

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 16 March 2009

Public Authority: National Offender Management Service (part of the Ministry of Justice)
Address: Data Access and Compliance Unit
Information Directorate
Ministry of Justice
First Floor – Zone C
102 Petty France
London
SW1H 9AJ

Summary

The complainant requested information from the public authority about the National Security Framework. The public authority replied that section 31(1)(f) (maintenance of security and good order in prisons) was engaged and extended the time limit in order to assess the public interest test. The Commissioner finds that section 17(1)(c) was breached at this point as the public authority failed to inform the complainant why the exemption was engaged. The timeframe was readjusted on at least eight separate occasions before the complainant complained to the Commissioner. The Commissioner finds that the delay of over fourteen months in carrying out a public interest determination was a breach of section 17(3)(b). The Commissioner has also found two breaches of section 10(1). The public authority is required within 35 calendar days to respond fully to the request in compliance with its obligations under section 1(1) 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 Commissioner notes that the National Offender Management Service (NOMS) is not a public authority itself, but is part of the Ministry of Justice. Therefore the public authority in this case is actually the Ministry of Justice not NOMS. However, for the sake of clarity, this Decision Notice refers to NOMS as if it were the public authority.

3. On 2 August 2007 the complainant, writing on behalf of a firm of solicitors, made the following request for information in accordance with section 1 of the Act:

'We write in response to your letter of 25 July in which you confirmed receipt of our request for a copy of the National Security Framework under the Freedom of Information Act 2000. We wish to confirm that we do require a full copy of this document.'

The Commissioner is considering the handling of this clarified request for information.

4. On 9 August 2007 the public authority acknowledged receiving the request and informed the complainant that it aimed to respond within twenty working days, by 4 September 2007.

5. On 4 September 2007 the public authority wrote to the complainant stating that it believed that the exemption provided by section 31(1)(f) (maintenance of security and good order in prisons) of the Act may be engaged in relation to the information in question. No explanation as to why this exemption was believed to be engaged was given. The public authority also informed the complainant that this is a qualified exemption and that it needed to apply the public interest test. It then extended the time limit to 2 October 2007 to complete its assessment of the test.

6. On 2 October 2007, the public authority then wrote to the complainant to inform her that the public interest determination was still to be carried out and set a new target response date of 30 October 2007.

7. A series of monthly holding letters were sent for the next year to the complainant, up to 26 August 2008. The last letter set a target response date of 1 October 2008.

8. After receiving a number of these letters the complainant wrote a letter to the public authority on 2 April 2008. In this letter she complained about the delays and invited it to expedite its response. She informed the public authority that she would contact the Commissioner should it fail to provide a substantive response without further delay.

The Investigation

Scope of the case

9. On 15 September 2008 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to ensure that the public authority complied with its obligations under section 1 of the Act and provide her with a full response to her request for information. She stated that the public authority was well outside the Commissioner's guidance in the time it was taking to conduct its public interest determination and that this was not a reasonable time. The focus of this investigation is the delay by the public authority in the provision of a substantive response to the request.

Chronology

10. On 15 September 2008, the complainant informed the Commissioner about the public authority's lack of action in carrying out a public interest assessment and responding to her request. The complainant has yet to receive a substantive response to her information request.
11. On 27 September 2008 the Commissioner wrote to the public authority and informed it that he had received this complaint and that it was eligible for consideration.
12. On 6 October 2008 the Commissioner wrote to the complainant to inform her that the case was allocated for investigation. He asked the complainant to provide additional documentation. The Commissioner also telephoned the public authority to inform it that he was investigating this complaint and wrote to the public authority to indicate his position. He stated that while section 17(2) allows that a response may be delayed whilst the balance of the public interest is considered, the Commissioner has published guidance which states that a public authority should delay its response by no more than a total of 40 working days from receipt of the request. The Commissioner advised the public authority that a substantive response should now be provided to the complainant within 20 working days. He set a deadline of 5 November 2008. He also sent this letter by email to ensure that it was received.
13. On 13 October 2008 the Commissioner ensured that the public authority had received its letter by calling the relevant case officer. He was informed that its attention was on this case, which was with government ministers awaiting sign off.
14. On 5 November 2008 the Commissioner's previous deadline expired and the Commissioner telephoned the public authority again. The public authority apologised for the delays in this case and informed the Commissioner that it was unable to comply with the Commissioner's deadline. It also informed the

- Commissioner that it was unlikely for a response to be issued over the next two weeks and a realistic timescale was a further month.
15. On 12 November 2008 a representative of the Commissioner met with those of the public authority and impressed on it the importance of providing a response in a reasonable time in this case. Also on 12 November 2008, the Commissioner was telephoned by the complainant and gave an update.
 16. On 14 November 2008 the Commissioner received a detailed update about how the case was progressing from the public authority. It informed him that it was looking to make considerable progress over the next two weeks.
 17. On 8 December 2008 the Commissioner telephoned the public authority to ask about the progress on this case. He was informed that the case officer would try and provide a response as soon as possible.
 18. On 5 January 2009 the complainant enquired how the case was progressing. On 6 January 2009 the Commissioner was informed by the public authority's case officer that no further progress had been made and that he would ask his manager to bring in extra resources to deal with this case.
 19. On 7 January 2009 the Commissioner telephoned the manager involved and asked for progress to be made on this case. He was informed that the public authority would bring additional resources in to deal with its backlog and that the Commissioner would be contacted by the relevant officer.
 20. On 13 January 2009 the Commissioner discussed the delays with the public authority. The public authority indicated that there would be a further delay while the relevant policy department addressed the case. It stated that it would provide an update the following week.
 21. On 20 January 2009 the public authority provided this update. It informed the Commissioner that the information in this case required input from other departments and that it was trying to organise meetings with the relevant people.
 22. As of the date of this notice the public authority has not provided a substantive response to the request for information.

Analysis

Section 10(1)

23. Section 10(1) (full wording in the legal annex attached to this notice) requires the public authority to comply with section 1 of the Act within twenty working days of receipt of the request.
24. Section 1(1)(a) of the Act requires the public authority to inform the complainant in writing whether or not recorded information is held that is relevant to the

request. The public authority has not explicitly confirmed or denied whether it holds relevant recorded information and it has been over fourteen months since the date of the request. This is a breach of section 10(1).

25. Section 1(1)(b) of the Act requires a public authority to communicate the information that it holds, subject to exemptions applying in the Act. The public authority has neither communicated the recorded information it holds or relied on any exemption and it has been over fourteen months since the date of the request. This is a further breach of section 10(1).
26. The Commissioner therefore finds two breaches of section 10(1) of the Act in respect of the obligations in both sections 1(1)(a) and (b).

Section 17(3)(b)

27. Section 17(3) (full wording in the legal annex) does allow the public authority to provide its public interest determination in a separate notice 'within such time that is reasonable in the circumstances'.
28. The Commissioner has issued publicly available Good Practice guidance on this point. This can be found at:
http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/foi_good_practice_guidance_4.pdf.

This states the following:

*"...our view is that public authorities should aim to respond fully to **all** requests within 20 working days. In cases where the public interest considerations are exceptionally complex it may be reasonable to take longer but, in our view, in no case should the **total** time exceed 40 working days."*

29. In this case the Commissioner notes that the time taken by the public authority was over fourteen months, well in excess of the recommended maximum of forty days. The Commissioner believes this to be totally unacceptable. The Commissioner is also aware of this public authority dealing with a number of other information requests in a similar way and issued NOMS with a Practice Recommendation on this issue on 10 March 2008. This can be found at:
http://www.ico.gov.uk/upload/documents/library/freedom_of_information/notices/noms_s45_pr_final_4_mar_08.pdf
30. The Commissioner therefore finds that the public authority has breached section 17(3)(b) because it has not provided the complainant with its public interest determination within a reasonable time.

Section 17(1)(c)

31. Section 17(1)(c) (full wording in the legal annex) requires that, where a public authority believes that any exemption from Part II of the Act applies, it should

issue a notice stating why the exemption in question is engaged (if not otherwise apparent). This notice must be issued within 20 working days of receipt of the request; there is no extension available to the time within which a notice identifying the exemption and stating why it is engaged must be provided.

32. In this case the original refusal notice did not offer the complainant any reason why the public authority believed section 31(1)(f) was engaged. The Commissioner therefore finds that the public authority has breached section 17(1)(c) in failing to state within twenty working days why it believed that the exemption was engaged and the Commissioner considers that this was not otherwise apparent.

The Decision

33. The Commissioner's decision is that the public authority did not comply with section 10(1) of the Act as it failed to comply with section 1(1)(a) and 1(1)(b) of the Act within twenty working days.
34. The public authority also breached section 17(3)(b) of the Act as in failing to complete its public interest determination and communicate the results of this to the complainant within a reasonable timescale.
35. The public authority additionally did not deal with the request for information in accordance with section 17(1)(c) of the Act in that it did not explain why the exemption was engaged, within 20 working days of receiving the request.

Steps Required

36. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- It must comply with sections 1(1)(a) and 1(1)(b) of the Act within 35 calendar days.
- To comply with section 1(1)(a)
- It must confirm or deny in writing whether it holds relevant recorded information or indicate that is relying on an exclusion to the duty to confirm or deny in this case (these exclusions allow the public authority to state that it is unable to confirm or deny whether information was held because to do so would disclose exempt information). If it is relying on a prejudice and public interest based exclusion (such as 31(3)) it must indicate why confirming or denying would engage the exclusion (that there would, or would likely to be prejudice to a purpose outlined in the Act) and its conclusion about where the balance of public interest lies.

To comply with section 1(1)(b)

- If it confirms that it holds relevant recorded information, it should either provide the information or issue a notice, which complies with section 17 of the Act, indicating that it is relying on an exemption. If it is relying on a prejudice and public interest based exemption (such as 31(1)(f)) it must indicate why the exemption is engaged (that there would, or would likely to be prejudice to a purpose outlined in the Act) and its conclusion about where the balance of public interest lies.

(If the public authority holds recorded information and considers that the balance of public interest favours disclosing the information or no longer considers the exemption to apply, the information should be provided to the complainant)

The Commissioner has found two breaches of section 10(1) but these breaches do not necessitate remedial action.

37. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

38. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

39. 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

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 16th day of March 2009

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

General Right to Access

Section 1(1) provides that:

“(1) 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 with request

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.

Refusal of Request

Section 17 provides that:

(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.

Law enforcement

Section 31 provides that:

(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

...

(f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained.

...

(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).