

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 31 March 2009

Public Authority: Department of Business, Enterprise and Regulatory Reform
(formerly the Department for Trade and Industry)

Address: 1 Victoria Street
London
SW1H 0ET

Summary

The complainant asked the then DTI for the names of creators of documents and folders on its internal Matrix electronic record and data management system. DTI refused to release the information, initially citing section 40 of the Act but later relying on 36 and 40. The Commissioner upheld the DTI's decision that section 36(2)(c) was engaged in relation to all of the names of individuals who were creators of records on Matrix, and concluded that in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in releasing the information. He found the DTI to have breached section 17(1) (b) and (c) by failing to apply section 36 by the completion of the internal review.

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

Background

2. The Department of Trade and Industry (DTI) is now the Department for Business, Enterprise and Regulatory Reform but, for consistency, it is described as the DTI throughout out this Decision Notice.
3. "Matrix" is the DTI's department-wide electronic record and data management (ERDM) system. It incorporates folders, which group together documents that

relate to the same task or transaction. Matrix stores documents and emails, scanned items and a metadata record of physical documents and items such as books, maps and CDs. It captures some metadata about a folder or document automatically (e.g. date registered and user login), but can also be used to add metadata (such as title, author, folder, physical format, access controls) to describe a document or to describe a folder (e.g. protective marking, access controls, notes). Creators/authors of records on Matrix are not only DTI officials but may also be external individuals.

4. In a previous complaint to the Commissioner (ref: FS50062558), the complainant asked for certain metadata (such as the identifier / registration ID, date created, title, subject, creator) for all resources in the DTI's Matrix ERDM library for the period 1 April 2003 to 31 December 2004. The DTI said that 1.4 million folders / documents had been created in that period and declined to provide the information on cost grounds. In consultation with the DTI, the complainant narrowed the scope and time period of his request to the period 1 January 2004 to 31 December 2004 so that the DTI was able to provide him with much of the information he sought. During that consultation he agreed to waive receipt of the names of creators / authors of documents, and the complaint to the Commissioner was therefore closed.

Present request

5. The complainant subsequently pursued the DTI's refusal to provide him with the name data, and this forms the subject of the present complaint. In an email on 22 April 2005, he asked the DTI, in respect of documents and folders in Matrix, for the identifiers (registration IDs) and the creators (personal names) for the period 1 December 2004 to 8 December 2004. On 5 May 2005, the DTI refused to provide the creators' names, citing the exemption in section 40 of the Act (Personal Information), although it offered to supply the registration IDs if the complainant considered that to be helpful.
6. On 10 May 2005, the complainant sought a review of that decision, confirming that he did not want the identifiers without the names. In its response of 8 June 2005, the DTI maintained its position that the names of creators of documents and folders held in Matrix fell within the exemption in section 40, in that the information constituted personal data and that disclosure of that data would be unfair processing and would thereby breach the first data protection principle of the Data Protection Act.

The Investigation

Scope of the case

7. On 9 June 2005, the complainant contacted the Commissioner to complain about the way in which his request for information had been handled. The complainant said that he had requested the following data from the DTI's record management system: the document number, and the name of the official who wrote the document. He said, in relation to the DTI's conclusion that the authorship of a

government document should be withheld on privacy grounds, that disclosure was completely consistent with the criteria in Schedule 2 of the Data Protection Act; that there were many other instances in which the authorship of government documents had been disclosed through the Act; and that it was common practice under other laws to release similar data. He said that he would be pleased to provide examples of cases from several other countries. The complainant said that, if the DTI's interpretation were to be upheld, the principle of official accountability that is central to the Act would be undermined.

8. In its initial correspondence with the Commissioner's staff, the DTI said that the exemption in section 40 related only to the names of junior staff and external creators of documents, but that the processes necessary to identify whether or not users of Matrix during the period in question were junior or senior grades or external creators would involve costs that would exceed the appropriate limit and, under section 12 of the Act, the DTI was therefore not obliged to provide that information.
9. In subsequent discussion with the Commissioner's staff, the DTI said that it was no longer relying on the exemption in section 40 to withhold any of the creators' names. However, in later correspondence, the DTI contended that the exemption in section 36 (Prejudice to the effective conduct of public affairs) was applicable to that information and that the balance of the public interest test favoured withholding it. The DTI also reverted to its position that section 40 did apply. However, now it was applying it to all of the creators' names, both internal and external. As to the internal staff, the DTI was no longer seeking to distinguish between junior and senior grades. Since the DTI is now of the view that both section 36 and section 40 apply to all the creators' names, that is the matter before the Commissioner, and no useful purpose would be served by his addressing the issue of the cost of distinguishing between junior and senior staff.

Chronology

10. On 27 July 2006, the Commissioner contacted the DTI to ask for its relevant papers and for any comments that it wished to make. The DTI responded on 29 September 2006. The Commissioner contacted DTI on a number of subsequent occasions between 25 January 2007 and 8 August 2007 to seek clarification of the information received. The DTI responded substantively on 16 August 2007. It apologised for the undue length of time taken to respond to the Commissioner's enquiries and to the changes made to its position during the course of the case. The Commissioner welcomes DTI's comments, but nevertheless considers the DTI's delays in responding to the Commissioner's requests for further clarification to be unacceptable; he is hopeful that he can expect a better performance from its successor Department in the future.

Analysis

11. The legal provisions relevant to the decision are set out in the Legal Annex to the Decision Notice.

Procedural matters

Section 17

12. Under section 17 of the Act, where a public authority is to any extent relying on a claim that information is exempt information, it must, within the time for complying with section 1(1) of the Act, give the applicant a notice which states that fact, specifies the exemption in question and (if not otherwise apparent) states why the exemption applies. In its refusal notice in the present case, the DTI relied on the exemption in section 40 as its basis for withholding the creators' names recorded on Matrix. In none of its correspondence with the complainant did it specify that it likewise considered section 36 to be applicable to that information. In *Bowbrick v the ICO (Tribunal reference: EA/2005/0006)* the Information Tribunal stated that "If a public authority does not raise an exemption until after the s17(1) time period, it is in breach of the provisions of the Act in respect to giving a proper notice because, in effect, it is giving part of its notice too late". The Commissioner therefore considers that the DTI was in breach of section 17(1) (b) and (c) as a result of its failure to notify the complainant of its reliance on section 36(2) (c) and to explain why it applied by the completion of the internal review.

Exemptions

13. In previous decisions of the Information Tribunal (for example *Department for Education and Skills v the Information Commissioner and the Evening Standard (EA/2006/0006)*; *Secretary of State for Work and Pensions v the Information Commissioner (EA/2206/0040)* and *Ministry of Defence v the Information Commissioner and Rob Evans (EA/2006/0027)*), the Tribunal has recognised that, in considering whether or not the names of government officials should be released, a distinction may be drawn between junior and senior officials, and that the names of the former are more likely to be withheld than the latter. In *EA/2006/006* the Tribunal has, however, also made it clear that each decision will depend on the facts of the individual case. For the reasons which follow, the Commissioner considers that, in the particular circumstances of this case, section 36 is engaged and that the balance of the public interest test lies in withholding all of the creators' names, whatever their degree of seniority.

Section 36

14. In correspondence with the Commissioner's staff, the DTI has said that it is in the first instance relying on section 36(2) (c) of the Act. Section 36(2)(c) provides that information is exempt if, in the reasonable opinion of a qualified person, disclosure of the information would, or would be likely to, prejudice the effective conduct of public affairs.
15. Information can only be exempt under section 36 if 'in the reasonable opinion of a qualified person' disclosure would, or would be likely to, lead to the above adverse consequences. In order to establish that the exemption has been applied correctly the Commissioner must:
 - Establish that an opinion was given;

- Ascertain who was the qualified person or persons;
 - Ascertain when the opinion was given;
 - Consider whether the opinion was objectively reasonable and reasonable arrived at.
16. The 'qualified person' in the case of government departments is a Minister of the Crown. The Commissioner has established that at the time the request was dealt with the qualified person was the Minister of State for Energy. A submission was put to him on 14 August 2007 by officials, advising that, in their view, the information held was exempt under section 36. The Minister was asked to consider whether in his reasonable opinion the exemption applied.
17. The Information Tribunal has decided (*Guardian & Brooke v The Information Commissioner & the BBC*) (EA/2006/0011 and EA 2006/0013) that a qualified person's opinion under section 36 is reasonable if it is both '*reasonable in substance and reasonably arrived at*'. It elaborated that the opinion must therefore be 'objectively reasonable' and based on good faith and the proper exercise of judgement, and not simply '*an opinion within a range of reasonable opinions*'. However, it also accepted that '*there may (depending on the facts) be room for conflicting opinions, both of which are reasonable*'. In considering whether an opinion was reasonably arrived at it proposed that the qualified person should only take into account relevant matters and that the process of reaching a reasonable opinion should be supported by evidence, although it also accepted that materials which may assist in the making of a judgement will vary from case to case and that conclusions about the future are necessarily hypothetical.
18. The DTI advised the Minister about the likely effect of the disclosure of details of individuals connected with the metadata, including the real likelihood that the public would be inadvertently led to believe that the creator of a record was responsible for the subject matter, which would lead to an increase of communication aimed directly at specific (and probably the wrong) officials. The Minister agreed that releasing the information in question would be likely to result in the kind of prejudice to the effective conduct of the DTI's affairs envisaged by section 36. He, therefore, concluded that the information should be withheld.
19. The Minister gave his opinion on 15 August 2007 that the release of the information would be likely to prejudice the effective conduct of public affairs.
20. The Commissioner has concluded that the opinion of the qualified person appears to be both reasonable in substance and reasonably arrived at, and therefore accepts that section 36(2)(c) is engaged.

Public Interest Test

21. Section 36 is a qualified exemption. That is, once the exemption is engaged, the release of the information is subject to the public interest test. The test involves balancing factors for and against disclosure to decide whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

22. In its correspondence with the Commissioner, the DTI contended that there is little or no public interest in making public the names of people in connection with the volume and nature of the electronic files they have opened in Matrix, or whose documents are stored in Matrix. In citing factors that it considered weighed against disclosure, the DTI said that *“linking individuals with the protective security marking of the documents and files they have created...would indicate that a person worked in an area of particular sensitivity which could give rise to inappropriate contact with the particular members of staff. Disclosing Matrix activity of junior staff who create records on behalf of others would give the impression that they were active in, say, policy development in a particular area and similarly might be the subject of misguided contact by the public. A further untoward outcome of making individuals’ Matrix activity public could be a pressure on staff to unnecessarily open Matrix files and folders in a bid to give the impression of their personal activity in certain areas. Conversely, some staff may be inhibited from using Matrix if they knew that their Matrix usage in terms of record and file creation were to be available to the public.”*
23. The DTI recognised that factors in favour of disclosure included public interest in the transparency of the DTI’s activities and functions and in having access to information concerning the internal administration of the DTI with a view to ensuring that the DTI’s internal processes are cost effective. However, the DTI contended that disclosure of the names of individuals designated as creators of documents and folders on Matrix (both internal and external) would not provide such information. It would tell the complainant who had opened a particular file or created a particular record; it would not provide the complainant with any accurate information as to which individuals dealt with a particular policy area or issue, or whether the internal processes were efficient or cost effective.
24. The DTI has already released a substantial amount of information in relation to Matrix and the Commissioner considers that the disclosure of the names of the creators of documents would do little to further advance the public interest in the transparency of Matrix given the disclosure that has already taken place.
25. The Commissioner is not convinced by the DTI’s argument that, were it to be decided that the creators’ names should be released, this may cause staff to open more files or folders unnecessarily or, conversely, to create fewer records on Matrix. If there was evidence of this, the DTI would have been expected to take the necessary measures to ensure that staff continued to use Matrix in a correct manner so as to perform their official duties.
26. The Commissioner accepts that many of the entries on Matrix under the heading ‘creator’ will have been made by individuals other than those with the responsibility for the content of the relevant documents or folders, which could potentially cause the public to make misguided enquiries if the information were to be released. However, in the light of the Information Tribunal’s decision in *Ministry of Defence v the Information Commissioner and Rob Evans (EA/2006/0027) (para 73)*, the Commissioner considers that misdirected enquiries from the public cannot be regarded as impinging upon the proper ability of a public authority to function unless there is evidence that such enquiries are likely to be extensive. The Commissioner has not been shown any such evidence. In the absence of such evidence, the Commissioner might therefore be tempted to take the view that the

information should be released. However, this is a quite different set of circumstances to those pertaining in the Tribunal case mentioned above. Here there is no evidence to suggest that there is any public interest to be recognised in the release of a lengthy series of names, many of which will have no significant link to the content of the documents or folders with which their names are associated. The Commissioner, therefore, concludes that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in releasing the information.

Section 40

27. The Commissioner recognises that the complainant's arguments in favour of releasing the names of individuals who were designated as creators of records on Matrix (paragraph 7 above) were intended to counter the DTI's initial reliance on section 40. However, since the Commissioner has decided that the DTI is entitled to withhold that information under section 36(2) (c) of the Act, no useful purpose would be served by him likewise determining whether or not section 40 would apply to that information.

The Decision

28. The Commissioner's decision is that the DTI acted in accordance with the requirements of the Act in its reliance on section 36(2) (c) to withhold the names of those individuals designated as creators of documents and folders on Matrix.
29. However, the Commissioner has also decided that the DTI breached section 17(1) (b) and (c) of the Act in failing to cite section 36(2) (c) and explain why it applied by the time of completion of the internal review.

Steps Required

30. The Commissioner requires no steps to be taken.

Right of Appeal

31. 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@dca.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 31st day of March 2009

Signed

**Gerrard Tracey
Assistant Commissioner**

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

Legal Annex

Exemption where cost of compliance exceeds appropriate limit

Section 12(1) provides that –

“Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.”

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.”

Prejudice to effective conduct of public affairs.

Section 36(2) provides that –

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

- (a) would, or would be likely to, prejudice-
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
 - (iii) the work of the executive committee of the National Assembly for Wales,
- (b) would, or would be likely to, inhibit-
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (a) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

Section 36(5) provides that –

“In subsections (2) and (3) "qualified person"-

- (a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown,

Personal information.

Section 40(1) provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

Section 40(2) provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

Section 40(3) provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”