

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 28 July 2008

Public Authority: National Offender Management Service (part 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 items confiscated from prisoners at HMP Risley and HMP YOI Thorn Cross. 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 at least three separate occasions before the complainant complained to the Commissioner. The Commissioner finds a delay of over eight months in carrying out a public interest determination to be in breach of section 17(3). The Commissioner also found the public authority in breach of section 1(1)(a), 1(1)(b) and section 10(1). 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 the National Offender Management Service [NOMS] is not a public authority itself, but is part of the Ministry of Justice. Therefore the public authority in this case is actually the Ministry of Justice and not NOMS. However, for the sake of clarity, this Decision Notice refers to NOMS as if it were the public authority.
3. On 25 September 2007 the complainant requested the following information in accordance with section 1 of the Act:

"I would like to know non-identifying information regarding the following:
 - 1) *The number of items confiscated from prisoners at HMP Risley, Warrington Road, Warrington, and HMP YOI Thorn Cross, Arley Road, Appleton Thorn, Warrington.*
 - 2) *The details of the above confiscations - what was confiscated.*
 - 3) *If internal investigations were launched as a result of any confiscations and what the results of these were.*
If possible I would like yearly data dating back to 2000.'
4. On 26 September 2007 the public authority acknowledged receiving the request and informed the complainant that they aimed to respond within twenty working days, so by 23 October 2007.
5. On 23 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 20 November 2007 to complete this public interest determination.
6. On 20 November 2007, the public authority then wrote to the complainant to inform her that the public interest determination was still to be carried out and set a new target response date of 18 December 2007.
7. After a series of reminders from the complainant, on 8 April 2008, the public authority again informed the complainant that the public interest determination had still to be completed and set a new target response date of 13 May 2008.

The Investigation

Scope of the case

8. On 8 April 2008 the complainant contacted the Commissioner to complain about the way her 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 her with a full response to her 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

9. On 8 April 2008, the complainant informed the Commissioner about the public authority's lack of action in carrying out a public interest determination and responding to her request. The complainant has yet to receive a substantive response to her information request.
10. On 6 May 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.
11. 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 her information request within 20 working days, copying this response to him or to respond to him 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 4 June 2008.
12. On 21 May 2008 the public authority wrote to the complainant and informed her that they believed the delays to consider the public interest test were justified in her case. They also specified that they were satisfied that the information was exempt under section 31(1)(f), provided reasons why they felt so; but said that they needed more time to do a public interest determination. They also informed the complainant to go to the Commissioner if she was dissatisfied with this response. They did say that they hoped to provide a full response by the Commissioner's deadline of 4 June 2008.
13. On 4 June 2008 the Commissioner was called by the public authority to talk about the progress of this case. The public authority apologised to the Commissioner and informed him that the release of this information needed ministerial approval and that a further delay was required. The Commissioner commented that this process was not compliant with the Act but agreed to give the public authority a final ten working days for them to provide a substantive response to the

complainant. He informed the public authority that if the substantive response was not provided by 18 June 2008 he would be minded to issue this Decision Notice.

14. As of the date of this notice the public authority has not provided the Commissioner any indication of its progress in providing a substantive response to the complainant's request.

Analysis

Section 1(1)(a)

15. Section 1(1)(a) (full wording in the legal annex) requires a public authority to confirm or deny whether requested information is held.
16. In light of the Information Tribunal Decision in *King v Department for Work and Pensions* [EA/2007/0085] the Commissioner now determines whether there have been procedural breaches at the time of the internal review and if there has been no review, then at 20 working days from the date of the request.
17. The public authority did not indicate explicitly that it held information that was relevant to the request until 21 May 2008. This was more than seven months from the date of request 25 September 2007.
18. The Commissioner therefore finds a breach of section 1(1)(a) of the Act as the public authority failed to confirm or deny whether it held information falling within the scope of the request within twenty working days of receiving the request.

Section 1(1)(b)

19. Section 1(1)(b) (full wording in the legal annex) requires that if the requested information is held by the public authority it must be disclosed to the complainant unless a valid refusal notice has been issued. The public authority has more than nine months from the date of the request still failed to either disclose the requested information or provide a valid refusal notice.
20. The Commissioner therefore finds the public authority in breach of section 1(1)(b) of the Act as it has failed to either provide the requested information or a valid refusal notice within the statutory time limits.

Section 10(1)

21. Section 10(1) (full wording in the legal annex) requires the public authority to comply with section 1 of the Act within twenty working days of receipt of the request.

22. As indicated above the public authority is still yet to comply with section 1 of the Act and it has been over nine months since the date of the request. The Commissioner therefore finds a breach of section 10(1) of the Act.

Section 17(1)

23. 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.
24. In this case the original refusal notice did not offer 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.
25. The Commissioner notes that the public authority did provide reasons to the complainant about why it felt the exemption was engaged on 21 May 2008. These reasons were supplied more than seven months after the request was received; well in excess of the twenty working days allowed by the Act.

Section 17(3)

26. 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. This states 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."*

27. 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 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
28. In the letter of 21 May 2008, the public authority gave its conclusion to the internal review it had carried out into the delays up until that point. By this time, NOMS had exceeded the upper limit of the ICO guidance (see paragraph 18) by four

months. The Commissioner is therefore particularly concerned that in this letter the public authority, whilst finally offering reasons for the exemption being applicable, offered no reasons for the delays and yet determined that they were “justified.”

29. 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 the maximum time for carrying out a public interest determination.

The Decision

30. The Commissioner's decision is that the public authority did not comply with section 1(1)(a) of the Act as it failed to inform the complainant whether it held information relevant to her request within twenty working days.
31. The public authority also did not comply with section 1(1)(b) of the Act as it failed to either provide the complainant with the information or indicate that an exemption applies to the information within the statutory timeframe.
32. The public authority also did not comply with section 10(1) of the Act as it failed to comply with section 1(1)(a) and 1(1)(b) of the Act within twenty working days.
33. The public authority did not deal with the request for information in accordance with section 17(1)(c) of the Act in that it did not explain within 20 working days of receipt of the request why the exemption was engaged.
34. The public authority has also breached section 17(3) of the Act as it failed to complete its public interest determination and communicate the results of this to the complainant within a reasonable timescale.

Steps Required

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

Issue a notice compliant with section 17(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.

The Commissioner has not ordered any steps in relation to the breach of section 17(1) in this Notice because the public authority's letter of 21 May 2008 stated why it believed the exemption cited to be engaged.

The Commissioner has found the public authority in breach of section 1(1)(a), 1(1)(b) and section 10(1) but these breaches do not necessitate remedial action.

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

Failure to comply

37. 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

38. 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 28th day of July 2008

Signed

**Gerrard Tracey
Assistant 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.