

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 28 February 2007

Public Authority: Office of Government Commerce

Address: Trevelyan House
26-30 Great Peter Street
London
SW1P 2BY

Summary

The complainant requested copies of eight letters sent by the OGC to the relevant Permanent Secretaries following their department's projects receiving a double red warning in Gateway reports and any replies from the Permanent Secretaries. The OGC disclosed edited copies of the letters but refused to disclose them in full on the grounds that the information requested was subject to section 33 of the Act 'Audit Functions' and that the public interest in maintaining the exemption outweighed the public interest in disclosure. The Commissioner investigated whether section 33 of the Act applied to the requested information and found that the exemption was not engaged as the OGC had failed to demonstrate that release of the information would, or would be likely to prejudice the exercise of any of its audit functions. The Commissioner's decision is to uphold the complaint and order the OGC to disclose the requested information within 35 calendar days from date of this notice.

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 has advised that on the 5 July 2005 the following request for information was made to the OGC:

"The text of the eight letters sent by the OGC to the permanent secretaries following their departments projects receiving a double red warning in Gateway reports and the replies from the permanent secretaries (if any) as revealed by Mr

John Oughton in evidence to the Commons public accounts committee published today (July 5)

If this is already regarded as not available under the current guidelines on your website (commercial secrecy and prejudicing good government by inhibiting frank discussion) I would be grateful for a very early reply so I can take the case to the Information Commissioner if necessary."

3. On 2 August 2005 the OGC responded to the complainant stating that it holds some of the information requested. The OGC attached an Annex to this response disclosing some information contained in four letter sent by the OGC to the permanent secretaries. The OGC stated that it was withholding information requested which identifies, or could be used to identify the programme, project or recipient public body subject to the Gateway review under section 33(1)(b) and (2) of the Act. In particular the OGC asserted that disclosure of the information requested would prejudice its functions in relation to the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions in so far as the Gateway process is such a function.
4. The OGC also explained that in its view the public interest in maintaining the exemption under section 33 outweighed the public interest in disclosure. In particular the OGC acknowledged that there is a general public interest in transparency of the Gateway process so as to allow public scrutiny of the process itself and whether government projects/programmes are being managed effectively and responding properly to information contained in Gateway reports, including recommendations and issues connected to RAG status given that these projects also involve considerable public expenditure. The OGC explained that a traffic light status (RAG status) is awarded to a project at the end of each stage: Amber means the project should go forward with some actions recommended, Green, the project is on target to succeed and Red mean there is immediate action necessary to achieve success. However, the OGC also argued that there is an overriding public interest in withholding information which identifies, or could be used to identify the programme, project or recipient public body subject to the Gateway review to the extent that this information would or would be likely to inhibit candour amongst future interviewees. The OGC suggested that to the extent that Gateway review interviewees on these projects may be less candid about matters that could lead to serious recommendations being made to those responsible for the project or programme (in particular those that have had consecutive red light warnings) there is an overriding public interest in maintaining the exemption under section 33.
5. The OGC further stated that information contained in letters received by the OGC was still being considered and that it would need an extension of the time of a further 15 working days in order to consider the public interest test in respect of this information.
6. On the 23 August 2005 the OGC advised the complainant that it had considered the public interest test in relation to letters sent to the OGC from the relevant departments and disclosed to the complainant edited versions of three letters

sent by the relevant departments to the OGC in relation to the consecutive “double red” warnings. The full and unedited replies were withheld on the grounds that the OGC considered the information was exempt from disclosure by virtue of section 33(1)(b) and (2) (Audit functions).

7. The Complainant requested that the OGC carry out an internal review of its decision on 19 September 2005. In particular the complainant questioned the OGC’s judgement in respect of the correct balance to be struck between frank discussion and the public’s right to know.
8. The OGC carried out an internal review at the complainant’s request on 18 October 2005 but maintained its decision to withhold the requested information, under section 33 of the Act.

The Investigation

Scope of the case

9. The complainant wrote to the Commissioner on the 14 November 2005 expressing his dissatisfaction with the OGC’s decision to withhold the full and unedited versions of the requested information.
10. The Commissioner’s investigation focused on whether the OGC was justified in relying on the exemption under section 33 of the Act as its basis for withholding the full and unedited versions of letters sent by the OGC to the permanent secretaries and the replies from the departments in respect of projects receiving “double red” warnings.

Chronology

11. On the 3 December 2005 the Commissioner began his investigation by writing to the OGC to inform it that a complaint had been received and to request a copy of the information being withheld.
12. The OGC replied on the 12 January 2006 attaching the requested information and also supporting documents including the uncorrected transcript of the Committee of Public Accounts meeting, Wednesday 17 November 2004 and the Public Accounts Committee Twenty-seventh Report on The Impact of the Office of Government Commerce’s Initiative on the delivery of major IT-enabled projects. The OGC also attached a letter sent to the Commissioner in relation to another case which set out the OGC’s views on a separate complaint involving a request for similar information.
13. The Commissioner wrote again on the 23 October 2006 asking the OGC to explain in more detail why it believed the exemption was engaged. The Commissioner confirmed that he had received copies of seven letters, 4 of these letters were sent by the OGC to the relevant permanent secretaries following their department’s receiving a double red warning in Gateway reports, and the other 3

letters were replies to the OGC from said permanent secretaries. The Commissioner queried that the complainant's original request referred to eight letters sent by the OGC and asked that the OGC confirm whether the OGC held a further four letters falling within the scope of this request and that the three replies from the relevant permanent secretaries were the only replies held by the OGC.

14. The OGC replied on the 21 November 2006. It explained that the OGC did not hold any further letters falling within the scope of the complainant's request and explained why it felt the information should not be disclosed. Additionally the OGC stated it wished to rely on the arguments put forward in relation to two other cases. The OGC pointed out that the other cases were awaiting determination at the Information Tribunal and suggested to the Commissioner that there was merit in awaiting the outcome of this before taking further action.
15. In his letter 28 November 2006 the Commissioner informed the OGC that the Commissioner intended to continue investigation of the complaints and where necessary issue decision notices.

Findings of fact

16. The OGC has explained that the Gateway review process examines the progress of high to medium risk governmental projects at five critical stages of their life-cycle. Reviews are mandatory for projects which are classified as high or medium risk. In addition there is a Gate Zero stage at which a feasibility of a project or programmes is assessed at its outset. A Traffic Light Status (RAG Status) is awarded to the project at the end of each stage. Red Status means the project team should take action immediately in order to achieve success. Amber states means the project should go forward, with actions to be carried out or recommendations to be acted on, before the next OGC Gateway Review of the project. Green Status means the project is on target to succeed but may benefit from the uptake of recommendations. Where a department's project receives consecutive red Gateway reviews, the Chief Executive of the OGC should write to the Permanent Secretary of the department responsible.
17. The OGC hold seven letters which fall within the scope of the complainant's request.
18. The OGC believe that section 33 exemption is engaged and that the public interest favours maintaining the exemption.
19. The complainant believes that the information withheld should be provided to him and does not accept that the public interest favours maintaining the exemption and therefore the withholding of the information.

Analysis

Exemption: Section 33 – audit functions

20. The OGC has explained that one of its functions is to examine and review major government projects, at critical stages of a projects lifecycle, to assess whether it can progress successfully and to make the necessary recommendations in order for it to do so. The Commissioner is therefore satisfied the OGC does examine the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions. Therefore the Commissioner is satisfied that the OGC is a public authority to which section 33 may apply.
21. Section 33 allows a public authority to refuse to disclose information if disclosure would, or would be likely to, prejudice the exercise of the public authority's functions in relation to the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions.
22. The OGC have argued that releasing the RAG status of a particular project would remove the confidentiality of Gateway reports, if the reports were altered from confidential peer reviews to reports subject to public scrutiny then this would inhibit the frankness, candour and voluntary co-operation of the interviewees and discourage future co-operation. They argue this would weaken the Gateway process and therefore prejudice OGC's ability to carry out necessary examinations of efficiency, effectiveness and economy. They state this "*chain reaction would risk weaker, less clear recommendations to remedy faults in the management of the projector programme and thereby increase the risk of its failure*".
23. The Commissioner is not persuaded that requested letters which reveal the projects which have had "double red" warnings, in this case would discourage the cooperation by those who may be asked to provide information to the OGC in the future. In addition, the Commissioner does not accept that those contributing as part of the Gateway review process do so, on a genuinely voluntary basis, or that they are at liberty to refuse to cooperate with future Gateway reviews. Those contributing information do so in a professional capacity. It is part of their official responsibilities to participate fully and frankly with Gateway Reviews and similar initiatives. However, in this case the request is not for the substance of the reports but rather for letters which would reveal which department's projects received consecutive red warnings.
24. The Commissioner does not accept that the officials responsible for gathering and collating the requested information would cease to perform their duties on the grounds that such information may be disclosed. Government departments, such as the OGC, are expected to provide accurate information when they are asked to do so. The Commissioner does not accept that the release of the requested information in this case, namely the unedited letters which identify the departments with two consecutive red warnings would or would be likely to result in government departments failing to provide information or in their providing

incomplete or inaccurate information to other government departments thereby inhibiting the OGC's audit function. Such senior civil servants would be in breach of their professional duty should they deliberately withhold relevant information or fail to behave in a manner consistent with the Civil Service Code. It is a matter for the bodies concerned, including the OGC, to ensure their officials continue to perform their duties according to the required ethical standard required.

25. The OGC has not demonstrated that release of the requested information would, or would be likely to prejudice the exercise of its audit functions under section 33(1) (b). The Commissioner's decision is therefore that the requested information is not exempt from disclosure by virtue of the exemption at section 33(1) (b) of the Act.

The Decision

26. The Commissioner's decision is that the exemption at section 33(1)(b) and (2) of the Act is not engaged in respect of the requested information as the public authority has not demonstrated that disclosure of the information would or would be likely to prejudice the exercise of any of its audit functions.
27. The Commissioner's decision is therefore that the public authority did not deal with the request for information in accordance with the requirements of the Act.

Steps Required

28. The Commissioner hereby gives notice that in exercise of his powers under section 50 of the Act he requires the OGC to disclose the information requested by the complainant on 5 July 2005 within 35 calendar days of the date of this Decision Notice.

Other matters

29. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
- When applying exemptions under the Act a public authority must consider the nature of the information requested. Each case should be reviewed on an individual basis and each decision in respect of disclosure made on its own merits.

Failure to comply

30. 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.

Right of Appeal

31. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 28th day of February 2007

Signed

**Jane Durkin
Assistant Commissioner**

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

Legal Annex

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.”

Audit functions

Section 33(1) provides that –

“This section applies to any public authority which has functions in relation to-

- (a) the audit of the accounts of other public authorities, or
- (b) the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions.”

Section 33(2) provides that –

“Information held by a public authority to which this section applies is exempt information if its disclosure would, or would be likely to, prejudice the exercise of any of the authority's functions in relation to any of the matters referred to in subsection (1).”

Section 33(3) provides that –

“The duty to confirm or deny does not arise in relation to a public authority to which this section applies if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the exercise of any of the authority's functions in relation to any of the matters referred to in subsection (1).”