

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 24 November 2009

Public Authority: House of Commons
Address: London
SW1A 0AA

Summary

The complainant sought information about various categories of people issued with Parliamentary passes to the House of Commons ("the House"). The House provided some information but withheld the names of individual pass holders who held passes by virtue of belonging to two organisations named in the request, relying on exemptions in sections 38 (health and safety) and 40 (personal information) of the Act. The Commissioner has concluded that neither section 38(1)(b) nor section 40(2) provides a basis to withhold the information and therefore has ordered the House to disclose this information. In handling this request the Commissioner has also concluded that the House breached sections 1(1)(b) and 10(1) by incorrectly withholding this information.

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 26 November 2007 the complainant requested the following information from the House:

1) A list of all categories of people currently issued with Parliamentary passes to the House of Commons. For example: MPs; Lords; Government departmental staff; Members' secretaries and research assistants; contractors.

Please include names of particular organisations issued with one or more passes, for example, The Association of Former MPs; The Industry and

Parliament Trust. Please include the number of passes these organisations currently hold.

2) The names of individuals currently holding Parliamentary passes from The Association of Former MPs (AFMP).

3) The names of individuals currently holding Parliamentary passes from The Industry and Parliament Trust (IPT).

4) The names of all individuals who are secretariats of All Party Groups who hold Parliamentary Passes.

3. The House responded on 19 December 2007 and provided some of the information requested. However, it refused to disclose some of the other information requested on the basis of various exemptions in the Freedom of Information Act (FoIA). Following the order of the numbered points above the House's response was:

1) All information provided.

2) Information held but exempt under sections 38 and 40 of the Act.

3) Information held but exempt under sections 38 and 40 of the Act.

4) No pass category for "All Party Groups" and therefore information not held but web-link supplied that gave information on those members of secretariats of All Party Groups who held a Parliamentary pass and had paid employment outside Parliament related to the subject of the Group.

4. At the complainant's request, this decision was subject to an internal review, the results of which were communicated to her in a letter dated 12 May 2008. The review upheld the original decision including the exemptions cited in that decision. The letter reporting the review findings went into more detail than the original decision letter and set out reasons why the requested names of individuals in numbered points 2) and 3) above would be personal data. It went on to argue that disclosure would identify living individuals who have a right to privacy and that disclosure could cause health and safety issues for all those who work on the Parliamentary estate. This concern was more compelling than the public interest in disclosure of the names. For these reasons the information was withheld relying on the exemptions in sections 40(2) and 38 of the Act. The letter also noted "I have concluded that both groups (AFMP and IPT) have more in common with other individuals who hold passes by virtue of belonging to external organisations that have business with the House than with, say MPs' staff and staff of the House. It is not current policy to disclose the names of pass holders from external organisations."

The Investigation

Scope of the case

5. On 9 July 2008 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - that she strongly disagreed with the House's argument that AFMP members had more in common with those who hold passes by virtue of belonging to external organisations having business with the House than with MPs' staff and the staff of the House. She noted that a significant minority of AFMP members had reported when surveyed in 2006 that they had contacts of various sorts with lobbying firms/think tanks. Membership of the Association afforded access to the House and therefore there was a legitimate public interest in knowing who held passes by virtue of their membership of the Association.
 - in the same way the complainant argued that there was a legitimate public interest in knowing which members of the IPT held passes because they were acting on behalf of industry and commerce to facilitate access to Parliament and Government.

Findings of Fact

6. Membership of the AFMP is open to all former MPs and the home page of the Association's website (<http://www.epolitix.com/stakeholder-websites/stakeholder-website-page/sites/association-of-former-members-of-parliament/pages/home-13/>) makes clear that it can get all members a Parliamentary pass. The website contains the results of a survey of its membership carried out on behalf of the Association in 2007 (<http://www.epolitix.com/Resources/epolitix/Forum%20Microsites/Association%20of%20Former%20Members%20of%20Parliament/life%20after%20parliament.pdf>). 343 members were polled and 184 responded (a 53% response rate). A significant minority of respondents, 28.3% or 54 members, "reported contacts of various sorts with lobbying firms and/or think tanks since leaving the Commons."
7. The IPT describes itself on its website (<http://www.ipt.org.uk/>) as:
a registered charity dedicated to promoting mutual understanding between Parliament and the worlds of business, industry and commerce for the public benefit. This is achieved by encouraging dialogue between legislators and wealth generators from all sectors of business. The IPT is independent, non-partisan and non-lobbying.
8. Noting the IPT's description of itself as "independent, non-partisan and non-lobbying" it should also be noted that its own website states that the "IPT is dependent on regular contributions from business", contributions that account for approximately half the IPT's income.

Chronology

9. Regrettably there was a delay of almost a year before the Commissioner commenced his investigation. This was due to a significant backlog of complaints which had accrued at his office. The Commissioner wrote to the House on 5 June 2009, asking for clarification of a number of issues in relation to its reliance on sections 38 and 40 of the Act in withholding requested information. On 3 August 2009, the House provided further information in response to this enquiry.

Analysis

Exemptions

Section 38

The House of Commons' Position

10. The House stated it would always consider carefully how much information it is prepared to make public having regard to possible security issues. The House noted the Palace of Westminster is a high profile potential terrorist target as are many of the people who work there. The House has a duty to protect those on the Parliamentary Estate and whilst not able usually to point to specific threats will take sensible precautions to limit information available to those who may have hostile intentions. The House's view is that "to make lists of pass holders available will, in most cases, be unwarranted".
11. In reporting the findings of its internal review in this case the House noted that while disclosing the names of one group of contractors' staff or the names of those from an external organisation who hold Parliamentary passes may not significantly increase the threat to security there is no justification in treating one group differently from another. If the House was to reveal one set of this type of information then it should be prepared to release similar sets of information when requested. The House stated "(A)t some point in the incremental release of such information the increase in the threat to security would become unacceptable".
12. The House concluded that the names of those currently holding Parliamentary passes from the AFMP and those currently holding Parliamentary passes from the IPT should not be released because it was exempt information under section 38 of the Act. In response to the further enquiries from the Commissioner, the House noted that the public interest in withholding the requested information outweighed the public interest in disclosure because enough information had "already been made available to secure political accountability and that further disclosures are not warranted given legitimate security concerns".

The Information Commissioner's Position

13. The Commissioner notes the House has not specified which sub-section or particular provision of section 38 of the Act applies to the withheld information. Having considered the arguments put forward by the House, the Commissioner judges that section 38(1)(b) (disclosure of information that would, or would be likely to endanger the safety of any individual) most closely matches those arguments but is not satisfied that section 38(1)(b) applies to the withheld information.
14. When making further enquiries on 5 June 2009 the Commissioner invited the House to consider and comment on the apparent inconsistencies in its approach to publishing the name of some Parliamentary pass holders and not others. In this regard the Commissioner drew the House's attention to the information it had provided in response to numbered point 4) of the original information request. This was a link (<http://www.publications.parliament.uk/pa/cm/cmhallparty/memi01.htm>) to lists concerned with All Party Groups. Amongst other details, the lists name any members of the staff of an All Party Group who holds a Parliamentary pass and who have paid employment relevant to the subject of the All Party Group outside Parliament.
15. The "Guide to the Rules on All Party Groups" is available on the Parliament website and notes that details must be provided "where any member of staff to the group is issued with a parliamentary pass and is engaged in a remunerated activity which is advantaged by the privileged access to Parliament afforded by their pass". This makes a clear statement about the advantages associated with holding a pass and provides the House's rationale for making that information public in the interests of transparency and accountability.
16. The names of other groups of people who hold Parliamentary passes can be found at http://www.parliament.uk/about_commons/register_of_members_interests.cfm. The possession of a Parliamentary pass is the common denominator for publication of the names, despite the fact that those named are engaged in different types of business at Parliament (e.g. staff of All Party groups, journalists accredited to the Parliamentary Press Gallery). The Commissioner can see no material difference between publishing this information for those groups of people and publishing the same information for AFMP members and IPT staff who hold Parliamentary passes.
17. In its response of 3 August 2009, the House stated in support of its reliance on section 38 that:

"It is difficult to predict precisely which pieces of information will be of use to potential terrorists, but the House considers that a cautious approach is both reasonable, sensible and in accordance with its duty of care to those working or visiting the Parliamentary estate. The House considers that to make lists of pass holders available will, in most cases be unwarranted. A list of pass holders could potentially be used by terrorists or others to identify individuals who may be sympathetic to the terrorist ends or who may be vulnerable to pressure in some other way."

18. The Commissioner believes this argument is fatally undermined by the information that the House already makes available publicly. Using that information it is a very simple exercise to identify a pass holder and to obtain their work address using information readily available. The House's argument would more obviously support a policy that meant no names of pass holders were published rather than the current policy where some names are published and others not, based on arbitrary and apparently unsupported criteria. Personal safety and security issues do not appear to be considered a relevant factor for these purposes.
19. In any event, the Commissioner has seen no evidence to support the broad assertion made. It appears the House's concern is not so much for the individuals identified as pass holders as for anyone physically present on the Parliamentary estate who might be affected by terrorist activity, the threat of which is increased by the identification of pass holders. Clearly, however, the physical safety of the Parliamentary estate, those who work there and visitors, is protected through rigorous security measures.
20. Therefore, with reference to the similar information that is already publicly available, the Commissioner is not satisfied that releasing the names of pass holders who hold passes by virtue of their membership of the AFMP or the IPT would, or would be likely to, endanger the safety of any individual and is not satisfied that the information is exempt under section 38(1)(b) of the Act. As the Commissioner is not satisfied that the requested information is exempt under section 38(1)(b) of the Act he has not given detailed consideration to the public interest arguments put forward by the House, although some aspects are considered further in the following section considering section 40 of the Act.

Section 40

The House of Commons' Position

21. The House states the names of pass holders who hold passes by virtue of their membership of the AFMP or the IPT are personal data. For the avoidance of doubt, the Commissioner agrees with the House's conclusion on this point. In its letter dated 12 May 2008 setting out the findings of its internal review, the House noted that although the names constituted personal data they could be disclosed if disclosure did not breach the data protection principles. In deciding whether this was the case here, the letter stated a balance must be drawn:

“between the right to know, fairness to the individuals concerned, and, because of the nature of the information requested, the impact of its release on the safety of those who work on or visit the Parliamentary estate. I have concluded that both groups have more in common with those who hold passes by virtue of belonging to external organisations that have business with the House than with, say, MPs' staff and staff of the House. It is not current policy to disclose the names of pass holders from external organisations.”

22. The letter went on to consider the health and safety considerations surrounding disclosure (see paragraphs 10 to 12) and concluded that the requested names were exempt information by virtue of section 40(2) of the Act.

The Information Commissioner's Position

23. As noted, the Commissioner is satisfied that the names of pass holders who hold passes by virtue of their membership of the AFMP or the IPT are personal data. However, the Commissioner is not satisfied that the requested information constitutes exempt information by virtue of section 40(2) of the Act.
24. Section 40(2) of the Act provides an exemption for information that is the personal data of any third party where disclosure would breach any of the data protection principles in the Data Protection Act 1998 (DPA). The House has not made this explicit but the data protection principle that the Commissioner understands the House believes would be breached if the withheld information is disclosed is the first principle. This states:
- i. Personal data must be processed fairly and lawfully, and
 - ii. Personal data shall not be processed unless at least one of the conditions in DPA Schedule 2 is met.
25. In considering whether the data has been processed fairly and lawfully, the Commissioner notes that the names of all people who hold passes giving access to the Parliamentary estate will have been obtained by the House for the purpose of issuing passes to control access to the estate. The personal data comprising these names was collected for a public reason rather than for anything that could be described as a private activity.
26. Although there is no reason to believe the House has asked individual pass holders to give their consent to their names being disclosed, the Commissioner's view is that the question of consent is largely immaterial in the present case. This is because the House publishes the names of some pass holders in recognition of the privileged access provided by a pass and the concomitant need for transparency and accountability. Therefore the Commissioner is satisfied that supplying the names of the AFMP and IPT pass holders would not constitute either unfair or unlawful processing.
27. Turning to the conditions in DPA Schedule 2, the Commissioner considers the sixth condition is the most relevant to this case, which reads:
- “The processing is necessary for the purposes of the legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.”
28. In considering whether disclosure would be fair and lawful the Commissioner has considered the three part test, which follows the approach laid down in the Information Tribunal's determination in the case of the House of Commons v ICO

& Leapman, Brooke, Thomas (EA/2007/0060 etc), which was later supported by the High Court in its subsequent judgement on that case. The parts of the test are:

- i. There must be a legitimate public interest in disclosure
 - ii. The disclosure must be necessary to meet that public interest
 - iii. The disclosure must not cause unwarranted harm to the interests of the individual.
29. The complainant set out her reasons for believing that there was a legitimate public interest in disclosure in her complaint to the Commissioner. These are described above at paragraph 5 of this Notice. These reasons had been considered previously by the House and rejected. The House stated membership of the AFMP was “more of a social activity than continuing to participate in public life at a lower level of engagement than when they were MPs”. Concerning the IPT pass holders the House stated that they “have more in common with other individuals who hold their pass for business reasons” and noted it was not current policy to disclose names of pass holders from external organisations. In its response to the Commissioner’s further enquiries the House made a further distinction between the names of AFMP pass holders and those from the IPT. It noted that while it would not be difficult to find out who was a former MP and therefore not be difficult to conclude that they would still have access to the Parliamentary estate, this was not true of IPT pass holders. The House also repeated its contention that release of the names would have health and safety ramifications that meant the public interest was against disclosure.
30. In weighing these competing arguments for and against a legitimate public interest in disclosure, the Commissioner is mindful of and persuaded by the rationale adopted by the House and described at paragraph 15 and 16 above, which means the names of pass holding staff of All Party Committees, as well as other categories of people holding passes (e.g. journalists) are made public in the interests of transparency and accountability. In the Commissioner’s view, despite the arguments presented by the House, a similar rationale applies to making public the names of AFMP and IPT pass holders. The House has argued that the AFMP is more akin to a social organisation but has conceded that the research quoted by the complainant means a significant minority of AFMP members are involved in lobbying activities, activities that could be assisted via the “privileged access” offered by a pass. The passes held by IPT members offer the same level of privileged access.
31. In considering whether disclosure is necessary to meet the identified legitimate public interest, the Commissioner has concluded that there is no other mechanism available in the present case. Moreover, disclosure has the further virtues of following the precedent set by, and be consistent with, the approach already followed by the House in publishing the names of pass holders in the interests of transparency and accountability.
32. In considering whether the disclosure would cause unwarranted harm to the interests of the individual pass holders, the Commissioner notes that any member of the AFMP has access to a pass by virtue of the public position that they

formerly held as an MP. Although the House has argued that the AFMP may be more akin to a social organisation and therefore more firmly allied to the private rather than public lives of its members, it is clear for the foregoing analysis that membership, which derives in the first place from a prominent place in public life, also provides privileged access to the Parliamentary estate. As noted, in other circumstances, the House has accepted that the identity of those enjoying such access should be made public and transparent by publishing the names of pass holders.

33. In this regard, the Commissioner is not persuaded by the inconsistencies in the House's claimed policies about which names are published and which are not. The House stated "(I)t is not current policy to disclose the names of pass holders from external organisations" but in the Commissioner's view this is precisely what the House does in publishing the names of staff of All Party Groups because they work in the field covered by the Group outside Parliament and because they hold a Parliamentary pass.
34. In the Commissioner's view, despite the House's attempt to differentiate between the two groups, the same considerations about access and transparency apply to those from IPT who hold passes.

Procedural Requirements

35. Section 1(1) of the Act states 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.'

36. Section 10(1) of the Act states 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 receipt.'

37. As the Commissioner has decided that the information covered by this complaint is not exempt from disclosure on the basis of section 38 and section 40(2) of the Act the Commissioner believes that this information should have been provided in line with the duty at section 1(1)(b) of the Act. The House's failure to do so therefore constitutes a breach of section 1(1)(b). Furthermore, by failing to provide this information within 20 working days of the request the House also breached section 10(1) of the Act.

The Decision

38. 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:

- numbered points 1) and 4) of the request

However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- for the reasons given above neither section 38 nor section 40 of the Act provide a basis to withhold the information at numbered points 2) and 3) of the request.
- the information should have been provided in line with the duty at section 1(1)(b) of the Act and the failure to do constitutes a breach of section 1(1)(b). Furthermore, the failure to provide this information within 20 working days of the request also breached section 10(1) of the Act.
- the failure to specify the relevant subsection or provision of section 38 constitutes a breach of section 17(1)(b) of the Act.

Steps Required

39. The Commissioner requires the House to take the following steps to ensure compliance with the Act:

- disclose to the complainant the names of individuals holding Parliamentary passes from The Association of Former MPs (AFMP) at the time of the request; and
- the names of individuals holding Parliamentary passes from The Industry and Parliament Trust (IPT) at the time of the request.

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

Failure to comply

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

Right of Appeal

42. 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 24th day of November 2009

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

Freedom of Information Act 2000

1 General right of access to information held by public authorities

(1) Any person making a request for information to a public authority is entitled—

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.

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

(3) 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.

(4) 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.

(5) 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).

(6) 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”.

10 Time for compliance with request

(1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.

(2) Where the authority has given a fees notice to the applicant and the fee is paid in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.

(3) If, and to the extent that—

(a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or

(b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.

(4) 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.

(5) Regulations under subsection (4) may—

(a) prescribe different days in relation to different cases, and

(b) confer a discretion on the Commissioner.

(6) 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 [1971 c. 80.] Banking and Financial Dealings Act 1971 in any part of the United Kingdom.

38 Health and safety

(1) Information is exempt information if its disclosure under this Act would, or would be likely to

- (a) endanger the physical or mental health of any individual, or
- (b) endanger the safety of any individual.

(2) 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, have either of the effects mentioned in subsection (1).

40 Personal information

(1) 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.

(2) Any information to which a request for information relates is also exempt information if

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.

(3) The first condition is

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the [1998 c. 29.] Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene

- (i) any of the data protection principles, or
- (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection

principles if the exemptions in section 33A(1) of the [1998 c. 29.] Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the [1998 c. 29.] Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).

(5) The duty to confirm or deny

(a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and

(b) does not arise in relation to other information if or to the extent that either—

(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the [1998 c. 29.] Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or

(ii) by virtue of any provision of Part IV of the [1998 c. 29.] Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).

(6) In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.

(7) In this section

“the data protection principles” means the principles set out in Part I of Schedule 1 to the [1998 c. 29.] Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

“data subject” has the same meaning as in section 1(1) of that Act;

“personal data” has the same meaning as in section 1(1) of that Act.