

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 16 February 2010

**Public Authority:** Cabinet Office  
**Address:** 70 Whitehall  
London  
SW1A 2AS

### Summary

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The complainant requested information about whether the Cabinet Office or any of its Agencies use pseudonyms as a point of contact with the public. If yes, various other pieces of related information were also requested such as how many such names are in use, where, what names and who authorised their use. The Cabinet Office refused to confirm or deny whether it held information falling within the scope of the request and cited the exemption provided by section 38(2) (health and safety). The Commissioner decided the Cabinet Office had breached section 1(1)(a) by failing to notify the complainant in writing whether it held information of the description specified in the request and now the Commissioner requires it to provide the complainant with that confirmation or denial.

### The Commissioner's Role

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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

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2. The complainant made an email request to the Cabinet Office on 26 March 2008 for the following information:

*Does the Department or any of its Agencies use pseudonymous names of staff who do not exist in outgoing correspondence or as an invited point of contact for the public for incoming correspondence either by letter, email or telephone?*

*If so, how many pseudonymous names are currently in use and in which*

*departments/agencies?*

*If pseudonymous names are used what are the names involved and what is the purpose of them, when did their use begin and who authorised such use?*

3. The Cabinet Office responded on 23 April 2008 and neither confirmed nor denied that it held the information requested, relying on the exemption in section 38(2) of the Act. The complainant requested an internal review on 23 April 2008. The results of the review were communicated to the complainant in a letter dated 24 July 2008. The review upheld the original decision including the exemption cited in that decision.

## The Investigation

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### Scope of the case

4. On 1 August 2008 the complainant contacted the Commissioner to complain about the way her request for information had been handled. After a regrettable delay, caused by the high number of complaints submitted to his office, the Commissioner commenced an investigation to establish whether the request for information had been properly handled by the Cabinet Office and whether the exemption in section 38 had been applied correctly.

### Chronology

5. On 8 June 2009, the Commissioner wrote to the Cabinet Office to ask a number of questions about the handling of the request for information. No reply was received so the Commissioner contacted the Cabinet Office on 23 July 2009 and was advised that the earlier letter had not been received. Although the Commissioner's letter was sent again on the same date, nothing had been received by 14 August 2009 when a reminder was sent to the Cabinet Office. The Cabinet Office's reply was received finally on 26 August 2009.

## Analysis

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### Exemptions

6. Section 38(1) of the Act states information is exempt if its disclosure would, or would be likely to, endanger the physical or mental health of any individual or endanger the safety of any individual. Section 38(2) states the duty to confirm or deny does not arise if by doing so would, or would be likely to, endanger the health or safety of any individual as set out in section 38(1).
7. In relying on section 38(2), the Cabinet Office stated the complainant should not take this as an indication that the information "requested is held or is not held by

- the department". The Cabinet Office did not provide any further detail to the complainant to explain its reliance on section 38(2), although it did set out some limited public interest arguments for and against disclosure.
8. Where a public authority has relied on an exemption that includes a refusal to confirm or deny whether information is held, the Commissioner needs to ensure his Decision Notice does not give any indication of whether or not the information is held by the public authority. Therefore, it is not always possible for him to comment in great detail on the reasons for reliance by a public authority on the exemption concerned as to do so may provide an indication whether the requested information is held or not. As a consequence, in the present case, the Commissioner's decision concerns only the issue of whether the Cabinet Office should have confirmed or denied that it held the information requested by the complainant.
  9. In considering the application of section 38(2), the Commissioner notes the tests "would, or would be likely to, endanger" are not weak ones and the Cabinet Office must not only be able to point to a danger or the likelihood of endangerment that is real, actual or of substance but also one that shows some causal link between the potential disclosure and actual or potential endangerment of any individual. In its internal review letter to the complainant dated 24 July 2008, the Cabinet Office applied the "would be likely to endanger" limb of section 38 and consequently the Commissioner has considered the Cabinet Office's decision in the light of the lower of the two tests set out in section 38.
  10. In its refusal letter of April 2008, the Cabinet Office set out two arguments against confirming and denying whether it held the requested information. The first was that if pseudonyms were used and this was confirmed it would undermine any intended health and safety benefits. The second was that if it confirmed that pseudonyms were not used it would confirm the identities of junior officials. The Cabinet Office concluded that in both scenarios there would be an increased risk to officials' health and safety.
  11. Taking the arguments that have been advanced against confirming or denying whether the information is held, the Cabinet Office has not provided any real detail to support its underlying contention that if pseudonyms are used, the simple fact of confirming use would undermine any intended health and safety benefits. In order to rely on section 38(2) the Cabinet Office would have to show that there would be a causal link from confirmation that would be likely to endanger its staff.
  12. If pseudonyms were used, simple confirmation of that fact would not identify which names used by the Cabinet Office were real and which were pseudonyms. In the Commissioner's view it is difficult to see how any intended health and safety benefits would be undermined simply by confirmation of the use of pseudonyms and how in turn that would be likely to endanger staff.
  13. The second argument advanced against confirming or denying was that if pseudonyms were not used and this was confirmed it would enable the identities of junior officials to be confirmed. The Commissioner agrees but does not find this argument particularly persuasive. The Cabinet Office has specified "junior"

- officials in its hypothetical argument but has not set out a health and safety risk that would be more likely simply because of the grade of the official concerned. The Commissioner notes it is common practice for officials of all grades, both junior and senior, to act as the named contact point for public authorities in a variety of different circumstances. A common example is that the named contact for public consultations carried out by government departments is often a relatively junior officer.
14. Even if it was accepted that there was a greater risk to junior officials the Commissioner can envisage a number of other solutions apart from relying on pseudonyms. These would include making the contact a more senior official or making use of generic addresses/contact points instead of named officials. No arguments have been advanced by the Cabinet Office to suggest that it has considered such alternative solutions, even hypothetically. For these reasons, the Commissioner is not persuaded that the Cabinet Office has demonstrated that if it confirmed pseudonyms were not used that this would be likely to endanger the health and safety of junior (or senior) officials.
  15. Turning to the one argument identified by the Cabinet Office in favour of confirming or denying whether the information is held, the Commissioner agrees it would serve to increase public understanding of how government departments operate, which would be a desirable outcome. If pseudonyms were used this increased understanding would not be limited to just that fact alone but might also extend to wider public understanding of the particular challenges or difficulties that required such a procedure to be adopted. Conversely, the use of pseudonymous names without disclosing that fact might, if it became known at a later date, serve to undermine the trust between the public and the public authority.
  16. As noted at paragraph 9 above, the test at section 38, “would be likely to, endanger”, is not a weak one and the Cabinet Office must not only be able to point to a danger or the likelihood of endangerment that is real, actual or of substance but also one that shows some causal link between the potential disclosure and actual or potential endangerment of any individual. For the reasons set out above, the Commissioner is not persuaded that the Cabinet has met this test.
  17. The Commissioner has considered the public interest arguments advanced by the Cabinet Office in reaching this conclusion. As the Commissioner’s conclusion is limited to the fact that the Cabinet Office has not demonstrated that confirming or denying whether the information is held would be likely to endanger the physical or mental health or safety of any individual he has not conducted a separate analysis of the public interest arguments for and against disclosure of the information.
  18. In the Commissioner’s view, the Cabinet Office has not looked objectively at the various categories of information specified in the request to see whether it was possible to respond positively on at least some of those categories.

## Procedural Requirements

### Section 1

19. The Commissioner is not satisfied that the Cabinet Office dealt with the request for information in accordance with section 1(1)(a) of the Act by failing to confirm whether it held information of the description specified in the request.

### The Decision

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20. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act by failing to confirm whether it held information of the description specified in the request.

### Steps Required

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21. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- provide to the complainant confirmation or denial of whether the information falling within scope of her request is held, and
- for any information that is held, either disclose this to the complainant, or provide a refusal notice valid for the purposes of section 17 of the Act setting out why this information will not be disclosed.

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

### Failure to comply

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23. 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

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24. Either party has the right to appeal against this Decision Notice to the First-Tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals  
PO Box 9300  
Arnhem House  
31 Waterloo Way  
Leicester  
LE1 8DJ

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://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 16<sup>th</sup> day of February 2010**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

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

## Legal Annex

### Freedom of Information Act 2000

#### 1 General right of access to information held by public authorities

- (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.
- (2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.
- (3) 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.
- (4) 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.
- (5) 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).
- (6) 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”.

#### 10 Time for compliance with request

- (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.

## 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.

### **38 Health and safety**

(1) Information is exempt information if its disclosure under this Act would, or would be likely to

(a) endanger the physical or mental health of any individual, or

(b) endanger the safety of any individual.

(2) 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, have either of the effects mentioned in subsection (1).