Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 30 November 2009

Public Authority: National Offenders Management Service (An executive agency of the Ministry of Justice)
Address: 102 Petty France
London
SW 1H 9AJ

Summary

The Complainant requested from the Ministry of Justice ("MOJ") information it had considered or generated during an industrial dispute with employees of the Prison Service. The MOJ communicated the majority of the requested information to the complainant however the rest was withheld under the exemption in section 36(2)(b)(i) - provision of free and frank advice - and the public interest favoured maintaining the exemption. The Commissioner found that the exemption had been properly applied, as had the public interest test. The Commissioner also decided that the public authority had failed to comply with its duty to issue an adequate refusal notice within the time limit set out in section 10(1) of the Act, which constitutes a breach of section 17(1)

The Commissioner's Role

1. The Commissioner's role 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. In a letter dated 3 January 2006 the complainant requested the following information from the National Offender Management Service ("NOMS"):

    - All information generated between October to December 2001 between a Mr. D, and a member of the Prisons Board and/or the Prison Board concerning the review of instructional grades.

- A paper, regarding the review of instructional grades, from Mr. D to the Prison Board generated in January 2002.

- All information generated by (and including) correspondence between the Prison Board, its members and four named individuals relating to the 2002 pay round/review of instructional officers for given dates between 6 June 2002 and March 2003.

- Any information held by the Prison Board or its members relating to the 2002 pay round with the Public and Commercial Services Union ("PCS").

3. In a second letter to NOMS, also dated 3 January 2006, the Complainant further requested:

- Any correspondence / papers exchanged between, or on their behalf, the Right Honorable Hilary Benn MP and the prison service management in relation to letters from PCS to them dated 19 February 2003 and 1 April 2003.

- All information held by the then Prisons Minister, the Right Honorable Hilary Benn MP, generated by a meeting with the PCS on 6 March 2003.

- All information held by the then Prisons Minister, the Right Honorable Paul Goggins MP, generated by a PCS 2002 pay deal and its impact on Instructional Officers in the month before and after the meetings with the PCS on the 17 September 2003 and 23 March 2004.

4. The Ministry of Justice, on 9 May 2007, acquired from the Home Office, responsibility for NOMS; for clarity, the acronym "MOJ" will be used to reference the public authority for the remainder of this decision notice.

5. The complainant was informed by the MOJ in correspondence dated the 30 January and 21 February 2006 that it would, in order to consider the public interest test, exercise its right to extend the time limit to deal with his information request.

6. On 1 March 2006, the MOJ informed the complainant that the requested information was being withheld by virtue of the exemption afforded by section 35(1)(a) (formulation of government policy) of the Act.

7. On 13 March 2006, the complainant requested an internal review of the decision. In response, the MOJ found that the majority of the requested information should be released to the complainant. The review also stated that section 36(2)(b)(i) (but not section 35 (1) (a) as previously stated) barred the release of the remainder of the requested information. These review findings (along with the released information) were conveyed to the complainant in a letter dated 29 August 2006.

The Investigation

Scope of the case

8. On 12 January 2007 the complainant contacted the Commissioner to complain about the way his request for information had been handled.

Chronology

9. The investigation commenced with the Commissioner writing to both parties (on 8 October 2007) seeking relevant documents and information In particular he asked the MOJ for a copy of the information it withheld following the internal review. The MOJ provided its substantive response on the 14 January 2008 and also supplied a copy of correspondence it had previously sent to the complaint.

10. On 18 January 2008 the Commissioner asked the MOJ to provide further detail about the obtaining of the reasonable opinion of a qualified person as required by section 36.

11. On 22 January 2008 the MOJ informed the Commissioner that the relevant qualified person was Tony McNulty MP, who was the relevant minister at the time. The MOJ went on to say that on 25 August 2006 a written submission was sent to him seeking his opinion on the applicability of section 36(2)(b)(i) to the complainant's request. On the 29 August 2006 the Home Office received an e-mail from the office of the minister stating that he was of the opinion that section 36(2)(b)(i) was engaged.

12. After a further request from the Commissioner, dated the 30 January 2008, the MOJ, on the 31 January 2008, provided him with a copy of the withheld information.

13. The Commissioner next tried, unsuccessfully, to resolve this matter between the parties informally. In the alternative the parties were permitted to put forward any further arguments for or against the release of the information.

14. In correspondence dated 2 February 2009 the complainant stated that he feared that a civil servant had deliberately misled or lied to a government minister during the industrial dispute. Disclosing the information, the complainant went on to say, would confirm the correctness of this belief and therefore disclosure was in the public interest. The Commissioner in a letter dated 3 February 2009, asked the complainant for further details (i.e. the name of the civil servant and/or the misleading statement) however the complainant declined to provide any further information. Under cover of a letter dated the 28 July 2009, the MOJ provided the Commissioner with a copy of the submissions (with attachments) made to the qualified person who was asked to provide the reasonable opinion for the purposes of section 36.

Findings of Fact

15. The National Offender Management Service ("NOMS") is an executive agency of the MOJ responsible for correctional services in England and Wales.

16. A primary role of prison service instructional officers is to provide prisoners with a higher level of vocational training over a wide range of subjects. In or around 2001 the government, seeking to make changes to the terms, conditions and working practices of these staff, negotiated on this matter with their union, the PCS.

17. The withheld information is contained in five documents and consists of information generated by NOMS when determining its strategy to be used during the then ongoing negotiations between NOMS and the PCS regarding the review of instructional officer grades; and a draft of a letter to be sent from NOMS to the PCS.

Analysis

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18. The full text of the all relevant sections of the Act considered in this notice is contained in the legal annex.

Procedural breaches

19. A public authority must inform a person requesting information whether it holds the requested information and if so, communicate that information to the applicant, promptly, but not later than 20 working days after receipt of the request (section 10) or issue a refusal notice pursuant to section 17(1).

20. The Commissioner notes that the MOJ's decision not to communicate the requested information to the complainant by relying on section 35, was given to him in its letter dated the 1 March 2006. However the MOJ were to substitute their reliance on section 35 for section 36(2)(b)(i). This was the outcome of the review process and did not occur until the 29 August 2006.

21. Regarding the MOJ's late reliance on section 36 the Commissioner view is that the internal review is a chance for a public authority to reconsider its original decision and correct any mistakes. Therefore if a reasonable opinion has been given by the qualified person, by the time of completion of the internal review, then section 36 will be taken to have been applied. The decision in McIntyre v the Information Commissioner supports this approach:

    (i) Firstly, at paragraph 31, stating that in relation to flaws in the process followed by the qualified person in arriving at their opinion that *"even if there are flaws in the process these can be subsequently corrected, provided this is within a reasonable time period which would usually be no later than the internal review".*

(ii) Secondly, at paragraph 38, in relation to the general application of the Act it said, "However the Act encourages or rather requires that an internal review must be requested before the Commissioner investigates a complaint under s.50. Parliament clearly intended that a public authority should have an opportunity to review its refusal notice and if it got it wrong to be able to correct that decision before a complaint is made."

22. In Bowbrick v the ICO the Information Tribunal stated that "If a public authority does not raise an exemption until after the s17(1) time period, it is in breach of the provisions of the Act in respect to giving a proper notice because, in effect it is giving part of its notice too late". Accordingly, by its late reliance on section 36 (it took in excess of 179 days to rectify its absence from the refusal notice) the MOJ acted in breach of section 17(1).

Exemption

23. The MOJ withheld information on the grounds provided by section 36(2)(b)(1), namely 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 - …
>
> … (b) would, or would be likely to, inhibit –
>
> (i) the free and frank provision of advice, or

Qualified person

24. Section 36 (5) provides that in relation to information held by a government department in the charge of a Minister of the Crown, then the "qualified person" is any Minister of the Crown.

25. The MOJ stated that the qualified person was Mr. Tony McNulty. The Commissioner is satisfied that at the material times Mr. Tony McNulty was a Minister of the Crown and thus an appropriate 'qualified person'. The Commissioner has viewed a copy of the submissions made to Mr. Tony McNulty and accepts, as explained to him in the MOJ's letter dated 22 January 2008, that the opinion was sought on 25 August 2006 and given on 29 August 2006.

26. The MOJ explained, in its 22 January 2008 letter to the Commissioner, that the opinion given was that the qualified person had "approved the use of section 36(2)(b)(i)". It was not stated whether the qualified person's opinion was that disclosure would inhibit or, in the alternative, would be likely to inhibit the free and frank provision of advice.

27. The Commissioner notes the comments of the Information Tribunal in the case of McIntyre v Ministry of Defence (EA/2007/0068) in which it explained at paragraph 45 that:

> "We consider that where the qualified person does not designate the level of prejudice, that Parliament still intended that the reasonableness of the opinion should be assessed by the Commissioner but in the absence of designation as to level of prejudice that the lower threshold of prejudice applies, unless there is other clear evidence that it should be at the higher level."

28. The Commissioner has therefore assumed, in absence of evidence to the contrary, that it was the qualified person opinion that should the information be disclosed the likelihood of inhibition occurring is one that is likely to occur, rather than one that would occur.

29. The Information Tribunal expressed its view (in 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'.

30. The Commissioner, having viewed the submissions made to the qualified person, notes that he was provided with a copy of the requested information and given advice about relevant factors concerning the application of the exemption. Having considered the material before the qualified person, the Commissioner is satisfied that in this case the opinion of the qualified person was reasonably arrived at.

31. It is the Commissioner's view that a reasonable opinion is one that, given the circumstances of the case, falls within a range of acceptable responses that are neither outrageous nor absurd. The Commissioner is satisfied that the opinion of the qualified person that disclosure would be likely to inhibit the free and frank provision of advice was an objectively reasonable one in the circumstances of the case.

32. As laid out in paragraphs 30 and 31above, the Commissioner decision is that the qualified person's opinion was one that was both reasonably arrived at and reasonable in substance. The Commissioner therefore accepts that the exemption is engaged.

Public Interest Test

33. Since section 36 is a qualified exemption it is subject to a public interest test under section 2(2)(b) of the Act. This provides that information can only be withheld if 'in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information'.

34. In the case of Guardian & Brooke v The Information Commissioner & the BBC, the Information Tribunal acknowledged that the application of the public interest test to the section 36 exemption, "involved a particular conundrum". It noted that it is not for the Commissioner to form his own view on the likelihood of prejudice under this section, as this is given as a reasonable opinion by a qualified person.

However, it went on to say, in considering the public interest test, it is impossible to make the required judgement without forming a view on the likelihood of inhibition or prejudice" (paragraph 88).

35. In the Tribunal's view (at paragraph 91), the reasonable opinion is limited to the degree of likelihood that such inhibition, on the balance of probabilities, will occur. It therefore argued that the reasonable opinion, "does not necessarily imply any particular view as to the severity or extent of such inhibition or the frequency with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant"

36. This means that whilst the Commissioner should give due weight to the reasonable opinion of the qualified person when assessing the public interest, he can and should consider the severity, extent and frequency of the inhibition on the free and frank provision of advice that would or would be likely to prejudice the effective conduct of public affairs. Whilst doing so he accepts the likelihood of the prejudice occurring is as accepted by the qualified person, and that the nature of the prejudice is not trivial or insignificant.

Argument in favour of disclosure

37. The MOJ explained to the Commissioner that they considered the following public interest arguments favouring disclosure:

- It will increase public confidence in the decision-making process if they have an understanding how officials provide advice to Ministers.
- It would also promote government accountability to members of the public, an important part of the democratic process.
- The release of the requested information would aid public understanding of how government decides the correct roles, duties, and remuneration of employees working in prisons

38. In addition to the above, the Commissioner also considered the following public interest arguments favouring disclosure:

- That disclosure of the information would contribute to the public's knowledge of the conduct of the government and its civil servants during an industrial dispute between the government and a union representing prison staff.

Argument against disclosure

39. The MOJ explained to the Commissioner that they considered the following public interest argument against release:

- "The formulation stage of government policy occurs very early in the process where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a

minister. It is in the public's interests for officials and Ministers in the Home Office to have the freedom to consider fully all the options and implications for changing the pay and grading of any of their staff, including, as is the case here, those with instructional duties in prisons. It is a time when officials are allowed to think outside of the box and come up with diverse and original ideas, however, this rich source of original thinking would be stifled if officials felt their original thoughts on an issue would be released".

40. In addition to the above, the Commissioner also considered the following public interest arguments against disclosure as follows:

- Pay and other contract negotiations are often complex and protracted matters where each party will discuss internally its negotiation strategy and other highly sensitive matters. The public interest will not be served if one side, the public authority, is compelled to divulge information regarding the formulation of its negotiation strategy while the employee side cannot be so compelled. The release of this information could potentially lead to more protracted disputes at greater expense to the public purse.

41. The Commissioner has closely examined the information to which the MOJ has applied this exemption and carefully considered the above arguments. The information that was withheld by the MOJ was generated by the then ongoing industrial dispute with prison officers. It is concerned with the tactics and the stance to be taken in those negotiations.

42. The Commissioner considers that the public interest arguments that favour disclosure are, on analysis, of greater interest and benefit for the union and its members rather than the wider public. Having viewed the information the Commissioner's decision is that the advancement of the public's knowledge, of the conduct of the government and its civil servants, during an industrial dispute between the government and a union representing public sector employees, will not be great. The release of the information would primarily example what must be commonly known, that civil servants advise and draft documents for and on behalf of government. Whilst the Commissioner recognises that disclosure brings an inherent benefit in transparency, accountability and trust in respect of a public authority's activity these cannot be solely determinative.

43. While the release of the requested information would aid public understanding of how government decides the correct roles, duties and remuneration of public employees working in prisons, and this is in the public interest, this may well be a short-term gain. The cost of acquiring this "public understanding" is that the "how government decides" may well change as advisors become more circumspect in the advice they offer (for the reasons noted at paragraph 45 below).

44. The Commissioner has considered the factor that the information was four years old at the time of the request. The age of the information requested can be a relevant factor to the extent that, in general, the public interest in maintaining the exemption will diminish over time.

45. However in this case, as with industrial disputes in general, settlements can and will continue to have important consequences for those involved for many years. These consequences will usually include legally enforceable agreements between the employer and employees such as the variance of a person contract of employment .This variance is likely to affect pay, the amount of hours worked and the type of work done. Factors such as these may well endure for lengthy periods of time. Accordingly in this context the withheld information will continue to retain a high sense of relevance and immediacy to the present day. In the circumstances of this complaint the time that has elapsed, between the creation of the information and the request, is relatively short. It therefore does not add great weight to the argument for disclosure.

46. Those who provide advice to those negotiating on behalf of a public funded employer, should be able to do so after they have considered (however controversial or provocative) all options, scenarios and possibilities free of the fear that these considerations may be publicly divulged in the not too distant future. Advisors, the Commissioner believes, would rightly be cautious about considering matters, that if disclosed could cause further or future industrial tension and unrest. Advisors with such fears would, the Commissioner believes, inhibit the advice they give.

47. The information that has been withheld by the MOJ was generated by the then ongoing industrial dispute with prison officers. It is concerned with the tactics and the stance to be taken in those negotiations. The public interest favours having a level negotiating table. Compelling, even post agreement, the divulgence of the negotiating strategy of one side is not in the interest of the public for the previously mentioned reasons. It is difficult to see how the public interest will be overall served if the advice process needed to ensure the effective conduct of negotiations is hampered or curtailed by advisors fearing the consequences of the divulgence of information generated by the advice process.

48. The Commissioner for the reasons explained above, has decided that the public interest in maintaining the exemption outweighs the public interest in disclosure.

The Decision

49. The Commissioner's decision is that the public authority failed to comply with its duty to issue a proper refusal notice within the time limit set out in section 10(1), and thereby breached section 17(1) of the Act.

Steps Required

50. The Commissioner requires no steps to be taken.

Other Matters

51 Part VI of the section 45 Code of Practice 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, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, 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 a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. Whilst he recognises that in this case, the delay occurred before the publication of his guidance on the matter, the Commissioner remains concerned that it took over 167 days for an internal review to be completed.

Right of Appeal

52. 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 30th day of November 2009

Signed ……..

Gerrard Tracey
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 2(2) provides that –
"In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information"

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."

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.

Formulation of Government Policy

Section 35(1) provides that –
"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 or the provision of such advice, or
(d) the operation of any Ministerial private office.

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.