

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 19 April 2010

Public Authority: The Ministry of Justice (Information Tribunal)
Address: 102 Petty France
London
SW1H 9AJ

Summary

The complainant requested information that would document that the Information Tribunal (the "Tribunal") has wide powers under Rule 14(1) of the Information Tribunal (Enforcement Appeals) Rules 2005. The Commissioner is satisfied that the Tribunal does not hold this information and therefore does not require the authority to take any steps. However, he has found that the Tribunal breached sections 1(1)(a), 10(1) and 16(1) in its handling of the request.

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.

Background

2. The request that forms the focus of this notice was submitted by the complainant following an appeal put before the Information Tribunal about a separate decision issued by the Commissioner. As part of the appeal process, the Information Tribunal issued instructions to the complainant pursuant to the powers derived from Rule 14(1) of the Information Tribunal (Enforcement Appeals) Rules 2005.

The Request

3. The Commissioner notes that under the Act the Information Tribunal (the "Tribunal") is not a public authority itself, but is actually an executive agency of the Ministry of Justice (MOJ) which is responsible for the Tribunal. Therefore, the public authority in this case is actually the MOJ and not the Tribunal. However, for the sake of clarity, this decision notice refers to the Tribunal as if it were the public authority.
4. In correspondence dated 9 June 2008, the complainant submitted the following request to the Tribunal:
 - i. *"...please send any documentary evidence you have showing that the Information Tribunal has 'very wide powers to issue directions and orders under Rule 14(1) [of the Information Tribunal (Enforcement Appeals) Rules 2005]...not restricted to the matters listed in Rule 14(2)' as claimed by Mr. Angel [then Chairman of the Information Tribunal, now the Principal Judge of the Information Rights jurisdiction in the First-tier Tribunal]."*
 - ii. *"Please send any documentary evidence you have that the return of the [specified] document 'enabled the parties to prepare for the hearing to assist the Tribunal to determine the issues' of my appeal."*
 - iii. *"Please send any documentary evidence you have that I could be compelled, to produce the [specified] document 'on the trial of an action in a court of law in that part of the United Kingdom where the appeal is to be determined.'"*
5. The Tribunal acknowledged the request in its correspondence of 18 June 2008, informing the complainant that it would furnish a response to his request by 9 July 2008.
6. On 16 July 2008, the complainant wrote to the Tribunal that he had yet to receive a reply, despite it being over twenty working days since the request was made.
7. The Tribunal subsequently responded to the request in a letter dated 21 July 2008. The Tribunal stated that the exemption provided by section 42 of the Act would apply to the requested information but due to the need to consider the public interest in disclosure it would require a further 10 working days for its position to be finalised.

8. In its letter of 29 July 2008, the Tribunal set out its view that while it held some information relating to the interpretation of Rule 14(1), it considered that the public interest favoured withholding the information under section 42 of the Act.
9. The complainant appealed the Tribunal's refusal in his letter of 14 August 2008, requesting an internal review and also including two further information requests which have not been considered by the Commissioner in this notice. He asserted that his requests were not for copies of legal advice and therefore questioned the applicability of section 42.
10. On 24 September 2008, the complainant wrote to the Tribunal asking that it respond to his request for review. As no response was received, the complainant again wrote to the Tribunal on 15 November 2008, calling for it to undertake its review.
11. In light of the Tribunal's continued failure to act on his appeal, the complainant wrote to the Commissioner on 6 January 2009 seeking his assistance.
12. In his letter of 26 January 2009, the Commissioner informed the Tribunal that, in line with his published guidance, he considered that a reasonable time for completing an internal review was 20 working days from the date of request for review, and in no case should the total time taken exceed 40 working days. The Commissioner therefore asked the Tribunal to issue its findings within 20 working days.
13. Following the Commissioner's intervention, the Tribunal advised the complainant in its correspondence of 9 February 2009 that it did not hold the requested information. While it accepted that its position should have been made clearer, the Tribunal went on to explain that its application of section 42 only covered legal advice relating to the appeal process referred to in paragraph 2 above.

The Investigation

Scope of the case

14. On 8 May 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following point:

"I find it very unlikely that the Tribunals Service does not hold copies of legislation or case law on which it relies to conduct its business."

15. During the course of the Commissioner's investigation the following matters were resolved informally and therefore these are not addressed in this Notice:

The Commissioner has determined that parts ii and iii of the complainant's original information request should have been processed under the Data Protection Act 1998 and not the Act. Therefore, it is only part i of the request that is considered here.

Chronology

16. In his letter of 24 July 2009, the Commissioner wrote to the Tribunal setting out his understanding of the case. He concluded his account by asking the Tribunal to detail the extent of its searches for any relevant information and to verify whether it holds any 'specific legislation' that would fall under part i of the request. The Tribunal acknowledged the Commissioner's correspondence on 29 July 2009.
17. On 26 August 2009, the Commissioner telephoned the Tribunal for an update on its reply. The Tribunal commented that a response should be provided within the next seven days.
18. As nothing further was heard by this suggested deadline, the Commissioner telephoned the Tribunal again on 7 September 2009. The Tribunal stated that it was hopeful that its reply would be issued in the next few days, if not that day. The Tribunal subsequently emailed the Commissioner to inform him that it was unable to provide a response the same day but would endeavour to answer his queries as soon as possible.
19. The Tribunal emailed the Commissioner again on 10 September 2009, explaining that the absence of an employee had precipitated a further delay in responding. The Commissioner acknowledged the email on 14 September 2009, indicating that further to the Tribunal's previous comments he would expect a substantive response that same week.
20. On 17 September 2009, the Tribunal emailed the Commissioner to notify him that, upon reflection, it considered it had misinterpreted the complainant's request. It therefore asked the Commissioner to grant a 20 working day extension to allow it to reconsider the request.
21. The Commissioner acceded to this request in an email of 18 September 2009, but informed the Tribunal that if this revised schedule was not met he would resort to the issuing of a information notice requiring the

authority to respond, pursuant to the powers conferred by section 51 of the Act.

22. The Tribunal finally responded to the Commissioner's correspondence of 24 July 2009, on 15 October 2009 via email. Concerning part i of the request, it stated that:

"...I have interpreted the request as one for information which was used by Mr John Angel to form the view that the powers of the Information Tribunal are 'very wide.' I can confirm that Mr Angel did not refer to any other documents which detail how wide the Information Tribunal powers are in relation to the issuing of directions and orders."

23. The Commissioner wrote to the complainant on 16 October 2009 setting out his initial findings gleaned from the Tribunal. In the event that the complainant was not satisfied with the response, he asked the complainant to identify any element of the account that he disagreed with or that he considered to be insufficient.

24. On 26 October 2009, the complainant informed the Commissioner that he disputed whether the Tribunal's reading of his request was an accurate representation of the intended meaning:

"My intended meaning was for documentary evidence that matters other than those listed in Rule 14(2) applied to Rule 14(1). Rule 14(1) does not refer to any matters which add to Rule 14(2). Just because Mr Angel did not refer to any other documents specifically does not mean that such documents do not exist."

25. In view of the complainant's comments, the Commissioner contacted the Tribunal on 6 November 2009 to report that it had seemingly assumed a reading of the request that did not tally with the one presented by the complainant. He therefore asked the authority to revisit the request, focusing on the general powers held by the Tribunal as opposed to the specific directions issued by Mr Angel.

26. On 26 November 2009, the Tribunal telephoned the Commissioner about what it considered to be ambiguity over the interpretation of the request. The Commissioner reiterated that the focus of the request was not the actions of the Information Tribunal in regards to the complainant's own appeal (as commented on by Mr Angel) but was instead the general powers contained in Rule 14(1). The Tribunal stated that it had consulted Mr Angel about this matter but he had considered there was nothing further to add. The Tribunal emailed the Commissioner later the same day to document its position.

27. In his correspondence of 17 December 2009, the Commissioner sought further assurances from the Tribunal about the extent of its searches for information that may be captured by the request. The response was received by the Commissioner on 19 January 2010.

Analysis

Is the requested information held by the public authority?

28. Where there is any contention about whether or not information is held by a public authority, the Commissioner has been guided by the approach adopted by the Information Tribunal in the case of *Linda Bromley & Others and the Information Commissioner v the Environment Agency (EA/2006//0072)*. In this case, the Tribunal indicated that the test to be applied was not one of certainty, but rather is the civil standard of the balance of probabilities.
29. On the face of it, the Commissioner considers that there would be a legitimate expectation that the Tribunal would hold guidance, or some such related literature, that would support its core functions under Rule 14(1). However, upon questioning, the Commissioner is persuaded that the Tribunal does not hold information that would be captured by the request itself.
30. The Tribunal has explained that the Rules themselves would act as the primary basis for issuing directions. The Tribunal has further informed the Commissioner that a judge is autonomous when such decisions are made at tribunal or in the courts.
31. Rule 14(1) itself states that the Tribunal *"may at any time of its own motion or on the application of any party give such directions as it thinks proper to enable the parties to prepare for the hearing or to assist the Tribunal to determine the issues."* Although 14(1) is not restricted by these, Rule 14(2) goes on to provide examples for the types of directions that may be considered appropriate.
32. While the Tribunal has confirmed that it does not have any documentary evidence stating that the Information Tribunal has wide powers to issue directions, it has surmised that *"wide powers"* may refer to the passage contained in Rule 14(1) which states that the Tribunal may *"give such directions as it thinks proper."*
33. In the absence of specific guidance on this issue, the Commissioner has enquired how the Tribunal ensures that the steps it takes in regards to the Rules are consistent. In response, the Tribunal has

stated that, where required, it may be instructed by its own practice notes and decisions on rules, which are available on the Tribunal's website¹. The only other source of assistance may come from higher courts on appeal, although the Tribunal is not aware of any such decisions in relation to the rules of procedure.

34. On the basis of the detailed responses above and taking into account his own experience of the operation of the Tribunal's rules of procedure, the Commissioner has determined that, on the balance of probabilities, the public authority did not hold recorded information within the scope of the request at the date on which the request was made.

Section 1 – right of access

35. Section 1(1)(a) (full copy in the legal annex attached to this notice) states that any person making a request for information to a public authority is entitled to be informed in writing by that public authority whether it holds any information of the description specified in the request.
36. The Commissioner believes that in order to meet with the requirements of section 1(1)(a), if a public authority does not hold the specified information at the date of the request, the correct response under the Act would be to deny holding the information. In this case, by incorrectly informing the complainant that it held the information and citing an exemption, the Commissioner has found that the Tribunal has breached section 1(1)(a) of the Act.

Section 10 – time for compliance

37. Section 10(1) (full copy in the legal annex) of the Act requires a public authority to respond to a request promptly and in any event no later than 20 working days after date of receipt. In failing to comply with this time-frame, the Commissioner finds the Tribunal to have breached section 10(1).

Section 16 – duty to provide advice and assistance

38. Section 16(1) (full copy in the attached legal notice) provides an obligation for a public authority to provide assistance to a person making a request, so far as it is reasonable to do so. Section 16(2) states that a public authority is to be taken to have complied with its section 16 duty in any particular case if it has conformed with the provisions in the section 45 Code of Practice in relation to the provision of advice and assistance.

¹ <http://www.informationtribunal.gov.uk/>

39. During the investigation, the Commissioner formed the view that there were at least two reasonable interpretations as to the intended meaning of the request. These interpretations were:
- a) the specific reference being made by Mr Angel in his claim that Rule 14(1) has "wide powers."
 - b) any information that documents the Tribunal has "wide powers" pursuant to Rule 14(1).
40. In his communications with the Commissioner, the complainant has confirmed that he meant the interpretation set out under part b) above. While the difference between the interpretations may, superficially at least, be discrete, the information captured by part b) would potentially be far broader.
41. The Commissioner's view is that in cases where there is apparent ambiguity between a public authority's interpretation of a request and an applicant's intention, the authority should seek clarification under section 1(3) of the Act. In line with the requirements of section 16, the public authority should also look to provide assistance to the applicant in providing this clarification.
42. To illustrate this point, the Commissioner would refer to paragraphs 8 and 9 of the section 45 Code of Practice on this issue, which state that:
- 8. *"A request for information must adequately specify and describe the information sought by the applicant. Public authorities are entitled to ask for more detail, if needed, to enable them to identify and locate the information sought. Authorities should, as far as reasonably practicable, provide assistance to the applicant to enable him or her to describe more clearly the information requested."*
 - 9. *"Authorities should be aware that the aim of providing assistance is to clarify the nature of the information sought, not to determine the aims or motivation of the applicant. Care should be taken not to give the applicant the impression that he or she is obliged to disclose the nature of his or her interest as a precondition to exercising the rights of access, or that he or she will be treated differently if he or she does (or does not). Public authorities should be prepared to explain to the applicant why they are asking for more information. It is important that the applicant is contacted as soon as possible, preferably by telephone, fax or e-mail, where more information is needed to clarify what is sought."*

43. The Commissioner considers that the Tribunal failed to provide advice that would have enabled the applicant to describe more clearly the information requested and therefore did not conform with the provisions of the section 45 Code of Practice. As a consequence, the Commissioner has determined that the Tribunal breached section 16(1) of the Act.
44. The Commissioner also finds that the Tribunal did not offer an appropriate level of assistance to the complainant by virtue of its failure to direct him to the practice notes and decisions issued by the Tribunal, as part of its response. While this information may not have satisfied the original request, the Commissioner considers that it would have been reasonable for the Tribunal to highlight the sources that its decisions may be guided by.

The Decision

45. The Commissioner is satisfied that the Tribunal did not hold recorded information within the scope of the request at the time the request was made.
46. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
 - Section 1(1)(a) – the public authority wrongly confirmed that it held recorded information in its refusal notice, when it did not hold such information.
 - Section 10(1) – the public authority did not provide a substantive response to the complainant within 20 working days.
 - Section 16(1) – the public authority did not provide an appropriate level of advice and assistance when responding to the request.

Steps Required

47. The Commissioner requires no steps to be taken.

Other matters

48. The Commissioner notes the significant delay on the part of the public authority carrying out its internal review into its handling of the request.
49. In his good practice guidance on this issue², the Commissioner considers that a reasonable time frame for completing an internal review is 20 working days from the date of the request for review. While there may be exceptional circumstances where it may be reasonable to take longer, the Commissioner's view is that in no case should the total time taken exceed 40 working days.
50. The public authority should ensure that it conducts any future internal review in accordance with this guidance.
51. In addition, during the course of his investigation, the Commissioner has encountered considerable delay on account of the public authority's reluctance or inability to meet the timescales for response set out in his letters.
52. In investigating complaints received under section 50(1) of the Act, the Commissioner is, in the majority of cases, reliant upon substantive submissions from public authorities. When public authorities do not respond to the ICO's enquiries within a reasonable timescale, the outcome is that an investigation is unnecessarily prolonged whilst the Commissioner attempts to secure a response.
53. Clearly, one of the knock-on effects of this is that a complainant is made to wait an unreasonable period of time for the issues they have raised to be addressed. This is of particular concern in cases where the purpose of an investigation is to establish whether an authority has legitimately withheld information specified in a request.
54. The Commissioner expects that, in future, the public authority will provide responses within the timescales set in the Commissioner's correspondence.

² This guidance is available at:

http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/foi_good_practice_guidance_5.pdf

Right of Appeal

55. 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.
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 April 2010

Signed

**Graham Smith
Deputy 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.”

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.”

Duty to provide Advice and Assistance

Section 16(1) provides that –

“It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it”.

Legal Professional Privilege

Section 42(1) provides that –

“Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”