

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 22 March 2011

Public Authority: The Supreme Court of the United Kingdom
Address: Parliament Square
London
SW1P 3BD

Summary

The complainant requested information concerning vacancies for Justices of the Supreme Court and the filling of such vacancies. The public authority initially disclosed some information, but withheld other information, citing the exemptions provided by the following sections of the Act: 40(2) (personal information), 44(1)(a) (statutory prohibitions to disclosure), 35(1)(a) (formulation or development of government policy), 36(2)(b) (inhibition to the free and frank provision of advice and the free and frank exchange of views) and 36(2)(c) (other prejudice to the effective conduct of public affairs). It later amended its stance and stated that the information in relation to which sections 36(2)(b) and (c), 40(2) and 44(1)(a) were cited was not held by it for the purposes of the Act. The Commissioner notes that the public authority stated correctly during his investigation that this information was not held by it for the purposes of the Act, however, as when it was dealing with the request it confirmed that it did hold the information the Commissioner finds that it breached section 1(1)(a). In relation to section 35(1)(a), the Commissioner finds that this was cited correctly for some information, but that the remainder of this information should be disclosed. The Commissioner has also found that the public authority breached sections 1(1)(b), 10(1) and 17(1)(b) through its handling of the 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.

The Request

2. The complainant made the following information request on 23 February 2010:

"[In relation to vacancies for Justices on the Supreme Court and appointments to such vacancies]

All information you hold which relates to these topics (including emails, reports, memoranda and records of meetings) which was created since 1 July 2009".

3. The public authority responded to this request initially on 23 March 2010. At this stage some information was disclosed to the complainant, with redactions from this information made under sections 40(2) (personal information) and 44(1)(a) (statutory prohibitions to disclosure), although no subsection from 44 was cited at this stage. Other information was withheld in its entirety under section 44(1)(a).
4. The public authority also stated at this stage that further information was believed to be exempt by virtue of sections 35(1)(a) (formulation or development of government policy), and 36(2)(b) (inhibition to the free and frank provision of advice and the free and frank exchange of views) and (c) (other prejudice to the effective conduct of public affairs), but that further time was required in order to consider the balance of the public interest in relation to these exemptions.
5. The public authority responded further on 9 April 2010. At this stage it was confirmed that the public interest in the maintenance of the exemptions provided by sections 35(1)(a) and 36(2)(b) and (c) was believed to outweigh the public interest in disclosure.
6. The complainant responded to this on 13 April 2010 and requested an internal review. The public authority responded with the outcome of the internal review on 19 May 2010. The conclusion of this was that the exemptions cited previously were upheld.

The Investigation

Scope of the case

7. The complainant contacted the Commissioner initially on 20 May 2010. The complainant indicated that he believed that the importance of the role of the public authority supported the case for disclosure of the requested information.

8. The complainant was contacted early in the case-handling process to clarify the scope of his complaint. The request in this case was originally one of a number of requests made under cover of this correspondence. The complainant confirmed that he wished this case to cover only the request quoted above and address all of the exemptions cited by the public authority.

Chronology

9. The Commissioner contacted the public authority in connection with this case on 1 November 2010. The public authority was asked to respond with further explanations for the exemptions cited and with a copy of the withheld information.
10. The public authority responded to this on 19 November 2010 and supplied copies of the information withheld under section 35(1)(a). It also now stated that its position had changed in relation to the information withheld under the other exemptions cited and that it now believed that it did not hold this information for the purposes of the Act. Its explanation on this point is covered in the analysis below.

Analysis

Substantive Procedural Matters

Section 1

11. During the Commissioner's investigation the stance of the public authority changed in relation to the information in connection with which it had cited the exemptions provided by sections 36(2)(b) and (c), 40(2) and 44(1)(a) and it now stated that it no longer believed that this information was held by it for the purposes of the Act. The task for the Commissioner here is to consider whether the public authority is correct in stating that this information is not held.
12. The public authority does not now claim that the information in relation to which these exemptions were cited does not exist. Instead, it now states that it incorrectly identified the information in question as held by it for the purposes of the Act. The position of the public authority is now that, whilst this information is physically stored on its premises, it was created by and used for the purposes of a different organisation.
13. The organisation in question was a selection commission, which existed for the purpose of filling a vacancy for a Supreme Court Justice. The Chief Executive of the public authority acted as secretary to, and has retained papers from, this commission. The argument of the public

authority is that this information is physically held on its premises by virtue of its Chief Executive having also acted as secretary to the selection commission.

14. In general the Commissioner would expect that a panel created by a public authority for the purposes of filling a vacancy would be part of that public authority. Generally, such a panel would have responsibilities delegated to it by the public authority, would follow the public authority's rules and procedures and would be responsible to the public authority through a line management structure.
15. The selection commission is in a different position. It is not discharging responsibilities given to it by the Supreme Court. Its role and responsibilities are created by statute (Constitutional Reform Act 2005). The conditions under which it is convened and dissolved are laid down in statute. The area of discretion which it has in relation to determining the selection process is circumscribed by statute. Therefore the information it holds is not held by the public authority for the purposes of the Act.
16. The conclusion of the Commissioner is, therefore, that the public authority is correct in now stating that the information recorded for the selection commission is not held by it for the purposes of the Act. The procedural breach in the public authority initially incorrectly confirming that this information was held by it is recorded below at paragraph 33.

Exemptions

Section 35

17. The public authority has cited section 35(1)(a), which provides an exemption for information that relates to the formulation or development of government policy. Consideration of this exemption is a two-stage process; first, the exemption must be engaged as a result of the information in question conforming to the description given in section 35(1)(a). Secondly, this exemption is qualified by the public interest, which means that the information must be disclosed unless the public interest in the maintenance of the exemption outweighs the public interest in disclosure.
18. Covering first whether the exemption is engaged, the approach of the Commissioner is that the term 'relates to' as it is used in the wording of this exemption can safely be interpreted broadly. This is in line with the approach of the Information Tribunal in the case *DfES v the Information Commissioner & the Evening Standard (EA/2006/0006)* in which it stated:

"If the meeting or discussion of a particular topic within it, was, as a whole, concerned with s35(1)(a) activities, then everything

that was said and done is covered. Minute dissection of each sentence for signs of deviation from its main purpose is not required nor desirable.” (paragraph 58)

19. In forming a conclusion as to whether this exemption is engaged, the central factor is the content of the information in question. This consists of papers supplied by the MoJ to the public authority which record part of the process of the passage of the Constitutional Reform and Governance Bill through Parliament. The content of these papers are made up of speaking notes for a Minister and email exchanges about the Bill.
20. The conclusion of the Commissioner here is that it is clear that this information does relate to the formulation or development of government policy. This Bill, a precursor to the Constitutional Reform and Governance Act 2010, was introduced by the then Government and the various iterations of this Bill, as well as the subsequent Act, are manifestations of government policy. The information in question records part of the process of the formulation and development of this policy and, therefore, the exemption provided by section 35(1)(a) is engaged in relation to this information.

The public interest

21. Having found that this exemption is engaged, it is necessary to go on to consider the balance of the public interest. In reaching a conclusion on the balance of the public interest, the Commissioner has taken into account those factors that relate to the specific information in question here, including what harm may result through disclosure of the information in question, and whether disclosure of information relating to the formulation and development of policy concerning judicial appointments would serve the public interest. This is in addition to the general public interest in transparency and openness in relation to the government policy formulation and development process.
22. That the information is within the class specified in the exemption is not, however, of relevance to the balance of the public interest. This is in line with the approach taken by the Information Tribunal in *DfES v the Commissioner & the Evening Standard* (EA/2006/0006), where it stated in connection with section 35(1)(a):

“The weighing [of the public interest] exercise begins with both pans empty and therefore level.” (paragraph 65)

Public interest arguments in favour of maintaining the exemption

23. Covering first those factors that favour maintenance of the exemption, the public authority has argued that disclosure would result in harm to the policy-making process in that the participants in this process would be inhibited if they were aware that the record of their contributions may later be subject to disclosure via the Act. In *DfES v the Commissioner and the Evening Standard* (EA/2006/0006) the Information Tribunal provided a number of guiding principles for consideration of the balance of the public interest in connection with section 35(1)(a). The arguments of the public authority about disclosure resulting in inhibition to participants in the policy making process are relevant to two factors highlighted by the Tribunal: 'safe space' and 'chilling effect'.
24. The term 'chilling effect' refers to an adverse effect on the frankness and candour of participants in the policy making process. Arguments about 'safe space' are related to chilling effect arguments but distinct, as the need for a safe space within which to debate policy exists regardless of any chilling effect that may result through disclosure. The basis of safe space arguments is that an erosion of the safe space for policy making would have a detrimental impact on the quality of the policy making process.
25. The weight that the Commissioner affords to chilling effect and safe space arguments will depend on how closely they relate to the information in question. For example, an argument that disclosure would result in a chilling effect to policy making in general would usually carry less weight than an argument that a chilling effect would result to the specific policy area to which the information relates. Also key is the stage reached in the policy-making process at the time of the request. Where a public authority argues that harm would result to a specific and ongoing policy-making process, this will generally carry more weight than an argument suggesting that harm would result to future policy-making in general through disclosure of information relating to policy that was complete at the time of the request.
26. In this case the Commissioner notes that the policy making process in question was ongoing at the time of the request, the Constitutional Reform and Governance Act 2010 having received Royal Assent on 8 April 2010. This adds weight to the suggestion that harm may have resulted through disclosure to this specific area of policy formulation and development. It is also notable, however, that the public authority has not at any stage advanced arguments that this specific policy making process could be harmed through disclosure. Instead, its arguments relate to general harm to this process.

27. The Commissioner has also taken into account the content of the information when considering what weight to afford to chilling effect / safe space arguments. This consists of a speaking note prepared by officials for a Minister, email exchanges and what appears to be an earlier draft of the speaking note. The later draft of the speaking note shows deletions from earlier drafts of this, so provides some insight into the drafting process in relation to this document. The Commissioner accepts that, given that the content of this document provides some insight into the drafting process, future inhibition due to a chilling effect / erosion of the safe space in which this document was drafted is a possibility and so this is a valid public interest factor in favour of the maintenance of the exemption in relation to this information.
28. In relation to the earlier draft of this document, no such deletions are visible and so this does not reveal the process of the formulation of this document in the same way. Neither is any of this content attributable to individuals. As for the content of the email exchanges, the Commissioner does not consider that any of the content of this could be fairly characterised as free or frank and so would not be suggestive of a future chilling effect. Given these points concerning the content of this information, the Commissioner does not believe that future inhibition to officials through the disclosure of this information is a likely outcome and so does not afford the chilling effect / safe space argument any weight as a factor in favour of maintenance of the exemption in relation to this information.

Public interest arguments in favour of disclosing the requested information

29. Turning to those factors that favour disclosure, the complainant argues that the position of the Supreme Court at the pinnacle of the judicial system means that there is a strong public interest requiring openness and transparency in relation to the public authority. The Commissioner agrees with this point and considers this to be a valid public interest factor in favour of disclosure.
30. The Commissioner has also considered what the content of the information suggests about the balance of the public interest. That the legislative process was ongoing at the time of the request is of relevance here. The view of the Commissioner on the content of this information, combined with the stage that the legislative process had reached by the time of the request, is that this would provide a genuine insight into the process of policy formulation and development in this important area. The content of this information does, therefore, weigh in favour of disclosure.

Conclusion

31. In relation to the draft speaking note on which deletions are noted, the conclusion of the Commissioner is that the public interest in the maintenance of the exemption provided by section 35(1)(a) outweighs the public interest in disclosure. Whilst the Commissioner has recognised a valid public interest in favour of disclosure of this information, the erosion of the safe space in which to carry out the policy making process and the possibility of a resultant chilling effect tips the balance in favour of the withholding of this information.
32. In relation to the remaining information, that is the email exchange and the earlier draft of the speaking note, the conclusion of the Commissioner is that the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure. In the absence of the weight of the chilling effect / safe space factor in favour of maintenance of the exemption, in relation to this information the factors in favour of disclosure set out above are not outweighed. The public authority is, therefore, required to disclose this information.

Procedural Requirements

Sections 1 and 10

33. By initially incorrectly confirming that it held the information covered at paragraphs 11 to 16 above, the public authority breached section 1(1)(a).
34. In failing to disclose within 20 working days of receipt of the request the information that the Commissioner now concludes should be disclosed, the public authority failed to comply with the requirements of sections 1(1)(b) and 10(1).

Section 17

35. In failing to specify any subsection from 44, the public authority did not comply with the requirement of section 17(1)(b).

The Decision

36. The Commissioner's decision is that the public authority breached section 1(1)(a) by initially confirming that it held information for the purposes of the Act which in fact it did not. The Commissioner finds that section 35(1)(a) was correctly applied in relation to some information, however, he also finds that the public authority applied section 35(1)(a)

incorrectly in relation to other information, and that it breached sections 1(1)(b), 10(1) and 17(1)(b) through its handling of the request.

Steps Required

37. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
 - disclose to the complainant the information in relation to which the Commissioner has concluded that the exemption provided by section 35(1)(a) was applied incorrectly; that is, the earlier version of the speaking note and the email exchange.
38. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

39. 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

40. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern. As specified in section 45(2)(b), the Code of Practice produced under section 45 provides that, where a public authority does not hold the information requested, but is aware that this is or may be held by a different public authority, the request should be transferred to that other public authority. In this case it could be argued that the public authority should have given consideration to whether the request (to the extent that it related to the information covered in the section 1(1)(a) analysis above) should have been transferred to the selection commission.
41. The Commissioner does not, however, believe that it was necessary for the public authority to do this in this case for the following reasons. First, the selection commission no longer existed at the time of the request so it was not possible to transfer the request to it. Secondly, it appears to be the case that selection commissions are not public authorities for the purposes of Schedule 1 of the Act, so would not have been obliged to comply with the request even had it been transferred.

Right of Appeal

42. 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

43. 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.
44. 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 22nd day of March 2011

Signed

**Gerrard Tracey
Principal Policy Adviser
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 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."