

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 9 August 2011

Public Authority: Scotland Office
Address: Dover House
Whitehall
London
SW1A 2AU

Summary

The complainant requested information relating to any meetings between representatives of the public authority and the Deputy Prime Minister or the Cabinet Office for the period 5 May 2010 to 5 August 2010. The public authority initially responded to this request by citing exemptions from Part II of the Act. However, at internal review stage the public authority altered its position and instead stated that it did not hold information falling within the scope of this request. The Commissioner finds that the public authority was correct in stating that this information was not held, but that it breached the Act in failing to advise the complainant of this within 20 working days of receipt 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.

The Request

2. The complainant made the following information request on 13 September 2010:

"The content of any correspondence, emails, meetings and notes of communication in the period 5 May 2010 to 5 August 2010, between the Secretary of State for Scotland, the Private Office of

the Secretary of State, or Special Advisors to the Secretary of State for Scotland, or the Scotland Office Press Office, or officials at the Scotland Office, with the Deputy Prime Minister, or the Private Office of the Deputy Prime Minister, or Special Advisors to the Deputy Prime Minister, or the Press Office of the Deputy Prime Minister, and officials in the Cabinet Office/Office of the Deputy Prime Minister in relation to the Act of Settlement."

3. The response to this request was dated 13 October 2010. This refused the request, with the exemptions provided by sections 35(1)(b) (information relating to Ministerial communications) and 35(1)(d) (information relating to the operation of any Ministerial private office) cited.
4. The complainant responded to this on 28 October 2010 and requested an internal review. After a lengthy delay and, as covered below, following the intervention of the Commissioner's office, the public authority responded with the outcome of the review on 1 July 2011. At this stage the public authority withdrew the citing of sections 35(1)(b) and 35(1)(d) and instead now stated that it did not hold any information falling within the scope of the complainant's request.

The Investigation

Scope of the case

5. The complainant contacted the Commissioner's office initially on 10 January 2011. At this stage the complaint related to the failure by the public authority to complete the internal review.
6. At the outset of the investigation of this case, by which point the internal review had still yet to be completed, the Commissioner's office contacted the complainant. The complainant was advised that, if he wished, an investigation into the exemptions cited would be commenced at that stage without waiting for the internal review to be completed due to the delays up until that point. The complainant responded to this on 5 April 2011 and confirmed that he did wish the citing of exemptions to be investigated.
7. As recorded below, in response to the Commissioner's office the public authority stated that it now wished to alter its stance in response to this request as it had now established that it did not hold any information falling within the scope of this request. After the public authority had informed the complainant of this, the Commissioner's office contacted the complainant again to ascertain if he wished to dispute the statement

from the public authority that it held no information falling within the scope of the request.

8. The complainant responded to this on 7 July 2011 and confirmed that he did wish the Commissioner's office to consider the issue of whether the public authority held information falling within the scope of this request. The complainant also asked the Commissioner to consider why the public authority had not accurately responded to the request earlier and why the internal review had been delayed. The procedural breaches in the handling of this case are recorded below and the Commissioner also comments further on the handling of this request in the '*Other matters*' section below.

Chronology

9. The Commissioner's office contacted the public authority initially on 14 April 2011. At that stage the investigation concerned the citing of sections 35(1)(b) and (d). The public authority was advised that the investigation would not be delayed whilst it completed the internal review and it was asked to respond with a copy of the information withheld from the complainant and with further explanations for the exemptions cited.
10. The public authority responded to this on 16 June 2011. It stated at this stage that the initial findings of the internal review had been that it in fact held no information falling within the scope of this request. It stated that it intended to respond with the internal review outcome advising the complainant of this once it had clearance from the Cabinet Office to do so.
11. The Commissioner's office responded to this on 24 June 2011 and stressed that, given this change in position and that the complainant had by that time not received an accurate confirmation or denial as to whether the information requested was held more than nine months following the date of the request, it was essential that the complainant was now advised of the change in position. The public authority was also advised that, whilst it was waiting for advice from the Cabinet Office, responsibility for dealing with the complainant's request in accordance with the Act remained with the Scotland Office.
12. The public authority contacted the complainant on 1 July 2011 and advised that no information falling within the scope of his request was held. Following this, as covered above, the complainant confirmed to the Commissioner's office that he did wish to continue with this case and wished the Commissioner's office to consider whether the public authority was correct in stating that it did not hold information falling within the scope of this request.

13. The Commissioner's office contacted the public authority again on 13 July 2011 and asked that it respond with a description of the searches it had carried out for information falling within the scope of the complainant's request. The public authority responded with the necessary explanations by letter dated 22 July 2011.

Background

14. The Act of Settlement is referred to in the request. This legislation dates from 1701 and provides, amongst other things, that the throne cannot be inherited by a Catholic and that male heirs take precedence in the line of succession.

Analysis

Substantive Procedural Matters

Section 1

15. The public authority has stated that it does not hold the information requested. The complainant has asked the Commissioner to consider if the public authority is correct on this point. The task for the Commissioner here is to consider whether the public authority is correct in stating that this information is not held. If the public authority is correct in stating that this information is not held, the conclusion of the Commissioner will be that the public authority has dealt with the request in accordance with section 1(1)(a) of the Act. This section is set out in full in the attached legal annex, as are all other sections of the Act referred to in this Notice.
16. The approach taken by the Commissioner when considering whether information is held is that the correct standard of proof to apply is the balance of probabilities. This is in line with the approach taken by the Information Tribunal in the case *Linda Bromley & others and the Environment Agency* (EA/2006/0072) in which it stated the following:

"...we must consider whether the IC's decision that the EA did not hold any information covered by the original request, beyond that already provided, was correct. In the process, we may review any finding of fact on which his decision is based. The standard of proof to be applied in that process is the normal civil standard, namely, the balance of probabilities..." (para 10);

because:

"...there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records..." (para 13).

17. In reaching a conclusion as to whether a public authority is correct in stating that requested information is not held, the Commissioner will ordinarily take into account:
 - the scope, quality, thoroughness and results of the searches; and
 - other explanations offered as to why the information is not held.
18. The public authority has described the searches that it carried out for information falling within the scope of the request. It has stated that an email was sent to *"all branches"* of the public authority seeking information falling within the scope of the request. The public authority supplied a copy of this email to the Commissioner's office and the Commissioner notes that this included the wording of the request and asked to be informed if any relevant information was held. The public authority also supplied copies of a number of emails sent in response to this that recorded that no relevant information had been found in the areas of the public authority from which they had been sent. The Commissioner takes this as evidence that appropriate steps were taken to ensure that knowledge of the receipt and scope of this request was disseminated widely.
19. The public authority has also stated that the *"Ministerial Correspondence Officer"* confirmed that a search was carried out of the database in which Ministerial correspondence is recorded for information of relevance to the request. The Commissioner notes that a search was carried out in an area within the public authority where any information of relevance to the request that was held by the public authority would be likely to be located.
20. The public authority has also asked the Commissioner to take into account that it holds information in an electronic format, meaning that it should be a simple task to locate relevant information in response to a request and reducing the likelihood that relevant information would remain undiscovered. Further, the public authority also stated that it is a small organisation, currently 56 staff members, and that it deals with a limited amount of correspondence. It stated that it would expect that staff members would recall any correspondence of relevance to the request.
21. The conclusion of the Commissioner is that the balance of probabilities suggests that the public authority is correct in stating that it does not hold information falling within the scope of the request. The reasoning for this is that the searches carried out by the public authority were

sufficient and appropriate for its size and that it is reasonable to conclude that, had the public authority held information falling within the scope of the complainant's request, these searches would have been sufficient to locate this information. In addition, the Commissioner is aware of no evidence that suggests that it is likely that the public authority does hold information falling within the scope of this request. The Commissioner finds, therefore, that the public authority was in accordance with section 1(1)(a) in stating that it did not hold information falling within the scope of this request.

Procedural Requirements

Section 10

22. In confirming that it held information which it did not, and thereby failing to accurately confirm or deny whether it held information falling within the scope of the request within 20 working days of receipt, the public authority did not comply with the requirement of section 10(1).

The Decision

23. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act in that it stated correctly and in accordance with section 1(1)(a) that it did not hold information falling within the scope of the request. However, in failing to state this until the internal review stage, the public authority failed to comply with the requirement of section 10(1).

Other matters

24. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern. The Commissioner's published guidance on internal reviews states that a review should be conducted within 20 working days, unless there are exceptional circumstances, in which case the review period may be extended to 40 working days. In this case the Commissioner notes that there appeared to be no exceptional circumstances, but that the internal review outcome was severely delayed. The public authority should be aware that responsibility to complete internal reviews in a timely fashion remains with it, even where it consults with other organisations, and ensure that internal reviews are carried out promptly in future.
25. At paragraph 22 above the breach of section 10(1) in the public authority failing to accurately confirm or deny whether it held the

information requested within 20 working days of receipt of the request is recorded. The Commissioner would also stress that when receiving information requests in future it is essential that the public authority establishes first whether the information requested is held, prior to citing any exemptions from Part II of the Act. That the public authority cited exemptions prior to informing the complainant that it did not hold the requested information suggests that it did not do so in this case.

Right of Appeal

26. 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

27. 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.
28. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 9th day of August 2011

Signed

**Jon Manners
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

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 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."