

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 7 December 2010

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

Summary

The complainant requested copies of advice given to the Information Tribunal (the "Tribunal") during the course of preparing for a hearing involving the complainant. The Commissioner considers this information to be the personal data of the complainant and, as such, exempt from disclosure under the Freedom of Information Act 2000 (the 'Act') by virtue of section 40(1).

The Commissioner's Role

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

Background

2. The request that forms the focus of this notice, dated 14 August 2008, was submitted by the complainant following an appeal put before the Information Tribunal (the "Tribunal") about a separate decision made by the Commissioner. As part of the appeals process, the Tribunal issued instructions to the complainant pursuant to the powers contained at Rule 14(1) of the Information Tribunal (Enforcement Appeals) Rules 2005 (the 'Rules').

3. The request itself is embedded in correspondence relating to an earlier information request made by the complainant to the Tribunal on 9 June 2008. This request has been separately considered by the Commissioner and so does not form part of this decision.

The Request

4. The Commissioner notes that under the Act the Tribunal is not a public authority itself, but is actually an executive agency of the Ministry of Justice (MOJ) which is responsible for the Tribunal. Therefore, the public authority in this case is actually the MOJ and not the Tribunal. However, for the sake of clarity, this decision notice refers to the Tribunal as if it were the public authority.
5. In correspondence dated 14 August 2008, the complainant submitted the following information request to the Tribunal:
 - i. *"...communications between a Ministry of Justice lawyer and his client, in this case the Information Tribunal, may be privileged, but communications which were between a non-professional legal adviser and the Information Tribunal will not be. Therefore I must now ask for copies of any advice given by any non-professional legal adviser to the Information Tribunal concerning [a specified official]'s order made under Rule 14(1) of the Information Tribunal (Enforcement Appeals) Rules 2005 of 3rd December 2007."*
 - ii. *"...I must now ask for copies of any advice given by any professional legal adviser to the Information Tribunal relating to the proper or improper issue, i.e. in accordance with Rule 14 of the Information Tribunal (Enforcement Appeals) Rules 2005, of [a specified official]'s order of 3rd December 2007."*
6. As the complainant did not hear back from the Tribunal, he wrote to the authority on 24 September 2008 and 15 November 2008 asking that a response be provided. In light of the Tribunal's continued failure to process his request, the complainant wrote to the Commissioner on 6 January 2009 seeking his assistance.
7. The Commissioner subsequently wrote to the Tribunal on 26 January 2009 to highlight its failure to respond to the complainant's correspondence of 14 August 2008.

8. In correspondence dated 9 February 2009, the Tribunal informed the complainant of the findings of its review in relation to his request of 9 June 2008 and briefly explained that it did not hold any information with respect to the request being considered here.
9. On 8 May 2009, the complainant contacted the Commissioner to complain about the way his requests of 14 August 2008 had been handled.
10. The Commissioner wrote to the Tribunal on 24 July 2009 seeking further information in connection with its response to the request.
11. Following a series of delays, the Tribunal emailed the Commissioner on 15 October 2009 to inform him that, upon reflection, it considered that it had not properly addressed the request. It apologised for the oversight and informed the Commissioner that it would shortly write to the complainant to provide its response.
12. As directed, the Tribunal formally responded to the request on 24 November 2009. This, in effect, served as its internal review. The Tribunal notified the complainant that, despite extensive searches, it could not identify any documents that would fall under the scope of the request.

The Investigation

Scope of the case

13. On 30 November 2009 the complainant contacted the Commissioner to complain about the Tribunal's alleged failure to identify and provide information covered by his request.

Chronology

14. Between 15 January 2010 and 17 November 2010, the Commissioner sought, and was provided with, clarification of the Tribunal's position with respect to the complainant's request.
15. As part of its submissions, the Tribunal provided the Commissioner with a copy of representations sent by the Department for Work and Pensions (DWP) to the Tribunal during the appeal proceedings. Although the Tribunal did not consider that this information fell within the scope of the request, it claimed that, in any event, the information

would be exempt from disclosure by virtue of the exemption provided by section 32 of the Act.

Analysis

16. The Tribunal has argued that the DWP's representations, referred to in paragraph 15 above, are not covered by the scope of the request. This is because the representations are not advice from the MOJ to the official referred to in the complainant's request.
17. In contrast, however, the Commissioner considers that the request was not limited to advice from the MOJ to a certain official. Rather it asks for copies of advice given to the Tribunal by any legal adviser, whether professional or non-professional, in connection with an order made on 3 December 2007.
18. The representations from the DWP constitute two applications for a direction from the Tribunal under 14(1) of the Rules. These applications are dated 3 December 2007 and 18 December 2007.
19. The Commissioner considers that the later application does not concern the order made on 3 December 2007 by the Tribunal under 14(1) of the Rules. He has therefore dismissed this information from the scope of his considerations.
20. However, the Commissioner is satisfied that the DWP's application of 3 December 2007 represents advice given by a professional legal adviser to the Tribunal concerning the issue of the order made on 3 December 2007 by the Tribunal under 14(1) of the Rules. The Commissioner has therefore determined that this information would be captured by the terms of the request.
21. The Commissioner has gone on to analyse this information as part of his decision, the findings of which are set out below.

Exemption

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

Section 40(1) – personal data

23. In this case the Commissioner has exercised his discretion to consider an exemption that was not relied upon by the Tribunal.

24. Section 40(1) states 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."

25. The exemption is absolute, meaning it will necessarily be engaged if the requested information is found to be the personal data of an applicant.

26. Personal data is defined as any information relating to a living individual. Section 1(1) of the Data Protection Act 1998 (DPA) provides that:

"Personal data means data which relate to a living individual who can be identified—

- (a) from those data, or*
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,*

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual."

27. The Commissioner considers that the DWP's submission of 3 December 2007 constitutes the personal data of the complainant. This is because the DWP is making an application to the Tribunal to require the complainant, the appellant to an appeal, to take specified steps in respect of the appeal proceedings. It is therefore clear that the complainant is intrinsically linked to the information.

28. In forming this view, the Commissioner has referred to his guidance 'Determining what is personal data'¹, published in 2007, which was designed to assist organisations and individuals classify whether information would constitute personal data. The Commissioner is satisfied that the information in question relates to an identifiable living individual, namely the complainant, and would therefore be his personal data for the purposes of the DPA.

¹http://www.ico.gov.uk/~media/documents/library/Data_Protection/Detailed_specialist_guides/PERSONAL_DATA_FLOWCHART_V1_WITH_PREFACE001.ashx

29. In light of the above, the Commissioner has found that section 40(1) of the Act is engaged and therefore the request should have been treated as a Subject Access Request under section 7 of the DPA. This is referred to in the 'Other Matters' section below.
30. As the Commissioner has concluded that the information is exempt from disclosure on the basis of section 40(1) of the Act, he has not considered whether section 32 of the Act would also apply.

The Decision

31. The Commissioner's decision is that the information requested by the complainant is exempt from disclosure under section 40(1) of the Act.

Steps Required

32. The Commissioner requires no steps to be taken.

Other Matters

33. Section 7 of the DPA gives an individual the right to request copies of personal data held about them – this is referred to as a right of Subject Access.
34. The Commissioner considers that in cases where a request is made for an applicant's own personal data the appropriate access regime is the DPA. He therefore considers that the request in question in this case should have been dealt with as a Subject Access Request under section 7 of the DPA. He encourages public authorities to consider requests under the correct access-regime in the first instance.
35. The Commissioner will contact the complainant and the Tribunal separately about the processing of the Subject Access Request.

Right of Appeal

36. 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 sent.

Dated the 7th day of December 2010

Signed

**Lisa Adshead
Freedom of Information Policy Delivery Manager**

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

Legal Annex

Freedom of Information Act 2000

Court Records

Section 32(1) provides that –

“Information held by a public authority is exempt information if it is held only by virtue of being contained in-

- (a) any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter,
- (b) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter, or
- (c) any document created by-
 - (i) a court, or
 - (ii) a member of the administrative staff of a court, for the purposes of proceedings in a particular cause or matter.”

Section 32(2) provides that –

“Information held by a public authority is exempt information if it is held only by virtue of being contained in-

- (a) any document placed in the custody of a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration, or
- (b) any document created by a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration.”

Section 32(3) 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 this section.”

Section 32(4) provides that –

“In this section-

- (a) "court" includes any tribunal or body exercising the judicial power of the State,
- (b) "proceedings in a particular cause or matter" includes any inquest or post-mortem examination,

- (c) "inquiry" means any inquiry or hearing held under any provision contained in, or made under, an enactment, and
- (d) except in relation to Scotland, "arbitration" means any arbitration to which Part I of the Arbitration Act 1996 applies.

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.”

Data Protection Act 1998

Basic interpretative provisions

Section 1(1) provides that –

“In this Act, unless the context otherwise requires—

“data” means information which—

- (a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,
- (b) is recorded with the intention that it should be processed by means of such equipment,
- (c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, or
- (d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68;

“data controller” means, subject to subsection (4), a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed;

“data processor”, in relation to personal data, means any person (other than an employee of the data controller) who processes the data on behalf of the data controller;

“data subject” means an individual who is the subject of personal data;

“personal data” means data which relate to a living individual who can be identified—

- (a) from those data, or
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

“processing”, in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including—

- (a) organisation, adaptation or alteration of the information or data,
- (b) retrieval, consultation or use of the information or data,
- (c) disclosure of the information or data by transmission, dissemination or otherwise making available, or
- (d) alignment, combination, blocking, erasure or destruction of the information or data;

“relevant filing system” means any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible.

(2) In this Act, unless the context otherwise requires—

- (a) “obtaining” or “recording”, in relation to personal data, includes obtaining or recording the information to be contained in the data, and
- (b) “using” or “disclosing”, in relation to personal data, includes using or disclosing the information contained in the data.

(3) In determining for the purposes of this Act whether any information is recorded with the intention—

- (a) that it should be processed by means of equipment operating automatically in response to instructions given for that purpose, or
- (b) that it should form part of a relevant filing system,

it is immaterial that it is intended to be so processed or to form part of such a system only after being transferred to a country or territory outside the European Economic Area.

(4) Where personal data are processed only for purposes for which they are required by or under any enactment to be processed, the person on whom the obligation to process the data is imposed by or under that enactment is for the purposes of this Act the data controller.”

Right of access to personal data

Section 7 of the DPA 1998 provides that -

(1) Subject to the following provisions of this section and to sections 8 and 9, an individual is entitled—

- (a) to be informed by any data controller whether personal data of which that individual is the data subject are being processed by or on behalf of that data controller,
- (b) if that is the case, to be given by the data controller a description of—
 - (i) the personal data of which that individual is the data subject,
 - (ii) the purposes for which they are being or are to be processed, and
 - (iii) the recipients or classes of recipients to whom they are or may be disclosed,
- (c) to have communicated to him in an intelligible form—
 - (i) the information constituting any personal data of which that individual is the data subject, and
 - (ii) any information available to the data controller as to the source of those data, and
- (d) where the processing by automatic means of personal data of which that individual is the data subject for the purpose of evaluating matters relating to him such as, for example, his performance at work, his creditworthiness, his reliability or his conduct, has constituted or is likely to constitute the sole basis for any decision significantly affecting him, to be informed by the data controller of the logic involved in that decision-taking.

Request for assessment

Section 42 of the DPA provides:

‘(1) A request may be made to the Commissioner by or on behalf of any person who is, or believes himself to be, directly affected by any processing of personal data for an assessment as to whether it is likely or unlikely that the processing has been or is being carried out in compliance with the provisions of this Act.

(2) On receiving a request under this section, the Commissioner shall make an assessment in such manner as appears to him to be appropriate, unless he has not been supplied with such information as he may reasonably require in order to—

- (a) satisfy himself as to the identity of the person making the request, and
 - (b) enable him to identify the processing in question.
- (3) The matters to which the Commissioner may have regard in determining in what manner it is appropriate to make an assessment include—
- (a) the extent to which the request appears to him to raise a matter of substance,
 - (b) any undue delay in making the request, and
 - (c) whether or not the person making the request is entitled to make an application under section 7 in respect of the personal data in question.
- (4) Where the Commissioner has received a request under this section he shall notify the person who made the request—
- (a) whether he has made an assessment as a result of the request, and
 - (b) to the extent that he considers appropriate, having regard in particular to any exemption from section 7 applying in relation to the personal data concerned, of any view formed or action taken as a result of the request.'