

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 26 June 2008

Public Authority: National Offender Management Service (part of the Ministry of Justice)
Address: 6th Floor
Selborne House
54-60 Victoria Street
London
SW1E 6QW.

Summary

The complainant requested information relating to indeterminate sentences. The public authority replied that section 35 (formulation of government policy) 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 made a valid complaint to the Commissioner. The Commissioner finds a delay of over six months in carrying out a public interest determination to be a breach of section 17(3). The public authority also failed to cite a valid exemption under the Act because it did not cite the relevant subsection and therefore breached section 17(1)(b) of the Act. The public authority is required to issue a notice explaining which exemption is engaged and why, where it believes the balance of the public interest lies and its reasoning for this. 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 not NOMS. However, for the sake of clarity, this Decision Notice refers to NOMS as if it were the public authority.

3. On 22 November 2007 the public authority received the following request from the complainant that asked for the following information in accordance with section 1 of the Act:

“Information relating to Indeterminate Sentence Public Protection (IPP) which I am subject to. Jack Straw Policy change, high court rulings, prison policy developments, lifer ‘status’ removed, movements, re-cats and anticipated changes.”

4. On 20 December 2007 the public authority responded to the complainant stating that it believed that the exemption provided by section 35 (Formulation of Government Policy) of the Act was 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 25 January 2007 (clearly the year should have been 2008) to complete this public interest determination.

5. The public authority then wrote a further letter to the complainant, also dated 20 December 2007, to inform him that it would actually require more time to do its public interest determination and set a new target response date of 25 February 2008. It appears there may have been a typographical error and that this letter was a re-issue of that sent on 25 January without the date of the letter being changed. On 25 February 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 date of 25 March 2008.

6. On 2 April 2008 the public authority wrote to the complainant and informed him that they believed the delays to consider the public interest test were justified in his case. They also specified that they were satisfied that the information was exempt under section 35(2)(i) and (ii) of the Act (section 35(2)(i) & (ii) of the Act does not exist and the Commissioner assumes the intention of the public authority was to cite section 35(2)(a) & (b)). However they said they needed more time to determine the public interest. They also informed the complainant of his right to go to the Commissioner if he was dissatisfied with this response.

The Investigation

Scope of the case

7. The focus of this investigation is the delay by the public authority in the provision of a substantive response to the complainant to his information request.

Chronology

8. On 1 January 2008, the complainant made an enquiry to the Commissioner about the public authority's lack of action in carrying out a public interest determination and responding to his request. On 6 March 2008 the complainant provided additional correspondence so that the Commissioner had a valid complaint about the way that his request for information was handled.
9. On 11 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. The Commissioner advised the public authority that a substantive response should now be provided to the complainant with a minimum of further delay. He also asked for a copy of this response to be sent to him.
11. The public authority acknowledged the Commissioner's letter on the 13 March 2008. On 2 April 2008, the public authority wrote to the complainant informing him that they felt that the public interest delay was justified. On the 17 April 2008 the Commissioner received an email from the public authority that purported to attach a letter to the complainant in this case but instead attached a letter to another requester. On the 26 April 2008 the Commissioner emailed the public authority and to say he was still awaiting a substantive response and indicated that previously the public authority had not sent him the correct one. He asked it to send the response to the Commissioner without further delay.
12. On 7 May 2008 the Commissioner informed the public authority that the Commissioner was minded to issue a Decision Notice on this case. He wrote to the public authority to offer a final opportunity for a substantive response. He indicated that the public authority should either provide to the complainant a substantive response to his information request within 20 working days, copying this response to him, or respond to him (the Commissioner) giving clear and specific reasons as to why it would not be possible to respond to the complainant within this time period and stating 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 5 June 2008.

13. On 9 June 2008 the Commissioner called the public authority, informed them that this Decision Notice was imminent and allowed five more working days as they informed him that the response may be ready. After these five working days had passed the Commissioner moved to issue this Decision Notice.
14. The Commissioner provided a further reminder to the public authority on 13 June 2008. On 26 June 2008 the public authority contacted the Commissioner and advised him that it was planning to release information to the complainant on 4 July 2008. Notwithstanding this clarification, the Commissioner has determined that, in view of the way the request has been handled, it would be appropriate to issue this decision notice.

Analysis

Section 17(1)

15. Section 17(1) (full wording in the legal annex) requires that, where a public authority believes that any exemption under 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 for providing a notice identifying the exemption and stating why it is engaged.
16. In this case neither the original refusal notice nor the additional extension letters offered the complainant any reason why the public authority believed section 35(2)(a) and (b) were engaged and the Commissioner therefore finds that the public authority has breached section 17(1)(b) and (c) in failing to state why it believed that the exemption was engaged within twenty working days from receipt of the request.

In citing sections 35(2)(i) & (ii), the public authority referred to subsections of the Act that do not exist. In failing to accurately cite an exemption under Part II of the Act, the public authority failed to comply with section 17(1)(b).

Section 17(3)

17. 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."*

18. In this case the Commissioner notes that the public authority has exceeded the maximum time allowed for compliance with his guidance by more than a factor of three. The Commissioner believes that this is unacceptable. The Commissioner is also aware that this public authority has been and is dealing with a number of other information requests in a similar way. He issued a Practice Recommendation to the public authority 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
19. The Commissioner is disappointed that in a letter to the complainant dated 2 April 2008, NOMS once again extended the time for the public interest test despite the issuing of the Practice Recommendation three weeks earlier.
20. In this letter the public authority also sought to address the complainant's request for an internal review into the time taken to respond to the request. By this time, NOMS had exceeded the upper limit in the ICO guidance (see paragraph 15) by two months. The Commissioner is therefore particularly concerned that in this letter the public authority offered no reasons for the delays and yet determined that they were "justified" and "warranted".
21. 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.

The Decision

22. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with section 17(1)(b) and (c) of the Act in that it failed to issue a valid refusal notice within 20 working days of receipt of the request.
23. 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

24. 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 which exemption is engaged and why 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.

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

Failure to comply

26. 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

27. 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 26th day of June 2007

Signed

**Nicole Duncan
Head of FOI Complaints**

**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.

Formulation of Government Policy etc.

Section 35 provides that:

- (1) Information held by a government department or by the National Assembly for Wales is exempt information if it relates to—
 - (a) the formulation or development of government policy,
 - (b) Ministerial communications,
 - (c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or
 - (d) the operation of any Ministerial private office.

(2) Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded—

(a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or

(b) for the purposes of subsection (1)(b), as relating to Ministerial communications.

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

(4) In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking.

(5) In this section—

- “government policy” includes the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the National Assembly for Wales;

- “the Law Officers” means the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland and the Attorney General for Northern Ireland;

- “Ministerial communications” means any communications—

(a)

between Ministers of the Crown,

(b)

between Northern Ireland Ministers, including Northern Ireland junior Ministers, or

(c)

between Assembly Secretaries, including the Assembly First Secretary,

and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly, and proceedings of the executive committee of the National Assembly for Wales;

- “Ministerial private office” means any part of a government department which provides personal administrative support to a Minister of the Crown, to a Northern Ireland Minister or a Northern Ireland junior Minister or any part of the administration of the National Assembly for Wales providing personal administrative support to the Assembly First Secretary or an Assembly Secretary;

- “Northern Ireland junior Minister” means a member of the Northern Ireland Assembly appointed as a junior Minister under section 19 of the [1998 c. 47.] Northern Ireland Act 1998.