

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 18 November 2010

Public Authority: The Governing Body of the Open University

Address: Walton Hall
Milton Keynes
MK7 6AA

Summary

The complainant requested a copy of transcripts of seminars used by a lecturer employed by the public authority to write a journal article. The public authority initially argued that the information was exempt under sections 40(2) and 41 as confidentiality had been promised to the participants in the seminars. After the start of the Commissioner's investigation, the public authority informed him that it appeared that the transcripts had been destroyed at some point prior to the request and were no longer held. It confirmed that audio recordings of the seminars, from which the transcripts had been made, were in the possession of the lecturer but argued that he held these in a private capacity.

The Commissioner has determined that, on the balance of probabilities, the public authority did not hold transcripts of the seminars at the time of the request. However, he has decided that the public authority did hold the requested information in the form of audio recordings from which the transcripts were made. He has required the public authority to either disclose this information or provide a refusal notice to the complainant explaining the basis on which the information is exempt from disclosure.

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 Requests

2. On 3 April 2009 the complainant requested "...the transcripts of the Real World Brainstorm seminars referred to by [a named lecturer]" in his paper in the journal Risk Analysis in 2005.
3. On 5 May 2009 the public authority emailed the complainant to inform him that the requested information was exempt from disclosure under sections 40(2) and 41 of the Act as confidentiality had been assured to the research participants.
4. On 5 May 2009 the complainant asked the public authority to carry out an internal review of its decision. He indicated that he would be prepared to accept a copy of the transcripts with the names of each person making a contribution redacted.
5. On 19 June 2009, having received no response to his request for an internal review, the complainant made a complaint to the Commissioner.
6. On 26 August 2009, following the intervention of the Commissioner, the public authority informed the complainant that the outcome of the internal review was to uphold its original decision. It explained that transcripts of interviews held for research purposes as part of raw research data was not releasable. As the research had been undertaken in confidence the transcripts could not be shared with third parties.

The Investigation

Scope of the case

7. On 7 September 2009 the complainant contacted the Commissioner to complain about the failure of the public authority to disclose a copy of the transcripts that he had requested. The Commissioner subsequently found that, on the balance of probabilities, the public authority did not hold a copy of the written transcripts at the time of the request. However, he proceeded to make a determination as to whether the public authority was correct to argue that it did not hold the audio recordings from which the written transcripts were made.

Chronology

8. The main correspondence with the complainant and the public authority is identified below.
9. On 3 October 2009 the Commissioner asked the public authority for its initial submissions as to the basis on which the requested information was withheld.
10. On 29 November 2009 the public authority provided its initial submissions together with supporting documents. It argued that the requested information was exempt from disclosure under sections 40(2) and 41 of the Act.
11. On 20 January 2010 the Commissioner wrote to the public authority seeking further arguments and a copy of the information falling within the scope of the request.
12. On 1 April 2010 the public authority wrote to the Commissioner to explain that the lecturer that the request related to was under the impression that he had retained the requested transcripts in a paper format. However, after a thorough search, the transcripts could not be located. It stated that a search had also been undertaken of its electronic files and the transcripts did not exist in an electronic form. It confirmed that the audio recordings from which the transcripts had been made still existed but argued that it did not hold these as they were held by the lecturer in a private capacity. The public authority consequently informed the Commissioner that, in its view, it no longer held the requested information.
13. On 19 April 2010 the Commissioner asked the public authority detailed questions regarding the searches that had been carried out for the written transcripts, the audio recordings from which the transcripts were made and the application of sections 40(2) and 41. He also asked to be provided with a copy of the audio recordings.
14. On 5 May 2010 the public authority wrote to the Commissioner and provided him with details of the searches that had been carried out for the written transcripts. In relation to the audio recordings, it argued it did not hold these but that they were held by the lecturer in a private capacity. The public authority subsequently provided the Commissioner with copies of the audio recordings.

Analysis

Substantive Procedural Matters

15. 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.”*

16. The Commissioner considered whether the information falling within the scope of the complainant’s requests was held by the public authority.

The written transcripts

17. The Commissioner initially considered whether the public authority held a copy of the written transcripts of the audio recordings of the seminars. In making this determination he applied the civil standard of proof of the balance of probabilities as outlined by the Information Tribunal in the case of *Bromley v Information Commissioner and the Environment Agency (EA/2006/0072)*. In deciding where the balance of probability lies, the Commissioner considered the scope, quality, thoroughness and results of the searches carried out by the public authority. He also took into account the explanation offered by the public authority as to why it believed that the written transcripts were no longer held.

18. The public authority stated that the lecturer named in the request had been under the impression that he had retained the requested transcripts in a paper format. However, after a thorough search, they could not be located. It explained that the lecturer had participated, in a private capacity, in organising seminars on environmental change and development issues for people involved in the media. He had made audio recordings of some of those seminars. The public authority’s Geography Department had then paid for written transcripts of these recordings to be made in support of a piece of research being undertaken by the lecturer which drew on upon both the seminars and interviews undertaken elsewhere.

19. The public authority informed the Commissioner that the lecturer only required the transcripts to write part of the journal article. The article was published in November 2005. There had been no further need for the lecturer to refer to the transcripts since it was published. The public authority confirmed that no terms and conditions were imposed by the external sponsors of the article and therefore there had been no requirement to keep the transcripts beyond the completion of the article. The lecturer had viewed the keeping of the recordings as adequate maintenance of an archive. In light of the poor quality of the transcripts, he did not put high priority on archiving them.
20. The public authority believed that the written transcripts had been destroyed at sometime between 2005 and 2008, in advance of one of several office moves that the lecturer had been required to undertake. Each office move had necessitated a reduction of paperwork. When the request had been made, the lecturer genuinely believed that the transcripts were still held in his paper files.
21. The public authority informed the Commissioner that the lecturer had confirmed at the time of the request that he could probably find the transcripts in a box somewhere in his office. He had provided a description of the transcripts and the context in which the recordings were made to the public authority's internal compliance staff. The application of exemptions had then been based on these descriptions. The public authority stated that the lecturer had confirmed that he had definitely not destroyed the transcripts after the request had been made.
22. The public authority detailed the searches which had been undertaken. It informed the Commissioner that this included searches of the lecturer's University office and home office. It also described the searches of its electronic files that had been carried out.
23. However, the public authority indicated that it believed that the search of electronic files was unlikely to have located the transcripts as the transcription was performed by a specially contracted transcriber, rather than a member of the faculty staff as part of their day to day work. It believed that the work was carried out at some point in 2005. The person was a specifically engaged from a bank of transcribers on an ad hoc basis for individual pieces of transcription work as they became available. These transcribers were treated as temporary employees or as self employed contractors.
24. The public authority informed the Commissioner that the work was not performed on the University's premises nor using the University's

equipment or electronic links. The transcriber was only required to provide paper copies of the recordings, not an electronic copy. It also confirmed that transcribers are instructed not to retain any electronic or paper copies once the work has been satisfactorily handed over. It appeared that the person who had carried out the transcribing was no longer engaged by the University in any capacity.

25. The public authority also informed the Commissioner that there was no possibility that copies of the transcripts were made and held in other locations as the lecturer was not collaborating with anyone else to produce his article or using the information for research that was part of a University funded project. Therefore there was no requirement for him to share the information with anyone else or disseminate it in any way.
26. The Commissioner has carefully considered the evidence provided by the public authority and has decided that, on the balance of probabilities, it did not hold a copy of the requested transcripts in a written or electronic form at the time of the request. The Commissioner went on to determine whether the audio recordings of the seminars were held by the public authority for the purposes of the Act.

The audio recordings

27. The Commissioner notes that the complainant's request was for "the transcripts" of the seminars falling within the scope of his request. It could be argued that this request therefore encompassed the written transcripts, which appear not to have been held by the public authority at the time of the request, but not the audio recordings from which those written transcripts were made. However, the Commissioner would emphasise that the Act provides a right of access to information, irrespective of the form in which it is held. A request may refer to information in a specific form, such as a particular written document, as a way of describing the information being sought. Where information is not in the possession of a public authority in the form that it is requested but it possesses the same information in a different form, then the requested information may still be held by the public authority for the purposes of the Act.
28. In this case, the Commissioner's view is that the request was for the information contained in the transcripts of the audio recordings which, in essence, is the same information as that contained in the audio recordings themselves. As it appears that the public authority did not hold the information in a written form at the time of the request, he has considered the position in relation to the same information held in an audio form.

29. The public authority argued that it did not hold the audio recordings of the seminars as these were held by the lecturer in a private capacity. It explained that the seminars at which the recordings were made were organised and attended by the lecturer privately. None of this work was undertaken by the lecturer as part of his contractual duties to the University. The public authority stated that he carried out the work in his own time and that he had taken annual leave to do so. It informed the Commissioner that it did not provide the lecturer with financial support for the seminars or receive any payments in respect of that work.
30. The public authority explained that the audio recordings had been used by the lecturer as one of the sources to inform the journal article that he had written and which had been published in November 2005. The writing of the article had been undertaken in the course of his normal academic research activity for the public authority. It confirmed that the lecturer had not used the recordings for any further research purposes since that time and that they had been kept at his home since they were made.
31. The public authority stated that at the time that the audio recordings were made it had no interest in the seminars or any outcome from them and had no intention to fund the transcription of the recordings. It was not until the public authority had an interest in the research article that was partly informed by the recordings that it agreed to fund the transcription costs. The funding of the transcription was provided by its Geography Department out of its research budget.
32. The public authority informed the Commissioner that, in its view, it did not hold the audio recordings of the seminars as they were held by the lecturer in a private capacity and were his private property.
33. Section 3(2) provides that
- “For the purposes of this Act, information is held by a public authority if –*
- (a) it is held by the authority, otherwise than on behalf of another person, or*
- (b) it is held by another person on behalf of the authority.”*
34. The Commissioner understands that the seminars to which the request relates were organised by the Cambridge Media and Environment Programme (“CMEP”). The named lecturer was a co-director of CMEP.

Over a number of years CMEP organised and ran a series of seminars which were intended to facilitate discussions amongst broadcasters and experts about world issues and how they are covered in the media. The Real World Brainstorm seminars, to which the request relates, comprised two meetings which took place in 2004. They mainly focussed on how British broadcasters addressed issues related to international development and the developing world including how decisions are taken about what constitutes news, the experiences of people from different countries in relation to the media, economic activity and aid related to the developing world.

35. The Commissioner is not aware of any evidence that the public authority provided any funding to CMEP prior to the request or any evidence to suggest that CMEP is not a separate organisation operating independently of the public authority. He is therefore satisfied that the lecturer was acting in a purely personal capacity when he attended the CMEP seminars and when he made the recordings of those seminars.
36. Subsequently the lecturer used the information contained in the audio recordings, and the transcriptions of those recordings, to assist him in the writing the published article. This was undertaken as part of his normal academic research activity in his capacity as a lecturer for the Open University. In the Commissioner's view, at this point, the information contained in the written transcripts and the audio recordings was held by the public authority.
37. Once the journal article had been published in 2005, the information contained in the audio recordings and transcripts formed part of the empirical evidence on which it was based. The retention of this information was therefore of significance in providing a record of the research process. This could then be called upon, if necessary, for a range of purposes including relevant audits, discussions with other researchers and verification of research results.
38. The Commissioner notes that the public authority's "Code of Practice for Research and Those Conducting Research" states that

"The individual researcher is responsible for the retention and archiving of data. Where there are no specific external requirements to retain records of a research project, or when such requirements have already been met, researchers should apply the principles laid down in the University's Retention Schedule. In summary these are that project records including data should be kept for a period of 6 years after the completion of the project. Data should be kept longer if discussion of the

results continues or if it has historical or archival value.” (page 4 paragraph 3).

39. In light of the above, the Commissioner expects that, in line with the above Code of Practice, data used as a basis for the journal article, including the audio recordings, would need to be retained by the lecturer for at least six years from the completion of the research project in order to ensure compliance with the public authority's Code of Practice for Research. As the article was published in November 2005, the lecturer would still need to have retained the audio recordings for the purposes of the public authority's policies when the request was made for the information contained in the audio recordings in April 2009. The lecturer would consequently have been holding that information on behalf of the public authority at the time of the request. The Commissioner has therefore concluded that the audio recordings falling within the scope of the request are held by the public authority under section 1(1)(a) of the Act.

The Decision

40. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with section 1(1)(a) of the Act by failing to confirm that it held the requested information in the form of audio recordings.

Steps Required

41. The Commissioner requires the public authority to provide the complainant with a copy of the audio recordings falling within the scope of his request or provide a refusal notice identifying the exemptions under the Act and/or exceptions under the Environmental Information Regulations 2004 that are applicable to the information.
42. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Other matters

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

44. The Commissioner notes that the complainant requested an internal review of the public authority's decision on 5 May 2009. However, the public authority did not provide a response until 26 August 2009 after the Commissioner had contacted the public authority himself over its failure to respond.
45. The Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review, and in no case should the total time exceed 40 working days. The time that the public authority took in providing a response substantially exceeded both of these time periods. The Commissioner would expect in future that the public authority would ensure that it generally completes internal reviews within 20 working days and that the time that it takes never exceeds 40 working days.
46. The Commissioner also wishes to express his concern that the public authority failed to verify whether it held written copies of the transcripts before confirming that it did to the complainant. In addition, he is concerned that it proceeded to apply exemptions under the Act without inspecting the information to which it was applying those exemptions.
47. The above failures, understandably, gave rise to serious concerns on the part of the complainant as to the handling of his request by the public authority and led to unnecessary complications and delays in the Commissioner's investigation of the complaint. The Commissioner expects the public authority in future, when responding to a request, to take much greater care in checking what information it holds and the form that the information takes. He would also expect that the public authority would ensure that it inspected information that had been requested before making a decision as to whether to apply exemptions under the Act.

Right of Appeal

48. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

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 sent.

Dated the 18th day of November 2010

Signed

Steve Wood
Head of Policy Delivery

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

Legal Annex

Freedom of Information Act 2000

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”.”

Public Authorities

Section 3(1) provides that –

“in this Act “public authority” means –

- (a) subject to section 4(4), any body which, any other person who, or the holder of any office which –
 - (i) is listed in Schedule 1, or
 - (ii) is designated by order under section 5, or
- (b) a publicly-owned company as defined by section 6”

Section 3(2) provides that –

“For the purposes of this Act, information is held by a public authority if –

- (a) it is held by the authority, otherwise than on behalf of another person, or
- (b) it is held by another person on behalf of the authority.”

Environmental Information Regulations 2004