

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 29 March 2010

Public Authority: The Attorney General's Office
Address: 20 Victoria Street
London
SW1H 0NF

Summary

The complainant requested information from the Attorney General's Office about the superintendence of the Crown Prosecution Service in relation to the Employment Tribunal case of another individual. The Commissioner finds that, apart from a small piece of information disclosed during the course of his investigation, the information was correctly withheld under section 40 (personal information). However, he finds that procedural breaches were committed. He requires no steps to be taken.

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 Attorney General's Office (AGO) provides legal and strategic policy advice and support to the Attorney General and the Solicitor General (the Law Officers).
3. The Attorney General's main responsibilities are:
 - chief legal adviser to the Government and Parliament;
 - guardian of the rule of law and the public interest; and

- overall responsibility for the work of the Attorney General's Office and superintended Departments (the Treasury Solicitor's Department, the Crown Prosecution Service, the Serious Fraud Office, the Revenue & Customs Prosecutions Office, the Army Prosecuting Authority and HM Crown Prosecution Service Inspectorate).
4. The document '*The Governance of Britain – A Consultation of the Role of the Attorney General*', published on 26 July 2007, describes superintendence in the context of the AGO as follows (para 1.22):

'It could thus be said that the concept of superintendence encompasses answering for the prosecuting authorities in Parliament, responsibility for the overall policies of those authorities, including prosecution policy in general, responsibility for the overall "effective and efficient administration" of those authorities, including matters of resources, a right for the Attorney General to be consulted and informed about difficult, sensitive and high-profile cases, but not responsibility for every individual prosecution decision, or for the day-to-day running of the organisation'.

5. The Crown Prosecution Service (CPS) was set up in 1986 to prosecute criminal cases investigated by the police in England and Wales. In undertaking this role, the CPS:
- advises the police on cases for possible prosecution;
 - reviews cases submitted by the police for prosecution;
 - where the decision is to prosecute, determines the charge in all but minor cases;
 - prepares cases for court; and
 - presents those cases at court.

The Request

6. On 19 January 2009, the complainant wrote to the Attorney General's Office (AGO) requesting the following information under the Act:

'All material touching the Law Officers' superintendence of the Crown Prosecution Service both in general and in particular in respect of a case before an Employment Tribunal between [named individual] and the CPS, and, without prejudice to the generality of the foregoing, any briefing note prepared by civil servants to Law Officers'.

7. The AGO responded on 5 February 2009 advising that the cost of compliance exceeded the appropriate limit and suggesting that the complainant narrow his request, for example to a specific case / file.

8. As a result of this exchange, the complainant wrote to the AGO on 8 February 2009 with the following request:

'As you will be aware I am concerned about a substantial waste of public money by the CPS in the Employment Tribunal case between them and [named individual].....

There must be some written protocol touching the statutory superintendence of the CPS by the Attorney General, and that is clearly disclosable.

I wish to ascertain against that background if the superintendence was adequate in the [name of individual] case. I have no particular interest in any other, and I would have thought that would not be too great a task'.

9. The AGO responded on 23 April 2009. In this correspondence it confirmed that it did not hold information relevant to the request. However, citing its duty to provide advice and assistance in accordance with section 16 of the Act, the AGO provided the complainant with links to a number of websites. It advised him that these websites provide general information about the superintendence of the Attorney General and the CPS.

10. The complainant requested an internal review on 27 April 2009.

11. Following a review of the information it held, the AGO responded on 13 May 2009 confirming that *'the department does hold information falling within the terms of the request and accordingly the response of 23 April was not correct'*. It provided the complainant with an explanation of why it had previously advised that it did not hold any relevant information. This explanation centred on the fact that the AGO mistakenly considered that the relevant file(s) had been destroyed in accordance with its file retention policy.

12. At this stage, the AGO told the complainant that it required further time to consider whether any of the information it held could be disclosed. However, it advised him that *'it is likely that all or most of the information will be exempt'* under section 36 (prejudice to the effective conduct of public affairs), section 40 (personal information), section 41 (information provided in confidence) or section 42 (legal professional privilege).

13. In respect of the element of the request concerning a written protocol on the superintendence of the CPS, the AGO confirmed that it did not hold this information. However, by providing him with electronic links to publications it considered relevant, it referred the complainant to general information about the superintendence of the CPS.
14. Having completed its internal review, the AGO contacted the complainant again on 11 June 2009. In its correspondence, it confirmed that, in respect of '*the information you requested relating to the Law Officers' superintendence of the CPS in respect of the [named individual] case*', it did hold information within the scope of his request. Although not citing the relevant exemption (section 21), it advised him that some of the information it held was reasonably accessible by other means and provided him with details of how and where the information could be accessed. However, it told the complainant that the remainder of the information it held was exempt from disclosure by virtue of sections 40(2) (personal information), 32 (court records) and 41 (information provided in confidence). The AGO also advised that while it considered section 36 (prejudice to the effective conduct of public affairs) would apply to most of the information, it was not relying on this exemption.

The Investigation

Scope of the case

15. On 22 June 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. With regard to the element of the request relating to protocol, the complainant made no reference to the fact that the AGO has said that it did not hold any such information. However, in respect of the other element of his request, he described the AGO's correspondence of 13 May 2009 as acknowledging '*that certain material did, in fact, exist*'. The complainant went on to tell the Commissioner that he did not consider the exemptions cited in the AGO's correspondence of 11 June 2009 were justified.
16. During the course of the Commissioner's investigation, the AGO advised that it was also relying on the exemptions in section 36(2)(b) and (c) in relation to some of the withheld information.
17. Accordingly, the focus of the Commissioner's investigation has been to determine whether or not the Attorney General's Office was correct in applying sections 32, 36, 40 and 41 with regard to the complainant's request for information.

Chronology

18. Having received notification from the Commissioner that he had received a complaint in this matter, the Commissioner acknowledges that he received a copy of the withheld information from the AGO on 8 September 2009.
19. The Commissioner commenced his investigation on 30 November 2009, inviting the AGO to provide him with further explanation in relation to its citing of the exemptions at sections 40, 32 and 41. He also asked it to confirm whether or not it was relying on other exemptions which it referred to in its correspondence to him dated 8 September 2009.
20. Further to initial correspondence, and a telephone call to the Commissioner's Office, regarding the complaint, the AGO provided its substantive response on 20 January 2010. In this correspondence, the AGO confirmed its reliance on the exemptions in sections 32, 40 and 41. In further correspondence, dated 25 January 2010, the AGO confirmed it was also relying on section 36.
21. During the course of the Commissioner's investigation, on 22 January 2010, the AGO disclosed a small amount of information, within the scope of the request, to the complainant.

Analysis

Exemptions

Section 40 Personal information

22. Section 40(2) of the Act is an absolute exemption which relates to the personal information of persons other than the requestor.

'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.'

23. Section 40(2) together with the condition in section 40(3)(a)(i) or 40(3)(b) provides an absolute exemption if disclosure of information

falling within the definition of personal data contained in section 1(1) of the Data Protection Act 1998 (the DPA) would breach any of the data protection principles.

24. In order to reach a view on the AGO's arguments in relation to this exemption, the Commissioner has first considered whether the withheld information is the personal data of one or more third parties.

Is the information personal data?

25. Personal data is defined in section 1(1) of the Data Protection Act (DPA) as:

'data which relate to a living individual who can be identified-

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.'

26. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way. The information can be in any form, including electronic data, images and paper files or documents.
27. The Commissioner notes that the information withheld by the AGO in this case relates to the AGO's superintendence of the CPS in relation to an Employment Tribunal case involving the CPS and one of its employees. The AGO has confirmed that *'the majority of the information within the scope of the request is held in the main [name of individual] file'*. The AGO has also provided the Commissioner with details of how the remaining withheld information is filed (for the purposes of this Decision Notice, the Commissioner will refer to this as 'the residual information').

Information contained in the main file

28. Having considered the contents of the main file, the Commissioner is satisfied that this element of the withheld information constitutes information that falls within the definition of 'personal data' as set out

in section 1(1) of the Data Protection Act 1998. He has reached this conclusion on the basis that the information comprises personal data relating to the employee who was the focus of the Employment Tribunal as well as the personal data of other individuals involved in the investigation and proceedings.

29. Further, he is satisfied that the entire file can be considered to be the personal data of the employee as the reason for its very existence is the CPS Employment Tribunal.

The residual information

30. In respect of the residual information, the AGO has provided the Commissioner with details of how this information is held. In this case, the Commissioner considers that the residual information also constitutes personal data relating to the employee who was the focus of the CPS Employment Tribunal and other individuals.
31. In the case of the residual information, the Commissioner is satisfied that it can all be considered as being the personal data of the CPS employee involved in the aforementioned proceedings as it is clearly linked to that person and has them as its focus.

Would disclosure breach one of the Data Protection principles?

32. Having accepted that all the information requested, whether the residual information or the information held in the main file, constitutes the personal data of a living individual other than the applicant, the Commissioner must next consider whether disclosure would breach one of the data protection principles.

The first principle

33. The first data protection principle states that:

'Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

- (a) *at least one of the conditions in Schedule 2 is met, and*
- (b) *in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met'.*

Would it be fair to disclose the requested information?

34. In determining whether a disclosure is fair under the first principle of the Data Protection Act 1998 for the purposes of section 40 of the

Freedom of Information Act, the Commissioner considers it appropriate to balance the consequences of any disclosure and the reasonable expectations of the data subject with general principles of accountability and transparency.

Reasonable expectations of the data subject

35. On the basis that the withheld information in this case relates to the relationship between an employee and their employer, the AGO has argued that disclosure would be unfair. In support of this argument, the AGO has told the Commissioner that:

'any employee has the reasonable expectation that such matters are private and confidential. Disclosure to the public would be unfair as [named individual] and the other persons concerned have a legitimate expectation that this information would remain confidential'.

36. The Commissioner's guidance, (Awareness Guidance 1, Personal Information), states that it is important to draw a distinction between the information which senior staff should expect to have disclosed about them compared to what information junior staff should expect to have disclosed about them. The rationale for this distinction is that the more senior a member of staff is, the more likely it is that they will be responsible for making influential policy decisions and/or decisions related to the expenditure of significant amounts of public funds.
37. Previous Decision Notices issued by the Commissioner have taken the line that there should be a lower expectation of privacy when information concerns a senior member of staff. In general, the Commissioner's view is that more senior staff, and those carrying out public-facing functions, should expect more information about them to be disclosed.
38. In making a determination about seniority in this case, the Commissioner has considered the job title of the individual concerned and their position within the CPS grading structure and assessed their responsibilities.
39. Having due regard to the circumstances of the case, the Commissioner is not persuaded that the seniority, or otherwise, of the data subject in this case would lead them to have an expectation of disclosure.

Has the data subject actively put some or all of the requested information into the public domain?

40. Where the data subject themselves has put some or all of the requested information into the public domain, the Commissioner

considers that this weakens the argument that disclosure would be unfair.

41. The Commissioner is aware that details of the Employment Tribunal concerning the CPS and the named individual, including comments attributed to the individual, were reported at the time. The Commissioner therefore accepts that there has been media coverage of events relating to the Employment Tribunal case. He also accepts that it could therefore be argued that, as some of the withheld information is in the public domain, this reduces the expectation of privacy in this case.
42. However, he is satisfied that the small amount of information in the public domain amounts to coverage of issues of the day rather than results from the data subject themselves actively putting information about the case into the public domain.
43. Having both considered the withheld information and looked at the information that was in the public domain at the time of the request, the Commissioner is satisfied that in this case, the data subject has not actively sought to put information relevant to the scope of the request into the public domain.

Has the data subject consented to the disclosure?

44. In correspondence with the Commissioner, the AGO has told the Commissioner that it has not sought the data subject's consent to disclosure, *'as it is clear'* that the named individual would not consent *'to such private and confidential information being disclosed to the public'*. In this respect, the Commissioner notes that there is no obligation on a public authority to seek the data subject's consent to disclosure. However, he considers it good practice to inform the data subject that a request for access to information about them has been made and to take any objections into account.

Consequences of disclosure on the data subject

45. The Commissioner considers that the focus of the consequences of disclosure on the harm or distress to the individual should relate to the impact on the individual in a personal capacity. Although it has not provided any evidence in support of its argument in relation to the consequences of disclosing the withheld information, the AGO has told the Commissioner that:

'disclosure of such private information would cause unnecessary and unjustified distress or damage to [named individual] and the other persons concerned'.

46. In this case, when considering the consequences of disclosure on the data subject, the Commissioner has taken into account the nature of the withheld information itself. He has also considered the fact that disclosure under Freedom of Information legislation is disclosure to the public at large and not just to the complainant.
47. The Information Tribunal in the case of *Guardian & Brooke v The Information Commissioner & the BBC* (EA/2006/0011 and EA/2006/0013) (following *Hogan and Oxford City Council v The Information Commissioner* (EA/2005/0026 and EA/2005/0030)) confirmed that, '*Disclosure under FOIA is effectively an unlimited disclosure to the public as a whole, without conditions*' (paragraph 52).
48. The Commissioner is of the opinion that disclosing personal data is generally less likely to be unfair in cases where the personal data relates to an individual's public or professional life rather than to their private life. The threshold for releasing professional information will generally be lower than that in releasing information relating to an individual's private or home life.
49. In this case, the withheld information relates to an Employment Tribunal. The Commissioner notes that Employment Tribunals are independent judicial bodies which determine disputes between employers and employees over employment rights. Accordingly, the Commissioner considers that the information in this case relates to an individual acting in a private, rather than a professional capacity, as it relates to a personal matter between an employee and their employer.
50. It is the Commissioner's view that the release of information relating to such disputes may be the cause of great anxiety to the individual concerned.
51. Furthermore, given the nature of the information, relating as it does to a specific Employment Tribunal case, he considers disclosure could be linked to an individual to provide particular information about that individual.

Accountability and transparency

52. In this case, the complainant, when requesting an internal review, wrote to the AGO arguing that:

'If as appears to be being suggested your department has had no notification of the existence of a dispute between the CPS and one of its employees that caused public money to be frittered away unnecessarily, at its lowest, there is an appalling lack of

communication between CPS and yourselves. The public do have a right to know how their money is being used'.

53. In the Commissioner's view, financial transparency and accountability can improve public trust and confidence in public authorities. He therefore accepts that it can be appropriate to disclose information where to do so would help determine whether public authorities are acting appropriately.
54. In this respect, the Commissioner notes that a disclosure was made to the complainant during the course of his investigation and that this disclosure included some figures relating to external legal costs.

Conclusion

55. The Commissioner recognises that in some cases there is a tension between the objective of freedom of information and the objective of protecting personal data. The Commissioner also understands from the AGO that, at the time of the request, the proceedings '*were ongoing and very much live*'.
56. Ultimately, in this case, the Commissioner has felt that he must strike a balance between transparency and an employee's reasonable expectations of privacy.
57. Having considered all the circumstances of the case, the Commissioner has concluded that it would be unfair to the individual to disclose the withheld information and to do so would contravene the first principle of the DPA. As disclosure would not be fair, the Commissioner has not gone on to consider whether disclosure is lawful or whether one of the Schedule 2 DPA conditions is met.
58. As section 40 is an absolute exemption there is no need to consider the public interest in disclosure separately.

Other exemptions

59. As the Commissioner has found that it would be unfair to disclose the requested information, he has not gone on to consider the other exemptions cited by the AGO in this case.

Procedural Requirements

Section 10 Time for compliance

60. Section 10(1) states:

'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'.

61. In this case the complainant made his request on 8 February 2009 but the AGO failed to confirm that it held information relevant to his request until 23 April 2009. It therefore took 51 working days for the AGO to respond to the information request.
62. The Commissioner notes that the 51 working days which the AGO took to issue its refusal notice was clearly in breach of the statutory timescale. Accordingly, the Commissioner finds that, in failing to confirm or deny within 20 working days whether it held the requested information, the AGO breached the requirements of section 10(1).

Section 17 Refusal of request

63. Section 17(1) of the Act provides that:

'A public authority which ... is to any extent relying:

.....

- 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.'

64. In failing to confirm that it held information within the statutory time limit, the AGO breached section 17(1).
65. In this case the AGO also failed to specify in sufficient detail, by the time of the completion of the internal review, which exemption applied to each element of the requested information and why it did so. The Commissioner has therefore concluded that the AGO was in breach of section 17(1)(b) and (c) of the Act.
66. Section 17(2) provides that:

'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'.

67. In other words, an authority may take further time to consider the public interest test in relation to the duty to confirm or deny or a qualified exemption. However it must issue a notice to the requester within 20 working days stating why it requires more time to come to its decision, and it must give an estimate of the date by which it expects to answer the request in full. The Commissioner finds the AGO in breach of section 17(2) for failing to provide the details required by that section within 20 working days.

The Decision

68. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- it correctly withheld the information to which it applied section 40(2).
69. However, the Commissioner has also decided that the following elements of the request were not dealt with by the AGO in accordance with the Act:
- it breached section 10(1) by failing to inform the complainant whether it held the requested information within 20 working days of the request;
 - it breached section 17(1) by failing to issue a valid refusal notice within the statutory time limit and section 17(1)(b) and (c) by

failing to specify the details required by these subsections of the Act; and

- it breached 17(2) by failing to issue a refusal notice in accordance with that subsection.

Steps Required

70. The Commissioner requires no steps to be taken.

Right of Appeal

71. 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 March 2010

Signed

**David Smith
Deputy Commissioner and Director of Data Protection**

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

Legal Annex

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.”