

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 21 December 2010**

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

### Summary

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The complainant requested information regarding the sale and development of land in the immediate vicinity of the British Library. The public authority initially responded by saying that it would be unable to comply with the request within the required cost limit as stated in section 12 of the Freedom of Information Act. The public authority suggested a more refined request may succeed. Following some correspondence a refined request was made that centred on the Prime Ministers Office. The Cabinet Office released all information held apart from one sentence that appeared in two documents. This sentence was withheld under section 43(2) of the Act. The Commissioner finds that the public authority incorrectly applied section 43(2). The public authority is therefore required to release this piece of information in full.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

### Background

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2. The request focussed on the sale and development of land in the immediate vicinity of the British Library.

3. The complainant has made a number of requests to several public bodies about the sale and development of the land.
4. Following the refusal of this request the complainant sent a second request to the Cabinet Office (CO) which has been dealt with separately.
5. The land in question was owned and controlled by the Department for Culture, Media and Sport and has been sold to a consortium headed by the Medical Research Council (the 'MRC') in conjunction with Cancer Research UK, the Wellcome Trust and University College London.

## **The Request**

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6. The complainant submitted the following request to the CO on 18 February 2008:

"I request all information held by the Cabinet Office relating to

1. Gordon Brown and the sale of the land to the north of the British Library.
2. Gordon Brown and the proposed building of a medical research centre on the site"

7. A response was issued from 10 Downing Street on 14 March 2008 stating that it would not be able to provide the information within the appropriate cost limit of £600 and that therefore under section 12 of the Act it did not intend to fulfil the request. The CO also suggested that to bring the request within the cost limit it should be restricted to a specific period of time and a specific aspect of the issue that the complainant was interested in.
8. The complainant wrote to the CO on 25 March 2008 reiterating his original request but also requesting details of Gordon Brown's involvement from January 2007 to the date of the letter.
9. The CO responded to the revised request on 18 April 2008 again suggesting further refinement. The CO advised that perhaps a search of the requested information held within the Prime Ministers Office may be more successful.
10. The complainant wrote to the CO on 21 April 2008 and requested that the CO proceed with its suggestion of searching within the Prime Ministers Office. This narrowed request is therefore the request which the Commissioner is considering further within this notice.

11. On the 26 May 2008 the complainant contacted the CO to ask why it had not responded to his request.
12. On 3 June 2008 the CO responded advising that it was unable to respond within the 20 working days stipulated within the Freedom of Information Act (the Act) as it was considering the public interest test in relation to section 35 of the Act. It promised a more complete response by 20 June 2008.
13. The Complainant asked the Commissioner to intervene regarding the lack of response by the CO. On the 14 August 2008 the Commissioner contacted the CO and asked it to provide a response to the complainant.
14. A full response was issued to the complainant on 19 August 2008. This correspondence was an apology enclosing a response dated 14 July 2008 which due to administrative error had not previously been issued. This provided the complainant with most of the information requested. The CO did however withhold some information and stated that this information was exempt under section 43(2) of the Act.
15. On the 8 September 2008 the complainant requested an internal review of the decision to withhold some of the information requested and on 22 December 2008 the complainant sent a reminder.

## **The Investigation**

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### **Scope of the case**

16. On 4 February 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 fact that the CO had not provided him with an internal review of its original decision.
17. Following receipt of the internal review, the complainant asked the Commissioner to investigate the handling of his request by the CO and in particular its use of section 43(2) of the Act. The request to be addressed was that outlined in paragraph 10 above. The request was narrowed to include the Prime Ministers office only.
18. The complainant also asked the Commissioner to consider if the CO had more information falling within the scope of the request than it had released or withheld under section 43(2) of the Act.

## **Chronology**

19. On the 10 February 2009 the Commissioner wrote to the complainant to advise that the CO had forwarded a copy of an internal review to the Commissioner. This was dated 14 November 2008 and once again the CO did not appear to have issued the correspondence to the complainant.
20. The complainant wrote to the Commissioner on 19 February 2009 confirming that he would like the Commissioner to examine the CO's use of section 43(2) and to question if any other information falling within the scope of the request was held by the CO.
21. The Commissioner wrote to the CO on 11 May 2009 asking for a full explanation of the exemptions used. The Commissioner also asked the CO to consider whether the request could be interpreted as environmental in nature and therefore falling within information covered by the Environmental Information Regulations 2004.
22. On 27 May 2009 the CO wrote to the Commissioner confirming its use of section 43 of the Act.
23. The Commissioner wrote to the CO on 3 June 2009 and asked it to present its public interest arguments in favour of maintaining the exemption used.
24. The CO replied on 24 August 2009 giving its arguments in favour of the exemption used.

## **Findings of fact**

25. For the purposes of the Act the CO is the public authority. The Prime Minister's Office is an office within the CO. The Prime Ministers Office is not a public authority in itself and therefore all requests under the Act to the Prime Minister's Office are dealt with by the CO.

## **Analysis**

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### **Substantive Procedural Matters**

#### **Is any of the requested information environmental information?**

26. Regulation 2(1) of the EIR defines 'environmental information' as any information in any material form on:

'(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)'

27. The Commissioner considers that the phrase 'any information...on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enacts. In the Commissioner's opinion a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor etc in question. In other words, information that would inform the public about the matter under consideration and would therefore facilitate effective participation by the public in environmental decision making is likely to be environmental information.
28. The Commissioner accepts that from an objective viewpoint the information which falls within the scope of this request could be environmental information by virtue of regulation 2(1)(c). However, for

information to be environmental information via regulation 2(1)(c) the Commissioner considers that:

- The information itself must be **on** a measure or activity; and
  - The measure or activity (not the information itself) must affect or be likely to affect the elements and factors in 2(1)(a) or (b).
29. The threshold of 'likely to affect' is one where the likelihood need not be more likely than not, but it must be substantially more than remote.
30. In the Commissioner's opinion, this request is asking for information on a measure – the sale of land and the development of land. This is because the sale of a piece of land is likely to result in changes to the use of the land, particularly in this case: the building of medical research facility whereby the construction of such a building following the sale would affect the land on the site.
31. However, in the circumstances of this particular case the complainant has been provided with the vast majority of the information, which includes the information concerning the sale and development of the land. In analysing the information which has been withheld the Commissioner has concluded that this information does not directly relate to the sale or the development of the site. Although the remainder of the document it is within does. As this is the only information which is withheld, and that information is clearly not related to the development or the sale of the site, the Commissioner considers that the information should be considered under the Act rather than under the Environmental Regulations.

### **Has all the relevant information been located?**

32. When considering the CO's assertion that it does not hold any further information falling within the scope of the request the Commissioner applies the civil standard of the balance of probabilities. In deciding where the balance lies, the Commissioner will consider the scope, quality, thoroughness, and results of the searches undertaken by the public authority to explain why the information is not held.
33. The complainant has argued that information released by the CO points to the involvement of the then Prime Minister, Gordon Brown and if Gordon Brown was involved in any way then the seniority of his position must mean that there would be further documentation detailing his involvement.
34. The CO has indicated that it has undertaken a thorough search both of paper/hard copy documentation and information held in electronic form and has released all information falling within the scope of the request.

It provided an explanation of the information it had provided to the complainant in response to his request, and also stated the areas it looked for information in response to it.

35. The CO explained in its letter to the complainant dated 14 November 2008 that "the Prime Ministers Office does not retain on file every item of correspondence it receives or documents that it generates, especially in matters that are clearly departmental. This is a purely practical issue: the Prime Minister's Office deals with hundreds of thousands of documents a year and to retain any more than a fraction would overwhelm the filing system and overflow the space available for storage." Further, in a letter to the Commissioner dated 27 May 2009 the CO provided a detailed description of the searches it had carried out to look for relevant information.
36. The Commissioner is persuaded by the argument that any involvement of the Prime Minister must involve some written evidence and that this should be reasonably accessible. However, the Commissioner is also aware that the Prime Ministers Office is a relatively small department that essentially acts as a conduit for communication to and from other Government departments it does not act as a repository for such communication.
37. The Commissioner has examined the evidence and does not consider that it indicates a detailed and prolonged involvement by the Prime Minister. The Commissioner is aware that the complainant is a retired civil servant who feels that there must be further evidence but the Commissioner has not been presented with any evidence to supplant the CO's assertion that it holds no further information falling within the scope of the request. Given the searches which the CO describes that it has carried out, the Commissioner is therefore satisfied that, on the balance of probabilities, no further information is held.

## **Exemptions**

### Section 43(2)

38. Section 43(2) provides that –

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."

39. In order for a prejudice based exemption, such as section 43, to be engaged the Commissioner believes that three criteria must be met:

- Firstly, the actual harm which the public authority alleges would or would be likely to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption.
  - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance.
  - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e. disclosure would be likely to result in prejudice or disclosure would result in prejudice. If the likelihood of prejudice occurring is one that is only hypothetical or remote the exemption will not be engaged.
40. The Commissioner considered each of these steps in turn, for the information being withheld.
41. The withheld information is one sentence that occurred in the document entitled “UK Centre for Medical Research and Innovation Launch Event” this was a briefing note dated 4 December 2007 to the Prime Minister and copied to No 10 officials. The same line was repeated in the Note dated 30 November 2007 entitled “Bliss brief for No.10”.
42. The CO has advised that to release the withheld information “would adversely affect the MRC’s bargaining position during negotiations about this issue which would result in the less effective use of public money.” When considering prejudice to a third party’s commercial interests the Commissioner considers that the public authority should have evidence that this does in fact represent or reflect the view of the third party. The public authority should not speculate in this respect; the prejudice should be based on evidence provided by the third party, whether during the time of compliance with a specific request or as a result of prior consultation, and the relevant arguments are those made by the third party itself.
43. The Commissioner notes that the CO has not provided evidence of discussions with the MRC concerning any possible commercial harm that it would suffer if the information were released. This in itself does not exclude the use of section 43 but the Commissioner considers that this omission seriously weakens the CO’s argument.
44. The Commissioner accepts that as the withheld information concerns a proposed financial contribution by the MRC that it is commercial in



nature. However, it is not sufficient to state that the information is commercial. It must demonstrate that release of the information would, or would be likely to, prejudice the commercial interests of an involved party.

45. The Commissioner in his Guidance NO.20<sup>1</sup> advises that although 'prejudice' is not defined within the Act it is given its normal legal meaning of 'harm'. It must therefore be considered if the release of the information concerned "would or would be likely to harm or damage the commercial interest of any person (including the public authority holding it)".
46. The Commissioner is sympathetic to the comments made by the CO but he cannot see how any prejudice which may occur would be real, actual or of substance. The Commissioner does not feel that either the CO or the MRC have sufficiently argued the connection between the particular information in question being released and it affecting the commercial interest of either party.
47. The Commissioner notes that the funding for the project has not yet been finalised and accepts that this is commercial in nature. However, the Commissioner considers that it has not been made clear how disclosure of the redacted material would adversely affect the MRC operationally. That is to say the CO has not identified an obvious causal link between a disclosure of this information and how its future funding will be damaged.
48. The evidential burden rests with the public authority, as decision maker, to establish that the risk of prejudice occurring must be real and significant. The Commissioner therefore believes that section 43(2) is not engaged in this instance and the information currently being withheld should be released.

### **Procedural Breaches**

49. By not issuing a correct refusal notice within the required 20 days the CO breached section 17(1) of the Act.
50. The public authority incorrectly applied section 43(2) to redact a sentence from two documents. In doing so the public authority failed to comply with section 1(1)(b) of the Act in that it incorrectly refused to disclose the information requested. The public authority is also in breach of section 1(1)(b) in its failure to disclose the sentence.

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<sup>1</sup> Available on the ICO website [www.ico.gov.uk](http://www.ico.gov.uk)

51. In failing to comply with section 1 of the Act, as stated above, within 20 working days of the request the public authority also breached section 10(1) of the Act (time for compliance with request).

## **The Decision**

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52. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act.

## **Steps Required**

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53. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
54. Release the redacted information from the two documents named "UK Centre for Medical Research and Innovation Launch Event" and "Bliss Brief for No.10".
55. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

## **Failure to comply**

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56. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## **Other Matters**

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57. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has

decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it took over 40 working days for an internal review to be completed, despite the publication of his guidance on the matter.

## Right of Appeal

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

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

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

59. 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.
60. 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 21<sup>st</sup> day of December 2010**

**Signed .....**

**Gerrard Tracey  
Principal Policy Advisor**

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

## Legal Annex

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### 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."

**Section 1(4)** provides that –

"The information –

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or

deletion that would have been made regardless of the receipt of the request."

**Section 1(5)** provides that –

"A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b)."

**Section 1(6)** provides that –

"In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as "the duty to confirm or deny"."

### **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(2)** provides that –

"Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt."

**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."

**Section 10(4)** provides that –

"The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of

receipt, as may be specified in, or determined in accordance with the regulations."

**Section 10(5)** provides that –  
"Regulations under subsection (4) may –

- (a) prescribe different days in relation to different cases, and
- (b) confer a discretion on the Commissioner."

**Section 10(6)** provides that –  
"In this section –  
"the date of receipt" means –

- (a) the day on which the public authority receives the request for information, or
- (b) if later, the day on which it receives the information referred to in section 1(3);

"working day" means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom."

## **Commercial interests**

**Section 43(1)** provides that –  
"Information is exempt information if it constitutes a trade secret."

**Section 43(2)** provides that –  
"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."

**Section 43(3)** provides that –  
"The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2)."