

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 1st May 2008

Public Authority: Ministry of Justice
Address: 6th Floor
Selbourne House
54 Victoria Street
London
SW1E 6QW

Summary

The complainant requested from the Ministry of Justice (MoJ) a copy of the advice given to the Minister to issue an exhumation licence in principle for George Kelly; a copy of all communications with the National Offenders Management Service (NOMS) regarding this matter; and the records in relation to communications with a named individual. MoJ provided a copy of some of the communications with the individual but refused to disclose the advice to the Minister under section 36 of the Act and a record of a telephone conversation with the individual under section 40 and 41 of the Act.

The Commissioner's investigation found that the MoJ had failed to respond to part of the request (the communications with NOMS) in breach of the requirements of section 1(1). The Commissioner also found that refusal notice was in breach of the requirements of section 17(1) of the Act. The Commissioner found that the advice to the Minister was not exempt under section 36(2)(b) of the Act as the public interest favours disclosure of the information. However, he did find that the advice to the Minister was the personal data of a third party and therefore exempt under section 40(2). He also agreed that the note of the telephone conversation was exempt under section 40(2).

The Commissioner requires the MoJ to respond to the outstanding part of the complainant's request within 35 calendar days.

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 has advised that on 15 December 2005 he made the following request for information:

"Please now provide the records relating to the advice to the Minister and her decision regarding the issuing of an exhumation licence in principle (for George Kelly) and the communication with the National Offender Services (NOMS) regarding this matter"

Please provide the records relating to the communications with [a named individual].

3. On 18 January 2006 the Department for Constitutional Affairs (DCA) responded to the information request. In relation to the advice to the Minister, DCA explained that it considered the advice was exempt under the Act but that it required further time to consider the public interest test, DCA stated it expected to respond fully by the 1 February 2006. In relation to the communications with a named individual DCA enclosed a copy of a letter sent to the individual on 1 December 2005 and a copy of the communication sent to a NOMS official to advise him of the position on 30 November 2005.
4. On 6 October 2006 DCA issued a refusal notice. In relation to the advice given to the Minister DCA stated that section 36 'Prejudice to the effective conduct of public affairs' was engaged and that the public interest favoured maintaining the exemption. DCA also found that in relation to the communications with the named individual it had located another document, a note of a telephone conversation, but that this was considered exempt under sections 40 and 41.
5. On 2 November 2006 the complainant requested an internal review of the decision to withhold the advice and the telephone note. In his letter the complainant also queried if the telephone note and the other two letters sent to him was all the information held in relation to the second part of this request.
6. On 1 March 2007 DCA provided the complainant with a response to his request for an internal review. The internal review upheld the application of sections 36 to the advice given to the Minister and sections 40 and 41 to the telephone note. The internal review did find that the communication with NOMS in relation to the decision to issue an exhumation licence in principle had not been addressed and that this would now be looked into.

The Investigation

Scope of the case

7. The public authority at the time of the request, refusal and internal review was the Department for Constitutional Affairs. The Department for Constitutional Affairs was integrated into the new Ministry of Justice (MoJ) on 9 June 2007, the Commissioner is satisfied that for the purposes of the Decision Notice the public authority is now the MoJ.
8. On 4 March 2007 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 the following points: the refusal to disclose the requested information; and the time taken to issue a refusal notice.
9. The complainant also wished to complain about the length of time taken by MoJ to complete the internal review. This has been addressed in the 'Other Matters' section of this notice.
10. The Commissioner's investigation therefore focused on the application of section 36 to the advice given to the Minister and the application of sections 40 and 41 to the telephone note.

Chronology

11. The Commissioner began his investigation by writing to the MoJ on 29 October 2007 requesting further arguments to support the application of the exemptions and for a copy of the withheld information. The Commissioner also queried if further information was held regarding the communications with the named individual.
12. The MoJ responded on 12 February 2008 providing the Commissioner with further arguments to support the application of section 36, 40 and 41 to the information withheld and a copy of the information withheld under section 40 and 41.
13. The Commissioner replied on 13 February 2008 asking MoJ to supply a copy of all the withheld information as requested in the letter of 29 October 2007. The Commissioner also asked the MoJ to clarify, as previously requested, if there was any other information held relating to communications with the named individual. In addition the Commissioner pointed out to the MoJ that in the letter dated 1 March 2007, the internal review, the then DCA had indicated to the complainant that it had not considered the communications with the National Offenders Management Service (NOMS) regarding the minister's decision and would now consider disclosing this information. The Commissioner asked MoJ to clarify if this had now been done.
14. MoJ responded on 13 February 2008 explaining that additional information was sent to the complainant regarding the communications with the named individual

and that further searches were taking place to locate the additional communications referred to in the complainant's request for an internal review. MoJ also explain that it had decided to limit the complainant's request for correspondence with NOMS to that which related to the minister's decision to issue an exhumation licence in principle. MoJ felt that the complainant's request of 15 December 2005 was unclear on the scope of the communications sought and so had clarified this with the complainant in the letter of 1 March 2007. However, the request for communications with NOMS has not yet been answered and was currently being processed.

15. MoJ explained on 13 February 2008 that in his letter of 2 November 2006 the complainant referred to two additional communications which he believed existed and had been withheld from him. These were communications with the individual seeking his comments on disclosure of his letter received 3 July 2003 in September 2006 and a communication with the individual on 1 December 2005. MoJ provided to the Commissioner a copy of a letter sent to the complainant on 18 January 2006 enclosing a copy of the letter sent to the individual on 1 December 2005. MoJ also explained that the complainant made his original request on 15 December 2005 and therefore any communications considered for disclosure were those held at that time. In the complainant's letter of 2 November 2006 he referred to communications which occurred subsequent to this in September 2006, these communications are outside of the scope of his request. The only communication being withheld from the complainant under sections 40 and 41 is a note of a telephone conversation with a named individual on 19 June 2003.

Findings of Fact

16. The information withheld under section 36 is the advice to the Minister, Harriet Harman, dated 28 November 2005, in relation to the issuing of an exhumation licence in principle.
17. The information withheld under sections 40 and 41 is a record of a telephone conversation with an individual made on 19 June 2003.

Background Information

18. In March 1950, George Kelly was found guilty of a double murder and sentenced to death. He was duly executed and, as required by the legislation of the time, buried in the prison grounds. Following an application to the Criminal Cases Review Commission, in June 2003, the Court of Appeal ruled the conviction to be unsafe.
19. Following the abolition of the death penalty in 1965 the Home Secretary of the day stated he would consider applications from the relatives or descendants of executed prisoners to be exhumed and re-buried outside prison grounds. A number of licences have been granted but this case was thought to be the first where the deceased's conviction was quashed prior to the application to exhume.

20. Discretion is normally exercised in an applicant's favour where the reason for an exhumation is for private, family purposes and where consent has been obtained from the nearest surviving relative. Where there are objections to the application of the licence from members of the family with the same degree of kinship, a licence is usually declined pending resolution by the parties of their differences.

Analysis

Procedural matters: Section 17 'Refusal of Request'

21. Section 17(1) states that a public authority which is relying on a claim that the information is exempt, must, within the time for complying issue a refusal notice which:
 - (a) states the fact that information is exempt,
 - (b) specifies the exemption in question, and
 - (c) states why the exemption applies.
22. Section 17(3) states that if a public authority is relying on a qualified exemption it must state the reasons for claiming that, in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
23. Section 10 of the Act provides that a public authority must comply with section 1 of the Act no later than the twentieth working day following receipt of the request. Section 1 states that a person making a request for information is entitled to be informed in writing if the information is held and if so to have the information communicated to him. Full texts of the relevant sections are included in the 'legal annex' section of this notice.
24. Section 10(3) allows the 20 working day time limit to be extended to a reasonable time where a public authority is considering the public interest test because one of the qualified exemptions may apply. The public authority must according to section 17(2)(b), in its refusal notice, inform the applicant that it needs more time to consider the public interest and give an estimate of the date by which it will make its decision.
25. The Commissioner has issued guidance regarding the time limits on considering the public interest following requests for information (Good Practice Guidance 4). The Commissioner considers 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 the Commissioner's view, in no case should the total time exceed 40 working days.
26. The complainant made his request on 15 December 2005, the public authority responded on 18 January 2006 informing the complainant that it held information but that it considered that the information was exempt from disclosure under the Act, but did not specify which exemption it considered applied. The public

authority stated it required further time to consider the public interest test and would respond by 1 February 2006.

27. On 6 October 2006 the public authority responded substantively informing the complainant that the information was exempt under section 36, 40 and 41. The Commissioner notes that section 40 and 41 are not qualified exemptions and therefore not subject to the public interest test.
28. The Commissioner finds that the refusal notice issued on 18 January 2006 was in breach of section 17(1) as it did not state which exemption applied. The Commissioner notes that the time taken to consider the public interest test was in excess of the time limits he considers to be reasonable, however, the request that is the subject of this decision notice, was made during the relatively early stages of the Act's implementation and prior to the publication of his guidance on the matter.

Section 1 'General Right of Access'

29. Section 1 (1) states that any person making a request for information to a public authority is entitled (a) to be informed 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 of the Act provides that a public authority must comply with section 1 of the Act no later than the twentieth working day following receipt of the request.
30. Section 1(3) states that where a public authority requires further information in order to identify and locate the information requested and has informed the applicant of that requirement it is not obliged to comply with subsection (1) until it is supplied with that further information.
31. The complainant made his request on 15 December 2005:

"Please now provide the records relating to the advice to the Minister and her decision regarding the issuing of an exhumation licence in principle and the communication with National Offenders Management Service (NOMS) regarding this matter."
32. In the internal review of 1 March 2007 the public authority informed the complainant that:

"the internal review considered that the communication with National Offenders Management Service (NOMS) regarding this matter had not been addressed. The department will therefore be considering disclosure of information relation to the communications with NOMS about the Minister's decision to issue an exhumation licence in principle in this case. If you have further representations to make about this you should make them via your usual channels of communications within the next 21 days."
32. Having received no response the public authority wrote to the complainant on 21 March 2007 informing him that it was treating the communications with NOMS to

be limited to those regarding the Minister's decision to issue an exhumation licence.

33. The Commissioner, during the course of the investigation, queried with the public authority if the information requested in this part of the request had now been supplied to the complainant. The public authority explained that it felt that the complainant's request of 15 December 2005 was phrased in such a manner that it could have been read to be for either communications with NOMS regarding the exhumation in general or more specifically for correspondence regarding the minister's decision to issue an exhumation licence in principle. Because of this it had asked the complainant to clarify this in the letter of 1 March 2007, as there was no response the public authority informed the complainant on 26 March 2007 that it had interpreted this part of the request to be for the communications with NOMS in relation to the minister's decision to issue an exhumation licence in principle. The public authority stated that this request had not currently been answered but was currently being processed.
34. The Commissioner considers that the complainant's request was clear in its scope for communications with NOMS regarding the minister's decision in principle to issue an exhumation licence. This decision is specifically referred to in the request and in the second sentence when the complainant requests the communications with NOMS, he makes it clear that the communications sought are those regarding this matter. Therefore the public authority should have complied with the requirements of section 1 of the Act and informed the complainant if the information was held and communicated that information to him within 20 working days as required by section 10. Even if the Commissioner were to agree with the public authority that the request needed clarification under section 1(3) of the Act, the Commissioner notes that this request had been clarified by 26 March 2007 and has still not been responded to.

Exemption: Section 36 'Prejudice to the effective conduct of public affairs'

35. Section 36(2)(b) provides that information is exempt if, in the reasonable opinion of a qualified person, disclosure of the information would or would be likely to inhibit (i) the free and frank provision of advice, or (ii) the free and frank exchange of views for the purposes of deliberation.
36. Information can only be exempt under section 36 if 'in the reasonable opinion of a qualified person' disclosure would, or would be likely to lead to the above adverse consequences. In order to establish that the exemption has been applied correctly the Commissioner must:
- Establish that an opinion was given;
 - Ascertain who was the qualified person or persons'
 - Ascertain when the opinion was given;
 - Consider whether the opinion was objectively reasonable and reasonable arrived at
37. The Information Tribunal has decided (*Guardian & Brooke v The Information Commissioner & the BBC*) (EA/2006/0011 and EA 2006/0013) that a qualified

person's opinion under section 36 is reasonable if it is both '*reasonable in substance and reasonably arrived at*'. It elaborated that the opinion must therefore be 'objectively reasonable' and based on good faith and the proper exercise of judgement, and not simply '*an opinion within a range of reasonable opinions*'. However, it also accepted that '*there may (depending on the facts) be room for conflicting opinions, both of which are reasonable*'. In considering whether an opinion was reasonably arrived at it proposed that the qualified person should only take into account relevant matters and that the process of reaching a reasonable opinion should be supported by evidence, although it also accepted that materials which may assist in the making of a judgement will vary from case to case and that conclusions about the future are necessarily hypothetical.

38. The MoJ have explained that the qualified person was Harriet Harman whose opinion was sought on 28 September 2006 and given on 3 October 2006. She agreed with the recommendation that release of the advice would be likely to inhibit the free and frank provision of advice. MoJ confirmed that a written record was made of the decision making process in relation to the application of section 36.
39. MoJ explained that it considered that the withheld information remains sensitive for the following reasons. The Minister was supplied with various options as to whom the licence should be issued and the potential risks and likely outcome of each approach. Officials supplied such thorough, free and frank advice to the minister to enable her to consider sensitive issues and make decisions accordingly. Release of the information to the individuals to whom it relates would be likely to inhibit such candid advice being supplied to ministers in the future and would make officials less likely to engage in written discussions of such controversial issues.
40. The MoJ explained that these reasons were included in the submission to the Minister to consider the application of section 36 along with a copy of the withheld information.
41. Having considered this evidence, the Commissioner is satisfied that in this case the opinion of the qualified person was both substantially and procedurally reasonable. The exemption is therefore engaged.

Public Interest Test

42. Section 36 is a qualified exemption and the Commissioner must therefore decide if the public interest in favour of maintaining the exemption outweighs the public interest in disclosure of the requested information.
43. In assessing the public interest arguments for disclosure the MoJ recognised that there is a public interest in the public being able to assess the quality of advice given to Ministers and subsequent decision-making. However, the MoJ found that the public interest favoured maintaining the exemption as it considers it is in the public interest to ensure decision making is based on the best advice available and in full consideration of all the options. MoJ argued that the public interest is

best served by ensuring difficult decisions are made in light of all the relevant material, in full consideration of the options and free from interference. Applying the exemption in this particular case serves the public interest by enabling ministers and officials to conduct a rigorous and candid debate, to consider all options and ensure the highest possible quality decision making.

44. The MoJ also explained that in this case the exhumation licence has been granted and the complainant is involved in several strands of litigation in relation to the matter. The judicial system exists to uphold the public interest and unless or until it is ordered by the court the MoJ do not consider that the public interest favours disclosure of the information.
45. The Commissioner rejects, as a general proposition, the argument that the extent and severity of the prejudice from disclosure would result in officials being inhibited and less likely to produce free and frank advice and less candid submissions. The Information Tribunal in *DfES v the Commissioner and the Evening Standard* (EA/2006/0006), was unimpressed with the argument that the threat of disclosure of civil servants' advice would cause them to be less candid when offering their opinions. It concluded that *'we are entitled to expect of [civil servants] the courage and independence that... [is]...the hallmark of our civil service'*, since civil servants are *'highly educated and politically sophisticated public servants who well understand the importance of their impartial role as counsellors to ministers of conflicting convictions'* and should not be easily discouraged from doing their job properly. The Commissioner does not believe that disclosure in this case would make officials responsible for providing advice and recording information less likely to perform their duties properly. Such public servants would be in breach of their professional duty as public servants should they deliberately withhold relevant information or fail to behave in a manner consistent with the Civil Service Code. It is a matter for the bodies concerned, including the MoJ, to ensure that their officials continue to perform their duties according to the required standards.
46. The Commissioner also does not consider that disclosure of the advice given to the Minister after the decision has been made would interfere with the decision making process as asserted by the MoJ. In reaching this decision the Commissioner has considered the extent and severity of the prejudice asserted by the MoJ and does not consider that any prejudice that could occur would be significant.
47. The Commissioner has viewed the information and notes that a considerable amount of it has either been disclosed to the public already in the 'background' section or is factual and makes notes of considerations, decisions and events which are now, and were at the time of the request, known to the complainant. For example included in the submission is a recommendation which was made public when the decision was made to issue the exhumation licence in principle.
48. The Commissioner also considers that the presentation of the considerations for the Minister are phrased in neutral, frank terms which demonstrate the impartiality of the MoJ and disclosure of this would enhance public confidence in the decision making process.

49. For these reasons the Commissioner finds that the public interest in maintaining the exemption does not outweigh the public interest in disclosure of the information.

Section 40 'Personal Data'

50. Section 40(1) states that information is exempt if it constitutes personal data of which the applicant is the data subject. Section 40(2) provides that information is exempt if the information is the personal data of someone other than the applicant, 'third party data', and disclosure of the information would breach any of the data protection principles. The term 'personal data' includes information about a living individual from which that individual can be identified.
51. In order for the Commissioner to reach a decision as to whether section 40 has been applied correctly the Commissioner must first consider if the information is personal data and then decide if disclosure would breach any of the data protection principles. The Commissioner has considered the definition of personal data as defined in the Data Protection Act 1998:

'...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 intention of the data controller or any other person in respect of the individual.'

52. The Commissioner must also decide if the personal data falls within the subsection (1) of section 40 or subsection (2). In order to reach this decision the Commissioner clarified with the complainant if they were acting on their own or on behalf of any of the individuals to whom the data relates. The complainant clarified that in the circumstances of this case he had acted on his own.
53. The Commissioner considers that the note of the telephone call with the named individual falls within the definition of personal data as not only can the individual be identified along with others mentioned within the note, but it represents the individual's personal views. The note withheld under section 40(2) is a record of a conversation with the individual and an official within the MoJ, it discusses other members of the individual's family and his opinions on the situation with regard to another individual.
54. The MoJ have argued that disclosure of the telephone note would breach the first data protection principle. The first data protection principle has two components:
1. Personal data shall be processed fairly and lawfully and
 2. Personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met

55. In considering whether disclosure of the telephone note would be unfair and therefore contravene the requirements of the first data protection principle, the Commissioner has taken into consideration the following factors:
- The reasonable expectations of the individual as to what would happen to his personal data;
 - Whether disclosure would cause any unnecessary or unjustified damage or distress; and
 - Whether individual refused to consent to the disclosure of the requested information
56. MoJ stated that the individual would have had an expectation that the personal views he conveyed would remain confidential. The note reflects his discussion of personal information relating to members of his family. Release of this information would cause him and his family distress as it is not already in the public domain and he would have had no expectation that it would be released. At the time, the individual and his family were in a dispute with the complainant's client and at the time of the phone call the individual would have understood that the conversation with the department would not be communicated to another interested party.
57. MoJ explained that the fact that the individual spoke with the department is not considered sensitive as he is known to the complainant, however, the views that he expressed during the conversation are his personal data and the personal data of others who were discussed.
58. The Commissioner has reviewed the information and concluded that the individual would have had an expectation that the record of his telephone call would not be disclosed. However, the fact that an individual has an expectation that information held about them will not be disclosed does not necessarily mean that this expectation is a reasonable one. The Commissioner's guidance on section 40 suggests that when considering what information third parties should expect to have disclosed about them, a distinction should be drawn as to whether the information relates to the third party's public or private lives. Although the guidance acknowledges that there are no hard and fast rules it states that:
- "Information which is about the home of family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned."*
59. There is no evidence to suggest that the individual was acting in anything other than a personal capacity when contacting the MoJ regarding this matter. The Commissioner also notes that the individual has not consented to the disclosure of this information.
60. MoJ explained that release of the information in this case would be of detriment to the individual in respect to his ongoing involvement in legal proceedings; disclosure would also distress not only the individual himself, but other members of his family discussed within the letter.

61. The Commissioner is therefore satisfied that disclosure of the telephone note would breach the first data protection principle and is therefore exempt under section 40(2) of the Act. There is consequently no need for the Commissioner to go on to consider the application of section 41 to this information.
62. The Commissioner, in light of his new guidance on the definition of personal data, has also considered if the advice to the Minister is also the personal data of a third party. Although the exemption was not claimed by the MoJ the Tribunal have found in *'Bowbrick vs. Nottingham City Council'* that whilst the Commissioner is under no positive duty to consider exemptions not claimed by the public authority the Commissioner can refer to section 40 within a decision notice even where it has not been claimed.
63. The Commissioner has considered carefully the content of the advice and has found that the information contained within is the personal data of third parties. The advice details the third parties relations to the deceased as well as their personal opinions, disputes, some personal history and their ongoing actions in relation to the issue.
64. In deciding whether disclosure would be in breach of the first data protection principle the Commissioner has taken into account the factors discussed in paragraphs 54 and 55. The Commissioner considers that the individuals under discussion in the advice would not expect that their personal information would be disclosed in this way. The advice discusses their respective positions, opinions and actions in relation to a sensitive issue. As discussed in paragraph 58 the Commissioner has to consider the capacity in which the individuals are being discussed, and as discussed in paragraph 59 there is nothing to suggest that the individual's actions (which are under discussion in the advice) were in anything other than a personal capacity.
65. The Commissioner considers that disclosure would cause both parties distress as their private actions in relation to each other; their personal opinions would be open to public scrutiny in a way they could not have anticipated.
66. The Commissioner is therefore satisfied that disclosure of the advice would breach the first data protection principle and is therefore exempt under section 40(2) of the Act.

The Decision

67. 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:
 - i. The application of section 40(2) to the telephone note of 19 June 2003 and the advice to the Minister

68. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- i. The refusal notice was in breach of the requirements of section 17(1)(b) and (c) as it did not state which exemption applied.
 - ii. The MoJ breached the requirements of section 1(1) as it failed to respond to that part of the complainant's request which related to communications with NOMS
 - iii. The application of section 36(2)(b) to the advice given to the Minister.

Steps Required

69. The Commissioner requires the public authority to take the following step to ensure compliance with the Act:
- i. Provide the complainant with a response to his request for communications with NOMS regarding the issue of an exhumation licence in principle
70. The public authority must take the step required by this notice within 35 calendar days of the date of this notice.

Other matters

71. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern. Section VI of the Code of Practice (provided for by section 45 of the Act) makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information. The Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that in the context of provisions in the Act a reasonable time for completing an internal review is 20 working days from the date of the request for review. He accepts that, in exceptional circumstances, it may be reasonable to take longer, but the total time taken should not exceed 40 working days.
72. In this case the complainant requested an internal review on 2 November 2006. MoJ sent its internal review decision to the complainant on 1 March 2007. MoJ have provided no explanation for the delay in completing the review, either to the Commissioner or to the complainant. The Commissioner acknowledges however, that the request that is the subject of this decision notice was made during the relatively early stages of the Act's implementation and prior to the publication of his guidance on the matter.

Failure to comply

73. 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

74. 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@tribunals.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 1st day of May 2008

Signed

**Anne Jones
Assistant Commissioner**

**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.”

Section 1(2) provides that -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

Section 1(3) provides that –

“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.”

Section 1(4) provides that –

“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.”

Section 1(5) provides that –

“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).”

Section 1(6) provides that –

“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”.”

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 –

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

Section 10(6) provides that –

“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.”

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-
 - (i) 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
 - (ii) 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.”

Prejudice to effective conduct of public affairs.

Section 36(1) provides that –

“This section applies to-

- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

Section 36(2) provides that –

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

- (a) would, or would be likely to, prejudice-
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
 - (iii) the work of the executive committee of the National Assembly for Wales,
- (b) would, or would be likely to, inhibit-
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

Section 36(3) provides that –

“The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).”

Section 36(4) provides that –

“In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words "in the reasonable opinion of a qualified person".

Section 36(5) provides that –

“In subsections (2) and (3) "qualified person"-

- (a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown,
- (b) in relation to information held by a Northern Ireland department, means the Northern Ireland Minister in charge of the department,
- (c) in relation to information held by any other government department, means the commissioners or other person in charge of that department,
- (d) in relation to information held by the House of Commons, means the Speaker of that House,
- (e) in relation to information held by the House of Lords, means the Clerk of the Parliaments,
- (f) in relation to information held by the Northern Ireland Assembly, means the Presiding Officer,
- (g) in relation to information held by the National Assembly for Wales, means the Assembly First Secretary,
- (h) in relation to information held by any Welsh public authority other than the Auditor General for Wales, means-
 - (i) the public authority, or
 - (ii) any officer or employee of the authority authorised by the Assembly First Secretary,
- (i) in relation to information held by the National Audit Office, means the Comptroller and Auditor General,
- (j) in relation to information held by the Northern Ireland Audit Office, means the Comptroller and Auditor General for Northern Ireland,
- (k) in relation to information held by the Auditor General for Wales, means the Auditor General for Wales,
- (l) in relation to information held by any Northern Ireland public authority other than the Northern Ireland Audit Office, means-
 - (i) the public authority, or
 - (ii) any officer or employee of the authority authorised by the First Minister and deputy First Minister in Northern Ireland acting jointly,
- (m) in relation to information held by the Greater London Authority, means the Mayor of London,
- (n) in relation to information held by a functional body within the meaning of the Greater London Authority Act 1999, means the chairman of that functional body, and
- (o) in relation to information held by any public authority not falling within any of paragraphs (a) to (n), means-
 - (i) a Minister of the Crown,
 - (ii) the public authority, if authorised for the purposes of this section by a Minister of the Crown, or
 - (iii) any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown.”

Section 36(6) provides that –

“Any authorisation for the purposes of this section-

- (a) may relate to a specified person or to persons falling within a specified class,
- (b) may be general or limited to particular classes of case, and
- (c) may be granted subject to conditions.”

Section 36(7) provides that –

A certificate signed by the qualified person referred to in subsection (5)(d) or (e) above certifying that in his reasonable opinion-

- (a) disclosure of information held by either House of Parliament, or
- (b) compliance with section 1(1)(a) by either House, would, or would be likely to, have any of the effects mentioned in subsection (2) shall be conclusive evidence of that fact.

Personal information.

Section 40(1) provides that –

“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.”

Section 40(2) provides that –

“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 the second condition below is satisfied.”

Section 40(3) provides that –

“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.”

Section 40(4) provides that –

“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).”

Section 40(5) provides that –

“The duty to confirm or deny-

- (a) 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), and
- (b) does not arise in relation to other information if or to the extent that either-
 - (i) he giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
 - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).”

Section 40(6) provides that –

“In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.”

Section 40(7) provides that –

In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act.