

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 8 March 2011

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

Summary

The complainant made requests for job descriptions of staff within the office of the Government Chief Whip and for accounting information relating to that body. The public authority initially disclosed some information and stated that no further information was held. Following the intervention of the Commissioner, the public authority acknowledged that it did hold further information falling within the scope of the request for job descriptions and cited the exemption provided by section 40(2) (personal information) in relation to this information. The Commissioner finds that this exemption was cited correctly and the public authority is not required to disclose this information. In relation to the accounting information, the Commissioner finds that the public authority stated correctly and in accordance with section 1(1)(a) that it did not hold this information. The Commissioner also finds that the public authority failed to comply with the procedural requirements of sections 1(1)(a), 10(1) and 17(1)(b) in its handling of the requests.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. The complainant made the following information request on 22 August 2009:

- (i) *"Job descriptions for the [employees who support the Government Chief Whip, his deputies and assistants]."*
3. The public authority responded to this on 23 September 2009. At this stage the public authority provided a written response to this request that set out the job titles and provided a very brief description in relation to each of these. The public authority stated that staff names were withheld under section 40. No subsection of this exemption was cited.
4. The complainant made the following information request on 13 October 2009:
 - (ii) *"Confirm what proportion of the £1.3 million pound expenditure [on financing the Government Chief Whip's Office in 2008-09] is accounted under Objective 2 [(to Support the Prime Minister and the Cabinet in domestic, European, overseas and defence policy making)] and how much is accounted under Objective 6 [(to promote the highest standards of propriety, integrity and governance in public life)]."*
5. The public authority responded to this on 24 November 2009, outside twenty working days from receipt of the request. In response to this request, no information was supplied to the complainant, but he was directed to the annual accounts published on the website of the public authority.
6. The complainant responded on 24 November 2009 and requested that the public authority carry out an internal review. The complainant noted specifically at this point that he had not been provided with the job descriptions that he had requested, nor a breakdown of expenditure that accorded to the wording of his request.
7. After a very lengthy delay and following the intervention of the Commissioner's office, the public authority responded with the outcome of the internal review on 9 August 2010. In relation to request (i), the complainant was supplied with more detailed written descriptions of the roles of staff supporting the Chief Whip than had been given in the previous response. In relation to request (ii), a brief further written answer was given on how the budget of the office of the Government Chief Whip is apportioned.
8. The complainant responded to the public authority on 12 August 2010. At this stage the complainant stressed that he wished to be provided with recorded information falling within the scope of the above requests, not merely a written answer. The public authority responded to this on 13 August 2010 and stated that it held no recorded information falling

within the scope of request (i) further to that provided previously and that it held no recorded information relevant to request (ii).

The Investigation

Scope of the case

9. The complainant contacted the Commissioner's office initially on 4 May 2010. At that stage the concern of the complainant related to the delay in the completion of the internal review. As referred to above, the Commissioner intervened at that stage and ensured that the public authority completed the internal review.
10. Following the completion of the internal review, the complainant was contacted on 1 September 2010 to ascertain how he wished to proceed with this case. An exchange of correspondence followed in which it was clarified that the complainant wished to proceed with this case in relation to the requests set out above.

Chronology

11. The Commissioner contacted the public authority in connection with this case on 28 September 2009. In relation to request (i) it was noted that it appeared somewhat surprising that no recorded information conforming to the complainant's requests for job descriptions was held and the public authority was asked to provide further explanation about this. In relation to request (ii), the public authority was asked to consider whether it would be possible to collate the information requested from existing recorded information that it did hold, and to provide a detailed description of the searches it had carried out if it maintained that no relevant information was held.
12. The public authority responded to this by letter dated 25 October 2010. In connection with request (i), the public authority supplied copies of vacancy advertisements, that it later disclosed to the complainant. It also supplied to the Commissioner copies of "*performance agreement and review forms*" relating to a number of posts within the office of the Government Chief Whip. It was later clarified with the public authority that it was not willing to disclose the review forms as it believed that these were exempt by virtue of section 40(2).
13. In relation to request (ii), the public authority stated that it was not possible to collate from existing sources the information requested by the complainant. It was later clarified with the public authority that it maintained that it did not hold information falling within the scope of request (ii), but that it had not carried out searches for this information

as it considered these to be unnecessary given that it was already aware that it did not hold this information.

14. Further correspondence followed during which the Commissioner sought an explanation from the public authority as to why it was sufficiently confident that it did not hold information falling within the scope of request (ii) that it was not necessary for it to carry out searches for this information. The public authority responded with further explanation on this point by letter dated 28 February 2011.

Analysis

Substantive Procedural Matters

Section 1

15. In relation to request (ii), the public authority has stated that it does not hold information falling within the scope of this request. The task for the Commissioner here is to reach a conclusion as to whether the public authority is correct in stating that it does not hold relevant information. If the public authority is correct in stating this, the conclusion of the Commissioner will be that the public authority has complied with section 1(1)(a) in relation to this request. If the Commissioner concludes that the public authority has stated incorrectly that no relevant information is held, this will indicate that the public authority is in breach of section 1(1)(a).
16. The test that the Commissioner applies when considering whether information is held is that the balance of probabilities must suggest that the public authority is correct in stating that this information is not held. This is in line with the approach taken by the Information Tribunal in the case *Linda Bromley & others and the Environment Agency (EA)* (EA/2006/0072) in which it stated:

"...we must consider whether the IC's decision that the EA did not hold any information covered by the original request, beyond that already provided, was correct. In the process, we may review any finding of fact on which his decision is based. The standard of proof to be applied in that process is the normal civil standard, namely, the balance of probabilities..." (paragraph 10) because *"...there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records..."* (paragraph 13).

17. When making a decision as to whether a public authority has complied with section 1(1)(a), the Commissioner will take into account the

description provided by the public authority of the searches carried out for relevant information and what this suggests about their scope, quality and thoroughness. In addition, or alternatively if appropriate, the Commissioner will also take into account any other reasoning offered by the public authority as to why it does not hold relevant information.

18. The public authority has confirmed that it did not carry out any searches for information falling within the scope of this request. Therefore, the only basis on which the Commissioner can conclude, on the balance of probabilities, that the public authority does not hold information falling within the scope of the request, will be any explanation it has provided as to why it does not hold relevant information.
19. The explanation provided by the public authority as to why it was sufficiently confident that it did not hold information falling within the scope of the request such that it was not necessary for it to carry out a search was that reporting on expenditure per Departmental Strategic Objective is done at a high level. This meant that the level of detail included in the reporting of expenditure per Objective was not sufficiently granular to show expenditure by the Chief Whip's Office separately.
20. The public authority explained that, instead, expenditure by the Chief Whip's Office would form part of a larger figure relating to the "Private Offices Group". This group includes, as well as the Chief Whip's Office, the private offices of all Cabinet Office Ministers.
21. Brief research on the website of the public authority shows the Private Offices Group included as part of the structure of the public authority. Also, accounts published on the website of the public authority show expenditure by Objective, but not broken down to a level of detail that shows expenditure on these by the Chief Whip's Office specifically.
22. On the basis of this evidence, the conclusion of the Commissioner is that, on the balance of probabilities, the public authority does not hold information falling within the scope of request (ii). The public authority therefore complied with section 1(1)(a) of the Act when stating that this information was not held.

Exemptions

Section 40

23. In relation to the information within the scope of request (i) that the public authority has now identified that it does hold and that has not been disclosed to the complainant, the public authority now cites the exemption provided by section 40(2). The Commissioner has therefore considered whether this exemption was applied correctly. The

procedural breach in the public authority previously failing to identify that it held information of relevance to this request is recorded below.

24. Consideration of this exemption is a two-stage process; first, the information must constitute the personal data of individuals aside from the requester. Secondly, the disclosure of this information must be in breach of at least one of the data protection principles.
25. Covering first whether the information in question constitutes personal data, section 1(1) of the Data Protection Act 1998 (DPA) provides the following definition of personal data:

“personal data’ means 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”.*

26. The information that the public authority has now identified as within the scope of this request consists of *“performance agreement and review forms”*, which list objectives and performance measures and targets for staff within the office of the Government Chief Whip. The forms provided by the public authority to the Commissioner’s office do not identify the individual staff members by name. The Commissioner is not aware of why the versions of these documents provided to his office are redacted in this way, so it is not known whether the implication of this is that this information is held in this anonymised form by the public authority, or whether the documents held by the public authority do identify the subjects by name, but that this content was redacted before this information was supplied to the Commissioner’s office. The Commissioner considers the latter more likely, but will address both possibilities here.
27. First, if the recorded information held by the public authority does identify staff members by name, this information would clearly both relate to and identify these staff members, and so this information would constitute personal data according to the definition from the DPA set out above.
28. As to whether these forms constitute personal data without the inclusion of names, the DPA quote above refers to any other information in the possession of the data controller. Disclosure via the Act means that information is effectively rendered publicly available, meaning that the data controller in this case would be any member of the public.

29. The view of the Commissioner here is that an individual with knowledge of the workings of the office of the Government Chief Whip, such as an employee, would have sufficient knowledge to link these forms to individuals. These forms specify job titles and, given that the Whip's office is a relatively small organisation, a job title would be sufficient for any person with knowledge of the workings of this organisation to link this information to individuals.
30. The view of the Commissioner is, therefore, that this information would constitute personal data, whether or not the original versions held by the public authority identify individuals by name. The next step is to consider whether the disclosure of this personal data would be in breach of any of the data protection principles. The Commissioner has focussed here on the first data protection principle, which requires that personal data be processed fairly and lawfully and, in particular, whether it would be, in general, fair to the subjects of this information for it to be disclosed.
31. A key issue to consider when assessing fairness is whether the subjects of this information hold an expectation of confidentiality. If these individuals hold a strong and legitimate expectation of confidentiality, this means it would be less likely to be fair for this information to be disclosed.
32. The information in question here consists of forms prepared in order to assess the subjects' performance in their professional roles. The view of the Commissioner is that individuals would in general have a strong and legitimate expectation of confidentiality in relation to this information. The Commissioner also believes that it is likely that the subjects of this information would suffer some distress through the disclosure of information that they regarded as confidential into the public domain.
33. In order for it to be fair for this information to be disclosed despite this expectation of confidentiality and the distress that would be likely to result, there would have to be clear and compelling legitimate interests in this disclosure. In this case, aside from the general public interest in improving the openness and transparency of the public authority, the Commissioner does not recognise any strong legitimate interests in the disclosure of the specific information in question that would override the expectation of confidentiality and likelihood of distress, so that the disclosure of this information would be fair.
34. The Commissioner therefore finds that disclosure would be unfair and in breach of the first data protection principle. Having already found that this information would constitute personal data, the overall conclusion of the Commissioner is that the exemption provided by section 40(2) is

engaged and the public authority is not required to disclose this information.

Procedural Requirements

Sections 1 and 10

35. In failing to confirm within 20 working days of receipt of the request that it held the information to which the section 40(2) analysis above relates, information which the Commissioner believes was clearly relevant to request (i), the public authority did not comply with the requirement of section 10(1); and in failing to rectify this by the time of the internal review it breached section 1(1)(a).
36. In failing to clearly confirm or deny within 20 working days of receipt of the request whether it held information falling within the scope of request (ii) and in failing to respond to this request within 20 working days of receipt, the public authority did not comply with the requirement of section 10(1); and in failing to rectify this by the time of the internal review it breached section 1(1)(a).

Section 17

37. In failing to specify any subsection from section 40 in the refusal notice of 23 September 2009, the public authority did not comply with the requirement of section 17(1)(b).

The Decision

38. The Commissioner's decision is that the public authority dealt with the requests for information in accordance with the Act in that it applied the exemption provided by section 40(2) correctly in relation to request (i) and it stated correctly and in accordance with section 1(1)(a) that it did not hold information falling within the scope of request (ii). However, the Commissioner also finds that the public authority breached sections 1(1)(a), 10(1) and 17(1)(b) in its handling of the requests.

Other matters

39. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern. The Commissioner's published guidance on internal reviews states that a review should be conducted within 20 working days, unless there are exceptional circumstances, in which case the review period may be extended to 40 working days. In this case the Commissioner notes that

there appeared to be no exceptional circumstances, but that the internal review outcome was severely delayed. The public authority should ensure that internal reviews are carried out promptly in future.

Right of Appeal

40. 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

41. 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.
42. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 8th day of March 2011

Signed

**Jon Manners
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

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

Section 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 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 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."