

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 2 March 2010

Public Authority: Ministry of Justice
Address: 102 Petty France
London
SW1H 9AJ

Summary

The complainant made a Freedom of Information Act request to the Ministry of Justice for a copy of the Tasker report, a detailed report into corruption and mismanagement at HMP Wandsworth. Subsequent to the Commissioner's intervention, the main body of the Tasker report was provided to the complainant's satisfaction, subject to minor redactions in respect of section 40(2). However, during the course of the investigation the Ministry of Justice identified that it held further information in the form of seven annexes to the main report, which had been withheld from the complainant. It was very slow to supply the Commissioner with copies of the annexes, and it failed to identify to him which exemptions it was applying in respect of them. The Commissioner concluded that the annexes had not been included within the scope of the Ministry of Justice's consideration of the request. In failing to issue a valid refusal notice in respect of the withheld annexes, the Commissioner therefore finds that the Ministry of Justice breached the time limit in section 17(1) of the Act. This Decision Notice therefore requires the Ministry of Justice to issue a refusal notice in compliance with section 17(1) in respect of the annexes. If the Ministry of Justice concludes that no exemption applies or if the exemption in question is qualified and the balance of the public interest favours disclosing the information, the annexes should be provided to the complainant.

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 request was made to HM Prison Service and initially dealt with by the National Offender Management Service (NOMS). The Commissioner notes that under the Act, NOMS is not a public authority itself, but is an executive agency of the Ministry of Justice. Therefore, the public authority in this case is actually the Ministry of Justice and not NOMS. It is referred to in this Decision Notice as “the public authority”.
3. On 10 March 2008 the Commissioner served a Practice Recommendation (ref: FPR0179447) on NOMS. The Practice Recommendation sought to address what appeared to be NOMS' overuse of extensions to the time for considering the public interest test. It also identified failures in connection with section 17(1). The Commissioner was concerned that the approach was strategically employed so as to ‘manage’ the workload created by the requests for information received. The complainant's initial complaint about the handling of her request was included within the scope of the Commissioner's consideration for the Practice Recommendation.
4. The complainant made the request in respect of herself and on behalf of two colleagues. All three had been employed at Wandsworth prison and were mentioned in the report. NOMS obtained written consent from the two colleagues to the release of personal data about them, to the complainant.

The Request

5. On 19 November 2007 the complainant requested the following information in accordance with section 1 of the Act:

“Thank you for your letters...outlining your interpretation of Ron Tasker's investigation... we would naturally like to see the relevant sections of the investigation so we can prepare properly... We would be obliged if you could send us the report.”

6. The public authority acknowledged the request on 28 November 2007, but it was not until 6 May 2008, having twice extended the time limit to consider the public interest, that it provided its response.
7. The public authority's letter of 6 May 2008 enclosed a redacted version of the Tasker report and unredacted copies of annexes 1, 3 and 7 to the report, composed of interviews between Ron Tasker, the author of the report, and the complainant and her two colleagues. The letter acted as a refusal notice in respect of certain information. It explained that information about third parties, other than the complainant and her two colleagues, had been withheld under section 40(3). It also cited sections 31(1)(f) and 31(1)(g) and stated that the public interest favoured withholding the information covered by these exemptions.

8. The complainant wrote to the public authority in 25 May 2008, to ask it to review its decision not to release the report in its entirety. The request was acknowledged by the public authority on 28 May 2008, but no further response was received.

The Investigation

Scope of the Investigation

9. The complainant wrote to the Commissioner on 22 July 2008 and again on 3 September 2008, to complain about the public authority's failure to action her request for a review. She asked the Commissioner to ensure that the public authority reviewed its decision to withhold sections of the report.
10. During the course of the Commissioner's investigation the following matter was resolved informally and therefore is not addressed in this Notice.
 - The main body of the Tasker report (together with three of the ten annexes) was supplied to the satisfaction of the complainant by 31 December 2009. The public authority applied redactions only in respect of section 40(2) to withhold personal data relating to junior members of staff and to prisoners. The complainant is not pursuing this aspect of the original complaint.
11. This Decision Notice instead focuses on the withholding of the remaining seven annexes to the report. The seven annexes are composed of transcripts of interviews between the report's author and various members of staff at HMP Wandsworth, and supplementary evidence (including letters, memos, standard forms, minutes of meetings and performance appraisals). These annexes were quoted from and referred to in the main report but were excluded from the information supplied to the complainant.

Chronology

12. On 11 September 2008, the Commissioner wrote to the public authority asking to be sent a copy of the Tasker report. Over the following eleven months, the Commissioner asked a further five times for the report to be supplied to him. Despite several assurances from the public authority that the report was about to be provided, it was not until the Commissioner indicated he was preparing an Information Notice that the Tasker report was supplied to him on 6 August 2009.
13. The report, a lengthy document of over 400 pages, was supplied to the Commissioner without seven of the ten annexes of staff interviews and supplementary evidence referred to in its contents list. In a telephone conversation on 13 July 2009 (before the report had been supplied to the Commissioner) the public authority referred to the annexes for the first time and queried whether they should be provided for the Commissioner's consideration. Having ascertained that the public authority considered that they formed part of

the Tasker report and fell within the scope of the request, the Commissioner indicated that they should.

14. On 15 September 2009 the Commissioner wrote to the public authority asking it to provide further clarification over its application of certain exemptions within the body of the main report and also reminding it to provide the annexes to the report. The letter asked for any proposed redactions in respect of these annexes to be indicated and explained.
15. The Commissioner contacted the public authority on 15 October 2009 and again on 17 November 2009 to request that the annexes and supporting arguments be supplied. The public authority replied on 30 November 2009, asking to be given until 12 December to do this.
16. On 14 December 2009, in a telephone conversation with the Commissioner, the public authority clarified that it had supplied three of the ten annexes (annexes 1, 3 and 7) to the complainant as part of its initial response of 6 May 2008, the annexes in question being transcripts of interviews between Ron Tasker and herself and her two colleagues.
17. The public authority also stated during the phone call that to examine the remaining seven annexes of interviews and supplementary evidence so as to establish whether any exemptions applied would take some considerable time, due to their volume and complexity. It declined to commit to a timescale for completing this.
18. Following a further request by the Commissioner, the copies of the annexes were received by the Information Commissioner on 23 December 2009. No explanation as to what sections of the annexes, if any, the public authority considered exempt, was supplied. Some words in the interview transcripts had been replaced with asterisks. In a telephone conversation on 2 February 2010, the public authority explained to the Commissioner that these asterisks did not represent redactions applied in respect of the Act, and that they appear on the original transcript documents as well.
19. On 31 December 2009, the public authority sent the complainant a copy of the Tasker report, complete save for the seven annexes and some minor redactions in respect of section 40(2).
20. On 12 January 2010 the Commissioner wrote to the complainant asking whether she was satisfied with this latest response. In her response, dated 17 January 2010, the complainant did not challenge the application of the exemption to the main body of the report; however, she indicated that the annexes remained of interest and that she would like to be supplied with them. In view of the public authority's ongoing failure to provide supporting arguments in respect of withholding the remaining seven annexes, the Commissioner considered it appropriate to move to the Decision Notice stage in order to resolve this aspect of the complaint.

Analysis

Section 17

21. The public authority has failed to provide the complainant with seven of the annexes, containing interviews between Ron Tasker and staff members at HMP Wandsworth and supplementary evidence. It has failed to provide an explanation to the Complainant or the Commissioner why it has withheld this information.
22. Section 17(1) requires that, where a public authority believes that any exemption from Part II of the Act applies, it should issue a notice stating why the exemption in question is engaged. This notice must be issued within 20 working days of receipt of the request.
23. In this case, the Commissioner does not consider that the refusal notice issued on 6 May 2008 or the subsequent communications sent to the complainant, as more of the report was released, can be considered to apply in respect of the annexes. He therefore considers that no valid refusal notice in respect of them has been issued.
24. Failing to issue a refusal notice within twenty working days was therefore a breach of section 17(1).

The Decision

25. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act, in that it did not issue a valid refusal notice in respect of the withheld annexes within the statutory time limit, thereby breaching section 17(1).

Steps Required

26. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act.
 - Issue a refusal notice compliant with section 17(1) that sets out any exemption(s) engaged by information contained in the remaining seven annexes (annex volumes 2, 4,5,6, 8,9 and 10) and why the exemption(s) applies (if this would not otherwise be apparent). If no exemptions apply, or if the exemption(s) in question is qualified and the public authority concludes that the balance of the public interest favours disclosing the information or no longer considers the exemptions to apply, the information should be provided to the complainant.

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

Failure to comply

28. 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.

Other matters

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

Internal Review

30. Part VI of the section 45 Code of Practice 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, the public authority failed to complete an internal review within these recommended timescales.

Engagement with the ICO

31. During the course of his investigation, the Commissioner has encountered considerable delay on account of the public authority's reluctance to meet the timescales for response set out in his letters. Furthermore, the Commissioner has been met with resistance in his attempts to understand the authority's reasons for handling the request as it did.
32. In investigating complaints received under section 50(1) of the FOIA, the Commissioner is, in the majority of cases, reliant upon substantive submissions from public authorities. When public authorities do not respond to the Commissioner's enquiries within a reasonable timescale, the outcome is that an investigation is unnecessarily prolonged whilst the Commissioner attempts to secure a response. Clearly, one of the knock-on effects of this is that a complainant is made to wait an unreasonable period of time for the issues they have raised to be addressed. This is of particular concern in cases where the

purpose of an investigation is to establish whether an authority has legitimately withheld information specified in a request.

33. The Commissioner expects that, in future, the public authority will provide responses within the timescales set in the Commissioner's correspondence and in accordance with the Memorandum of Understanding.

Right of Appeal

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 2nd day of March 2010

Signed

**Steve Wood
Assistant Commissioner**

**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.”

Effect of Exemptions

Section 2(2) provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

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

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.”

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.”

Law enforcement.

Section 31(1) provides that –

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

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,
- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls,
- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
- (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.”

Section 31(2) provides that –

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

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

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

Personal information.

Section 40(1) provides that –

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

Section 40(2) provides that –

“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.”

Section 40(3) provides that –

“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 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 Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”