

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Dated 12 October 2006

**Public Authority:** National Assembly for Wales  
**Address:** Cathays Park  
Cardiff  
CF10 3NQ

### Summary Decision and Action Required

The Commissioner's decision in this matter is that the public authority has not dealt with the complainant's request in accordance with Part I of the Act in that it failed to provide a proper response to the request within the statutory timescale and failed to give adequate advice and assistance to the complainant.

The Commissioner has decided that the public authority has dealt with the complainant's request in accordance with its obligations under section 1(1) of the Act by applying the exemption at section 42 of the Act appropriately.

The Commissioner has also decided that the application of the exemption at section 40(2) of the Act has been applied appropriately in the majority of instances. However, in a small number of instances the Commissioner has decided that the exemption at section 40(2) of the Act has been applied inappropriately.

Accordingly, the Commissioner requires the public authority to release some additional information that was inappropriately redacted by virtue of the exemption at section 40(2) of the Act.

#### **1. Freedom of Information Act 2000 (the Act) – Application for a Decision and the Duty of the Commissioner**

1.1 The Information Commissioner (the 'Commissioner') has received an application for a decision whether, in any specified respect, the complainant's request for information made to the public authority has been dealt with in accordance with the requirements of Part I of the Freedom of Information Act 2000 (the 'Act').

1.2 Where a complainant has made an application for a decision, unless:

- a complainant has failed to exhaust a local complaints procedure, or
- the application is frivolous or vexatious, or
- the application has been subject to undue delay, or
- the application has been withdrawn or abandoned,

the Commissioner is under a duty to make a decision.

- 1.3 The Commissioner shall either notify the complainant that he has not made a decision (and his grounds for not doing so) or shall serve a notice of his decision on both the complainant and the public authority.

## 2. The Complaint

- 2.1 The complainant has advised that on 18 April 2005 the following information was requested from the public authority in accordance with section 1 of the Act:

*“Background information referred to in your letter [to the complainant] of 16 March 2000.”*

- 2.2 The letter of 16 March 2000 was written by a civil servant in the public authority in reply to the complainant’s request for the Minister for Health and Social Services to hold an enquiry into the circumstances of the suspension of an NHS employee. The letter states, “The background to [the] case was studied and the conclusion was reached that a [sic] inquiry would be of little benefit ...”. It is this background that the complainant was referring to in her request for information.
- 2.3 Despite chasing up the request a number of times, the complainant had not received a substantive response to her request by 15 July 2005 and so she complained to the Commissioner. However, prior to the Commissioner beginning his investigation into the complaint, the public authority wrote to the complainant on 12 October 2005 enclosing some information and informing her that further information had been withheld as it constituted personal information exempt by virtue of section 40(2) of the Act and matters of legal professional privilege exempt by virtue of section 42 of the Act.
- 2.4 The information released comprised of limited extracts of a report (the Report) written by North Glamorgan NHS Trust and addressed to the Director of NHS Wales. The information withheld was also contained in the report.
- 2.5 The complainant indicated to the Commissioner that she remained dissatisfied with this limited disclosure and wished to pursue her complaint. As the complainant had been waiting for the information since her initial request in April 2005, the Commissioner took the decision to commence investigation without providing the public authority with the opportunity to conduct an internal review of its decision to withhold information.

## 3. Relevant Statutory Obligations under the Act

**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 –

“...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 16(1)** provides that –

“It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it”.

**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 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-

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

**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 42(1)** provides that –

“Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”

#### **4. Review of the case**

- 4.1 When the original complaint was received by the Commissioner, the public authority had neither released the information requested nor issued a valid refusal notice. However, the public authority did release some information and issue a refusal notice on 12 October 2005.
- 4.2 On commencing his investigation, the Commissioner noted that the public authority's 12 October refusal notice was not compliant with the provisions set out in section 17(1) and (3) of the Act. This is because the refusal notice was not provided within 20 working days of the request and did not specify clearly the exemptions being relied on, explain why the exemptions applied or explain why, in relation to s.42, the public interest required the maintenance of the exemption. The public authority subsequently wrote to the complainant on 14 December 2005 setting out in full its reasons for refusal.
- 4.3 As the complainant indicated that she remained dissatisfied with the limited disclosure and the grounds for refusal of further information captured by her request, the focus of the Commissioner's investigation switched to the public authority's use of the exemptions at sections 40 and 42 of the Act.
- 4.4 An unredacted version of the report was supplied to the Commissioner by the public authority, together with a detailed commentary about which exemptions had been applied to each section. A copy of the information released to the complainant on 12 October was also supplied.
- 4.5 It became clear during the course of the investigation that there was the potential for misunderstanding in terms of precisely what information was captured by the request. The public authority provided limited extracts of the report to the complainant and stated that the other information captured by the request was being withheld by virtue of the exemptions at sections 40 and 42 of the Act. The refusal notice could therefore be interpreted as implying that the entirety of the report not released was exempted, whereas in reality a significant proportion of the report was redacted as it was not considered to fall within the scope of the request. Accordingly, the Commissioner has considered the issue of whether the public authority could have provided additional advice and assistance to the complainant, in accordance with section 16 of the Act.
- 4.6 The public authority provided further information about the background to the report and the particular sensitivities involved in the case. In particular, the Commissioner notes that the report was written to assist the then Minister for Health and Social Services in deciding whether or not to hold an enquiry into the circumstances of the lengthy suspension of an NHS employee. The suspension lasted for over four years and there was some pressure for an enquiry to be held – indeed the Minister's predecessor (the then Under Secretary of State for Wales) had publicly called for such an enquiry.

## 5. The Commissioner's Decision

5.1 The Commissioner's decision in this matter is that the public authority has not dealt with the complainant's request in accordance with the following requirements of Part I of the Act:

**Section 10(1)** - in that it exceeded the statutory time limit for responding to a request made under section 1(1).

**Section 16** – in that it failed to offer the complainant advice and assistance by way of clarifying the exact nature and scope of the request.

**Section 17(1)** – in that the refusal notice issued to the complainant was not provided within 20 working days of the request and did not clearly specify the exemptions being relied on and the reasons why those exemptions applied.

**Section 17(3)** - in that the refusal notice issue issued to the complainant did not properly explain why the public interest required the maintenance of the exemption relating to legal professional privilege.

**Section 40(2)** – in that some information that was inappropriately withheld because it either did not constitute 'personal data' (as defined by section 1(1) of the Data Protection Act 1998) or its disclosure would not breach any of the data protection principles.

5.2 However, the Commissioner's decision is that the public authority was correct in seeking to rely on the exemption at section 42 of the Act in order to withhold information captured by this request. The Commissioner also finds that the majority of redactions made by virtue of the exemption at section 40(2) of the Act were made appropriately.

5.3 Further explanation of the Commissioner's decision is provided below.

### Section 10 – time for compliance

5.4 The Commissioner finds that there was a breach of section 10 of the Act in that the public authority took 123 working days to respond to this request. Whilst this length of delay is clearly in breach of the Act, the Commissioner has noted the particular complexity and sensitivity of this matter and accordingly does not believe that the public authority deliberately delayed its response to avoid its obligations under the Act.

### Section 16 – advice and assistance

5.5 Part II of the Secretary of State for Constitutional Affairs' Code of Practice, issued under section 45 of the Act, sets out the requirements for public authorities in the provision of advice and assistance to requestors. Paragraph 10 of the Code

states that appropriate assistance might include, for example, providing an outline of the different kinds of information which might meet the terms of the request.

- 5.6 The Commissioner notes that this request was made as part of a series of correspondence between the complainant and the public authority, and that the authority believed that the complainant understood precisely what information was and was not captured by the request. Whilst the Commissioner cannot comment on the public authority's interpretation of the scope of the request, he believes that the authority should have explained in more detail exactly what information it believed was captured by the request. In the absence of such an explanation, it would have been reasonable for the complainant to have expected that the entire report would be relevant to her request.
- 5.6 The Commissioner finds that the public authority should have done more to clarify the exact scope of the request. Accordingly, the Commissioner finds that the public authority breached its duty under section 16 of the Act to provide requestors with advice and assistance.

#### Section 40 – personal data

- 5.8 Section 40(2) of the Act allows public authorities to exempt information that constitutes the personal data of third parties, if either of the conditions set out in subsections (3) and (4) are met. The relevant condition in this case is at subsection (3)(a)(i), where disclosure would breach any of the data protection principles (as set out in schedule 1 of the Data Protection Act 1998). In this case the public authority has argued that disclosure of personal data would breach the first and second data protection principles.
- 5.9 The Commissioner finds that the report does contain information that falls within the definition of 'personal data', as set out in section 1(1) of the Data Protection Act 1998. These data relate to a number of individuals, but principally to the subject of the report.
- 5.10 In the majority of instances the Commissioner agrees with the public authority that the disclosure of personal data would breach the first principle – that data must be processed fairly and lawfully. At the heart of the matter is the issue of fairness. The report deals with sensitive information, in particular with regard to allegations relating to professional misconduct. There is a risk that individuals may suffer detriment as a result of disclosure of such information, particularly in relation to allegations rather than statements of fact, and the subject of the report would not have anticipated disclosure. Likewise, other individuals referred to in the report would have had little or no reasonable expectation of their personal information being disclosed in this way. Accordingly, the Commissioner finds that, for the majority of times where it has been cited, the public authority has applied the Act correctly in relying on the section 40 exemption.
- 5.11 However, the Commissioner believes that the public authority has been over-cautious in a number of instances where it has redacted information. The Commissioner recognises that this has been a difficult and complex case for the public authority. He understands why the cautious approach was taken and

notes that, during the course of his investigation, the public authority has recognised that its original approach was over-cautious. Nevertheless, the Commissioner believes that some of the information redacted does not constitute personal data and therefore cannot be withheld by virtue of the section 40(2) exemption.

- 5.12 Furthermore, the Commissioner believes that some information was withheld that, although constituting personal data, could have been disclosed without breaching any of the data protection principles.
- 5.13 Accordingly, the Commissioner's decision is that the public authority should release some additional information that was originally redacted by virtue of the exemption at section 40(2) of the Act. The Commissioner's staff have indicated to the public authority this additional information.

### Section 42 – legal professional privilege

- 5.14 The Commissioner notes that the public authority has exempted a relatively small amount of information under section 42 of the Act. Section 42 allows public authorities to exempt information in respect of which a claim to legal professional privilege could be maintained in legal proceedings. This exemption is subject to a public interest test, as set out in section 2(2)(b) of the Act.
- 5.15 The Commissioner finds that the public authority has not breached the Act in relying on the exemption at section 42 of the Act. For those sections of the report where the section 42 exemption has been claimed, the Commissioner believes that the exemption is triggered, because these sections refer directly to legal advice from a professional advisor that attracts privilege.
- 5.16 In terms of the public interest, the Commissioner notes that there are valid public interest arguments in favour of disclosure in this case. This is because the information requested constitutes background information upon which a Ministerial decision was taken, and there is a public interest in knowing the facts upon which such decisions are taken. Furthermore, the information relates to the lengthy suspension of a public servant and there is a legitimate public interest in understanding the circumstances in which such a situation arose.
- 5.17 However, the Commissioner considers that the generic public interest in maintaining the section 42 exemption is particularly strong. He is also mindful of the Information Tribunal's decision (case number EA/2005/0023) which endorsed this approach. So although the Commissioner recognises that there is an obvious public interest in the information requested, he finds that the public interest would favour the maintenance of the exemption in this case.

## **6. Action Required**

- 6.1 The Commissioner hereby gives notice that, in exercise of his powers under section 50 of the Act, he requires that the public authority shall, within 30 calendar days of the date of this Decision Notice, release additional information to the

complainant that was inappropriately redacted by virtue of the exemption at section 40(2) of the Act.

**7. Right of Appeal**

7.1 Either party has the right to appeal against this Decision Notice to the Information Tribunal (the 'Tribunal'). Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@dca.gsi.gov.uk](mailto:informationtribunal@dca.gsi.gov.uk)

7.2 Any Notice of Appeal should be served on the Tribunal within 28 days of the date on which this Decision Notice is served.

**Dated the 12<sup>th</sup> day of October 2006**

**Signed .....**

**Phil Boyd  
Assistant Commissioner**

**Information Commissioner's Office  
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