

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 20 November 2008

Public Authority: Office of the Legal Services Ombudsman ('OLSO')
Address: 3rd Floor
Sunlight House
Quay Street
Manchester
M3 3JZ

Summary

The complainant requested a breakdown of the amount of money paid by the Office of the Legal Services Ombudsman ('OLSO') to its external solicitors to defend itself against a judicial review action brought against the OLSO by him. The OLSO confirmed that it held such information but considered it be exempt from disclosure on the basis of section 43(2) of the Act because disclosure would be likely to prejudice its commercial interests. The Commissioner has examined the information which falls within the scope of the request and determined that it is the complainant's personal data. Consequently, the Commissioner's decision is that the information is exempt from disclosure on the basis of section 40(1) of the Act and the OLSO was not therefore obliged to confirm or deny whether it held the requested information by virtue of section 40(5) of the Act. The Commissioner believes that the OLSO should have treated the request as a subject access request under section 7 of the Data Protection Act 1998.

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. On 21 September 2007 the complainant submitted a request to the OLSO asking for a breakdown of its legal costs for the financial year 2003/04, including a list of the solicitors firms to whom such payments were made.
3. The OLSO responded on 11 October 2007 and informed the complainant that its legal costs for 2003/04 totalled £57,000. However, the OLSO refused to disclose a list of payments made to various solicitors firms on the basis of section 43 of the Act.¹
4. The complainant subsequently submitted a revised version of his request on 22 October 2007. This revised request read:

'I am asking for the cost of one of the solicitor firm to which payment were made during 2003/04, the solicitor firm is Mace&Jones of Manchester, whom were contract to represent the OLSO in a high court hearing against myself in the year 2003 I have a personal interest in what the final cost the solicitor firm had charge the OLSO. And what the OLSO had paid...so I would like a break down of the full cost which the solicitor firm Mace&Jones had charge the OLSO again [names of complainant]. If you denied my request I would like an internal review of you decision.'

5. The OLSO contacted the complainant on 23 October 2007 and explained that it had considered his revised request for a breakdown of the costs paid to Mace & Jones solicitors for representing the OLSO against the complainant and concluded that such information was also exempt on the basis of section 43 of the FOI Act.

The Investigation

Scope of the case

6. On 18 December 2007 the complainant contacted the Commissioner and asked him to consider the OLSO's decision to refuse to disclose the information he requested on 22 October 2007.

Chronology

7. The Commissioner initially contacted the OLSO on 30 June 2008 and asked to be provided with a copy of the information that it withheld from the complainant and a detailed explanation as to why it believed that this information was exempt from disclosure on the basis of section 43 of the Act. The Commissioner also suggested to the OLSO that the information which falls within the scope of the

¹ Section 43(2) of the Act provides that information is exempt if disclosure would, or would be likely to prejudice the commercial interests of any party, including the public authority.

- request may be the complainant's personal data as the information being sought clearly has some link to the complainant. The Commissioner therefore asked the OLSO to explain exactly how the information being requested was held by the OLSO e.g. is the information simply in accounting files or was it also held on a complaint file directly related to the complainant.
8. On 10 July 2008 the OLSO informed the Commissioner of the total amount of money it paid Mace & Jones in relation to the judicial review brought by the complainant and also provided a breakdown of this figure by financial year. OLSO also provided the Commissioner with a detailed explanation as to why it believed that this information was exempt from disclosure on the basis of section 43(2).
 9. The Commissioner contacted the OLSO again on 1 August 2008 and asked for clarification as to the nature of the information that the OLSO held which fell within the scope of the complainant's request. The Commissioner noted that the complainant's request of 22 October 2007 asked for 'a break down of the full cost' incurred by the OLSO. The Commissioner explained to the OLSO that it had clarified with the complainant that he was not simply seeking access to a breakdown of the amount by financial year but by requesting a 'break down of the full cost' he was in fact seeking a more detailed breakdown, for example by the amount charged by Mace & Jones for particular services. The Commissioner therefore asked the OLSO to confirm if it held any further information which may fall within the scope of the complainant's request.
 10. The OLSO responded on 8 August 2008 and provided the Commissioner with a number of invoices which Mace & Jones submitted to the OLSO for payment with regard to services it provided the OLSO in relation to the judicial review action brought by the complainant.

Analysis

Exemption

11. The Commissioner has concluded that the information falling within the scope of the request – i.e. the invoices submitted by Mace & Jones to the OLSO - are exempt from disclosure on the basis of section 40(1) of the Act.
12. Section 40(1) of the Act states that:

'Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject'.
13. Section 40(5) of the Act also states that:

'The duty to confirm or deny: does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).'

14. The Data Protection Act 1998 (DPA) defines personal data as:

‘...data which relate to a living individual who can be identified
a) from those data, or
b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.’

15. In the Commissioner’s opinion the withheld information is the personal data of the complainant because his name is contained on the invoices and he is therefore identifiable from these invoices. Furthermore, the Commissioner understands that the judicial review action concerned the OLSO’s handling of the complainant’s complaint about legal services he had been provided with. As the complainant was the ‘client’ with regard to these legal services, the Commissioner believes that the complainant clearly has a close and direct link to the OLSO’s investigation into the provision of these legal services, and the subsequent judicial review action brought in order to challenge the OLSO’s findings. As the invoices clearly ‘relate to’ the judicial review action that the complainant brought against the OLSO, the Commissioner believes that this strengthens the view that the invoices are the complainant’s personal data.

16. The Commissioner is therefore satisfied that the requested information is exempt from disclosure on the basis of section 40(1). Section 40(5) of the Act states that the duty contained at section 1(1)(a) of the Act for public authorities to confirm or deny whether information is held is removed if information is exempt from disclosure on the basis of section 40(1) of the Act. Therefore, on the basis of section 40(5), the OLSO was not in fact obliged to confirm or deny under the Act whether it held the information sought by the complainant. However, the request should have been dealt with under section 7 of the DPA. This is referred to in the ‘Other Matters’ section below.

17. As the Commissioner has concluded that the withheld information is exempt from disclosure on the basis of section 40(1) of Act, and the appropriate regime under which the complainant may have a right of access to this information is under the DPA rather than the Act, the Commissioner has not considered whether the information is also exempt from disclosure on the basis of section 43(2) of the Act.

The Decision

18. The Commissioner has concluded that the information held by the OLSO which falls within the complainant’s request is exempt from disclosure on the basis of section 40(1). The Commissioner has also concluded that the OLSO was not

obliged to comply with the requirements of section 1(1)(a) of the Act in relation to this information by virtue of section 40(5).

19. Although the Commissioner recognises that the OLSO did provide the complainant with confirmation under the Act that the requested information was held and sought to rely on a different exemption to withhold this information, as the information is the complainant's own personal data the request should have been dealt with under the Data Protection Act 1998.

Steps Required

20. The Commissioner requires no steps to be taken.

Other matters

21. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
22. Section 7 of the DPA gives an individual the right to request copies of personal data held about them – this is referred to as a right of Subject Access. As the information being sought was in fact the complainant's personal data this request should have been dealt with as a Subject Access request rather than a request under the Act. The Commissioner encourages public authorities to consider requests under the correct regime at the first instance. In the Commissioner's opinion responsibility for applying exemptions and determining whether a request should be considered under the Act or the DPA rests with the public authority and not the requestor.
23. Under section 42 of the DPA the Commissioner can make an assessment of the OLSO's compliance with the DPA. The Commissioner is in the process of undertaking such an assessment in respect of the OLSO's handling of this request and will communicate the outcome of this assessment to the complainant in due course.

Right of Appeal

24. 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 20th day of November 2008

Signed

**Gerrard Tracey
Assistant Commissioner**

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

Legal Annex

Freedom of Information Act 2000

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 40(1) provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

Section 40(5) provides that –

“The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
- (b) does not arise in relation to other information if or to the extent that either-
 - (i) he giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
 - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).”

Section 43(2) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

Data Protection Act 1998

Part I

1) In this Act, unless the context otherwise requires—

“personal data” means data which relate to a living individual who can be identified—

(a)

from those data, or

(b)

from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

Section 7 Right of access to personal data (1) Subject to the following provisions of this section and to sections 8 and 9, an individual is entitled—

(a) to be informed by any data controller whether personal data of which that individual is the data subject are being processed by or on behalf of that data controller,

(b) if that is the case, to be given by the data controller a description of—

(i) the personal data of which that individual is the data subject,

(ii) the purposes for which they are being or are to be processed, and

(iii) the recipients or classes of recipients to whom they are or may be disclosed,

(c) to have communicated to him in an intelligible form—

(i) the information constituting any personal data of which that individual is the data subject, and

(ii) any information available to the data controller as to the source of those data, and

(d) where the processing by automatic means of personal data of which that individual is the data subject for the purpose of evaluating matters relating to him such as, for example, his performance at work, his creditworthiness, his reliability or his conduct, has constituted or is likely to constitute the sole basis for any decision significantly affecting him, to be informed by the data controller of the logic involved in that decision-taking.