

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 6 July 2010

Public Authority: Intellectual Property Office (IPO)
Address: Concept House
Cardiff Road
Newport
South Wales
NP10 8QQ

Summary

The complainant requested relevant recorded information about how the public authority dealt with a request for information in respect of a complaint made by him. He received some information but disputed the application of section 42(1) in respect to the legal advice that had been received. The public authority applied section 42(1) [legal professional privilege] to this information.

The Commissioner has decided that this information is the complainant's personal data and that the public authority should have applied section 40(1) to it and considered the request under the Data Protection Act (the 'DPA'). He will conduct a further assessment under section 42 of the DPA and the result will be communicated to the complainant. He requires no remedial steps to be taken in this case.

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. On 17 September 2009 the complainant requested the following in accordance with section 1(1) of the Act:

'Please would you let me know in writing if you hold information described in the following description?

Complaints were made by me regarding the conduct of Hearing Officer and a Registered Patent Agent in 1989. As a result of my earlier request in 2005 all relevant documents with the exception of one were released to me. File references IPCD 32979, 45869 and other associated files were included in the disclosed documents. The date of the last document was 21 March 2005

After receiving the documents I made [a] further complaint to the Chief Executive regarding matter[s] found in the documents. My repeated requests for review have been refused for reasons which would be found in the requested information. I understand that this matter has been considered among others by Ministers Lord Sainsbury, David Lammy MP, Chief Executives Ron Marchant and Ian Fletcher. The last communication came by email from the Director of Patents Sean Dennehey dated 22 July 2009.

I am interested in the information held for the period between the above two dates. If any part of the information requested above is covered by one or more of the absolute exemptions in the Act please treat this request as a request for that part of the information which is not covered by the absolute exemption. Selection and redaction would make that possible.

...

I would be grateful if you would supply the requested information in the form of photocopies or by email.'

3. On 20 October 2009 the public authority issued a response. It provided some information. However, it withheld other relevant information by virtue of number of sections including sections 40 [personal data] (in relation to the third party personal data within the withheld information) and 42 [legal professional privilege]¹.

¹ All provisions cited in this Notice can be found in the Legal Annex attached to it.

4. On 15 December 2009 the complainant requested an internal review. He explained that he disputed the application of section 42 of the Act. In particular he wanted the advice relating to the handling of his 2005 request for an individual's statement. He explained that he believed that the information was now historical and should be released. He also expressed his concern about the lack of consideration of the public interest test. He explained that it was of considerable public interest as it was the subject of long and costly proceedings through a number of bodies, which in his view could have been avoided. He explained that the original information was only not provided after an individual objected to its disclosure and that the process was in his view unfair to him. He also requested the emails that were connected to the legal advice.
5. On 11 January 2010 the public authority communicated the results of its internal review. It explained that this internal review only focussed on the withholding of the legal advice under section 42(1). It stated that it upheld its position and provided more detailed arguments about why. It explained that the exemption was engaged because the disputed information was a confidential communication that was created for the purposes of litigation and it was important that the confidential relationship between lawyer and client is protected in accord with their expectations. It explained that it was relying on a canon of decisions made by the Information Tribunal and High Court relating to the very substantial inbuilt public interest in maintaining the confidentiality of legally privileged material. It explained that in its view the public interest arguments in favour of release do not outweigh those in favour of the maintenance of the exemption. It explained that it did not believe that the information was truly historical and it believed that the costs of the proceedings with the complainant did not change that fact. It explained that it believed that section 42(1) also applied to the connected emails.

The Investigation

Scope of the case

6. On 26 February 2010 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 following points:
 1. That he wanted the Commissioner to consider whether the legal advice has been correctly withheld ('the disputed information');

2. That he believed that this information would have changed the verdict of a previous case considered by the Commissioner;
 3. That the public interest test had not been conducted appropriately; and
 4. That he believed that the public interest favoured disclosure in this case due to the public authority's alleged previous conduct.
7. On 18 April 2010 the Commissioner telephoned the complainant. On 23 April 2010 the complainant wrote to the Commissioner and confirmed that he sought only the 'disputed information'.
8. The Commissioner would normally draft a Decision in cases similar to this one so as to avoid confirming or denying whether information is held as otherwise the Notice has the potential to reveal personal data of the complainant to the public. In this case it is the Commissioner's view, having seen the withheld information, that it is the personal information of the complainant and that confirming the existence of the information would reveal that he has made a complaint about the public authority. However in this case the complainant has informed the Commissioner that he is not worried about releasing this fact to the public. Furthermore, it would have been difficult in this case to draft a meaningful notice without revealing whether or not the withheld information is held unless a confidential annex was used.

Chronology

9. 20 April 2010: The Commissioner wrote to the public authority to confirm that he had received an eligible complaint. He asked for a copy of the 'disputed information'.
10. 14 May 2010: The Commissioner telephoned the public authority to ask again for the 'disputed information'.
11. 16 May 2010: The Commissioner received a copy of the 'disputed information'.

Analysis

Exemption

Section 40(1)

12. The Commissioner is the regulator of both the Data Protection Act (DPA) and the Freedom of Information Act. The way the Freedom of Information Act is worded means that the rights under the Act cannot prejudice or take precedence over a data subject's rights under the DPA.
13. In *Bowbrick v Information Commissioner* [EA/2005/2006] at paragraph 51 the Information Tribunal confirmed that the Commissioner can use his discretion to look at section 40 when considering cases under the Act:

'If the Commissioner considered that there was a section 40 issue in relation to the data protection rights of a party, but the public authority, for whatever reason, did not claim the exemption, it would be entirely appropriate for the Commissioner to consider this data protection issue because if this information is revealed, it may be a breach of the data protection rights of data subjects....Section 40 is designed to ensure that freedom of information operates without prejudice to the data protection rights of data subjects.'

14. The public authority cited section 42(1) and not 40(1) in its refusal notice and its internal review. The Commissioner has decided as the regulator of the DPA to use his discretion to consider whether section 40(1) applies to the requested information. The Commissioner will not proactively seek to consider exemptions in all cases before him, but in cases where personal data is involved the Commissioner believes he has a duty to consider the rights of data subjects.

15. 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.'

16. This exemption is absolute and does not require a public interest test to be conducted. In addition, in relation to information which is exempt by virtue of subsection (1) or would be if it were held, public

authorities are not obliged to comply with section 1(1)(a) by virtue of section 40(5).

17. In order to rely on the exemption provided by section 40, the information being requested must constitute personal data as defined by the DPA. Personal data is defined in section 1 of the DPA as 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.'
18. The Commissioner's understanding of the nature of personal data has been informed by discussions with the Article 29 Working Party (a European advisory body on data protection and privacy). The Working Party worked to harmonize the interpretation of the definition of personal data.
19. In August 2007 to reflect these discussions, the Commissioner revised his guidance which is designed to assist organisations and individuals to determine whether information may be classified as personal data. In order to do this the guidance asks a series of questions. The Commissioner has considered the information being sought by the complainant along side these questions.
20. The Commissioner's Guidance can be viewed in full at the following link:

http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf
21. The Commissioner has examined the 'disputed information' and is satisfied, using his guidance, that all of it is the complainant's personal information in this case. It is information about how the public authority handled his original request for information and this relates directly to him. It also identifies and distinguishes him from other members of the public. The Commissioner acknowledges that some of the withheld information is both the complainant's personal data and third party personal data. Information can constitute the personal data of more than one individual and where this is the case, if the

complainant is one of those individuals, then section 40(1) will apply. In the circumstances of this case, all the withheld information constitutes the complainant's personal data and therefore the information in its entirety should be considered under section 40(1).

22. In the case of *Mr Nicholas George Fenney v Information Commissioner* [EA/2008/001], the Information Tribunal considered an appeal regarding a request for information about the appellant's complaint against the police. It stated that.

" There is no basis for arguing that the DPA intended that the only data subject to be considered when assessing a document incorporating data on more than one individual is the one whose data is more extensive or more significant. If information incorporates the personal data of more than one person the data controller is not required to attempt an assessment as to which of them is the more significant and to then recognise the rights to protection of that individual and ignore any others. Its obligations are set out in sections 7(4) to 7(6) DPA, which require it to consider whether the information requested includes information relating to a third party and, if it does, to disclose only if that third party consents or it is reasonable in all the circumstances (by reference to the particular matters identified in subsection (6)) to comply with the request without his or her consent.

The file recording how the complaint lodged by the Appellant was handled includes his personal data for the purposes of DPA section 1 and therefore falls with FOIA section 40(1). The structure of the FOIA in this respect is quite clear and is intended to avoid overlap with the DPA. The information is therefore treated as covered by an absolute exemption and falls out of the machinery for disclosure set out in the FOIA and must be treated as a data subject request under DPA" (paragraphs 13 and 14).

23. The Commissioner has determined that, in view of the above, the public authority was in fact not obliged to confirm whether or not it held the information sought by the complainant, by virtue of section 40(5). However 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.
24. As the Commissioner has concluded that the withheld information is exempt from disclosure on the basis of section 40 (1) of the Act, and the appropriate regime under which the complainant may have a right of access to this information is under the DPA rather than the Act, the

Commissioner has not gone on to consider whether the information was also exempt from disclosure on the basis of section 42(1) of the Act.

Procedural Requirements

Section 10(1)

25. Section 10(1) requires that the public authority complies with its obligations under section 1(1)(a) and 1(1)(b) in twenty working days. In this case the public authority took more than twenty working days to issue its refusal notice and therefore breached section 10(1). This is because it failed to comply with either section 1(1)(a) or section 1(1)(b) within twenty working days.

Section 17(1)

26. Section 17(1) also requires that the public authority issues an appropriate refusal notice in twenty working days. The public authority failed to do this and therefore breached section 17(1)

The Decision

27. The Commissioner's decision is that the information was exempt from disclosure under section 40(1) of the Act and the public authority should have identified this as a request that should have been dealt with as a subject access request under the DPA. In light of the contents of this Decision Notice the Commissioner has not ordered any remedial steps.
28. The public authority also breached sections 10(1) and 17(1) as it failed to provide an appropriate notice within twenty working days of receiving the request.

Steps Required

29. The Commissioner requires no steps to be taken.

Other matters

30. 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.
31. The Commissioner notes that this request should have been dealt with as a subject access request under section 7 of the DPA. He would encourage public authorities to consider requests under the correct regime in the first instance.
32. The Commissioner has made an assessment under section 42 of the DPA of the public authority's compliance with that Act. This was dealt with separately and does not form part of this Decision Notice. An assessment under section 42 of the DPA is a separate legal process from the consideration under section 50 of the FOI Act. The complainant will receive this assessment in a separate letter.

Right of Appeal

33. 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 6th day of July 2010

Signed

**David Smith
Deputy Commissioner**

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

Legal Annex

Freedom of Information Act 2000

General right of access to information held by public authorities

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.”

Time for compliance with request

Section 10 provides that-

(1) 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.

...

Refusal of request

Section 17 provides that -

(1) 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.

(2) Where—

(a) in relation to any request for information, a public authority is, as respects any information, relying on a claim—

(i) that any provision of Part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or

(ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and

(b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.

(3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming—

(a) that, 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 authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

(4) A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

(5) A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.

(6) Subsection (5) does not apply where—

(a) the public authority is relying on a claim that section 14 applies,

(b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and

(c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.

(7) A notice under subsection (1), (3) or (5) must—

(a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and

(b) contain particulars of the right conferred by section 50.

Personal information

Section 40 provides that -

(1) 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.

(2) 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.

(3) 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 [1998 c. 29.] 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 [1998 c. 29.] Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the [1998 c. 29.] Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject’s right of access to personal data).

(5) The duty to confirm or deny—

(a) 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), and

(b) does not arise in relation to other information if or to the extent that either—

(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the [1998 c. 29.] Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or

(ii) by virtue of any provision of Part IV of the [1998 c. 29.] Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).

(6) In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the [1998 c. 29.] Data Protection Act 1998 shall be disregarded.

(7) In this section—

- “the data protection principles” means the principles set out in Part I of Schedule 1 to the [1998 c. 29.] Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;
- “data subject” has the same meaning as in section 1(1) of that Act;
- “personal data” has the same meaning as in section 1(1) of that Act.

Legal Professional Privilege

Section 42 provides that:

(1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.

...

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.'