

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 31 March 2009

Public Authority: North Staffordshire Primary Care Trust
Address: Moorlands House
Stockwell Street
Leek
Staffordshire
ST13 6HQ

Summary

The complainant requested the level of payment made by the public authority against invoices issued by a company for financial services provided by one of its employees to the public authority within a specified period. The public authority confirmed it held the information requested and subsequently withheld the information by virtue of the exemption at section 43(2) of the Act. During the course of the investigation, the public authority informed the Commissioner that it did not actually hold any information matching the complainant's request. After considering the case, Commissioner is satisfied that at the time of the request, the public authority did not, on the balance of probabilities, hold the information requested by the complainant. However, he finds the public authority in breach of section 1(1)(a) of the Act for failing to deny that it held information relating to the complainant's request and section 10(1) for failing to respond to the request within twenty working days. He also finds the public authority in breach of section 17(1) for failing to issue a refusal notice within 20 working days and 17(1)(b) for failing to cite fully the exemption it was relying on.

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 24 May 2007, the complainant made a request for;

'.....the level of payment made by (the) Trust against invoices sent by Mallard Financial Ltd (Mallard Financial) for work carried out by (named person) since June 2006....'

3. The public authority responded on 25 June 2007. It disclosed the total amount of payments made to Mallard Financial Ltd since June 2006. It however withheld the information requested by virtue of the exemption at section 43 of the Act because Mallard Financial confirmed that the disclosure of payments made for specific individual services would prejudice its commercial interests.
4. The public authority waived its right to carry out an internal review and advised the complainant to appeal directly to the Commissioner.

The Investigation

Scope of the case

5. On 19 July 2007 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to review the public authority's decision to withhold the information requested.
6. The Commissioner initially set out to determine the applicability or otherwise of section 43 (as cited by the public authority) to the requested information. However, subsequent findings which are outlined below led him to consider whether, at the time of the request, the public authority did actually hold the requested information.
7. The Commissioner also considered whether the public authority was in breach of its obligations under sections 10(1) and 17(1) of the Act.

Chronology

7. On 22 July 2008, the Commissioner wrote to the complainant outlining the scope of the complaint and invited her to comment if she disagreed with the scope of the investigation resulting from her complaint.
8. Although the complainant did not respond until 17 August 2008, she did not disagree with the scope of the investigation.
9. On 29 July 2008, the Commissioner wrote to the public authority in order not to delay the investigation. The Commissioner requested a copy of the requested information and invited the public authority to make submissions in relation to the application of section 43.
10. The public authority did not respond directly to the Commissioner's queries until 31 October 2008.
11. The public authority explained to the Commissioner that '(it had been) *unable to find any record, paper or electronic of (the complainant's) request or (its*

- response)'. The public authority also added that it had been unable to trace the steps it undertook before responding to the complainant's request.
12. According to the public authority although it had been able to locate the invoices for work carried out by Mallard Financial Ltd in the period of the request these invoices did not specify the particular employee(s) who actually carried out the work. It provided the Commissioner with copies of the invoices it had located.
 13. In light of the above response, the Commissioner decided to investigate whether or not the public authority held the information requested at the time of the request. He therefore wrote to the public authority again on 05 November 2008.
 14. The public authority did not respond until 02 January 2009.
 15. On 19 January 2009, the Commissioner wrote to the public authority again seeking additional clarification. He also wrote to the complainant and updated her on the direction of the investigation in light of the public authority's assertion.
 16. The public authority responded on 06 February 2009.

Analysis

17. A full text of the relevant provisions of the Act referred to in this section is contained within the Legal Annex at the end of this Notice.

Procedural Matters

18. By virtue of the provisions of section 17(1) and 17(1)(b), when denying an applicant access to information, a public authority is required to issue a refusal notice within 20 working days and specify the exemption it is relying on.
19. The Commissioner notes that the public authority responded to the complainant's request after 20 working days and did not specify the sub section of section 43 it was relying on. Therefore, the Commissioner finds the public authority breached section 17(1) and 17(1)(b) of the Act.

Section 1

20. By virtue of section 1 of the Act, a person making a request for information is entitled to be informed by the public authority whether or not it holds the information requested, and if it does, to provide the applicant with the information unless it is not obliged to comply with the duty imposed by section 1 or withhold the information requested by virtue of the relevant provisions of the Act.
21. In addition, by virtue of section 10(1) a public authority must comply with its section 1 duty within 20 working days.

22. At the start of the investigation, the public authority explained that it was '*unable to confirm*' whether or not the requested information was held at the time of the request (i.e. 24 May 2007) because it had been unable to find any information matching the request contrary to its letter of 25 June 2007 to the complainant.
23. It however argued that since the services requested from Mallard Financial were not for the services of any specific individual(s) and the payments made were directly to Mallard, it was reasonable to infer that it did not hold the information requested contrary to its letter of 25 June 2007.
24. To support the above position, the public authority provided the Commissioner with a copy of an order requisition form relating to the services provided by Mallard Financial. It explained that this was for a 'call –off' order i.e. for services required over a given period up to a maximum budget. The Commissioner notes that the order was placed with Mallard Financial for an 'Interim Deputy Director of Finance Management Support.'
25. The public authority however explained that the order requisition form provided was only for the period 1 April 2007 and 31 March 2008 and that the previous order would have expired on 3 March 2007. It was unable to trace a copy of the previous purchase requisition form due to the loss of some of its records as a result of a merger and organisational restructuring between 2006 and 2008.
26. The public authority did however confirm that the services requested within the period covered by the request (i.e. since June 2006 to May 2007) would have been the same as its overall service need was unchanged, i.e. Interim Deputy Director of Finance Management Support.
27. The public authority explained that the level of support or services provided by Mallard Financial included management support for tasks such as financial forecasting, account reconciliation, year-end closure of accounts, budget management, project work and any back office support as appropriate.
28. According to the public authority, during the period in question, (named person's) job title was; 'Interim Finance Support' but two individuals including (named person) provided the services requested.
29. The public authority also explained that it had, pursuant to the Commissioner's enquiries, searched its records for the requested information. It had specifically searched;
 - Freedom of Information specific files and folders, both electronic and paper copies,
 - Files and folders of the individual who dealt with the original request,
 - General letters/correspondence files and folders (electronic and paper copies),
 - Order/requisition books (only held in paper copies), and
 - Invoice/payment folders for the period (electronic and paper copies).

30. According to the public authority, the searches did not reveal any document(s) matching the complainant's request of 24 May 2007.
31. The public authority then confirmed that it had '*received no invoices from Mallard Financial for the work carried out by (named person); it received monthly invoices for the "Financial Services contract" detailing expenses, travel, toll and parking costs for the support provided.....No payments have been made directly to (named person) and as far as (the public authority) could ascertain (it) has not held and does not hold any records matching the specific request.....*'
32. It added that all of the records identified and supplied to the Commissioner relate to a wider contract with Mallard Financial for 'Interim Deputy Director of Finance management support' and not specifically for work carried out by (named person).

Commissioner's assessment

33. In the Information Commissioner v Environmental Agency EA/2006/0072, the Information Tribunal (Tribunal) upheld the Commissioner's view that that the test to be applied in establishing if information is held is not certainty, rather it should be based on a balance of probabilities. The application of the test requires a consideration of a number of factors including the quality of the public authority's final analysis of the request, scope of the search it made on the basis of that analysis and the rigour and efficiency with which the search was then conducted. It will also require considering, where appropriate, any other reasons offered by the public authority to explain why the information is not held.
34. The Tribunal also adopted the above approach in Fortune v Information Commissioner and the National Patient Safety Agency EA/2004/0004 where it decided that on the basis of the searches conducted by the public authority, the public authority did not, on the balance of probabilities, hold the information the appellant alleged had been provided to it.
35. The Commissioner therefore has to determine whether at the time of the request, the public authority did, on the balance of probabilities, hold information relating to the level of payment for work specifically carried out by (named person) on behalf of Mallard Financial since June 2006.
36. In reaching a decision, the Commissioner considered the possibility that searches could reveal information of the exact nature requested, or the possibility that the requested information could be extracted from information already held by the public authority in relation to payments it had made to Mallard Financial.
37. As noted above, the public authority made payments directly to Mallard Financial for the financial services they were contracted to provide. The invoices provided to the Commissioner in this respect are for financial services provided by Mallard Financial from November 2006 to March 2007. The invoices do not specify the particular individuals who provided these services on behalf of Mallard Financial.

38. Taking into account the order requisition form provided, the invoices for the services provided from November 2006 to March 2007, as well as the searches subsequently conducted by the public authority, the Commissioner is satisfied that at the time of the request, on the balance of probabilities, the public authority did not hold the information requested.
39. The Commissioner also notes, as explained by the public authority, that (named person) was not the only individual providing services on behalf of Mallard Financial in the period of the request. Therefore, it would be inaccurate to conclude that the payments made in the period covered by the request were against invoices for work specifically carried out by (named person).
40. In light of the above, the Commissioner finds that, on the balance of probabilities, the public authority did not hold the information requested by the complainant on 24 May 2007. He also finds that by failing to notify the complainant of this within 20 working days the public authority has breached section 10(1) of the Act.

The Decision

41. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act.
42. He finds the public authority in breach of section 1(1)(a) as it incorrectly informed the complainant that it held information relating to the request of 24 May 2007.
43. He therefore also finds the public authority in breach of section 10(1) for failing to inform the complainant within 20 working days that it did not hold the information requested.
44. He also finds that the public authority in breach of section 17(1) and section 17(1)(b) for failing to issue a refusal notice within 20 working days and specify the sub section of the exemption it was relying on.

Steps Required

45. The Commissioner requires no steps to be taken.

Other matters

46. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
47. The authority's refusal notice of the 25 June 2007 explains that;

'The PCT does not currently have its own appeals procedure in place but you can appeal direct to the Information Commissioner, the details of which are included in this letter'

48. Part VI of the [section 45 Code of Practice](#) recommends that each public authority has in place a procedure for dealing with complaints about the handling of requests for information. The Commissioner considers that the failure to offer the complainant an internal review demonstrates non-conformity with this part of the Code.
49. The Commissioners' Good Practice and Enforcement Team will be contacting the Trust to establish whether the authority is continuing to decline to provide internal reviews and to determine whether the failure to offer a review on this occasion is indicative of poor practice more generally.
50. The Commissioner would also like to record his concerns in relation to the public authority's approach to confirming the extent of information held. By incorrectly informing the complainant that all the requested information was held, it appears that the authority did not locate (or view) the information before the refusal was issued. Therefore, the Good Practice and Enforcement Team will also be contacting the public authority in light of the records management issues identified during the course of the investigation.
51. The Commissioner would also like to record his concerns in relation to the public authority's delay in responding to his queries, and would expect to see an improvement in future investigations involving the public authority.

Right of Appeal

52. 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 31st day of March 2009

Signed

**Gerrard Tracey
Assistant Commissioner**

**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.”

Section 1(2) provides that -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

Section 1(3) provides that –

“Where a public authority –

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.”

Section 1(4) provides that –

“The information –

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.”

Section 1(5) provides that –

“A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).”

Section 1(6) provides that –

“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.”

Time for Compliance

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 10(2) provides that –

“Where the authority has given a fees notice to the applicant and the fee paid is 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.”

Section 10(3) provides that –

“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.”

Section 10(4) provides that –

“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.”

Section 10(5) provides that –

“Regulations under subsection (4) may –

- (a) prescribe different days in relation to different cases, and
- (b) confer a discretion on the Commissioner.”

Section 10(6) provides that –

“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 -

- (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(2) states –

“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.”

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 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 –

- (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.”

Section 17(7) provides that –

“A notice under section (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.”