

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 14 May 2008

Public Authority: National Offender Management Service (an executive agency of the Ministry of Justice)

Address: Access Rights Unit
6th Floor
Selborne House
54-60 Victoria Street
London
SW1E 6QW.

Summary

The complainant requested information relating to the Office of Surveillance Commissioner inspection of HM Prison Service. The public authority replied that section 31(1)(f) (maintenance of security and good order in prisons) was engaged and that it would carry out a public interest determination within a target timeframe. The Commissioner finds that section 17(1)(c) was breached at this point as the public authority failed to inform the complainant why the exemption was engaged. The timeframe was readjusted on three separate occasions before the complainant complained to the Commissioner. The Commissioner finds a delay of over six months in carrying out a public interest determination a breach of section 17(3) to be unreasonable. The public authority is required to issue a notice explaining why section 31(1)(f) is engaged and where it believes the balance of the public interest lies. If the public authority concludes that the balance of the public interest favours disclosing the information or no longer considers the exemption to apply, the information should be provided to the complainant.

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 Commissioner notes that under the Act the National Offender Management Service is not a public authority itself, but is an executive agency of the Ministry of Justice which is responsible for the National Offender Management Service and therefore the public authority in this case is actually the Ministry of Justice not the National Offender Management Service. However, for the sake of clarity, this decision notice refers to the National Offender Management Service as if it were the public authority.
3. On 4 September 2007 the complainant requested the following information in accordance with section 1 of the Act:

“HM Prison Service is subject to inspections by the Office of Surveillance Commissioners. With respect to the latest inspection report, I would like to request a copy of:
 1. *The OSC's covering letter,*
 2. *The report's conclusions,*
 3. *The report's recommendations,*
 4. *If possible, a full copy of the report, and*
 5. *Your response to the OSC.”*
4. On 4 September 2007 the public authority acknowledged receiving the request and informed the complainant that they aimed to respond within twenty working days, so by 2 October 2007.
5. On 2 October 2007 the public authority wrote to the complainant stating that it believed that the exemption provided by section 31(1)(f) (maintenance of security and good order in prisons) of the Act may be engaged in relation to the information in question. No explanation as to why this exemption was believed to be engaged was given. The public authority also informed the complainant that this is a qualified exemption and that it needed to make a public interest determination. It then set a target response time of the 30 October 2007 to complete this public interest determination.
5. On 30 October 2007, the public authority then wrote to the complainant to inform him that the public interest determination was still to be carried out and set a new target response of 27 November 2007. On 27 November 2007, the public authority again wrote to the complainant to inform him that the public interest determination was still to be carried out and set a new target response of 8 January 2008.
6. On 8 January 2008, the public authority again informed the complainant that the public interest determination had still to be completed and set a new target response of 5 February 2008.

The Investigation

Scope of the case

7. On 8 January 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to ensure that the public authority complied with its obligations under section 1 of the Act and provide him with a full response to his request for information. The focus of this investigation is the delay by the public authority in the provision of a substantive response to this request.

Chronology

8. On 8 January 2008, the complainant informed the Commissioner about the public authority's lack of action in carrying out a public interest determination and responding to his request. The complainant has yet to receive a substantive response to his information request.
9. On 23 January 2008, the Commissioner informed the public authority of this complaint and asked it to carry out a public interest determination in twenty working days. On 30 January 2008, the public authority wrote to the Commissioner to confirm that it had received this letter.
10. On 3 March 2008 the complainant emailed the Commissioner and informed him that the twenty working days have passed and he had still not received any further response. On 4 March 2008 the Commissioner informed the public authority that he would investigate this complaint. On 7 March 2008 the public authority informed the Commissioner that it was 'looking into the matters raised.'
11. On 25 March 2008 the Commissioner wrote to the public authority to indicate his position. He stated that while section 17(2) allows that a response may be delayed whilst the balance of the public interest is considered, the Commissioner has published guidance which states that a public authority should delay its response by no more than a total of 40 working days from receipt of the request.
12. The Commissioner advised the public authority that a substantive response should now be provided to the complainant with a minimum of further delay. He directed the public authority to either provide to the complainant a substantive response to his information request within 20 working days, copying this response to him or to respond to him by giving clear and specific reasons as to why it would not be possible to respond to the complainant within this time period and the date by which a substantive response would be provided. He also requested an explanation as to why the time extensions up until this point had been necessary. He set a deadline of 20 April 2008.
13. On 20 April 2008 the Commissioner emailed the public authority and once again asked for a substantive response by 24 April 2008. On 22 April 2008 the public authority acknowledged receiving the Commissioner's email in a telephone call about another case.

14. On 24 April 2008 the Commissioner called the public authority to enquire about the progress of this case. The public authority apologised to the Commissioner and informed him that they would ensure that the right person would get back to him the next day. The Commissioner informed the public authority that without a proper reply to his letter of 25 March 2008, he would be minded to issue this Decision Notice.
15. On 25 April 2008 the public authority called the Commissioner and assured him that a response would be provided by 2 May 2008.
16. The Commissioner wrote another reminder to the public authority on 29 April 2008. The Commissioner made sure that 2 May 2008 was seen as the very final deadline. The complainant received another extension letter on 29 April 2008 informing him that the public authority's new target date was 28 May 2008. This was forwarded to the Commissioner by the complainant.
17. The Commissioner called the public authority on the 9 May 2008 and was told to call back on the 12 May 2008. The Commissioner called the public authority again on the 12 May 2008 and was informed that there was no movement in this case. He was told to contact another officer at the authority.
18. The Commissioner called the other officer and was told to call back later when they had familiarised themselves with the case. On 13 May 2008 the Commissioner called the public authority and was told that there was still no progress. The Commissioner informed the public authority that he would issue this Decision Notice imminently.

Analysis

Section 17(1)

19. Section 17(1) (full wording in the legal annex) requires that, where a public authority believes that any exemption from part II of the Act applies, it should issue a notice stating why the exemption in question is engaged. This notice must be issued within 20 working days of receipt of the request; there is no extension available to the time within which a notice identifying the exemption and stating why it is engaged must be provided.
20. In this case neither the original refusal notice nor the additional extension letters offered the complainant any reason why the public authority believed section 31(1)(f) was engaged. The Commissioner therefore finds that the public authority has breached section 17(1)(c) in failing to state why it believed that the exemption was engaged within twenty working days.

Section 17(3)

21. Section 17(3) (full wording in the legal annex) does allow the public authority to provide its public interest determination in a separate notice 'within such time that

is reasonable in the circumstances'. The Commissioner has issued publicly available Good Practice guidance on this point. This can be found at: http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/foi_good_practice_guidance_4.pdf. These state the following:

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

22. In this case the Commissioner notes that the public authority has exceeded the maximum of his guidance by more than a factor of three. The Commissioner believes that this to be totally unacceptable. The Commissioner is also aware of this public authority dealing with a number of other information requests in a similar way and issued NOMS with a Practice Recommendation on this issue on 10 March 2008 . This can be found at: http://www.ico.gov.uk/upload/documents/library/freedom_of_information/notices/noms_s45_pr_final_4_mar_08.pdf

In particular, the Commissioner is disappointed that NOMS went on to extend the time for the public interest test in this case on 29 April 2008 despite the issuing of the Practice Recommendation seven weeks earlier.

23. The Commissioner therefore finds that the public authority has breached section 17(3) because it has not provided the complainant with its public interest determination within such time as is reasonable. As stated in the Commissioner's guidelines, he considers forty working days to be a reasonable time for carrying out a public interest determination. The public authority has been given ample opportunity to explain why there has been such an excessive delay in this case, but has not done so.

The Decision

24. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with section 17(1)(c) of the Act in that the refusal notice it issued did not explain why the exemption was engaged within 20 working days.
25. The public authority has also breached section 17(3) of the Act as they failed to complete their public interest determination within a reasonable timescale.

Steps Required

26. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

Issue a notice compliant with sections 17(1) & (3) that states why the exemption is engaged, which in this case means stating why disclosure would or would be likely to prejudice the maintenance of security and good order in prisons, and its conclusion about where the balance of the public interest lies. If the public authority concludes that the balance of the public interest favours disclosing the information or no longer considers the exemption to apply, the information should be provided to the complainant.

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

Failure to comply

28. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

29. 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 14th day of May 2008

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

General Right to Access

Section 1(1) 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.”

Time for compliance with request

Section 10 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 is paid 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.

Refusal of Request

Section 17 provides that:

(1) 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.
- (2) 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.
- (3) 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.

Law enforcement

Section 31(1)(f) provides that:

- (1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

...

- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained.