to any officer of the authority,
- (b) in the case of a government department other than a Northern Ireland department, to the Minister of the Crown in charge of the department, and
- (c) in the case of a Northern Ireland department, to the Northern Ireland Minister in charge of the department.”

Section 30(5) provides that –

“In this section-

"criminal proceedings" includes-

- (a) proceedings before a court-martial constituted under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957 or a disciplinary court constituted under section 52G of the Act of 1957,
- (b) proceedings on dealing summarily with a charge under the Army Act 1955 or the Air Force Act 1955 or on summary trial under the Naval Discipline Act 1957,
- (c) proceedings before a court established by section 83ZA of the Army Act 1955, section 83ZA of the Air Force Act 1955 or section 52FF of the Naval Discipline Act 1957 (summary appeal courts),
- (d) proceedings before the Courts-Martial Appeal Court, and
- (e) proceedings before a Standing Civilian Court;

"offence" includes any offence under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957.”

Section 30(6) provides that –
“In the application of this section to Scotland-

- (a) in subsection (1)(b), for the words from "a decision" to the end there is substituted "a decision by the authority to make a report to the procurator fiscal for the purpose of enabling him to determine whether criminal proceedings should be instituted",
- (b) in subsections (1)(c) and (2)(a)(ii) for "which the authority has power to conduct" there is substituted "which have been instituted in consequence of a report made by the authority to the procurator fiscal", and
- (c) for any reference to a person being charged with an offence there is substituted a reference to the person being prosecuted for the offence.”

Section 40 provides that -

40 - (1) 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.

(2) Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or second condition below is satisfied.

(3) The first condition is-

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

- (i) any of the data protection principles, or
- (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject’s right of access to personal data).”