

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 29 June 2010

Public Authority: Cabinet Office
Address: 70 Whitehall
London
SW1A 2AS

Summary

The complainant requested details of every case in which the European Commission had issued a formal letter under Article 226 (a letter of formal notice requesting that a Member State respond to allegations that it is in breach of European Community law). The public authority withheld the information held on the basis of the exemptions at 27(1)(b), 27(2) (International relations), and 35(1)(a) (Formulation or development of government policy). The Commissioner finds that sections 27(1)(b) and 27(2) were not engaged but that section 35(1)(a) was correctly engaged. The Commissioner has however decided the withheld information should be disclosed because in all the circumstances of the case, the public interest in maintaining the exemption at section 35(1)(a) did not outweigh the public interest in disclosure. The Commissioner additionally finds the public authority in breach of sections 10(1) (Time for compliance with request), 17(1), and 17(3) (b) (Refusal of request).

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.

Background

2. The European Commission ('the Commission') may commence infraction proceedings against a European Union ('EU') Member State where there is an allegation that the Member State has breached its obligations under the Economic Community Treaty ('EC Treaty'). The Commission usually initiates this through what is commonly referred to as an Article 226 letter or a letter of formal notice where it formally notifies the Member State of the alleged breach and gives it an opportunity to respond. An Article 226 letter may not necessarily result in the Commission issuing a Reasoned Opinion or a referral to the European Court of Justice (ECJ).

The Request

3. On 10 January 2008, the complainant requested the following information:
 - A) details of every case in which the Commission has issued a formal letter under Article 226, and
 - B) details of every case in which the Commission has issued a Reasoned Opinion.
4. On 11 February 2008 the public authority responded. It explained that information in respect of item B of the requests was freely available on the Commission's website. It however also provided the complainant with a list containing details of the specific cases within the scope of item B.
5. In terms of item A, the public authority explained that it considered the information held exempt from disclosure on the basis of the exemption at section 27 (information likely to prejudice international relations) of the Act. According to the public authority;

'Cases in which the UK has been issued with a formal letter under Article 226 are not listed on the Commission's website; information about such cases is generally considered confidential...'
6. The public authority further explained that the 'confidentiality protected in section 27' enables the Commission and EU Member States to enter into free and frank discussions with a view to reaching negotiated settlements and avoiding infractions being referred to the European Court of Justice.

7. On 03 March 2008 the complainant requested a review of the public authority's decision.
8. On 21 May 2008 the public authority wrote back with the details of the outcome of the internal review. It clarified that it considered the information held in relation to item A to be exempt from disclosure on the basis of the exemptions at sections 27(1)(b), (c), and (d) of the Act. The public authority also explained that it considered the provision in section 27(3) (regarding the nature of information categorised as confidential for the purposes of section 27) applied to the Article 226 cases.

The Investigation

Scope of the case

9. On 26 June 2008 the complainant contacted the Commissioner to complain about the way her request for information had been handled.
10. The complainant explained that item A should be restricted to open cases and subsequently confirmed in another letter that the public authority had satisfied item B of her requests.
11. However, in light of the public authority's response to the Commissioner's queries (explained in detail below), the scope of the Commissioner's investigation covered details of open cases as at April 2009 which had been issued Article 226 letters and cases which had been issued Article 226 letters and subsequently closed as at April 2009. The new scope of investigation was agreed with the complainant on 23 February 2010.
12. The Commissioner however found that part of the withheld information falls outside the scope of the request. The Commissioner considers that because this information is primarily an update on the actions taken so far in relation to each case, it does not constitute the details of the cases in the context of the complainant's request. The relevant information can be found in the 'Case Comments' sections of the list of cases provided to the Commissioner marked Annex B and Annex C.

Chronology

13. In two separate letters dated 21 August 2009 and 18 February 2010 the Commissioner wrote to the complainant to clarify the scope of the complaint.

14. On 21 September 2009 and 23 February 2010 the complainant wrote back clarifying the scope of the complainant as set out above.
15. On 24 September 2009 the Commissioner wrote to the public authority requesting the withheld information as well as its representations on the application of the exemptions.
16. Having not received a response to his letter, the Commissioner issued an Information Notice to the public authority on 14 January 2010 in accordance with his powers under section 51 of the Act.
17. On 12 February 2010 the public authority responded to the Commissioner's letter of 24 September 2009 which was also annexed to the Information Notice he issued in January.
18. The public authority explained that the live database of cases requested by the complainant is constantly updated and because it had not made a copy of the database at the time of the request, it could not provide a precise record matching the scope of the request. It explained that the closest record it could provide was a snapshot of live cases as at April 2009 and a further list of cases which had been closed by April 2009.
19. Having received the complainant's confirmation that she was happy for the Commissioner to issue a decision on the information the public authority was able to provide as part of the investigation, the Commissioner proceeded to investigate the case on this basis.
20. In terms of the exemptions applied, the public authority explained that having conducted a fresh review of the case, it now considered the details of all the cases provided were exempt on the basis of the exemptions at sections 27(1)(b), 27(2), and 35(1)(a).

Analysis

21. A full text of all the statutory provisions in this part of the Notice can be found in the Legal Annex.

Exemptions

Section 27(2) – confidential information obtained from an international organisation

22. Information is exempt from disclosure on the basis of the above exemption if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.
23. Section 27(3) further states that for the purposes of section 27, 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 the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.
24. According to the public authority, 'the fact that the Commission has issued the UK with an Article 226 letter is considered by both the Commission and the UK as confidential information..' In this context, the public authority referred the Commissioner to Article 4(2) of the Access to Documents Regulation 1049/2001 which partly states that, the Commission shall refuse access to a document where disclosure would undermine the protection of the purpose of inspections, investigations and audits.
25. The public authority also referred the Commissioner to the decisions of the General Court (formerly known as the Court of First Instance – CFI) in *WWF UK v Commission* [1997] ECR II – 313 (WWF) and *The Bavarian Lager Company Ltd v Commission* [1999] ECR II – 3217 (Bavarian Lager).
26. Specifically, at paragraph 63 of the decision in the WWF case, the CFI indicated that Member States are entitled to expect the Commission to refuse access to documents relating to investigations against them which may lead to an infringement procedure. Paragraph 63 partly states;

'...Court considers that the confidentiality which the Member States are entitled to expect of the Commission in such circumstances warrants, under the heading of protection of the public interest, a refusal of access to documents relating to investigations which may lead to an infringement procedure, even where a period of time has elapsed since the closure of the investigation.'
27. The judges in the Bavarian Lager case also agreed with the above position in the WWF case. They noted at paragraph 46;

'In the present case, having regard to the preparatory nature of the document at issue and to the fact that, when access to it was requested, the Commission had suspended its decision to deliver the reasoned opinion, it is clear that the procedure under Article 169 of the Treaty was still at the stage of inspection and investigation. As the Court stated in the WWF judgment, the Member States are entitled to expect confidentiality from the Commission during investigations which may lead to an infringement procedure (paragraph 63). The disclosure of documents relating to the investigation stage, during the negotiations between the Commission and the Member State concerned, could undermine the proper conduct of the infringement procedure inasmuch as its purpose, which is to enable the Member State to comply of its own accord with the requirements of the Treaty or, if appropriate, to justify its position (see Case C-191/95 Commission v Germany [1998] ECR I-5449, paragraph 44), could be jeopardised. The safeguarding of that objective warrants, under the heading of protection of the public interest, the refusal of access to a preparatory document relating to the investigation stage of the procedure under Article 169 of the Treaty.'

28. Broadly speaking, the withheld information in this case is a list of the open and closed cases as at April 2009 and includes the subject matter of the Directives which prompted the Article 226 letter.
29. In the context of the request therefore, the Commissioner considers that the substantially relevant information would be the details of the Directives alleged to have been incorrectly transposed into UK law.
30. However, the first question for the Commissioner to determine is whether the withheld information was provided by the Commission to the public authority as both sections 27(2) and 27(3) clearly state that the confidential information should have been obtained from a State, international organisation or court.
31. It is clear that the public authority would have been made aware of possible infraction proceedings by virtue of a formal notice via an Article 226 letter from the Commission. The Commissioner is therefore satisfied that other than the information which he has already decided is not within the scope of the request, the withheld information was obtained by the public authority from the Commission.
32. The next question for the Commissioner is to determine whether the withheld information could be correctly categorised as confidential within the meaning of sections 27(2) and 27(3).

33. The Commissioner has carefully considered the public authority's submissions especially in light of the case law referred to and the Access to Documents Regulation. He is of the view, however, that the emphasis in both Article 4(2) of the Regulations and the CFI decisions is on the refusal of access to documents which, if disclosed, could undermine the Commission's investigations. It is not a blanket refusal of access to information and as such there is an implicit recognition that not all disclosed information would undermine investigations. In other words, the confidentiality of information is predicated on the possibility that disclosure could undermine investigations and not merely because it relates to possible infraction proceedings against a Member State.
34. In the WWF case, the CFI did actually note at paragraph 64;
- 'It is important, nevertheless, to point out that the Commission cannot confine itself to invoking the possible opening of an infringement procedure as justification, under the heading of protecting the public interest, for refusing access to the entirety of the documents identified in a request made by a citizen. The Court considers, in effect, that the Commission is required to indicate, at the very least by reference to categories of documents, the reasons for which it considers that the documents detailed in the request which it received are related to the possible opening of an infringement procedure. It should indicate to which subject-matter the documents relate and particularly whether they involve inspections or investigations relating to a possible procedure for infringement of Community law.'
35. The Commissioner therefore disagrees with the public authority that the fact that the UK was issued a formal notice under Article 226 should be considered confidential. There are certainly confidential issues regarding the disclosure of substantial or detailed information relating to the investigation of Article 226 notices. However, the Commissioner is not persuaded that this extends to mere knowledge that such formal notices may have been issued. Furthermore, in the course of its correspondence with the complainant regarding the request, the public authority did indeed acknowledge that the UK had been issued Article 226 letters.
36. In the context of this case, the Commissioner also considers that the withheld information which is in effect predominantly the details of the Directives which are/were the subject of possible infraction proceedings against the UK, do not constitute confidential information within the meaning of the term as envisaged in relation to documents provided by the Commission to Member States pursuant to a possible investigation for an alleged infraction.

37. There is no doubt that the terms on which information is exchanged by the Commission and Member States in relation to investigations requires a degree of confidentiality from both parties. The Commissioner is of the view that this is because the prevention of prejudicial outcomes is at the heart of the need to maintain confidentiality. However, the Commissioner is not persuaded that disclosure in this case would have such an effect and the public authority has not provided any specific arguments in relation to any/all of the cases to persuade him otherwise. Therefore, the Commissioner is not persuaded that the withheld information can be considered confidential within the meaning envisaged in sections 27(2) and 27(3).
38. There is also the question of whether the circumstances in which an Article 226 letter is sent by the Commission to a Member State should inevitably draw a reasonable conclusion that such information is confidential. Again, the Commissioner acknowledges that the UK government is entitled to reach such a conclusion taking into account the sensitivity surrounding infraction proceedings generally. However, the withheld information in this case does not, in the Commissioner's view, specifically lend itself to such a conclusion. As suggested by the Information Tribunal (Tribunal) in *Campaign Against Arms Trade v The Information Commissioner and Ministry of Defence (EA/2006/0040)*, the test is what would be reasonable in the mind of the confider, taking into account their culture and traditions and the lack of an internationally uniform concept of confidentiality. In that case, the Tribunal took into account the particular characteristics of the Kingdom of Saudi Arabia (KSA) (for example, the secretive nature of its society) in determining the KSA's reasonable expectations of confidentiality.
39. The Commissioner is of the view that in the present case, a realistic expectation of confidentiality would extend to the documents which, if disclosed, could be prejudicial to the outcome of the ongoing investigation for an alleged breach of a Directive. However, as suggested by the CFI at paragraph 64 of its judgement in the WWF case above, the Commissioner is not persuaded that the Commission would realistically expect that confidentiality should be extended to the subject matter of the Directive which was allegedly breached.
40. In light of the above, the Commissioner finds that the details of the open and closed cases in April 2009 (within the scope of the request) in which Article 226 letters had been issued were incorrectly withheld on the basis of section 27(2). As the Commissioner has found that this exemption is not engaged in relation to the information he has therefore not gone on to conduct a public interest test.

Section 27(1)(b) – Prejudice to the relations between the UK and any international organisation

41. Information is exempt from disclosure on the basis of the above exemption if its disclosure would or would be likely to prejudice relations between the UK and any international organisation or international court.
42. The public authority explained that the Commission does not publish details of Article 226 cases which had not been issued a reasoned opinion in order for both the Commission and Member States to be able to enter into free and frank discussions with a view to reaching a negotiated settlement and consequently avoiding infractions being referred to the European Court of Justice.
43. The public authority argued that should such information been made publicly available, it could affect negotiations between the Commission and the UK which would be detrimental to the UK's efforts to secure favourable solutions in both active and dormant cases. The public authority therefore concluded that the disclosure of the withheld information would be likely to prejudice relations between the UK and the Commission.

Prejudice Test

44. Section 27(1)(b) is a prejudice based exemption which in effect means that for it to be engaged, the public authority must be able to demonstrate that disclosure would, or would be likely to, be prejudicial to the interest the exemption seeks to protect.
45. In Hogan v the ICO and Oxford City Council (EA/2005/0026 & EA/2005/0030), the Information Tribunal (Tribunal) stated that "The application of the 'prejudice' test should be considered as involving a numbers of steps. First, there is a need to identify the applicable interest(s) within the relevant exemption.....Second, the nature of 'prejudice' being claimed must be consideredA third step for the decision-maker concerns the likelihood of occurrence of prejudice." (Paragraphs 28 to 34).
46. It is clear that the applicable interest here is to preserve and protect the relationship between the UK and the Commission. It is envisaged therefore that the disclosure of withheld information would be likely to damage relations between both parties.
47. In terms of the nature of the prejudice, there is certainly an argument to be made that disclosure could prejudice the UK's interest in that it could adversely affect the UK's position in an ongoing investigation. The public authority has made clear how the UK's negotiation position

may be affected, it has not clearly demonstrated how disclosure would be likely to prejudice relations between the UK and the Commission.

48. However, in the Commissioner's view, an argument could perhaps be made that, there could be damage to relations between the UK and the Commission if such allegations were made public and the Commission subsequently decided the UK had no case to answer.

Likely to Prejudice

49. In the Commissioner's opinion, 'likely to prejudice' means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote.
50. The Commissioner has already pointed out that the substantial part of the withheld information (which constitutes a list of open and closed cases at Article 226 stage) describes the relevant Directive for which the UK is potentially subject to infraction proceedings in relation to its transposition. In terms of the disclosure regarding a case which the Commission subsequently decided that the UK had no case to answer, the Commissioner is the opinion that because it is more in the interest of the UK to negotiate, and where possible, resolve a case before a Reasoned Opinion is issued or a referral is made to the ECJ, disclosure would have been unlikely to result in a real and significant risk of prejudice to relations between the UK and the Commission. In addition, an argument could also be made that because an Article 226 letter does not signal an automatic breach of a Directive, a subsequent finding that the allegation was unfounded would not necessarily lead to a real and significant risk of prejudice to relations between the UK and the Commission.
51. The Commissioner is therefore not persuaded that disclosure would have been likely to be prejudicial to the UK's relations with the Commission or indeed to its efforts to secure favourable solutions. In the Commissioner's opinion, the public authority has not been able to demonstrate how the relations between the UK and the Commission would have been likely to be prejudiced in the context of the withheld information in this case. It has also not been able to persuade the Commissioner that the disclosure of the withheld information would result in real and significant damage to its ability to secure favourable settlements for the UK and avoid potential infraction proceedings.
52. In light of the above, the Commissioner finds that the withheld information (within the scope of the request) was incorrectly withheld on the basis of section 27(1)(b). He has therefore not gone on to conduct a public interest test.

Section 35(1)(a) – Formulation of government policy

53. Information is exempt on the basis of the above exemption if it is held by a government department and relates to the formulation or development of government policy. In order to reach a decision as to whether the exemption was correctly engaged, the Commissioner has to first determine whether the information within the scope of the request in the table of cases provided relates to the formulation or development of government policy.
54. The public authority explained that the infraction cases constitute information relating to the formulation of government policy in respect of the subject matter of each of the cases. The public authority explained that at an article 226 stage (i.e. formal notice of alleged incompatibility with Directive in question) the government would start to consider a number of options on how to resolve the issue. The consequent outcome from the government's adopted position could include the allegedly incompatible UK legislation not being amended, or the Commission deciding to issue an infraction notice. The public authority further explained that although cases which are closed at an article 226 stage cannot be subsequently re-opened by the Commission, the Commission may bring a fresh case against the UK in respect of a similar matter in the future. The public authority therefore argued that; '(r)eleasing details of the closed cases would be likely to cause prejudice to the ongoing formulation of government policy in respect of the subject matter of the closed infractions.'
55. There is no precise definition of the term 'government policy' but it is generally accepted that it refers to a process by which governments translate their political vision into programmes and actions to deliver outcomes. The term also suggests that it requires ministerial approval or at least represents the collective view of ministers and applies across government. Government policy could be generated from a number of sources including ideas from ministers, as a result of significant incidents, manifesto commitments, EU regulations and directives.
56. 'Formulation' suggests the early stages of government policy generation. 'Development' on the other hand implies a review of existing policy which may result in alterations. Generally, the Commissioner is of the opinion that the process of implementing Directives into UK legislation relates to the development of government policy as there is often scope to affect the impact of the Directive during the transposition process. Member States are able to transpose Directives to meet the specific demands of their countries and could therefore amend Directives (without losing their aspirational aims) to fit into the fabric of their own legislative framework.

57. The Tribunal has also noted that 'relates to' could be safely given a broad interpretation so that it would not be necessary to consider whether any of the withheld information deviates from section 35(1)(a) activities. It is sufficient that the context in which it was produced and the subject matter cover section 35(1)(a) activities.¹
58. The starting point as always is the withheld information. The Commissioner is satisfied the subject matter in each of the Directives referred to in both the open and closed cases can be correctly categorised as government policy. The Directives are part of EU legislation (and consequently EU policy) which will take account of the views of Member States including the UK. However, the Commissioner disagrees that the relevant Directives which were the subject of possible infringement proceedings relate to the 'formulation' rather than the 'development' of government policy. He is of the opinion that because the Directives have already been subject to UK input in relation to the relevant subject matter, the policy in question had already been formulated. The Commissioner considers that the process of transposing the Directives into UK legislation including the negotiations with the Commission following an Article 226 letter relate to the development of government policy.
59. The Commissioner agrees with the Tribunal that 'relates to' should be broadly interpreted. He is therefore satisfied that the subject matter of the Directives and the remainder of the information within the scope of the request in the table of cases relate to the process of developing government policy; in this case how best to effectively transpose the Directives and avoid infraction proceedings against the UK.
60. The Commissioner therefore finds that the information in the table of cases within the scope of the request was correctly withheld on the basis of the exemption at section 35(1)(a)..
61. Section 35(1)(a) is a qualified exemption and accordingly subject to a public interest test. He now has to decide whether in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosure.

Public interest arguments in favour of disclosing the requested information

62. The public authority did not clearly outline the public interest factors it had taken into account in its refusal notice or in the letter detailing the outcome of its review. It did however make representations to the

¹ DfES v Information Tribunal & the Evening Standard EA/2006/0006 (paragraphs 53-58)

Commissioner in relation to the public interest reasons for maintaining the exemption.

63. In identifying the relevant public interest in disclosure in this case, the Commissioner took into account the Tribunal's comments regarding the general public interest in openness in *Guardian Newspapers Ltd and Heather Brooke v The Information Commissioner and BBC* (EA/2006/0011 and EA/2006/0013). According to the Tribunal;

'While the public interest considerations in the exemption from disclosure are narrowly conceived, the public interest considerations in favour of disclosure are broad-ranging and operate at different levels of abstraction from the subject matter of the exemption. Disclosure of information serves the general public interest in the promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and the informed and meaningful participation by the public in the democratic process.' (Paragraph 87).

64. In addition to the above, the Commissioner considers that there is a public interest in knowing to what extent the UK is meeting its EU obligations in terms of the transposition of Directives.
65. There is also a public interest in knowing the subject matter of the Directives which are potentially subject to infraction proceedings. Members of the public who are directly affected by these Directives may also wish to voice their opinions regarding the extent to which such Directives should be transposed.

Public interest arguments in favour of maintaining the exemption

66. The public authority argued that there is a public interest in the ability of the government to be able to develop policy relating to the subject matter of the relevant cases freely and in a way which secures the best outcome for the UK. The public authority argued that it would not be in the public interest to release the list of open cases as it would harm the government's ability to develop policy and come to an agreed view on the way forward.
67. The public authority explained that the freedom to negotiate freely would enhance the possibility of the UK being able to negotiate a favourable settlement with the Commission and thereby reduce the risk of further infraction and costly fines.

Balance of the public interest arguments

68. The Commissioner accepts that there is a public interest in preserving the negotiation space between the government and the Commission in order for the government to be able to reach favourable settlement agreements for the UK.
69. However, the Commissioner has not been presented with any convincing arguments that disclosure of the list of cases as at April 2009 would have adversely affected the government's ability to negotiate favourably for the UK and consequently increase the risk of infraction proceedings. The Commissioner also notes that the likelihood and severity of any impact on the policy development process would be much lower for the closed cases, where development would have been complete. He has not been presented with any convincing arguments about how disclosure of details of the closed cases would impact on any other proceedings in future on related issues. This is in contrast with the disclosure of material or documents which could be relevant during the course of investigations.
70. In any event, as noted by the CFI in the WWF case, the Commissioner considers that there is a significant public interest in the public being made aware of Directives that are potentially subject to infraction proceedings.
71. The Commissioner therefore finds that on balance, in all the circumstances of the case, the public interest in maintaining the exemption did not outweigh the public interest in disclosure.

Procedural Requirements

72. Section 17(1) requires a public authority to notify an applicant of the specific exemption(s) being relied on to withhold information within 20 working days.
73. The Commissioner finds the public authority in breach of section 17(1) for the late reliance on sections 27(2) and 35(1)(a) of the Act.
74. Where a public authority is relying on a qualified exemption, section 17(3)(b) places a requirement on the public authority to set out its public interest reasoning to the complainant in its refusal notice or within a reasonable time.
75. The Commissioner finds the public authority in breach of section 17(3)(b) for failing to clearly explain the public interest reasons for withholding the requested information to the complainant.

The Decision

76. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act.
77. The public authority incorrectly withheld all of the information (within the scope of the request) in relation to the cases open as at April 2009 and cases closed as at April 2009 and therefore breached section 1(1)(b).
78. The public authority breached section 17(1) for the late reliance on the exemptions at sections 27(2) and 35(1)(a).
79. The public authority breached section 17(3)(b) for failing to clearly set out the public interest reasons for withholding the information to the complainant.

Steps Required

80. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

Disclose the information in the list of cases supplied to the Commissioner marked Annex B and Annex C excluding the information (outlined at paragraph 12 above) which the Commissioner has found not to be within the scope of the request.

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

Failure to comply

82. 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.

Other matters

83. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
84. Part VI of the section 45 Code of Practice (the "section 45 code") makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it took over 40 working days for an internal review to be completed, despite the publication of his guidance on the matter.

Right of Appeal

85. 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 served.

Dated the 29th day of June 2010

Signed

Steve Wood
Head of Policy Delivery

Information Commissioner's Office
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SK9 5AF

Legal Annex

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.”

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.”

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."

Formulation of Government Policy

Section 35(1) provides that –

"Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (a) the formulation or development of government policy,
- (b) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request or the provision of such advice, or
- (d) the operation of any Ministerial private office.

Section 35(2) provides that –

"Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded-

- (a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or
- (b) for the purposes of subsection (1)(b), as relating to Ministerial communications."

Section 35(3) provides that –

"The duty to confirm or deny 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)."

Section 35(4) provides that –

"In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking."

Section 35(5) provides that –

"In this section-

"government policy" includes the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the National Assembly for Wales;

"the Law Officers" means the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland and the Attorney General for Northern Ireland;

"Ministerial communications" means any communications-

- (a) between Ministers of the Crown,
- (b) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or
- (c) between Assembly Secretaries, including the Assembly First Secretary, and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly, and proceedings of the executive committee of the National Assembly for Wales;

"Ministerial private office" means any part of a government department which provides personal administrative support to a Minister of the Crown, to a Northern Ireland Minister or a Northern Ireland junior Minister or any part of the administration of the National Assembly for Wales providing personal administrative support to the Assembly First Secretary or an Assembly Secretary;

"Northern Ireland junior Minister" means a member of the Northern Ireland Assembly appointed as a junior Minister under section 19 of the Northern Ireland Act 1998."