

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 19th December 2007

Public Authority: The Charity Commission
Address: PO BOX 1227
Liverpool
L69 3UG

Summary

The complainant wrote to the Charity Commission ("the public authority") seeking a copy of a draft report produced by the Independent Complaints Reviewer (the ICR) into complaints concerning the public authority. Those complaints related to its handling of an application made by the complainant for a declaration of charitable status. The public authority refused the request as it considered that the information contained in the draft report was exempt under section 41 of the Act. The Commissioner finds that the public authority has correctly applied the section 41 exemption in this case. However, the Commissioner finds that the public authority delayed in responding to the request and therefore has breached sections 10 and 17 of the Act.

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 in this case is a company limited by guarantee, established in 2004. In November 2004 the complainant applied to the public authority for charitable status. The public authority is responsible for the regulation of charitable bodies in England and Wales. A dispute arose between the public authority and the complainant in relation to its application. The complainant made a complaint about this decision to the public authority which was not upheld by it. The complainant was not satisfied with the public authority's decision.

The public authority then asked the ICR to investigate its handling of the application for charitable status and the complaint which the complainant had raised

3. Having completed the investigation, the ICR produced the draft report which it made available only to the public authority for the purposes of checking for factual accuracy. A final report was subsequently sent by the ICR to both parties. The complainant has advised the Commissioner that on 27 February 2006 it made the following request to the public authority:

"...In accordance with the provisions of the Freedom of Information Act I would like formally to request all paperwork relating to my complaint from inception to date, warning and reminding you that only certain qualifying documents are allowed to be retained under the aegis of being legally privileged. I wish to receive file copies of all paperwork and correspondence including annotated file copies of anything that we have sent you at any point in time in the past. The request includes the provision of a copy of the ICR's original 17th January 2006 report on my complaint and its covering letter.

The request also includes providing full disclosure of all financial payments made to the ICR in FY 04/05 and FY 05/06 to date together with projections as to what payments are anticipated / will be needed to be made to the ICR for the remaining part of this tax year- and what funding the Charity Commissioner is projecting for the ICR in FY 06/07." ("**The Request**").

The Investigation

Scope of the case

4. The complainant has advised the Commissioner that it emailed the public authority on 7 April 2006 enquiring as to why the public authority had not responded to its request within the time limit under the Act. On 13 April 2006 the public authority replied and acknowledged the email of 7 April 2006. The public authority apologised and indicated that a fax had been received that day from the complainant's fax number but it could not confirm whether this was the request of 27 February 2006.
5. On 18 April 2006 the complainant again emailed the public authority expressing its frustration that the public authority had not replied to the request and repeated the request. The complainant at this time made a second request to the public authority for information that it had provided to the ICR, the date on which it was provided, confirmation as to who was responsible for its complaint file and other details relating to his original complaint (the second request).
6. The public authority replied to this second request on 12 May 2006 and gave specific answers to each of the queries raised by the complainant. The public authority also provided the complainant with the financial information which formed part of the request. As regards the information concerning its application

- for charitable status, the public authority advised the complainant that it only held information which it had obtained from Companies House. That information comprised general information relating to the complainant, its registered status under the Companies Acts and its filed accounts. Further, the public authority advised the complainant that it did hold a copy of the draft report but that it considered that the information contained in the draft report was exempt under section 41 of the Act.
7. On 16 May 2006 the complainant contacted the Commissioner to complain about the public authority's refusal to provide a copy of the draft report.
 8. The Commissioner wrote to the complainant on 14 June 2006 advised it that it must first seek an internal review of this decision and if he remained dissatisfied with the outcome of that review, the Commissioner could then consider an application under section 50 of the Act.
 9. The complainant then emailed the public authority on the 20 June 2006 asking it to carry out an internal review of its decision to withhold the draft report.
 10. The public authority informed the complainant by email dated 29 June 2006 that it had received its request for a review of its decision to withhold the draft report and that a review would be carried out in due course. The public authority also advised that the review would be carried out by a member of the public authority's legal division.
 11. On the 3 July 2006 the complainant emailed the public authority and stated that it was causing further delay in the process and that it did not accept its decision to carry out an internal review. The complainant also advised that it would be contacting the Commissioner.
 12. The complainant then wrote to the Commissioner on 5 July 2006 and advised him that it had contacted the public authority to conduct a review and raised a query with regard to the Commissioner's role in regulating the ICR.
 13. On the 13 July 2006 the public authority emailed the complainant in response to its email of the 3 July 2006 and advised it of the complaints procedure and its options should it be dissatisfied with the result of the review.
 14. The public authority wrote to the complainant on the 8th September 2006 and informed it of the outcome of the internal review. The public authority upheld its original decision on the grounds that the information contained in the draft report was confidential and that section 41 applied and was therefore exempt from disclosure.
 15. On the 15th September 2006 the complainant wrote to the Commissioner and made a complaint concerning the response he had received from the public authority and asked the Commissioner to issue a decision notice against the public authority ordering a disclosure of the draft report.

Chronology

16. On 25 June 2007 the Commissioner wrote to the public authority and asked it to provide a copy of the draft report. The Commissioner also raised a number of questions in relation to any consultation between the public authority and the ICR regarding disclosure of this report. The Commissioner also asked the public authority to set out its reasons as to why it considered the report to be exempt under the Act. The Commissioner asked the public authority to identify any information contained in the draft report which was already in the public domain. The Commissioner also enquired as to whether there were specific pieces of information in the report which were regarded as confidential and others which were not.
17. The public authority replied to the Commissioner on 9 August 2007 and provided him with a copy of the draft report and copies of correspondence with the ICR concerning the issue of confidentiality. The Commissioner also obtained a copy of the final report which had been released to the complainant. The Commissioner was also provided with copies of information leaflets on how to make a complaint to the ICR. These leaflets emphasised the importance of the confidentiality of draft ICR reports, while advising the public that the final report produced by the ICR would only be available to the parties concerned in any complaint. The Commissioner notes that the ICR reports are not publicly available.

Findings of fact

18. The Commissioner has viewed all the information provided by the public authority and the complainant in this case and has considered the information relating to complaints which is provided on the public authority's website and on the ICR website. The Commissioner has established the following facts in relation to this complaint.
 - (i) the complainant made five complaints against the public authority in relation to its handling of the application for charitable status.
 - (ii) the public authority reviewed its decision on this issue and during the course of its review decided to refer the complaint to the ICR
 - (iii) the ICR role in handling such complaints is to act independently of the public authority and it performs this role for a number of public bodies.
 - (v) the draft report has not been made available to the complainant or the public at large although it was sent to the public authority for a check as to factual accuracy.
 - (vi) The information contained in the draft report is not in the public domain.

- (vii) the request of 27 February 2006 was not received by the public authority by fax on that date.

Analysis

Procedural matters -Section 10: Time for compliance

- 19. The Commissioner notes that there was a considerable delay in the processing of the request. The Commissioner has enquired as to the reason for this delay. The public authority has explained to the complainant that the fax containing the request was received at the wrong fax machine and the additional copy of the request sent by post was lost.
- 20. The public authority confirmed to the complainant that the log of the fax machine shows that a fax was received from the complainant's number on the date when the complainant states it was sent.
- 21. Under section 10 (1) of the Act a public authority is obliged to respond to a request for information promptly and in any event not later than the twentieth working day following the date of receipt of that request. In this case the Commissioner finds that the public authority has not responded to the request within the statutory time limit and is therefore in breach of section 10 of the Act.
- 22. The Commissioner also finds that the public authority is also in breach of its obligation under section 17 (1) of the Act. Section 17(1) of the Act requires a public authority to provide a refusal notice with the time for complying with section 1(1) of the Act. That is the time specified at paragraph 21 above. In this case the public authority has failed to meet the statutory time limit.

Exemptions

Section 41: information provided in confidence

- 23. Section 41 of the Act states:
 - '41(1) Information is exempt information if–
 - (a) it was obtained by the public authority from any other person (including another public authority), and
 - (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person. '

24. The public authority considers that the draft report was exempt under Section 41 of the Act because the information contained in that report was given in confidence. It considers that the release of this information would be an actionable breach of confidence as it was supplied under an express or implied duty of confidence.
25. The Commissioner must consider first whether all of the information in the draft report was provided by a third party. In this particular case the Commissioner is satisfied that the information contained in the draft report is an amalgamation of information provided by the two parties involved in the dispute (the public authority and the complainant) and the views, findings and conclusions of the ICR. On reading the draft report the Commissioner finds that the information provided by the public authority is so intermingled with the information provided by ICR and the complainant that it is impossible to extract it from the draft report. Therefore the Commissioner is satisfied that in this particular case all of the information in the draft report is information provided by the ICR.
26. Taking all these matters into consideration the Commissioner finds that the first limb of the section 41 exemption is met in this case and must now consider whether or not the disclosure of the draft report would constitute an 'actionable' breach of confidence
27. In considering whether a breach of confidence is actionable, the Commissioner must decide whether there is a reasonable chance of success in the event that an action for breach of confidence was commenced¹. In order to do this the Commissioner must be satisfied that the information has the necessary quality of confidence. This is an essential feature of confidentiality and there is a two pronged test to be met².
28. Firstly the material must be of limited availability. In this case the Commissioner notes that the draft report was only made available to the public authority and is not publicly available. Secondly the information must be of a specific character capable of clear definition. The Commissioner notes that in this instance the information is not trivial in nature The request in this case relates to a specific report. In light of this, the Commissioner is satisfied in this case that the information requested has the necessary quality of confidence.
29. The Commissioner must now consider whether an obligation of confidence has been created in this case. In arriving at his decision he has taken account of the fact that the ICR procedure is declared to be confidential in nature and limited to the relevant parties to a complaint. The Commissioner notes that the parties are explicitly informed of this when they first engage in the complaints process.
30. The Commissioner finds that this confidentiality is emphasised by the fact that the outcome of an ICR investigation is published only in an anonymised form in her annual report. A draft report may change in light of a public authority's comments on the facts but also as a result of further information becoming available. The detail of an ICR investigation is not published. In light of this, the

¹ See The Law of Freedom of Information by McDonald & Jones at paragraph 6.67

² Halsbury's Laws of England : Confidence and Data Protection para. 401 et seq.

Commissioner is satisfied that an obligation of confidence arises in relation to the information contained in the draft report.

31. The Commissioner also notes the ICR has been consulted by the public authority in relation to the request and has refused to agree to the disclosure of the draft report under the Act.
32. In light of the above, the Commissioner is satisfied that the basic elements of a claim for breach of confidence are met but he must also consider whether there would be a defence to an action for breach of confidence. In doing so he must consider whether the public interest would require disclosure of the draft report.
33. The Commissioner finds that the common law is quite clear that where the confidentiality of information has been established then it would require some compelling evidence of serious wrongdoing to justify the release of that information into the public domain and this is not shown in this case³.
34. The Commissioner has had sight of the draft report and has carefully considered its contents, the context in which it was produced and also the detail of the final ICR report. The Commissioner can find no evidence of serious wrongdoing in this case and therefore considers that there is no public interest in this case which would override the inherent public interest in maintaining the confidentiality of the information contained in the draft report.
35. Therefore the Commissioner is satisfied that the section 41 exemption is engaged in this case and that the public authority was correct to withhold the draft report under the Act. Since the section 41 exemption is an absolute exemption, the Commissioner need not consider the application of the public interest test as set out in section 2(2)(b) of the Act.
36. The Commissioner is aware that many requests for information under the Act are made by individuals who have a personal interest in the information requested. In this case, the requester had made the complaints which ultimately led to the ICR investigation and the creation of the draft report. While the Commissioner is conscious that the release of the draft report may be of interest to the complainant in this case, he is mindful of the fact that disclosure under the Act is made to the world at large.

The Decision

37. The Commissioner's decision is that the public authority has failed to respond to the complainant's request in accordance with sections 10 (1) and 17 (1) of the Act in that it failed to respond within the statutory time limits. However the

³ See *Derry City Council v The Information Commissioner* [Ryanair][EA/2006/0014 [see paragraph 41 of the decision for a consideration of *The Attorney General v Guardian Newspapers* [No.2] [1990] 1 AC 109 'The Spycatcher Case' and *London Regional Transport v The Mayor of London* [2001] EWCA with regards to this issue.

Commissioner is also satisfied that the public authority has properly withheld the requested information in accordance with the Act.

Steps Required

38. In light of his conclusions at paragraph 37 above, the Commissioner requires no steps to be taken.

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.

Right of Appeal

Either party has the right to appeal against this Decision Notice to the Information 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@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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

Dated the 19th day of December 2007

Signed

**Marie Anderson
Assistant Commissioner**

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

Legal Annex:

Freedom of Information Act 2000

1. Section 10: Time for compliance with request :

(1) Information is exempt information if–

(a) it was obtained by the public authority from any other person (including another public authority), and

(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 [1971 c. 80.] Banking and Financial Dealings Act 1971 in any part of the United Kingdom.

2. Section 17: Refusal of request

(1) 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.

(2) Where—

(a) in relation to any request for information, a public authority is, as respects any information, relying on a claim—

(i) that any provision of Part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or

(ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and

(b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

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

(3) 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.

(4) 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.

(5) 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.

(6) Subsection (5) does not apply where—

(a) the public authority is relying on a claim that section 14 applies,

(b) 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

(c) 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.

(7) A notice under subsection (1), (3) or (5) must—

(a) 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

(b) contain particulars of the right conferred by section 50.

3. Section 41 Information Provided In Confidence:

(1) Information is exempt information if—

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

(2) The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1) (a) would (apart from this Act) constitute an actionable breach of confidence.