

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 26 May 2011

Public Authority: National Audit Office
Address: 157-197 Buckingham Palace Road
Victoria
London
SW1W 9SP

Summary

The complainant made a request to the National Audit Office (NAO) for information gathered to enable it to conduct an audit of the progress of the London 2012 Olympic and Paralympic Games. The NAO refused to provide some of the requested information under the section 33(1)(b) with section 33(2). The Commissioner considers that this exemption was correctly engaged in this case.

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. In order to audit the progress of the London 2012 Olympic and Paralympic Games, the NAO has had to obtain information from and interview individuals who are part of the Olympic Delivery Authority (ODA). The ODA is the public body responsible for developing and building the new venues and infrastructure for the Games and their use after 2012. In carrying out its functions

the ODA works alongside a number of other bodies including LOCOG (The London Organising Committee of the Olympic Games) and other third party contractors. The ODA may therefore obtain information from LOCOG or other third party contractors which it may pass on to the NAO to assist it in conducting its audit.

The Request

3. The complainant made a request to the NAO on 12 March 2010. The request was for the following information:
 1. *At point 2.4 of your February 2010 progress report into the preparations of the London 2012 Olympic Games you state that seven of the projects are NOT on target to be completed for the date that had been agreed with LOCOG. Please state the titles of these projects, what the agreed handover date was and what the new later expected handover date is?*
 2. *Please provide me with copies of any notes you hold following interviews conducted with any board members of the ODA which were conducted as part of your inquiry.*
4. As the complainant did not receive a response to the request he resent it on 4 June 2010.
5. On 23 July 2010 the NAO responded to the complainant's request for information. In relation to point 1 of the request, the NAO refused to disclose this information as it stated it was exempt under section 33(2) (audit functions) and section 43(2) (commercial interests). In relation to point 2 of the request, the NAO also refused to disclose this information as it stated it was exempt under section 33(2) (audit functions). It provided the complainant with further detail as to why it believed the exemptions were applicable in this case.

As the complainant was dissatisfied with the response he had received, on 26 July 2010 he asked the NAO to conduct an internal review of its decision.
6. On 24 September 2010 the NAO wrote to the complainant with the result of the internal review it had carried out. It upheld its

application of the exemptions as set out in its initial response dated 23 July 2010.

The Investigation

Scope of the case

7. On 27 September 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether NAO had dealt with the request in accordance with the Act.
8. During the course of the Commissioner's investigation the NAO provided the information requested at point 1 of the request. This has therefore not been considered any further in this Notice.

Chronology

9. On 12 November 2010 the Commissioner contacted NAO to ask for submissions in relation to its application of section 33(2) and section 43(2). He also asked NAO to provide a copy of the withheld information.
10. On 9 December 2010 NAO responded to the Commissioner. It provided the Commissioner with a copy of the withheld information and with further submissions in relation to its application of section 33(1)(b) with 33(2) and section 43(2).
11. On 13 January 2011 the Commissioner contacted NAO for further information in relation to its application of section 33(1)(b) with 33(2) and section 43(2).
12. On 14 February 2011 NAO provided the Commissioner with the further information he had requested.
13. On 13 April the NAO wrote to the Commissioner to confirm that it was now going to disclose the information requested at point 1 of the request and that this would be done on 18 May 2011.
14. On 18 May 2011 the NAO disclosed the information requested at point 1 to the complainant.

Analysis

Substantive Procedural Matters

Exemptions

Section 33 – Audit Functions

15. Section 33 applies to public authorities who have functions in relation to:
 - (a) the audit of the accounts of other public authorities, or
 - (b) the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions.
16. Under section 33(2) information will be exempt if its disclosure would, or would be likely to, prejudice the exercise of any of the authority's functions in relation to any of the matters referred to above.
17. In this case the NAO has explained that the information requested consists of information supplied to it by the Olympic Delivery Authority (the "ODA") to enable it to report to Parliament on the progress of the 2012 Olympics and Paralympics programme. It explained that it has compiled a series of reports on the preparations for the London 2012 Olympic and Paralympic Games and in particular the spending in relation to this. It has argued that disclosure of this information would be likely to inhibit its ability to compile such reports in the future.
18. The Commissioner is satisfied that section 33(1)(b) applies to the work of the public authority, given its role as described at paragraph 17. However, for the exemption to be engaged the public authority needs to demonstrate that disclosure would, or would be likely to, prejudice its audit functions.
19. The NAO has explained that its work in this area is based on timely reporting on a fast-moving programme striving to meet

- tight deadlines. It explained that whilst the Comptroller & Auditor General has statutory access rights to documents held by and explanations from the ODA, its audit reports benefit from the willing engagement of audited bodies with the audit process. It further stated that accountability to Parliament is enhanced by the timeliness of its reports on the programme and anything which may delay that process would prejudice the exercise of its statutory function to report to Parliament. It explained that the release of audit working papers would be likely to inhibit the speed of the exchange of information during future audits and could lead to less timely reports on how public authorities are spending public funds.
20. Additionally it has explained that its reviews of the progress of the Olympic project rely on the cooperation of LOCOG and third party contractors which might be affected by the disclosure of the information requested. It explained that the NAO does not have statutory rights of access to information held by these organisations or to seek explanations from them. It therefore argued that the frankness and efficiency of access to relevant information which may be held or required from such bodies could be impaired during future audits. Again it has suggested that this would or would be likely to lead to less robust and timely reports on how public authorities are spending public funds.
21. The NAO has explained that the purpose of its reports on expenditure on the London 2012 Olympic and Paralympic Games is to hold public bodies to account by examining issues relevant to the use of resources in a timely manner. It stated that timely disclosure is key to the efficiency of its work. Furthermore it explained that access to a complete set of relevant information at a certain point in time, increases the effectiveness of its work. It stated that the quality of the evidence base underpins the robustness of its reports to Parliament.
22. Finally in this case the NAO has argued that disclosure of the requested information would be likely to prejudice its audit functions in relation to the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions, rather than would prejudice its audit functions in relation to the examination of the economy, efficiency and effectiveness with which other

- public authorities use their resources in discharging their functions.
23. The threshold to prove would be likely to prejudice is lower than if the NAO had claimed that audit functions would be prejudiced. In dealing with the issue of the likelihood of prejudice, the Commissioner notes that in the case of *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)*, the Information Tribunal confirmed that “the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk” (paragraph 15). He has viewed this as meaning that the risk of prejudice need not be more likely than not, but must be substantially more than remote.
 24. The Commissioner considers that if the requested information were disclosed this would be likely to prejudice the NAOs ability to conduct its audit functions in relation to the progress of the Olympic project in the future. This is because it may cause the ODA, LOCOG or third party contractors to be less timely in their supply of this or similar information in the future. The Commissioner considers that the likelihood of prejudice is clearly increased by the timing of the request, given the audit process in relation to the Olympic project is still ongoing and the NAO have supplied convincing arguments about the importance of timely audit reporting to Parliament.
 25. Whilst the Commissioner recognises that the NAO has statutory powers to request information from the ODA, he also considers that an audit is most effective when the NAO is able to engage in a free and frank exchange of views with the body being audited within the context of an open and effective relationship. The Commissioner considers that informal methods of information gathering and research such as interviews are very important to the audit process. Therefore it is reasonable to conclude that the public authority’s audit functions would be likely to be prejudiced if public authorities were to become more reluctant to engage in these processes. The content of the requested information left in dispute relates to interviews held with board members of the ODA. It is clearly important that the information reflects frank assessments of the projects.
 26. The Commissioner also considers that some of the requested information may however have been obtained from LOCOG or

third party contractors. Again the Commissioner considers that disclosure may have an impact on the timeliness of engagement between LOCOG or third party contractors and the ODA which in turn would have an impact upon the ability of the ODA to supply the NAO with this information. Whilst the NAO does have the ability to enforce the ODA to provide it with information it does not have the ability to do so in relation to LOCOG or third party contractors. The Commissioner therefore considers that disclosure may delay the NAO in obtaining information it requires from other bodies such as LOCOG or third party contractors to enable it to compile its reports on the preparations and spending on the Olympic project in the future.

27. The Commissioner considers that whilst the February 2010 report had already been published at the time of the request, the Olympic project is ongoing and will continue to be subject to regular audits in the future. Therefore he considers that because the project is ongoing this increases the likelihood of prejudice occurring. Therefore the Commissioner is satisfied that the disclosure of the withheld information would, on the balance of probabilities, be likely to prejudice the NAO's ability to conduct future audits of the ODA.
28. The Commissioner therefore considers that section 33(2) is engaged in this case.
29. As the exemption is engaged in this case the Commissioner will now go on to consider the public interest test.

Public interest arguments in favour of disclosing the requested information

30. The NAO has explained that the ODA is responsible for delivering a major project in which there is considerable public interest. It recognised that there is a public interest in knowing that the project is subject to an appropriate level of accountability and transparency.
31. It also explained that understanding how auditors arrive at their conclusions and in particular how the NAO has exercised its functions in relation to monitoring the progress of the Olympic project is also in the public interest.

32. The Commissioner considers that there is a strong public interest in the Olympic project being open, transparent and accountable in relation to the way in which it is progressing and the way it is being delivered. He also considers that there is a strong public interest in understanding how the NAO came to its findings and conclusions which are detailed in the published report of February 2010.
33. The Commissioner also considers that there is a strong public interest in knowing how public money is being spent in relation to such a major project and that the ODA is obtaining value for money.
34. The Commissioner considers that because the Olympic project is ongoing this adds weight to the public interest argument in favour of disclosure as there is a strong public interest in the ODA being open and accountable in its delivery of this major ongoing project.

Public interest arguments in favour of maintaining the exemption

35. The NAO has argued that it is in the public interest that it is able to access information it requires to carry out its audit functions in a timely and efficient manner as fewer public resources are then spent trying to access information.
36. The NAO has also argued that there is a strong public interest in it being able to carry out its functions effectively as this allows it to provide a clear, accurate and up to date report to Parliament. Furthermore it has explained that all of its reports published to date have formed the basis of a public hearing of the Parliament's Committee of Public Accounts. It has explained that both the NAO's report and the report published by the above Committee following each of its hearings make recommendations for how the bodies involved in the Olympic project could improve their approach and in doing so achieve better value for money. It is clearly in the public interest that the audit process is conducted as effectively as possible.
37. The Commissioner considers there is a strong public interest in public resources being utilised efficiently. He considers that if information is not shared with the NAO as freely and frankly and on a more voluntary basis, public resources will be taken up

- trying to obtain the information the NAO needs to conduct its audit functions effectively. The Commissioner considers that this would not be in the public interest.
38. The Commissioner also considers that there is a strong public interest in the NAO being able to conduct its audit effectively which again would be hindered if information were not shared as freely and frankly and in a timely manner.
39. The Commissioner considers that whilst the February 2010 report had already been published at the time of the request, the Olympic project is ongoing and will continue to be subject to regular audits in the future. Therefore he considers that whilst this adds weight to the public interest arguments in favour of disclosure it also adds weight to the public interest in maintaining the exemption. This is because while the NAO's audit functions in relation to monitoring the progress of the Olympic project are ongoing there is as discussed above a very strong public interest in the audits being conducted as efficiently and effectively as possible.

Balance of the public interest arguments

40. Upon considering all of the public interest arguments the Commissioner considers that there is a public interest in the delivery of the Olympic project being open, transparent, accountable and showing that those bodies involved are achieving value for money. This is because it is a major ongoing project which requires significant public resources. Whilst the Commissioner finds this is a strong general public interest factor in favour of disclosure, he also notes that that the NAO state that the current overall progress of the Olympic project is good. This is in contrast to some significant projects of this type, which have sometimes run significantly over time and budget. Whilst the public interest in disclosure is strong, it is not raised to a higher level because of significant problems and clearly established concerns that public money is not being used effectively.
41. The NAO has also explained that the requested information was used to compile the report which was published in February 2010. The NAO has therefore argued that information contained

- within the published report goes some way to meeting the public interest arguments in favour of disclosure.
42. The Commissioner also agrees that the February 2010 report does go some way in reducing the weight of the public interest arguments favouring disclosure in relation to transparency and accountability.
 43. The Commissioner also accepts that there is strong public interest in avoiding prejudice to the NAO's audit functions. The NAO provides a valuable service by identifying areas of improvement in the performance of public bodies which raise value for money implications. This has a benefit to the taxpayer as the NAO's reports and those issued by the public accounts committee help to save money and promote greater efficiency. Conversely the Commissioner has also given consideration to the extent and severity of any prejudice that would be likely to be caused to the NAO's audit functions.
 44. Having taken all this into account and given that the audit process was ongoing at the time of the request and still is, in that future audits will be conducted by the NAO on the progress of this project and that there is a strong public interest that these are conducted as effectively and efficiently as possible the Commissioner considers that there is a strong public interest in maintaining the exemption in this case.
 45. On balance the Commissioner considers that the public interest in favour of maintaining the exemption outweighs the public interest arguments in favour of disclosure.
 46. As the Commissioner considers that subsection 33(2) is engaged in this case, he has not gone on to consider the application of section 43(2).

Procedural Requirements

Section 10

47. Section 10(1) of the Act 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.”

48. The Commissioner has considered whether or not the NAO complied with section 10(1) of the Act.
49. The NAO failed to comply with section 1(1)(a) within the statutory time for compliance, therefore it breached section 10(1) of the Act in its handling of the request.

Section 17(1)

50. As the NAO did not issue its refusal notice within the statutory time for compliance it breached section 17(1) in its handling of the request.

The Decision

51. 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 was correct to apply section 33 (2) in order to withhold the requested information.

52. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- It breached sections 10(1) and 17(1) in its handling of this request.

Steps Required

53. The Commissioner requires no steps to be taken.

Other Matters

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

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, it took over 40 working days for an internal review to be completed, despite the publication of his guidance on the matter.

Right of Appeal

55. 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

56. 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.
57. 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 26th day of May 2011

Signed

Steve Wood
Head of Policy Delivery
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Legal Annex

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."

Time for compliance

Section 10 provides that -

"(1) 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.

(2) Where the authority has given a fees notice to the applicant and the fee is paid in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.

(3) If, and to the extent that—

(a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or

(b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.

(4) The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with, the regulations.

(5) Regulations under subsection (4) may—

(a) prescribe different days in relation to different cases, and

(b) confer a discretion on the Commissioner.

(6) In this section—

- “the date of receipt” means—
 - (a) the day on which the public authority receives the request for information, or
 - (b) if later, the day on which it receives the information referred to in section 1(3);
- “working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.

Refusal of Request

Section 17(1) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

(c) states that fact,

(d) specifies the exemption in question, and

(e) states (if that would not otherwise be apparent) why the exemption applies.”

Section 17(2) states –

“Where–

- (f) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 - 2. 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
 - 3. that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (g) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.”

Section 17(3) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (h) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
- (i) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

Section 17(4) provides that -

"A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

Section 17(5) provides that –

"A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact."

Section 17(6) provides that –

"Subsection (5) does not apply where –

- (j) the public authority is relying on a claim that section 14 applies,
- (k) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
- (l) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request."

Section 17(7) provides that –

"A notice under section (1), (3) or (5) must –

- (m) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and

- (n) contain particulars of the right conferred by section 50."

Audit Functions

Section 33 provides that –

“(1) This section applies to any public authority which has functions in relation to—

(a) the audit of the accounts of other public authorities, or

(b) the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions.

(2) Information held by a public authority to which this section applies is exempt information if its disclosure would, or would be likely to, prejudice the exercise of any of the authority's functions in relation to any of the matters referred to in subsection (1).

(3) The duty to confirm or deny does not arise in relation to a public authority to which this section applies if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the exercise of any of the authority's functions in relation to any of the matters referred to in subsection (1).”