

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 5 February 2009

Public Authority: The Parliamentary Commissioner for Administration
(Parliamentary and Health Service Ombudsman)

Address: Millbank Tower
Millbank
London
SW1P 4QP

Summary

The complainant wrote to the Parliamentary and Health Service Ombudsman (“the public authority”) to request information regarding its handling of a complaint he had previously made against the Planning Inspectorate. Whilst the public authority disclosed to the complainant some of the information it held, it also withheld some information under section 44 of the Act which provides for an exemption where the disclosure of information is prohibited under any other law or enactment. The public authority said that the relevant statutory prohibition was section 11(2) of the Parliamentary Commissioner Act 1967. The Information Commissioner has considered the complaint and has found that the public authority correctly withheld the information under section 44 of the Act. In addition the Commissioner found that the withheld information is exempt under section 40(1) because it constitutes the personal data of the complainant. The Commissioner also found that the public authority breached section 17 of the Act by failing to issue the complainant with a refusal notice within 20 working days of receiving the request and breached section 10 of the Act by failing to communicate to the complainant within 20 working days the disclosable information. The Commissioner requires no steps to be taken by the public authority.

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. On 6 July 2006 the complainant wrote to the public authority to request information relating to its responsibilities in the implementation of the Code of Practice on Access to Government Information ("the Code"). The complainant had previously complained to the public authority about the Planning Inspectorate and included within this was a complaint about a request for information he had made to the Planning Inspectorate under the Code. The public authority had informed the complainant that it could not pursue this particular complaint further because the Code had been superseded by the Act with effect from 1 January 2005 and that therefore its role in policing the code also came to an end at this point.
3. The complainant's freedom of information request was for information on the public authority's handling of his complaints and for information regarding the extent of its remit in considering complaints received under the code. The complainant separated his request into six parts and a full text of the request is included as an annex to this decision notice.
4. The public authority responded to the request on 17 August 2006. The public authority refused the first part of the complainant's request under section 44 of the Act. It explained that section 44 provides for an exemption for information where its disclosure is prohibited under any other law. It said that the relevant statutory prohibition was section 11(2) of the Parliamentary Commissioner Act 1967 and that this provides that information obtained by the Ombudsman in the course of or for the purposes of an investigation shall not be disclosed except for the purposes of the investigation and any report to be made in respect of it. It said that the requested information was obtained and held for the purposes of considering the complaint against the Planning Inspectorate. The public authority said that it was refusing the second part of the complainant's request for the same reasons.
5. In response to the third part of the complainant's request the public authority provided the complainant with a copy of a press notice originally published in May 2005. It said that this was the only information falling within the scope of this part of the complainant's request.
6. In response to part 4 of the request the public authority highlighted the existence of the Memorandum of Understanding it had with the Information Commissioner and which was available on its own website. A copy was also provided to the complainant. The public authority said that interim arrangements were given on page two of the document and information about post decision correspondence is on page 3 of that document. The complainant was also referred to a web address for the British and Irish Ombudsman Association where it said details of the protocol for the referral of hybrid complaints could be found.
7. In response to part 5 of the request for details of the statutory references that the public authority had relied upon when it explained that it's responsibilities regarding the enforcement of the Code ended on 1 January 2005; the public

authority said that it relied upon the Act and the Parliamentary Commissioner Act 1967. The complainant was provided with the relevant internet addresses where texts of the legislation were available.

8. Finally, the public authority provided the complainant with a copy of guidance that was issued to its staff for dealing with complaints about Access to Information. The complainant was informed that such complaints were investigated in accordance with the procedures and jurisdictional requirements set out in the Parliamentary Commissioner Act 1967. The public authority also provided the complainant with the relevant excerpt from its own procedures manual which stipulates what action should be taken when a request for access to official information is received.
9. The complainant wrote back to the public authority on 29 August 2006. He said that he was dissatisfied and asked that the public authority reconsider its response to his request.
10. The complainant said that he disagreed with the public authority's reasons for refusing parts 1 and 2 of his request. He argued that the statutory prohibition in section 11(2) of the Parliamentary Commissioner Act 1967 does not apply to the requested information.
11. In respect of parts 3 and 4 of the request the complainant queried whether the public authority had supplied him with all the information it held and raised the possibility that it could hold further information falling within the scope of the request.
12. The complainant raised no objections about the public authority's response to part 5 of the request.
13. The complainant suggested that the public authority had interpreted part 6(i) of his request too narrowly. He said that he expected that further information would be held. As regards part 6(ii) the complainant said that the information he had been sent was not what he requested. He clarified the nature of the information he was seeking and asked that the public authority respond.
14. The public authority wrote back to the complainant on 19 October 2006 at which point it provided further explanation as to the reasons for refusing parts 1 and 2 of the request.
15. In respect of part 3 of the request the public authority now said that it agreed with the complainant that it might hold further information in relation to its responsibilities regarding the supersession of the Code by the Act. It said that it was currently trying to establish whether this was the case and that if it did hold further information it would look at whether the information could be disclosed to the complainant under the Act.
16. In respect of part 4 of the request the public authority said that the Memorandum of Understanding had been communicated to its staff by email but that this email

- was no longer held. It said that it would bear this part of the request in mind should it transpire that it held further information regarding part 3 of the request.
17. The public authority said that it was sorry if it had interpreted part 6 of the request too narrowly. It now provided the complainant with further guidance from its procedures manual which related to the application of section 12(3) of the Parliamentary Commissioner Act 1967. It also provided the complainant with some sections of the guidance that had been missing from the guidance that was originally provided. It said that it had not identified any further relevant guidance.
 18. In conclusion, the public authority said that it would provide the complainant with any further information when it had been obtained and after it had consulted appropriately about its release. It said that it recognised that in responding to the complainant's requests it had not met its statutory obligations under the Act and it apologised for this.
 19. The complainant received nothing further from the public authority and on 27 November 2006 wrote to the public authority to formally ask for an internal review of the handling of his request. The complainant reiterated his arguments from his previous letter and outlined what information he felt was still outstanding.
 20. The public authority presented the complainant with the findings of its internal review on 29 March 2007.
 21. The public authority upheld the decision to refuse to disclose legal advice requested in parts 1 and 2 under section 44 of the Act by virtue of section 11(2) of the Parliamentary Commissioner Act 1967. However the public authority said that in order to be helpful it had obtained new legal advice on the issue of its responsibilities after 31 December 2004 in the context of overseeing the Code. The complainant was provided with a copy of the new legal advice and the public authority explained that the information was being provided under its powers under the Parliamentary Commissioner Act and in order to aid the complainant's understanding of its decision in the complaint against the Planning Inspectorate.
 22. The public authority also provided the complainant with further information it had identified as falling within the scope of the request. It said that it was now providing information that could be interpreted as announcements; specifically a copy of a letter dated 21 July 2004 sent to MPs and an example of letters it sent in November 2004. It said that it was not providing copies of all the letters because the example that was being sent contained the information that was in all the letters. It also provided a full text of the relevant part of a November 2003 memorandum that was sent to the Public Administration Select Committee. It informed the complainant that subsequent minutes and other information from 2003 could be found on the Committee's website at www.publications.parliament.uk.
 23. The public authority apologised for not sending this additional information to the complainant earlier. However, it stressed that the information was not knowingly withheld. It said that staff who had previously dealt with the request had not identified the information. It said that other than this information, and the

information previously disclosed, no further information on announcements was held.

24. The public authority told the complainant that he had already received all the information it held in relation to parts 4, 5 and 6 of the request and he was advised that if he remained dissatisfied then he should approach the Information Commissioner.

The Investigation

Scope of the case

25. On 24 April 2007 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - The public authority's delay in responding to his requests.
 - The public authority's decision to refuse to disclose information in response to parts 1 and 2 of the request.
26. The Commissioner has not considered the public authority's response to parts 3, 4, 5 and 6 of the request because the complainant has not asked him to.
27. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act. In particular, the complainant asked the Commissioner to consider the public authority's handling of his internal review. The complainant was concerned that his internal review was passed from the member of staff originally allocated to consider the review to the head of the public authority.
28. The complainant also expressed his dismay at the length of time the public authority took to carry out an internal review. The Commissioner has addressed this in the 'Other matters' section.

Chronology

29. The Information Commissioner wrote to the public authority with details of the complaint on 2 January 2008. The Commissioner asked the public authority to fully explain and justify its decision to withhold the information under section 44 of the Act by virtue of section 11(2) of the Parliamentary Commissioner Act 1967. The Commissioner also asked to be provided with a copy of all the information that had been withheld from the complainant. Finally the Commissioner asked the public authority to outline a brief chronology of its investigation into the complaint against the Planning Inspectorate.
30. The public authority responded to the Commissioner on 11 January 2008. A copy of the information that had been withheld in response to parts 1 and 2 of the

request was disclosed to the Commissioner and the public authority confirmed that it believed that the specific documents could not be disclosed because the statutory prohibition in section 11(2) of the Parliamentary Commissioner Act applied. It stressed that, as far as it was concerned where the statutory prohibition refers to “for the purposes of the investigation” this includes for the purposes of deciding whether there is going to be an investigation. The public authority referred to the case of *Collins JR (Turpin) v Commissioner for Local Administration 2001* in aid of its position.

31. The public authority went on to say that any advice that it had obtained on the complaint against the Planning Inspectorate, including that obtained from internal legal staff, has been solely for the purposes of deciding whether or not to conduct an investigation. It added that it had satisfied section 11(2)(a) of the Parliamentary Commissioner Act 1967 by disclosing to the complainant all of the information that it considered material to its decision not to investigate his complaint against the Planning Inspectorate, including information gathered through enquiries with its legal staff. However, it said that to release any further information would be to breach section 11(2).
32. The public authority explained why it had provided the complainant with some legal advice on its responsibilities in relation to the enforcement of the Code after 1 January 2005. The public authority said that in its letter of 29 March 2007 it had provided the complainant with newly obtained legal advice on its legal position in order to assist the complainant's understanding of the decision not to investigate his complaint regarding the Planning Inspectorate's handling of the request he had made under the Code. It added that the new legal advice had been provided to the complainant in order to go some way towards satisfying his wish to know more about its legal position. It said that this legal advice summarises the pertinent points of the earlier advice obtained from its legal staff.
33. Finally, the public authority said that whilst it believed that the legal advice it had withheld was exempt from disclosure under the section 44 of the Act, had the statutory prohibition in section 11(2) of the Parliamentary Commissioner Act 1967 not existed then it was likely that the exemption in section 42 of the Act (legal professional privilege) would apply. However, it said that a definite decision on whether or not that exemption applied had not been reached as it was satisfied that the statutory prohibition prevented disclosure.

Findings of fact

34. The complainant had previously complained to the public authority regarding the Planning Inspectorate's handling of a request for information he had made to that body under the Code of Practice on Access to Government Information.
35. Up until 1 January 2005 the public authority had responsibility for investigating complaints about the handling of requests for information under the Code.
36. The public authority has confirmed that it received the complaint against the Planning Inspectorate on 25 March 2004 and that on 15 July 2004 it wrote to the complainant's Member of Parliament explaining why it would not investigate the

complaint regarding the Planning Inspectorate's handling of the request for information he made under the Code. The complainant was dissatisfied with this decision and there followed further correspondence between him and the public authority. The case was finally brought to a close in June 2006.

37. The legal advice that has been withheld from the complainant is dated from December 2005 to January 2006.

Analysis

38. A full text of the relevant statutes referred to in this section is included as an annex to this decision notice.

Procedural matters

39. The complainant made his request for information to the public authority on 6 July 2006 and it responded on 17 August 2006. At this point the public authority issued the complainant with a refusal notice in respect of parts 1 and 2 of the request and disclosed the information it had thus far identified as falling within the scope of the rest of the request. In doing so the public authority exceeded the 20 working days required by the Act.
40. The public authority subsequently identified further information which it said fell within the scope of the request. This was provided to the complainant on 19 October 2006 and in its internal review of 29 March 2007. Again the public authority failed to provide the complainant with this information within the 20 working days required by the Act.

Exemption

Section 44 – Prohibitions on disclosure

41. The public authority refused to disclose the information falling within the scope of parts 1 and 2 of the request under section 44 of the Act. Section 44 provides for an exemption from the Act for information which is prohibited from disclosure under any other law or enactment. The public authority has said that the relevant statutory prohibition is section 11(2) of the Parliamentary Commissioner Act 1967. The Commissioner accepts that section 11(2) of the Parliamentary Commissioner Act 1967 acts as a statutory prohibition on the disclosure of information obtained by the public authority in the course of, or for the purposes of, an investigation. The Commissioner also accepts that responding to a freedom of information request is not one of the 'gateways' to disclosure set out in sub-sections a) – c) of section 11(2).
42. The issue to be considered as part of this decision notice is whether the information requested by the complainant in parts 1 and 2 of the request, can be said to have been obtained by the public authority in the course of, or for the purposes of, an investigation.

43. The Commissioner has reviewed the information that has been withheld from the complainant and has considered the extent to which any or all of the information is covered by the statutory prohibition on disclosure.
44. The withheld information constitutes a request for legal advice and the response from the public authority's legal department providing that advice. The legal advice was generated by the public authority itself and therefore was not 'obtained' by the public authority in the sense that it was not received from an external source. However, it is the Commissioner's view that where the documents themselves have been generated by the public authority itself, the information contained within the documents should be considered to have been obtained by the public authority for the purposes of the investigation if it draws upon or makes significant reference to the details of the complaint against the Planning Inspectorate or any investigation into the complaint.
45. The legal advice refers significantly to the details of the complaint against the Planning Inspectorate and information that had been received through the public authority's preliminary enquiries with the Planning Inspectorate. Clearly the public authority only received this information as a result of it receiving the complaint against the Planning Inspectorate. The Commissioner is satisfied that this information was obtained by the public authority.
46. As to whether the information was obtained 'for the purposes of, or in the course of an investigation'; the Complainant has argued that the information was not obtained for such a purpose because when the legal advice was requested a decision not to pursue his complaint had already been taken. For its part, the public authority has argued that 'for purposes of...the investigation' covers situations where information has been obtained for the purposes of deciding whether or not to investigate a complaint.
47. The Commissioner has considered the arguments put forward by both parties and is minded to agree with the public authority's interpretation of the statutory prohibition. Having reviewed the content of the legal advice the Commissioner is satisfied that, despite the fact that the public authority had previously informed the complainant's MP that it would not investigate the complaint, when the legal advice was requested the public authority was still considering the possibility of pursuing an investigation into complaints raised against the Planning Inspectorate and the legal advice was requested in this context.
48. The Commissioner also wishes to highlight the public authority's disclosure to the complainant of more recent legal advice summarising the pertinent points from the earlier legal advice that had been withheld under section 44. The Commissioner is of the opinion that as a result of this disclosure much of the information contained within the withheld legal advice will have been made available to the complainant. The remainder of the withheld information focuses on the specific circumstances of the complaint against the Planning Inspectorate which, as has already been noted, was only obtained by the public authority as a result of it receiving the complaint against the Planning Inspectorate.

49. The complainant has also advanced arguments to the effect that the information should not be withheld because he is the person who made the complaint against the Planning Inspectorate. However, the Act is applicant blind and therefore the identity of the person making the request is not relevant and should not influence the public authority's response to the request. Disclosure under the Act is disclosure to the public at large. Furthermore, it is the Commissioner's view that where the statutory prohibition applies to any requested information, that information will be exempt from disclosure under section 44 of the Act regardless of who has requested the information. The Commissioner recognises that the public authority has some discretion to disclose information obtained in the course of, or for the purposes of an investigation where it believes that it would be conducive to the purposes of the investigation. However, this would be disclosure outside of the Act and the Commissioner has not sought to question the public authority's use of its discretion in this regard.
50. Section 44 is an absolute exemption and therefore the Commissioner has not undertaken an assessment of the public interest test.

Section 40 – Personal information

51. The public authority has relied solely on section 44 to refuse to disclose the information in respect of parts 1 and 2 of the request. However the Commissioner has also considered the extent to which any of the withheld information constitutes the personal data of the complainant.
52. Section 40(1) of the Act provides that information is exempt from disclosure if it constitutes personal data of which the person making the request is the data subject. Personal data is defined in the Data Protection Act 1998 ("DPA 1998") as data which relate to a living individual who can be identified from those data and other information which is in the possession of, or is likely to come in the possession of, the data controller. In this case the data controller is the public authority.
53. The Commissioner has reviewed the withheld information and he is satisfied that it is the personal data of the complainant. Therefore the Commissioner finds that the information withheld in response to parts 1 and 2 of the request is additionally exempt under section 40(1). Whilst the Commissioner considers this information to be exempt under the Act, given that the information constitutes the personal data of the complainant, the complainant is entitled to request this information under section 7 of the DPA 1998.
54. The Commissioner has carried out a separate assessment under the terms of the DPA 1998 and has informed the complainant that he considers it unlikely that the public authority breached the DPA 1998 by failing to disclose the information in parts 1 and 2 of the request. The Commissioner notes that there is a specific exemption from the subject information provisions of the DPA 1998, under section 31(4), which relates to personal data processed for the purposes of discharging any function conferred by statute on the Parliamentary Commissioner for Administration.

The Decision

55. The Commissioner's decision is as follows:

- By failing to issue the complainant with a refusal notice, in respect of parts 1 and 2 of the request, within 20 working days of receiving the request, the public authority breached section 17(1) of the Act.
- By failing to provide the complainant with the non-exempt information, within 20 working days of receiving the request, the public authority breached section 10(1) of the Act.
- The public authority dealt with the request in accordance with the Act to the extent that it correctly withheld the information falling within the scope of parts 1 and 2 of the request under section 44(1) of the Act.
- In addition, the Commissioner considers the information in parts 1 and 2 of the request to be exempt from disclosure under section 40(1) of the Act.

Steps Required

56. The Commissioner requires no steps to be taken.

Other matters

57. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

On 27 November 2006 the complainant asked the public authority to conduct an internal review of its handling of his information request. The public authority did not present the findings of the internal review until 29 March 2007. Section VI of the *Secretary of State for Constitutional Affairs' Code of Practice on the discharge of public authorities' functions under Part I of the Freedom of Information Act 2000* issued under section 45 of the Act says that it is good practice for a public authority to have a procedure in place to deal with complaints about the manner in which a request for information is handled. As he made clear in his *Good Practice Guide No 5*, the Commissioner considers that these reviews should be completed as soon as possible. Whilst 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 up to 40 days. In this case the public authority took 4 months to carry out the internal review and whilst the Commissioner acknowledges that the complainant requested an internal review before *Good Practice Guide No 5* was published, the Commissioner still considers this to be a significant failure to conform to the Code of Practice.

Right of Appeal

58. 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 5th day of February 2009

Signed

**Graham Smith
Deputy Commissioner**

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

Annex A – The Request

I am writing to make an open government request for all the information to which I am entitled under the Freedom of Information Act 2000 [FOIA]. To assist you with this request, I outline my query below as specifically as possible. If, however, this request is too wide or insufficiently clear, I should be grateful if you would contact me as I understand that under the Act you are required to advise and assist requesters, if necessary, in re-framing requests.

Circumstances of FOIA request

My request relates to the responsibilities of the Parliamentary and Health Service Ombudsman [PHSO] in the implementation of the Code of Practice on Access to Government/Official Information [COP].

I wish to establish the legal position after 31 December 2004 in circumstances where the PHSO involvement had begun several months before but was not completed by 1 January 2005 when the Freedom of Information Act 2000 came into effect. I set out my formal requests below and would ask, please, that your responses are as requested and not reduced to “simple terms”. Where more convenient for you, copies of the requested texts will be acceptable provided you confirm that they contain the whole of those texts.

I ask for:

- 1: Full details of the text of the request to the PHSO legal department by Deputy Ombudsman Trish Longdon for “legal and jurisdictional advice” [her letter to me of 15 March 2006] and of the legal department’s response(s).
2. Full details of the texts of all other recorded advice (by way of notes or minutes of meetings, notes of telephone conversations, notes for the file, letters, emails, text messages, memoranda and similar) from the PHSO’s legal department or individual legal staff on the Ombudsman’s responsibilities in the circumstances of this request as set out under the heading above “Circumstances of FOIA request”.
3. Full details of the texts of all announcements (by way of the means illustrated in request **2** above and whether or not in the public domain) relating to the Ombudsman’s responsibilities in the circumstances of this request as set out above.
4. Full details of the texts of all guidance, advice, instruction, protocol and similar relating to the Ombudsman’s responsibilities in the circumstances of this request as set out above.
5. To the extent not fully covered by your answers to requests **1- 4** above, the texts of the precise statutory references (Acts, sections, schedules, paragraphs and secondary legislations regulations, orders and similar) relied on for the office of the PHSO interpretation of an immediate cut-off on 1 January 2005 of its responsibilities in the implementation of the COP.

6. Full details of the texts of all guidance, advice, instruction, protocol and similar for PHSO staff of all grades concerning:

- (i) The application of section 12(3) Parliamentary Commissioner Act 1967 to the implementation of the COP; and,
- (ii) An MP referral case where section 5 (Details of a complaint about refusal of access to official information) of the Referral form has been completed but not section 4 (Details of a complaint about maladministration).

Annex B – Legal Annex

Section 1(1) of the Act 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 10(1) of the Act 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.”

Section 17(1) of the Act provides that:

“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.”

Section 40(1) provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

Section 44(1) provides that:

“Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-

- (a) is prohibited by or under any enactment,
- (b) is incompatible with any Community obligation, or
- (c) would constitute or be punishable as a contempt of court.”

Section 11(2) of the Parliamentary Commissioner Act 1967 provides that:

“Information obtained by the Commissioner or his officers in the course of or for the purposes of an investigation under this Act shall not be disclosed except—

- (a) for the purposes of the investigation and of any report to be made thereon under this Act;
- (b) for the purposes of any proceedings for an offence under the Official Secrets Acts 1911 to 1989 alleged to have been committed in respect of information obtained by the Commissioner or any of his officers by virtue of this Act or for an offence of perjury alleged to have been committed in the course of an investigation under this Act or for the purposes of an inquiry with a view to the taking of such proceedings; or
- (c) for the purposes of any proceedings under section 9 of this Act;

and the Commissioner and his officers shall not be called upon to give evidence in any proceedings (other than such proceedings as aforesaid) of matters coming to his or their knowledge in the course of an investigation under this Act.”