

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 17 December 2009

Public Authority: Department for Transport
Address: Great Minster House
76 Marsham Street
London
SW1P 4DR

Summary

The complainant made a request for information to the Department for Transport (the "Department") concerning policies and procedures for luggage carried airside and risk assessments and reports used to devise the 100ml rule for liquids taken airside. The request was refused under sections 24(1), 31(1)(a) and (b) and 27(1)(a) and (b) of the Freedom of Information Act 2000 (the "Act"). The Commissioner has investigated and considers that the Department was correct to withhold the most detailed information under section 24(1). However, he has also determined that the most general information is not exempt under any of the exemptions cited by the Department and he has therefore ordered disclosure of this information. He has set out, in a confidential schedule to this Decision Notice, the information that the Department is required to disclose. The Commissioner has also noted a number of procedural breaches of the Act.

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 Act. This Notice sets out his decision.

The Request

2. The complainant made a request for information to the Department for the following information –

Instructions to UK Airport Operators in respect of:

- (a) size and quantity of hand carried luggage allowed airside;

- (b) procedures, processes and results of monitoring for luggage rules carried airside; and
- (c) risk assessments and reports used to devise the 100ml rule for liquids taken airside.

The Department has explained to the Commissioner that it received the request on 17 May 2007.

3. The Department wrote to the complainant on 26 June 2007 and explained that it required further time to respond to his request in full. It stated that it was “considering” applying the exemptions contained within sections 24 (national security) and 31 (law enforcement) of the Act to the information the complainant had requested. The Department explained that it hoped to respond again by 11 July 2007.
4. On 14 August 2007 the Department wrote to the complainant again and apologised for the delay in processing his request. However, it explained that it required further time to consider this case before it would give a conclusive reply.
5. Following the intervention of the Commissioner, the Department responded to the complainant on 15 October 2007. It confirmed that it held the information requested and explained that it considered the information was exempt under sections 24(1) and 31(1)(a) and (b) of the Act. It explained the public interest factors it had taken into account when concluding that the public interest in maintaining the exemption outweighed the public interest in disclosing the information.
6. On 21 October 2007 the complainant contacted the Department and asked for an internal review of the decision to withhold the requested information from him.
7. The Department wrote to the complainant on 23 November 2007 with details of the outcome of the internal review. It confirmed its decision to withhold the requested information.

The Investigation

Scope of the case

8. On 26 December 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 Department’s refusal to provide him with the requested information.
9. During the course of the Commissioner’s investigation the following matters were resolved informally and therefore these are not addressed in this Notice:
 - The Department conceded that the information requested at (a) was reasonably accessible to the complainant at the time of his request and it

should therefore have applied section 21(1) to the information. The Department has now provided the complainant with details of the information that would have been accessible to him, at the time of the request.

- Following discussions between the Department and the complainant concerning how request (b) should be interpreted, the complainant agreed to exclude the part of his request concerned with “results of monitoring” with regard to request (b) from the scope of his complaint.
10. This Decision Notice therefore focuses on the following parts of the original request:
- (b) procedures and processes for luggage rules carried airside; and
 - (c) risk assessments and reports used to devise the 100ml rule for liquids taken airside.

Chronology

11. On 25 November 2008 the Commissioner wrote to the Department to begin the investigation. He asked a number of questions to assist his understanding of the Department’s application of exemptions, and asked to be provided with a copy of the information withheld from the complainant. The Commissioner asked the Department to respond to him by 5 January 2009.
12. The Department responded on 19 January 2009. It responded to some of the Commissioner’s questions, however refused to provide a copy of the withheld information on the grounds that the Memorandum of Understanding between the Commissioner and the Secretary of State for Constitutional Affairs (now the Secretary of State for Justice), on behalf of the Government departments, did not require it to do so. Further, the Department claimed that the information relevant to request (c) was also exempt under sections 27(1)(a) and (b) of the Act.
13. On 10 February 2009 the Commissioner responded to the Department. He explained that he was willing to commence the investigation without sight of the withheld information, however explained that it may become necessary to examine the information at a later stage of the investigation. The Commissioner also posed some additional questions regarding the Department’s application of exemptions and the public interest test.
14. On 24 February 2009 the Commissioner spoke to the Department on the telephone in order to assist the Department in providing a response to his most recent letter. The Department provided this response on 26 February 2009.
15. The Department provided a supplementary response to the Commissioner’s letter of 10 February 2009, having obtained some further clarification from the complainant, on 30 March 2009.
16. The Commissioner received further arguments about the exemptions claimed on 27 May 2009.

17. The Commissioner considered the information on file and determined that he could not make a decision as to the application of exemptions to the withheld information without sight of that withheld information. He contacted the Department on 17 June 2009 and asked if a representative from his office could meet with the Department and inspect the withheld information.
18. The Department contacted the Commissioner on 18 June 2009 and confirmed that representatives would be available on 24 June 2009 to discuss the withheld information.
19. On 24 June 2009 the Department contacted the Commissioner and explained that the meeting would have to be postponed. On 15 July 2009 the Department contacted the Commissioner and offered to meet his representative on 17 July 2009.
20. On 17 July 2009 the Commissioner's representative met officers from the Department. The withheld information was made available for the Commissioner's representative to inspect, and additional information was provided to assist him understanding the withheld information in context.
21. Following this meeting, the Commissioner considered it would be useful to compare the withheld information in request (b) with information in the public domain. He asked the Department to provide him with copies of the information relevant to request (b), which the Department had previously explained was marked 'restricted'. The Department supplied this information, with strict conditions as to its handling, on 7 August 2009.

Analysis

22. The provisions referred to throughout this notice are cited in full in the Legal Annex to it.
23. Though the Department's correspondence to the complainant did not specify which exemptions were considered to apply to which requests, the Department clarified to the Commissioner that it considered sections 24(1) and 31(1)(a) and (b) to apply to the information relevant to request (b) and sections 24(1) and 27(1)(a) and (b) to apply to request (c).

Exemptions

National security

24. The Commissioner has considered whether the Department has correctly applied section 24(1) of the Act.
25. Section 24(1) provides that –

- “Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security.”
26. The Commissioner considers that, in order for the exemption to be engaged, the withholding of the information must be *required* for the purposes of safeguarding national security. Although not defined in the Act the Commissioner considers that the word ‘required’ in this context means ‘necessary for the purposes of safeguarding national security’ and sets a high threshold for the use of the exemption. Given the close link between information rights and human rights the Commissioner has deemed it appropriate to consider the case law on article 8(2) of the European Convention on Human Rights. In that context, the word ‘necessary’ means that interference with the rights protected may be justified when it is *necessary* in a democratic society in the interest of national security. The necessity test is well defined in the Convention jurisprudence and equates with a pressing social need. Necessity is something less than absolutely essential but does connote a degree of imperative. The Commissioner would stress that, using the test he has adopted, it is not sufficient for the information to simply relate to national security; there must be evidence of real and specific threats to national security before the exemption can be said to be engaged.
27. ‘National security’ is not defined in statute or in case law. However, the Information Tribunal in the case of *Baker v Information Commissioner and the Cabinet Office* (EA/2006/0045) considered the following remarks, made in the House of Lords decision of *Secretary of State for the Home Department v Rehman* [2001] UKHL 47; [2003] 1 AC 153, to be useful when considering the issue of national security:
- (i) “national security” means “the security of the United Kingdom and its people” (paragraph 50 per Lord Hoffman);
 - (ii) the interests of national security are not limited to action by an individual which can be said to be “targeted at” the UK, its system of government or its people (paragraph 15 per Lord Slynn);
 - (iii) the protection of democracy and the legal and constitutional systems of the state is a part of national security as well as military defence (paragraph 16 per Lord Slynn);
 - (iv) “action against a foreign state may be capable indirectly of affecting the security of the United Kingdom” (paragraphs 16 to 17 per Lord Slynn); and
 - (v) “reciprocal co-operation between the United Kingdom and other states in combating international terrorism is capable of promoting the United Kingdom’s national security” (paragraph 17 per Lord Slynn).
28. The Department has explained the key elements in its aviation security programme.

29. The Transport Security and Contingencies Directorate (TRANSEC) aims to protect the travelling public, transport facilities and those employed in the transport industries primarily from acts of terrorism and to retain public confidence in transport security, whilst not imposing requirements that impact disproportionately on the travelling public or on the effectiveness and efficiency of industry operations. TRANSEC regulates the security industries.
30. The Secretary of State is empowered by legislation to require the regulated transport industries to implement security measures, which are designed to protect them from unlawful interference.
31. The Department has explained that at the time of the complainant's request for information, the threat level to the United Kingdom was graded at 'severe', which means that an attack was considered to be highly likely. According to the Department, threat is a measure of the likelihood that terrorists will attack a particular target and is dependent on the terrorists' intent and likely capability. The threat level, and other information, is provided to TRANSEC to enable it to focus security measures on those targets that are most at risk. At the time of responding to the request, the Department considered that there was sufficient evidence to suggest there were individuals and groups who were strongly motivated to plan and carry out an attack.
32. It should not be construed that anything in the Department's correspondence with the complainant or with the Commissioner should be taken to suggest that the complainant would be likely, if he were provided with the requested information, to use that information irresponsibly. However, in making a decision, the Commissioner must have regard to the fact that disclosure under the Act is tantamount to disclosure to the public at large and once released, the Department would cease to have control over the dissemination of the information.

Request (b)

33. The Department has explained that one such possibility for carrying out an attack would be to try and conceal prohibited articles in cabin baggage and take them through airport security screening areas by avoiding detection by security staff and equipment. These articles could then be used to destroy or hijack aircraft and commit other acts of terrorism. The Department has explained that knowledge of security screening procedures would substantially increase terrorists' chances of success.
34. The Department has argued that disclosing details of baggage security screening and placing it in the public domain would be highly likely to result in the information being used by terrorists to circumvent airport security procedures. The Department has been keen to impress upon the Commissioner the fact that the information is currently of limited distribution (accessible only to persons engaged in the implementation of security policies) and that it is marked 'restricted'.
35. The Commissioner has inspected the withheld information relevant to request (b). It is clear from the description of the information requested at (b) that it concerns

procedures which are in place to safeguard national security. Further, the Commissioner considers that, with the exception of a small part of the requested information, if the requested information were to be released, it could be used by terrorists to undermine the effectiveness of airport security procedures and thus increase the likelihood of successful attacks being carried out. He is therefore satisfied that the withholding of the majority of this information is required for the purpose of safeguarding national security and that the section 24(1) exemption is engaged in relation to this information. The Commissioner has provided the Department with a confidential schedule, setting out where he considers section 24(1) to apply to the requested information.

Request (c)

36. The Department has explained that, whilst the rules on what liquids may be taken airside are public knowledge, disclosing detailed information about the design of measures such as the 100ml rule for liquids would prejudice the prevention or detection of persons attempting to take prohibited articles on board. It has explained that disclosure of the requested information in (c) would substantially assist terrorists by enabling them to:
 - identify the type and quantities of liquids that are of concern and the damage that could be inflicted;
 - increase their knowledge about liquid explosives and chemical interactions;
 - utilise any weaknesses in the design of liquid restrictions; and
 - adapt their methods in order to avoid detection at airport security screening areas.
37. The Department has explained to the Commissioner that the information at request (c) is marked 'secret' and accessible only to nominated government officers holding the appropriate security clearance.
38. The Department considers that the arguments provided about the withheld information should guide the Commissioner in reaching the conclusion that the requested information is exempt from disclosure and that the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner has taken into account the Department's considerations however must reach an independent conclusion on the matter, with reference to the content of the withheld information.
39. The Department also considers that, as terrorists work in unexpected ways, disclosure of any information could be detrimental to national security, as it cannot predict all the ways in which the information may be used.
40. The Commissioner's representative has inspected the information at request (c). It is clear from the description of the information requested that it concerns the drawing up of procedures for liquids which may be taken airside. The Commissioner is satisfied that, in relation to the most detailed of the information, if the requested information were to be released, it could be used by terrorist groups to their advantage. This would clearly be detrimental to national security. The Commissioner is therefore satisfied that the withholding of this information is

required for the purpose of safeguarding national security and that the section 24(1) exemption is engaged in respect of this information.

41. The Commissioner has detailed, in a confidential schedule to this Decision Notice, the information he does not consider to be exempt from disclosure. The Commissioner considers this information effectively to be in the public domain or that the information reveals no detail that would assist anyone wishing to harm the nation's security, and therefore he does not believe it can be said to be necessary for the purposes of safeguarding national security to withhold it. The Commissioner has made this statement after carefully considering the confirmation the information would provide. He is mindful of the fact that similarity with other information in the public domain should not always be persuasive in national security cases. In this case he has not been provided with any convincing arguments that the information does not simply reflect official information already in the public domain on the topic.
42. In respect of the information which the Commissioner considers is exempt under section 24(1), he has carried out a public interest test.

Public interest arguments in favour of disclosing the requested information

43. The Department has identified the following public interest arguments in favour of disclosing the requested information:
 - the public interest in transparency and openness, in that disclosure of the requested information could help reassure the travelling public that airport security measures are in place and may increase confidence in the UK aviation security regime as a whole; and
 - the public interest in allowing interested parties to contribute to a debate about wider aviation security policy.

Public interest arguments in favour of maintaining the exemption

44. The Department has identified the following public interest arguments in favour of maintaining the exemption:
 - the public interest in safeguarding the security of the travelling public and the UK aviation industry and ensuring that processes and procedures designed to afford such protection are as effective as possible; and
 - the public interest in allowing the transport industry to operate as freely as possible from requirements that impact disproportionately on the effectiveness and efficiency of industry operations.

Balance of the public interest arguments

45. The Department has explained that the potential consequence of a prohibited article successfully passing through the airport security screening point (either by avoiding detection at the screening point or by devising a method of subverting the liquids rule) could well be the loss of an aircraft and its occupants. The Commissioner considers there is a very strong public interest in maintaining the

exemption in relation to details of procedures which are designed to protect national security. Owing to the severity of the potential misuse of the requested information, if it were to be disclosed, the Commissioner would require very strong counter-veiling public interest considerations to tip the balance in favour of disclosure.

46. The Department has explained that, if it disclosed the requested information, it would have to implement more rigorous screening procedures at airports than it does currently, similar to those employed following the liquid explosives threat of August 2006. This in turn would lead to extensive delays for passengers, flight cancellations, and the need for investment for additional security staff and screening equipment.
47. The Commissioner acknowledges the public interest in individuals being properly informed of aviation security requirements and having the ability to participate in debates concerning these issues.
48. The Tribunal, in the case of *Bellamy v Information Commissioner and the Department for Trade and Industry* (EA/2005/0023), clarified that the Commissioner may only take into account public interest factors inherent in the exemption under consideration, rather than those relevant to the subject matter, when making a decision. The Commissioner has reviewed the factors referred to in paragraphs 26 and 27 and does not consider that likely damage to the smooth running of the transport system and inconvenience to the public have been argued in way that indicates a risk to national security. Therefore, he may not take this factor into account when weighing the public interest factors in this case.
49. On balance, the Commissioner considers that the public interest in maintaining the exemption far outweighs the public interest in disclosure. He has therefore not gone to consider whether the other exemptions cited by the Department are applicable in respect of the information he considers to be correctly withheld under section 24(1).
50. In relation to the information which the Commissioner does not consider to be exempt under section 24(1), he has gone on to consider whether sections 31(1)(a) and (b) and 27(1)(a) and (b) of the Act are applicable.

Law Enforcement

51. The Commissioner has considered whether the Department has properly applied sections 31(1)(a) and (b) to the information relevant to request (b) and which is not exempt under section 24(1).
52. Section 31(1) provides that –

“Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

(a) the prevention or detection of crime, [or]

(b) the apprehension or prosecution of offenders...”

53. The Tribunal, in the case of *Hogan v Information Commissioner and Oxford City Council* (EA/2005/0030), explained that the application of the ‘prejudice’ test involved a number of steps: “First, there is a need to identify the applicable interest(s) within the relevant exemption...second, the nature of the ‘prejudice’ being claimed must be considered...a third step for the decision-maker concerns the likelihood of occurrence of prejudice” (paragraphs 28 to 34).

Identifying the applicable interests

54. The Department explained that it considered disclosure of the requested information would impact on the prevention and/or detection of crime and the apprehension of those attempting to take prohibited articles airside. It has argued that disclosure of the requested information would provide an insight into the Department’s policies and procedures in respect of airport security searches, which could then be used by terrorists to identify methods which would make it easier for them to circumvent airport security.
55. The Commissioner considers the Department has correctly identified the interests relevant to the exemption.

The nature of prejudice

56. The Tribunal, in the case of *Hogan*, commented that “...an evidential burden rests with the decision-maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice...” (paragraph 30).
57. The Department has explained that the need for high level security reflects the history of attacks against civil aviation. It has cited the terrorist incidents at Lockerbie involving Pan-Am 102 in 1988 and in the United States of America on 11 September 2001 as evidence of what may occur if individuals are able to subvert airport security policies and procedures.
58. The information the Department has provided demonstrates that individuals are prepared to attempt to carry prohibited articles on to aircraft. However, the Commissioner does not believe that the remaining withheld information would provide individuals with details of the Department’s processes and procedures, given that it is very general and so widely known or assumed. It therefore cannot be said the disclosure of the information would prejudice the prevention and/or detection of crime or the apprehension of offenders.
59. As the Commissioner does not consider that a causal relationship exists between the potential disclosure and the identified prejudice, he has not gone on to consider the likelihood of any prejudice arising. The Commissioner does not consider that the section 31(1) exemptions cited are engaged.

International relations

60. The Commissioner has considered whether the Department was correct to apply sections 27(1)(a) and (b) to the information to which is relevant to request (c) and to which section 24(1) does not apply.
61. Section 27(1) provides that –
- “Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-
- (a) relations between the United Kingdom and any other State, [or]
 - (b) relations between the United Kingdom and any international organisation or international court...”

Identifying the applicable interests

62. The Department has explained that the liquids restriction is a mandatory requirement set by the European Union following the UK security alert in August 2006. Further, it has explained that the information it holds regarding the liquids rule has been provided by international partners such as the US and other EU member states. The Department considers that the UK's relationships with these international partners would be compromised if the information were to be disclosed.
63. The Commissioner considers the Department has correctly identified interests relevant to the exemption.

The nature of prejudice

64. The Department has argued that the free flow of information between respective international security organisations would be compromised if it was known that information given in confidence was to be made readily available to third parties.
65. The Commissioner has reviewed this argument against the remaining information under consideration. He is of the view that the remaining information under consideration is not information which itself has been provided by international partners, merely that it relates to information which has been provided by these international partners. He also believes that, as the information is very general or so widely known that, any significant reaction from these parties whom the UK has a relationship with could not be said to be likely. The Commissioner also notes that he has been provided with limited arguments that have not considered the content of information in detail.
66. In light of the above, the Commissioner does not consider that the Department has demonstrated a causal relationship between the disclosure of the relevant information and the identified prejudice. He does not consider the exemption to be engaged.

Procedural Requirements

67. The Commissioner has considered whether the Department has dealt with the request in accordance with the procedural requirements of the Act.

General right of access

68. 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.”

69. The complainant’s request was received by the Department on 17 May 2007. Whilst the Department wrote to the complainant on two occasions before issuing a full refusal notice, it did not explicitly confirm that it held the information requested until 15 October 2007. However, this was before the date of the internal review (which was conducted on 23 November 2007) and therefore the Commissioner considers that the Department has complied with section 1(1)(a) of the Act.

70. The Department has withheld all of the information requested from the complainant. For the reasons outlined above, the Commissioner considers that some information may be disclosed to the complainant. In relation to this information, the Commissioner finds that the Department has breached section 1(1)(b) of the Act by failing to make this information available to the complainant. In relation to the information which the Commissioner agrees is exempt, the Department has not breached section 1(1)(b) of the Act.

Time for compliance

71. 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.”

72. The complainant’s request was received by the Department on 17 May 2007. Whilst the Department wrote to the complainant on two occasions before issuing a full refusal notice, it did not explicitly confirm that it held the information requested until 15 October 2007. This was clearly outside of the twenty working day period for confirming whether the information was held and therefore the Department has breached section 10(1) in this aspect.

73. As described above, the complainant’s request was received by the Department on 17 May 2007. The Department has not yet disclosed any information in response to the complainant’s request. In relation to that information which the

Commissioner has determined should be disclosed, the Department has breached section 10(1).

Refusal notices

74. Section 17(1) 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.”

75. Section 17(1) requires public authorities to notify complainants of the exemptions upon which they are relying by the time for compliance with section 1(1) of the Act, which in this case is twenty working days.

76. The Department confirmed to the complainant on 26 June 2007 that the exemptions it was considering were sections 24(1) and 31. In its correspondence with the Commissioner, the Department further cited section 27(1)(a) and (b) of the Act as a reason for refusing request (c). All of the exemptions relied upon by the Department were applied outside the twenty working day statutory period. The Department has therefore breached section 17(1) of the Act.

77. Section 17 of the Act requires public authorities to include certain information in a refusal notice. This includes explaining to the complainant which exemption(s) it is relying upon and explaining why it considers that information is engaged. The Department explained to the complainant that it was relying upon sections 24(1) and 31(1)(a) and (b) to withhold the requested information. However it did not explain to the complainant that it was relying upon section 27(1)(a) and (b). It has therefore breached section 17(1)(b) and (c) in relation to its application of section 27(1).

78. Section 17(3) provides that –

“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...

- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

79. In this case, the Department did not provide a full refusal notice within twenty working days, however stated that it required additional time to consider the public interest test in relation to its application of sections 24(1) and 31(1)(a) and (b). The complainant's request was received by the Department on 17 May 2007. The Department provided a full refusal notice, including details of its public interest determinations, on 15 October 2007, 105 working days after the request was received.
80. The Act does not define what constitutes a "reasonable" time for providing a full public interest determination. The Commissioner has considered the issue and published guidance which states that in no case should a public authority take longer than a further twenty working days to carry out a public interest determination. The Department has therefore breached section 17(3)(b) by failing to provide its completed public interest determination within this timescale. The guidance referred to by the Commissioner is available online at the following link:
- http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/foi_good_practice_guidance_4.pdf

Means by which communication can be made

81. The complainant's request for information specified that he wished to receive a copy of the information by email and a summary or digest of the information by post.
82. Section 11(1) provides that –
- “Where, on making his request for information, the applicant expresses a preference for communication by one or more of the following means, namely –
- (a) the provision to the applicant of a copy of the information in permanent form or in another form acceptable to the applicant,
 - (b) the provision to the applicant of a reasonable opportunity to inspect a record containing the information, and
 - (c) the provision to the applicant of a digest or summary of the information in permanent form or in another form acceptable to the applicant.

The public shall so far as is reasonably practicable give effect to that preference.”

83. Section 11(1) applies only to that information which may be disclosed under the Act. There is no requirement for the public authority to summarise information which it is not required to disclose.
84. The Commissioner considers that he is ordering disclosure of so little of the requested information that the Department would not be able to summarise it in

any useful way. He therefore does not consider it would be reasonably practicable for the Department to give effect to the complainant's preference to receive a summary of it. Therefore, the Department has not breached section 11(1)(c) by declining to comply with the complainant's preference to receive a summary of the information.

The Decision

85. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- section 1(1)(a), by confirming it held the requested information;
 - section 1(1)(b) by correctly applying section 24(1) to certain requested information;
 - section 11(1)(c), in that it would not be reasonably practicable to provide a summary or digest of the information.
86. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- section 1(1)(b) in respect of the information it withheld from the complainant which the Commissioner does not consider to be exempt from disclosure;
 - section 10(1), in that it failed to confirm it held the requested information within the relevant time period and failed to provide the complainant with information to which he was entitled within the relevant time period;
 - section 17(1) in relation to its late application of exemptions;
 - section 17(1)(b) and (c) in relation to its failure to explain to the complainant that it was relying upon sections 27(1)(a) and (b) to withhold the information at request (c); and
 - section 17(3) in that it failed to complete its public interest test within a reasonable time.

Steps Required

87. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- to provide to the complainant a copy of the information detailed in the confidential schedule to this Decision Notice.
88. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

89. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

90. 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.
Website: www.informationtribunal.gov.uk

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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 17th day of December 2009

Signed

**Steve Wood
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 1(2) provides that –

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

Section 1(3) provides that –

“Where a public authority –

- (a) reasonably requires further information in order to identify and locate the information requested, and
- (b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.”

Section 1(4) provides that –

“The information –

- (a) in respect of which the applicant is to be informed under subsection (1)(a), or
- (b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.”

Section 1(5) provides that –

“A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).”

Section 1(6) provides that –

“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.”

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.”

Section 10(2) provides that –

“Where the authority has given a fees notice to the applicant and the fee paid is 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.”

Section 10(3) provides that –

“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.”

Section 10(4) provides that –

“The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.”

Section 10(5) provides that –

“Regulations under subsection (4) may –

- (a) prescribe different days in relation to different cases, and
- (b) confer a discretion on the Commissioner.”

Section 10(6) provides that –

“In this section –

“the date of receipt” means –

- (a) the day on which the public authority receives the request for information, or
- (b) if later, the day on which it receives the information referred to in section 1(3);

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.”

Means by which communication to be made

Section 11(1) provides that –

“Where, on making his request for information, the applicant expresses a preference for communication by one or more of the following means, namely –

- (a) the provision to the applicant of a copy of the information in permanent form or in another form acceptable to the applicant,
- (b) the provision to the applicant of a reasonable opportunity to inspect a record containing the information, and
- (c) the provision to the applicant of a digest or summary of the information in permanent form or in another form acceptable to the applicant.

The public shall so far as is reasonably practicable give effect to that preference.”

Refusal of Request

Section 17(1) 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 17(2) states –

“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.”

Section 17(3) provides that –

“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.”

Section 17(4) provides that –

“A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

Section 17(5) provides that –

“A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.”

Section 17(6) provides that –

“Subsection (5) does not apply where –

- (a) the public authority is relying on a claim that section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.”

Section 17(7) provides that –

“A notice under section (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.”

National Security

Section 24(1) provides that –

“Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security.”

Section 24(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security.”

Section 24(3) provides that –

“A certificate signed by a Minister of the Crown certifying that exemption from section 1(1)(b), or from section 1(1)(a) and (b), is, or at any time was, required for the purpose of safeguarding national security shall, subject to section 60, be conclusive evidence of that fact.”

Section 24(4) provides that –

“A certificate under subsection (3) may identify the information to which it applies by means of a general description and may be expressed to have prospective effect.”

International Relations

Section 27(1) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) relations between the United Kingdom and any other State,
- (b) relations between the United Kingdom and any international organisation or international court,
- (c) the interests of the United Kingdom abroad, or
- (d) the promotion or protection by the United Kingdom of its interests abroad.”

Section 27(2) provides that –

“Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.”

Section 27(3) provides that –

“For the purposes of this section, any information obtained from a State, organisation or court is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.”

Section 27(4) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a)-

- (a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1), or
- (b) would involve the disclosure of any information (whether or not already recorded) which is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.”

Section 27(5) provides that –

“In this section-

"international court" means any international court which is not an international organisation and which is established -

- (a) by a resolution of an international organisation of which the United Kingdom is a member, or
- (b) by an international agreement to which the United Kingdom is a party;

"international organisation" means any international organisation whose members include any two or more States, or any organ of such an organisation;

"State" includes the government of any State and any organ of its government, and references to a State other than the United Kingdom include references to any territory outside the United Kingdom.”

Law enforcement

Section 31(1) provides that –

“Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,
- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls,

- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
- (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment."

Section 31(2) provides that –

“The purposes referred to in subsection (1)(g) to (i) are-

- (a) the purpose of ascertaining whether any person has failed to comply with the law,
- (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
- (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,
- (d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,
- (e) the purpose of ascertaining the cause of an accident,
- (f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,
- (g) the purpose of protecting the property of charities from loss or misapplication,
- (h) the purpose of recovering the property of charities,

- (i) the purpose of securing the health, safety and welfare of persons at work, and
- (j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.”

Section 31(3) provides that –

“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 any of the matters mentioned in subsection (1).”