

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 2 March 2010

Public Authority: The Home Office
Address: 2 Marsham Street
London
SW1P 4DF

Summary

The complainant submitted a number of requests to the Home Office which focused on correspondence which the Home Office may have exchanged with HRH The Prince of Wales and representatives of His Royal Highness. The Home Office initially refused to confirm or deny whether it held information falling within the scope of the requests on the basis of section 37(2) of the Act – communications with the Royal Household. During the course of the Commissioner's investigation the Home Office dropped its reliance on section 37(2) and confirmed to the complainant that it did hold information falling within the scope of his requests, albeit that it could not provide the information because to do so would exceed the appropriate cost limit at section 12(1) of the Act.

The Commissioner is satisfied that to fulfil the requests would exceed the cost limit and therefore the Home Office can rely on section 12(1) to refuse to provide the requested information. The Commissioner is also satisfied that the Home Office has now provided the complainant with sufficient advice and assistance, in line with its duty at section 16 of the Act, so that he can submit a refined request that could be fulfilled within the cost limit, albeit that the Home Office has indicated that it would consider such information to be exempt from disclosure on the basis of section 37(1)(a) of the Act and also sections 40(2) – personal data and 41(1) – information provided in confidence.

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 submitted an email to the Home Office on 22 February 2006. This email contained a number of requests which focused on correspondence which the Home Office may have exchanged with HRH The Prince of Wales and representatives of His Royal Highness. The full text of this email is included in an annex which is appended to this Notice.
3. The Home Office issued a refusal notice on 4 April 2006 in which it refused to confirm or deny whether it held any information falling within the scope of the complainant's requests on the basis of section 37(2).
4. On 7 June 2006 the complainant asked the Home Office to conduct an internal review of this decision.
5. The Home Office informed the complainant of the outcome of the internal review on 12 June 2006; namely that the decision to refuse to confirm or deny whether information was held on the basis of section 37(2) was upheld.
6. Following the intervention of the Commissioner (details of which are given below) the Home Office contacted the complainant again in March 2009. In this communication the Home Office confirmed that it had re-considered the balance of the public interest test and it believed that the public interest now favoured confirming that it did hold information falling within the scope of the requests. The Home Office explained that it had conducted a search of Ministerial and Ministers' private office records, as far as the cost limit specified in section 12 of the Act would allow, and was able to confirm that it did hold information falling within the scope of the requests. (The records in these areas were searched because they were considered to be the areas in the department most likely to hold relevant information.) However the Home Office explained that it considered the information which had been located to be exempt from disclosure on the basis of sections 40(2), 41(1) and 37(1)(a).

The Investigation

Scope of the case

7. The complainant first contacted the Commissioner on 17 June 2006 and asked him to consider the Home Office's refusal to confirm or deny whether it held information falling within the scope of his requests.
8. However, as is clear from the above, at the time this Notice is being issued the Home Office has confirmed to the complainant that it holds information falling within the scope of the requests. That is to say, it has dropped its reliance on the exemption provided by section 37(2) of the Act and has confirmed that it actually holds information falling within the scope of these requests.

9. However, the Home Office has explained to the Commissioner that to fulfil the requests in their entirety, i.e. to provide all of the information it may hold which falls within the scope of them, would exceed the appropriate cost limit at section 12(1) of the Act. Furthermore, the Home Office has confirmed that in its opinion the information that it has located, i.e. the correspondence held in private offices, is exempt on the basis of the exemptions contained at section 37(1)(a), 40(2) and 41(1).
10. The Commissioner has carefully considered the scope of this case for the purposes of this Notice. He has limited his decision to the question whether the original requests can be answered within the cost limit. This is because the complainant's initial complaint sought access to **all** of the information falling within the scope of the requests, not part of the information that may have been located. Moreover although the Home Office has indicated to the complainant that it can locate some information within the cost limit, i.e. the information in the private offices, it did not liaise or confirm with the complainant whether he wished to be provided with this information, subject of course to the application of the exemptions, or whether he would prefer to refine his request to information potentially held in other policy areas of the Home Office.
11. The Commissioner has also considered whether the Home Office has complied with requirement under section 16 of the Act to provide applicants with advice and assistance.

Chronology

12. Although the complainant originally contacted the Commissioner in June 2006, due to a backlog of complaints received about public authorities' compliance with the Act the Commissioner was unable to begin his investigation of this case immediately. Therefore it was not until 13 February 2007 that the Commissioner contacted the Home Office in relation to this complaint.
13. The Commissioner also contacted the Cabinet Office in order to discuss the issues relating to this case as a number of other government departments had received similar requests seeking details of correspondence with The Prince of Wales and the Cabinet Office was involved in co-ordinating the various public authorities' responses. (The Commissioner subsequently received a number of complaints about the responses provided by these public authorities.)
14. The Home Office provided the Commissioner with a substantive response to his letter of 13 February 2007 on 27 June 2007.
15. In March 2008 representatives of The Royal Household, the Cabinet Office and the Commissioner's office met to discuss the issues raised by the various complaints the Commissioner had received involving requests for The Prince of Wales' correspondence with government departments.
16. On 7 July 2008 the Commissioner wrote to The Royal Household in order to seek further views on the application of the exemptions in these cases, in particular the

- refusal to confirm or deny whether information falling within the scope of the requests was in fact held.
17. The Commissioner received a response from The Royal Household in November 2008.
 18. In December 2008 representatives of The Royal Household, the Cabinet Office and the Commissioner's office met again in order to further discuss the issues raised by these complaints.
 19. On 27 January 2009 the Commissioner contacted the Home Office to explain that following discussions with the Cabinet Office and The Royal Household, it was his understanding that the Home Office was no longer refusing to confirm or deny whether it held information falling within the scope of these requests. The Commissioner therefore asked the Home Office to contact the complainant and confirm to him whether it held information falling within the scope of his requests.
 20. As noted above, in March 2009 the Home Office contacted the complainant and confirmed that it had conducted a search of 'private office electronic records (as far as the cost limit specified in section 12 of the Act allows), as this is judged to be the area most likely to hold information relevant to your request'. The Home Office confirmed that some information had been located but it considered this to be exempt from disclosure on the basis of the exemptions provided by sections 37(1)(a), 40(2) and 41(1).
 21. The Commissioner contacted the Home Office again on 29 July 2009 in order to clarify a number of issues in relation to confirmation that had been provided to the complainant in March 2009.
 22. The Home Office provided the Commissioner with a response on 13 November 2009.
 23. Having reviewed this response the Commissioner sought further clarification from the Home Office on 26 November 2009 with regard to a number of outstanding points.
 24. The Home Office provided the Commissioner with a response dated 1 February 2010.

Analysis

Substantive Procedural Matters

Section 12 – cost of compliance exceeds appropriate limit

25. Section 1(1) of the Act provides applicants with a general right of access to information held by public authorities. This right is broken down into two parts: firstly the right to know whether information is held by a public authority - section

1(1)(a); and secondly, if information is held, to have that information provided – section 1(1)(b).

26. Section 12(1) of the Act provides that public authorities do not have to comply with a request where the estimated cost of responding to that request exceeds the appropriate limit as specified by The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Regulations'). However, section 12(2) confirms that a public authority must comply with the requirements of section 1(1)(a) of the Act unless the cost of simply confirming whether information is held would exceed the appropriate cost limit. Section 12(4) provides that when a public authority receives two or more requests about a similar issue the public authority can aggregate the cost of complying with these requests.
27. Section 4(3) of the Regulations sets out the basis upon which an estimate can be made:

'(3) In a case in which this regulation has effect, a public authority may, for the purpose of its estimate, take account only of the costs it reasonably expects to incur in relation to the request in-

- (a) determining whether it holds the information,
- (b) locating the information, or a document which may contain the information,
- (c) retrieving the information, or a document which may contain the information, and
- (d) extracting the information from a document containing it.

(4) To the extent to which any of the costs which a public authority takes into account are attributable to the time which persons undertaking any of the activities mentioned in paragraph (3) on behalf of the authority are expected to spend on those activities, those costs are to be estimated at a rate of £25 per person per hour.'

28. The appropriate limit for central government departments such as the Home Office is £600, the equivalent to 24 hours' work.

The Home Office's position

29. The Commissioner understands that the Home Office's position is that although it can confirm, within the cost limit, that it does hold information falling within the scope of the requests (and indeed has now done so), to locate and retrieve all of the relevant information falling within the scope of the requests would take longer than 24 hours.
30. In order to support this position the Home Office provided the Commissioner with the explanation set out below which describes how it would locate and retrieve the information relevant to these requests. In providing this explanation the Home Office noted that as the information covered by the seven requests is closely related, in practice any search to aim to identify the information needed to fulfil

one request would be likely to identify information relevant to the other requests. Therefore although the Home Office argued that it would be entitled to aggregate the cost of fulfilling the seven requests in line with section 12(4), in practice this would not make a difference to the engagement of section 12(1). Moreover, in order to be able to fulfil the requests for lists and numbers it would be first necessary to locate the relevant correspondence needed to fulfil the earlier requests. Therefore the explanation which follows effectively represents the process needed to fulfil all of the requests.

31. The first step would be to undertake a search to identify any correspondence from The Prince of Wales or his representatives or records of meetings with His Royal Highness. The Home Office explained that it could not rely on Ministerial or Permanent Secretary private offices for this information because as a general rule they do not hold papers for any length of time (i.e. although correspondence may have been initially received by these offices it would have been passed to the relevant policy units.) Therefore it could not be guaranteed that by searching these areas alone all potential relevant information would be located. Rather, in general it is the responsibility of particular policy units to maintain records of such contact. Therefore the various policy units would have to be searched.
32. The Home Office explained that in the last three to four years there has been a move towards electronic record keeping within the department, but in some policy areas paper files are still maintained and moreover a search for material dating back 20 years would involve the close examination of a large number of paper files.
33. The Home Office explained that there are about 90 policy units in the 'core' department, not including the UK Border Agency, the Identity and Passport Service and Criminal Records Bureau. The Home Office suggested that some of these policy units could be excluded from any search, for example central support services, on the basis that they would be unlikely to hold any relevant information. However, the Home Office noted the variety of subjects upon which The Prince of Wales may have corresponded was potentially broad and therefore there was a limit to the number of policy departments which could be excluded from any search. Furthermore, the Home Office noted that in 20 years the organisational structure of the department had changed considerably and therefore to ensure that any search was comprehensive a relatively wide search would need to be carried out. Taking these factors into account the Home Office estimated that it would have to search at least 50 policy units in order to ensure that any search was sufficiently comprehensive.
34. The Home Office explained that correspondence with The Prince of Wales or his representatives, or indeed any member of The Royal Family, would not normally be kept on a file, be it paper or electronic, which made it apparent that it contained such material. Rather such material would be held in a file relating to the relevant policy topic; consequently the number of files that would have to be searched is potentially very high. Many paper files would not be held on site and therefore the exercise would involve identifying possible paper files and retrieving them and going through them manually.

35. The Home Office explained that the time taken out to carry out such a search would vary considerably from one policy unit to another, but it estimated that locating, retrieving and extracting the information would involve, on average, around two hours work per unit.
36. The Home Office explained that it would then take time to compile the requested lists and figures, although this would be relatively straightforward once the information itself had been retrieved. It estimated that this would take around 4 hours.
37. The Home Office noted that it was difficult to provide a more detailed estimate given that the requests are potentially very wide in scope, but it believed that the estimate set out above was relatively conservative in nature.

The Commissioner's position

38. In considering estimates relied upon by public authorities in relation to section 12, the Commissioner has followed the approach of the Information Tribunal in *Alasdair Roberts v Information Commissioner* (EA/2008/0050) at paragraphs 9 to 13 in which the Tribunal confirmed that the approach of deciding whether an estimate was reasonable involved consideration of a number of issues, including:
 - A public authority only has to provide an estimate rather than a precise calculation;
 - The costs estimate must be reasonable and only based on those activities described in Regulation 4(3);
 - Time spent considering exemptions or redactions cannot be taken into account;
 - Estimates cannot take into account the costs relating to data validation or communication;
 - The determination of a reasonable estimate can only be considered on a case-by-case basis; and
 - Any estimate should be 'sensible, realistic and supported by cogent evidence'.¹
39. Bearing these guiding principles in mind, the Commissioner is prepared to accept that the estimate provided by the Home Office is a reasonable one and moreover demonstrates that the cost of complying with the requests would significantly exceed £600. As the figures provided by the Home Office indicate that to search the 50 policy units would take two hours each thus it would take 100 hours to locate and gather all of the relevant information. Given the length of time period emphasised in the requests, 20 years, and the way in which relevant information is stored in the Home Office, the Commissioner believes that it is therefore correct to conclude that to fulfil the seven requests would exceed the appropriate cost limit and therefore the Home Office is entitled to refuse to comply with these requests on the basis of section 12(1) of the Act.

¹ [Alasdair Roberts v Information Commissioner \(EA/2008/0050\)](#)

Section 16 – advice and assistance

40. Section 16(1) of the Act requires public authorities to provide advice and assistance, so far as it would be reasonable to expect the public authority to do so, to applicants who propose to make or have made requests for information.
41. Section 16(2) of the Act states that a public authority in relation to the provision of advice and assistance, will have complied with the requirements of section 16(1) of the Act if it has conformed with the code of practice issued under section 45 of the Act.²
42. Paragraph 14 of the section 45 code of practice sets out what advice and assistance should be offered to applicants whose requests are refused on the basis of section 12(1) of the Act. This paragraph suggests that public authorities should consider providing an indication of what information is available within the cost limit and also consider advising the applicant that by reforming or re-focussing their request, information may be available within the cost limit.
43. The Commissioner notes that the Home Office has informed the complainant that within the cost limit it could provide information held by private offices, albeit that the Home Office believes that such information is exempt from disclosure on the basis of the exemptions contained at sections 37(1)(a), 40(2) and 41(1) of the Act. The Commissioner also notes that in light of the detailed explanation of how the information is held set out above – i.e. within individual policy areas – the complainant is now in a position to submit a request seeking information potentially held by a particular policy area. In light of the cost estimate submitted by the Home Office it is possible that the complainant could potentially ask for up to 12 particular policy areas to be searched within the cost limit should he choose to submit a further, refined request.
44. The Commissioner is therefore satisfied that the Home Office has in effect provided the complainant with sufficient advice and assistance so that he is in a position to submit a refined request that could be fulfilled within the cost limit provided by section 12(1).

Procedural Requirements

45. Part I of the Act includes a number of procedural requirements with which public authorities must comply.
46. Section 10(1) requires a public authority to comply with the requirements of section 1(1) of the Act within 20 working days following the date of receipt.
47. Section 17(1) of the Act requires a public authority to provide an applicant with a refusal notice stating the basis upon which it has refused a request for information. Section 17(5) requires that such a notice which cites section 12 of the Act be provided within 20 working days of the request.

² [Section 45 Code of Practice](#)

48. In handling this request the Home Office failed to confirm to the complainant within 20 working days of the date of the request that it held information of the nature requested. This constitutes a breach of sections 1(1)(a) and 10(1) of the Act.
49. Furthermore the Home Office failed to provide the complainant with a refusal notice citing section 12(1) of the Act within 20 working days of the request. This constitutes a breach of section 17(5) of the Act.

The Decision

50. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
 - The Home Office is entitled to refuse to comply with the requests on the basis of section 12(1) of the Act.
51. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
 - The Home Office breached sections 1(1)(a) and 10(1) by failing to confirm within 20 working days of the date of the request that it held information of the nature requested.
 - The Home Office also breached section 17(1) by failing to issue a refusal notice citing section 12(1) within 20 working days of the request.

Steps Required

52. The Commissioner requires no steps to be taken.

Other matters

53. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
54. For the reasons set above the Commissioner is satisfied that the Home Office has provided the complainant with sufficient advice and assistance because the details of the cost estimate sufficiently allow the complaint to submit a refined request. However, in future cases where it is clear that searching for all of the information falling within the scope of an applicant's request would exceed the cost limit the Commissioner would expect a public authority not to decide to

search up to the cost limit by focussing on a particular area of the department without consulting the applicant first.

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 2nd day of March 2010

Signed

**Graham Smith
Deputy Commissioner and Director of Freedom of Information**

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

Annex – text of request

1. ...A list of all approaches made by HRH The Prince of Wales to the Home Office during the course of the last 20 years. This should include the date the Prince contacted the department (for whatever reason), as well as the nature of the matter under discussion. These approaches could have been made by the Prince in person, by email, by telephone or by post.
2. ...A list of all approaches made by representatives of employees of HRH The Prince of Wales to The Home Office. This should include the date the representatives/employees contacted the Department, as well as details about the nature of the approach and issues involved. These approaches could have been made in person, by email, by telephone or by post. The list of approaches should stretch back 20 years.
3. ...How many times has HRH The Prince of Wales personally contacted any civil servant in the employ of the Home Office or any member of the Department's ministerial team. Please provide details of these approaches, the dates they happened and the issues concerned. I am looking for information stretching back over a 20 year period.
4. ...How many times have representatives acting on behalf of the Prince of Wales contacted any civil servant in the employ of the Home Office or any member of the department's ministerial team? Please provide details of these approaches, the dates they happened and the issues concerned. I am looking for information stretching back over a 20 year period.
5. ...How many times has HRH The Prince of Wales met with a senior member of staff from The Home Office or a member of the Department's ministerial team. Could you please provide details of these meetings, including the dates they took place, the venue they were held and the nature of the topics under discussion? I am looking for information stretching back over a 20 year period.
6. ...Please provide all internal documents held by the Home Office any associated body or agency falls under its control which relates in any way whatsoever to approaches from the Prince of Wales and or representatives acting on his behalf. These documents should include, among other things, all department minutes, memos, emails, telephone transcripts, letters and reports which touch upon this matter. I am looking for information stretching back over a 20 year period.
7. ...Please provide all correspondence between the Home Office and any outside organisation or individual (including other government departments) which relate to approaches from HRH The Prince of Wales or representatives acting on his behalf. I am looking for information stretching back over a 20 year period.

Legal Annex

Freedom of Information Act 2000

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.”

Section 1(2) provides that -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

Section 1(3) provides that –

“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.”

Effect of Exemptions

Section 2(1) provides that –

“Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that either –

(a) the provision confers absolute exemption, or

(b) 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 public authority holds the information

section 1(1)(a) does not apply.”

Section 2(2) provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

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.”

Section 10(3) provides that –

“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.”

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.”

Section 12(2) provides that –

“Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.”

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”.

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.”

Communications with Her Majesty.

Section 37(1) provides that –

“Information is exempt information if it relates to-

- (a) communications with Her Majesty, with other members of the Royal Family or with the Royal Household, or
- (b) the conferring by the Crown of any honour or dignity.”

Section 37(2) provides that –

“The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).”

Personal information.

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.”

Information provided in confidence.

Section 41(1) provides that –

“Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

Section 41(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.”