

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 compensation payments made to prisoners and former prisoners. The public authority replied that section 43 (commercial interests) 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 two separate occasions before the complainant complained to the Commissioner. It was also extended a further time after the Commissioner set a deadline. The Commissioner finds a delay of over six months in carrying out a public interest determination to be in breach of section 17(3). The Commissioner has also found the public authority in breach of section 1(1)(a), 1(1)(b) and section 10(1) of the Act. The public authority is required to issue a notice explaining why section 43 is engaged in relation to each part of the request 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 request was sent to HM Prison Service when it was the responsibility of the Home Office. However he understands that on 1 April 2008 the headquarters and regional structures of HM Prison Service and the National Offender Management Service (NOMS) were streamlined into a single organisation responsible for running HM Prison 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 not NOMS. However, for the sake of clarity, this decision notice refers to the NOMS as if it were the public authority.

3. On 28 November 2007, the complainant emailed the following request to the public authority:

'I am writing to request information under the Freedom of Information Act 2000 regarding compensation claims made against HM Prison Service.

I would like to know the following in reference to financial years 2005/06 and 2006/07. Please supply any information clearly identified to which financial year it is applicable.

1. How many compensation claims were made against HM Prison Service in the financial years 2005/06 and 2006/07?

2. Who made the compensation claims and what was the nature of the claim?

3. Which prisons were involved in the compensation claims?

4. Please indicate which claimants are existing inmates, or had been inmates during the time the compensation claim relates to.

5. Were any of the claimants employed by HM Prison Service. If so, how many and what was the amount and nature of the claim?

6. Were any of the claims settled? If so, how much compensation was paid?

7. Did HM Prison Service accept any liability in any of the cases?

8. How many of the cases remain pending?

9. What was the financial cost, legal or otherwise, of dealing with the compensation claims?'

4. On 29 November 2007, the public authority acknowledged their receipt of the request. On 17 January 2008 the public authority wrote to the complainant stating that it believed that the exemption provided by section 43 (commercial interests) 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 15 February 2008 to complete this public interest determination.

5. On 15 February 2008, 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 14 March 2008. On 14 March 2008, 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 11 April 2008.
6. On 11 April 2008, the public authority wrote to the complainant again and informed him that the public interest test was still to be carried out and set a new target response of 16 May 2008.

The Investigation

Scope of the case

7. On 18 April 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 18 April 2008, the complainant informed the Commissioner about the public authority's delay 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 12 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.
10. 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 11 June 2008.

11. On 4 June 2008 the Commissioner emailed the public authority and reminded it that he expected a substantive response by 11 June 2008.
12. On 11 June 2008 the public authority wrote to the complainant and informed him that they could not meet the Commissioner's deadline in this case and set a new target response of 11 July 2008.
13. On 13 June 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 he should email it to obtain a detail of progress.
14. On 13 June 2008 the Commissioner emailed the public authority to advise it that in the absence of detailed reasons why there was a delay, what steps were being taken to provide a response and a set deadline he would issue this Decision Notice imminently. As of 17 July 2008 the Commissioner has not received a response to his email of the 13 June 2008 and so moved to issue this Decision Notice.

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 has not indicated explicitly that it holds information that was relevant to the request and seven months have passed.
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 seven 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 seven 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 neither the original refusal notice nor the additional extension letters offered the complainant any reason why the public authority believed section 43 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)

25. 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."*

26. 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 unacceptable. The Commissioner is also aware that this public authority has dealt 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 11 June 2008 despite being set a deadline by the Commissioner and the issuing of the Practice Recommendation eleven weeks earlier.

27. 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.
28. It is also relevant to note that the Commissioner received a separate complaint against the public authority from a different individual but which dealt with related material. In that case the request was for information about the total amount of compensation paid to inmates at 8 high security prisons during 2005/6 and 2006/7. That request was made in March 2006 and the public authority again issued a refusal notice citing section 43 and extended the public interest test a number of times. This complaint did not result in a Decision Notice because the public authority provided a response prior to one being issued. Whilst the Commissioner recognises that the request in that case was narrower it nevertheless related to some of the material within the scope of the request in this case. Furthermore it is relevant as it demonstrates that in fact the public authority had already been giving some consideration to the public interest in relation to a portion of information within the scope of the request in this case as early as March 2007. This supports the Commissioner's conclusion that the time taken to consider the public interest in this case is unreasonable. He has made further comments about the related request in the Other Matters section below.

The Decision

29. 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 his request within twenty working days.
30. 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.
31. 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 of receiving the request.
32. 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.

33. 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

34. 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 commercial interests of any person, 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.

35. 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.

Other matters

37. The Commissioner has highlighted the difference between commercial and financial interests in relation to the applicability of section 43 in his Awareness Guidance Number 5 and draws this to the public authority's attention for when it provides a substantive response.
38. Furthermore as mentioned above, at paragraph 28, the Commissioner has considered a complaint about a request to the public authority for related but more limited material. In that case he notes that, having extended the public interest test for a number of months, the public authority in fact concluded that information could be disclosed. It therefore supplied some information which is within the scope of the request in this case to another complainant on 21 December 2007.
39. Given that some of the material that was released to the other complainant on 21 December 2007 was within the scope of the request in this case, the Commissioner would have expected the public authority to also have sent it to the complainant in this case at the same time. Instead the public authority sent a letter extending the time for considering the public interest test on 17 January 2008. The Commissioner would expect the public authority to release the information previously disclosed to be released to the complainant in this case as soon as possible.

Failure to comply

40. 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

41. 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.

Commercial interests

Section 43 provides that:

- (1) Information is exempt information if it constitutes a trade secret.
- (2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
- (3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).