

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 13 February 2007

Public Authority: The Information Commissioner's Office
Address: Wycliffe House, Water Lane
Wilmslow
Cheshire
SK9 5AF

Summary

The complainant requested for access to all the documents held by the Information Commissioner's Office (ICO) in connection with its investigation of two Freedom of Information complaints. The ICO refused to disclose the requested information citing section 30 of the Freedom of Information Act 2000. After a careful evaluation of the requested information, the information received during this investigation and the relevant provisions of the Act, the Commissioner's decision is that the public authority has validly applied the exemption in section 30. Consequently the complaint is not upheld.

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 1 September 2005, the complainant made a request to the ICO for: *"all letters, correspondence, attendance/ telephone notes in relation to Thompson/Information Commissioner's office and McGregor/Information Commissioner's Office"*, (the requested information).
3. The ICO responded to the complainant's request on 16 September 2005. In its letter, the ICO confirmed that it held the requested information but applied the exemption in section 30(1)(a) (b) of the Act in its decision to withhold the information.
4. On 20 September 2005, the complainant then made a request to the public authority for an internal review of its decision.

5. On 29 November 2005, the ICO confirmed the internal review had taken place. The review was conducted by its Chief Operations Officer who upheld the original decision to withhold the requested information, on the basis of section 30(1)(a) and (b) of the Act because in his view, *“the Thompson case falls squarely within the wording of s30(1)(a [and] the ICO is currently in the process of ascertaining whether a person should be charged with an offence. In my view, the initial decision that this exemption applied to the Thompson case was correct... The McGregor case contains information that, when read in conjunction with the Thompson case, may lead to a decision to institute criminal proceedings”*.

However, the complainant was provided with a summary of the information contained in the McGregor file.

6. The complainant was dissatisfied with the result of the internal review and on 14 December 2005 it made a request to the Commissioner under section 50 of the Act to review the decision to withhold the requested information.
7. The complainant's request was allocated to a Senior Complaints Resolution Manager (“the Investigating Officer”) to investigate on behalf of the Commissioner. The Investigation Officer confirms herewith that he had not been involved in the original decision to withhold the requested information and in the internal review.
8. The Commissioner has noted the complainant's position expressed in its letter of 14 December 2005 that: *“the Thompson contact is fundamentally linked to the investigation. It appears to the writer that the repeated contact from Mr Thompson... is a significant matter of consideration in the investigation of the Thompson complaint.”*
9. Notwithstanding this, the Commissioner wishes to state that this Decision Notice will deal solely with the issue of whether the ICO has applied the Act validly in refusing to provide access to the requested information. The Commissioner is unable to investigate any operational issues relating to the conduct of, and merit of the criminal investigation.

The Investigation

10. The requested information consists of all the information that has been submitted to, and generated from the Commissioner's investigation of two complaints under section 50 of the Act, namely:
 - Case reference: FS50063912 (Thompson/ Wansbeck District Council), hereinafter referred to as the “Thompson case”.
 - Case reference: FS50062330 (McGregor/ Wansbeck District Council), hereinafter referred to as the “McGregor case”.

11. In order to facilitate the Commissioner's review of the complainant's request the Investigating Officer has had access to all the relevant papers and has also had the opportunity of receiving information from the complaint resolution officers that investigated the Thompson Case and the McGregor case.

In addition, the Investigating Officer has met with the key members of the ICO's Investigation Unit. This unit is primarily responsible for the investigation of alleged criminal breaches of the Data Protection Act 1998 and the Act

Analysis

12. The public authority has applied section 30 (1) (a) and (b) to the complainant's request for information. The public authority also maintains that the public interest in withholding the requested information outweighs the public interest in disclosure.
13. The Commissioner will now deal with this case by considering the public authority's application of the above exemption. A full text of the relevant sections of the Act referred to are contained in the legal annex.

Exemption

Section 30

14. In order to establish whether the public authority has correctly withheld the requested information, there are two issues to be determined by the Commissioner. The first is whether section 30(1) (a) and (b) has been validly applied. The second question – which only arises if the first question is answered in the affirmative – is whether it is in the public interest to withhold or release the requested information.
15. In refusing to disclose the part of the requested information contained in the Thompson case, the Chief Operating Officer for the ICO stated in his letter of 29 November 2005 that having *"looked at the files in question, it is clear to me that the Thompson case falls within the wording of s30(1)(a)... The ICO is currently in the process of ascertaining whether a person should be charged with an offence"*
16. Section 30(1) covers information which has at any time been held by a public authority for the purposes of particular investigations including information held in connection with:
 - Criminal investigations which the authority has a duty or power to conduct.
 - Prosecutions brought by the public authority.

This exemption is a “class based” exemption so it is not necessary to be able to point to some harm or prejudice that may arise as a result of disclosure.

17. The information for the purpose of section 30(1)(a) must be held for an investigation which is criminal in the sense that it is conducted with a view to its being ascertained whether a person should be charged with a criminal offence. Therefore the investigation must be one conducted with a view to charge or prosecute an alleged offender. Another requirement for the engagement of section 30(1)(a) is that the public authority should have the legal duty and power to investigate the alleged criminal breach.

Legal duty of the Commissioner

18. The Commissioner is the independent regulator for public access to official information. Section 47 of the Act, affirms the Commissioner’s duty to perform his functions under the Act in order to promote the observance by public authorities of the requirements of the Act.
19. Section 1 of the Act provides the most fundamental requirement under the Act. This section imposes a duty (subject to exceptions) on a public authority to confirm to an applicant whether or not it holds the information that has been requested.
20. Under section 77 of the Act it is an offence, where a request has been made to a public authority, for a person to conceal any record held by a public authority with the intention of preventing its disclosure. In addition, schedule 3 of the Act provides the Commissioner with the powers to apply for and obtain warrants to enter, search and inspect premises where offences under the Act are suspected.
21. Having considered all the above, the Commissioner is satisfied that he has the legal duty, and the statutory powers to conduct investigations into alleged criminal breaches of the Act.

The criminal investigation

22. After an evaluation by the Commissioner of: the information from the relevant papers, information received from the Investigation Unit and the complaint resolution officers that originally investigated the Thompson and McGregor cases, the Commissioner is satisfied that prior to the complainant’s request, the Investigation Unit was investigating an alleged criminal breach of the Act directly related to the Thompson and McGregor case. This alleged breach had arisen because of the contradictions in the complainant’s response to two separate information requests under section 50 of the Act from Mr Thompson and Mr McGregor.

In the Thompson’s case, the complainant had informed the first requester that it did not hold the information, whereas in a subsequent request for the same information (McGregor Case) the complainant had confirmed to the second requester that it held the information - which it had previously denied to the first requester.

23. Having considered the above, the Commissioner is satisfied that the public authority was investigating an alleged breach of the Act.

Purpose of the investigation

24. After carefully reviewing the requested information within the background context of the facts in paragraph 22 (above), and the issues considered in paragraphs 18 to 20, the Commissioner is satisfied that the requested information was held for the purposes of the investigation into the alleged criminal breach of the Act by the complainant.
25. Consequently it is the Commissioner's view that the public authority has correctly applied the exemption in section 30(1) (a) to the part of the requested information contained in the Thompson complaint.
26. With regard to the requested information contained in the McGregor complaint, the Chief Operating Officer has also stated that *"...similar reasons for non-disclosure apply. In this case, section 30(1)(b) applies. The McGregor case contains information that, when read in conjunction with the Thompson case may lead to a decision to institute criminal proceedings"*
27. Under sub-section 30(1)(b), it is not necessary that the authority possesses the legal duty to conduct its investigation. The investigation does not also need to be focussed solely on the issue of whether or not to charge or prosecute. In addition, under this sub-section it is sufficient if the investigation is one which the authority has the power to conduct. Finally, it is not necessary that the only or dominant purpose of the investigation should be prospective criminal proceedings.
28. After carefully reviewing: the requested information within the background context of the facts in paragraph 22 (above); and the issues considered in paragraphs 18 to 24 (above), the Commissioner is satisfied that section 31(1)(b) is also equally applicable to the requested information (i.e. both the Thompson and McGregor cases).
29. Consequently it is the Commissioner's view that the ICO has correctly applied the exemption in section 30(1) (a) and (b) to the requested information.

The public interest test

30. Section 30 provides a qualified exemption. This means that even though information is exempt a public authority is still required to decide whether the public interest in maintaining the exemption outweighs the public interest in disclosure.
31. The Commissioner acknowledges the ICO's argument that disclosing the requested information would not be in the public interest because *"...if [it] were required to [be released], into the public domain as a result of an FOI request, details of cases where no decision has been taken to charge a person with an offence. It might be that no charge would be brought, it might alert someone to an*

investigation prematurely and it would seriously adversely affect the ICO's ability to apply the relevant legislation".

32. However, the Commissioner is mindful of the strong public interest in promoting openness and transparency in the discharge of his statutory functions. For example, disclosure of the requested information may enable the public to understand why an investigation reached a particular conclusion, or in seeing that the investigation had been properly carried out. In addition, the Commissioner acknowledges that disclosure would promote openness and accountability in the spending of public money.
33. Other factors in favour of disclosure that he has considered are: promoting the understanding and participation in the public debate of current issues affecting the public; and furthering increased awareness of freedom of information issues.
34. The Commissioner has considered the competing public interest arguments in favour of maintaining the exemption and in favour of disclosure. He is satisfied that the balance of the public interest is weighed in favour of maintaining the exemption by withholding the information.
35. In the particular circumstances of this case, the primary factors in the Commissioner's decision on where the public interest lies are: the issues of the timing of the complainant's request; the potential impact of disclosure on the success of the ICO's investigation; and the prejudicial effect that disclosure will have on the ability of the Commissioner to effectively perform his regulatory functions.
36. As stated in paragraph 22, the complainant made its request at a time when active investigation into the alleged criminal breach of the Act had commenced. Therefore the process of establishing if a breach had occurred had not been finalised nor had a decision to be taken to prosecute an alleged offender. It is the Commissioner's view that disclosure of the information would have been premature, and would probably have the following effects:
 - detrimental impact on the successful investigation of the alleged criminal breach.
 - diminished the chances of a successful prosecution, bringing a future charge(s), or making arrests in the event that it was decided to prosecute the alleged offender.
37. As the independent regulator for public access to official information, it is important for public confidence in the activities of public institutions that allegations of criminal breaches of the Act are thoroughly investigated by the Commissioner. The Commissioner is therefore satisfied that it is in the greater public interest that his ability to discharge his functions under the Act should be effective and unimpeded. The Commissioner further believes that his powers of investigation and sanction would deter public authorities from non-compliance with the requirements of the Act. This deterrent factor, and the knowledge that the Commissioner would vigorously enforce the Act, is important to the ultimate

promotion of a culture of openness and transparency in the manner that public authorities conduct their affairs.

Section 44

38. Section 44 of the Act provides that information is exempt if its disclosure by the public authority holding it is prohibited by or under any enactment. Under section 59 of the Data Protection Act 1998 as amended by Schedule 2 Part II (18) and (19) of the Act, the Commissioner is (subject to certain conditions) prohibited from disclosing any information that has been obtained for the purposes of the Act.
39. The Commissioner considers that the exemption in section 44 of the Act may also be engaged in respect of the requested information because it is information held by the ICO for the purposes of its own section 50 investigations into the Thompson and McGregor cases. However as he is satisfied that section 30 of the Act is applicable to the requested information, there is therefore no need to fully consider this exemption.

The Decision

40. The Commissioner's decision is that the ICO has dealt with the request for information in accordance with the Act:

Steps Required

41. The Commissioner requires no steps to be taken.

Failure to comply

42. Failure to comply with the step 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

43. 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 13th day of February 2007

Signed

**Richard Thomas
Commissioner**

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

Legal Annex

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 30(1) provides that –

“Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-

(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained-

- (i) whether a person should be charged with an offence, or
- (ii) whether a person charged with an offence is guilty of it,

(b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or

Section 44(1) provides that –

“Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-

- (a) is prohibited by or under any enactment,
- (b) is incompatible with any Community obligation, or
- (c) would constitute or be punishable as a contempt of court.”

47. - (1) It shall be the duty of the Commissioner to promote the following of good practice by public authorities and, in particular, so to perform his functions under this Act as to promote the observance by public authorities of-

- (a) the requirements of this Act, and
- (b) the provisions of the codes of practice under sections 45 and 46.

(2) The Commissioner shall arrange for the dissemination in such form and manner as he considers appropriate of such information as it may appear to him expedient to give to the public-

- (a) about the operation of this Act,
- (b) about good practice, and
- (c) about other matters within the scope of his functions under this Act, and may give advice to any person as to any of those matters.

(3) The Commissioner may, with the consent of any public authority, assess whether that authority is following good practice.

(4) The Commissioner may charge such sums as he may with the consent of the Secretary of State determine for any services provided by the Commissioner under this section.

(5) The Commissioner shall from time to time as he considers appropriate-

(a) consult the Keeper of Public Records about the promotion by the Commissioner of the observance by public authorities of the provisions of the code of practice under section 46 in relation to records which are public records for the purposes of the Public Records Act 1958, and

(b) consult the Deputy Keeper of the Records of Northern Ireland about the promotion by the Commissioner of the observance by public authorities of those provisions in relation to records which are public records for the purposes of the Public Records Act (Northern Ireland) 1923.

(6) In this section "good practice", in relation to a public authority, means such practice in the discharge of its functions under this Act as appears to the Commissioner to be desirable, and includes (but is not limited to) compliance with the requirements of this Act and the provisions of the codes of practice under sections 45 and 46.

50 of the Act provides. - (1) Any person (in this section referred to as "the complainant") may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I.

(2) On receiving an application under this section, the Commissioner shall make a decision unless it appears to him-

(a) that the complainant has not exhausted any complaints procedure which is provided by the public authority in conformity with the code of practice under section 45,

(b) that there has been undue delay in making the application,

(c) that the application is frivolous or vexatious, or

(d) that the application has been withdrawn or abandoned.

(3) Where the Commissioner has received an application under this section, he shall either-

(a) notify the complainant that he has not made any decision under this section as a result of the application and of his grounds for not doing so, or

(b) serve notice of his decision (in this Act referred to as a "decision notice") on the complainant and the public authority.

- (4) Where the Commissioner decides that a public authority-
- (a) has failed to communicate information, or to provide confirmation or denial, in a case where it is required to do so by section 1(1), or
 - (b) has failed to comply with any of the requirements of sections 11 and 17, the decision notice must specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken.
- (5) A decision notice must contain particulars of the right of appeal conferred by section 57.
- (6) Where a decision notice requires steps to be taken by the public authority within a specified period, the time specified in the notice must not expire before the end of the period within which an appeal can be brought against the notice and, if such an appeal is brought, no step which is affected by the appeal need be taken pending the determination or withdrawal of the appeal.
- (7) This section has effect subject to section 53.

77 of the Act provides. - (1) Where-

- (a) a request for information has been made to a public authority, and
 - (b) under section 1 of this Act or section 7 of the Data Protection Act 1998, the applicant would have been entitled (subject to payment of any fee) to communication of any information in accordance with that section, any person to whom this subsection applies is guilty of an offence if he alters, defaces, blocks, erases, destroys or conceals any record held by the public authority, with the intention of preventing the disclosure by that authority of all, or any part, of the information to the communication of which the applicant would have been entitled.
- (2) Subsection (1) applies to the public authority and to any person who is employed by, is an officer of, or is subject to the direction of, the public authority.
- (3) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 5 on the standard scale.
- (4) No proceedings for an offence under this section shall be instituted-
- (a) in England or Wales, except by the Commissioner or by or with the consent of the Director of Public Prosecutions;
 - (b) in Northern Ireland, except by the Commissioner or by or with the consent of the Director of Public Prosecutions for Northern Ireland.

Section 59 of the Data Protection Act 1998. provides that: (1) No person who is or has been the Commissioner, a member of the Commissioner's staff or an agent of the Commissioner shall disclose any information which-

- (a) has been obtained by, or furnished to, the Commissioner under or for the purposes of the information Acts,
- (b) relates to an identified or identifiable individual or business, and
- (c) is not at the time of the disclosure, and has not previously been, available to the public from other sources,

unless the disclosure is made with lawful authority.

(2) For the purposes of subsection (1) a disclosure of information is made with lawful authority only if, and to the extent that-

(a) the disclosure is made with the consent of the individual or of the person for the time being carrying on the business,

(b) the information was provided for the purpose of its being made available to the public (in whatever manner) under any provision of the information Acts,

(c) the disclosure is made for the purposes of, and is necessary for, the discharge of-

(i) any functions under the information Acts, or

(ii) any Community obligation,

(d) the disclosure is made for the purposes of any proceedings, whether criminal or civil and whether arising under, or by virtue of, the information Acts or otherwise, or

(e) having regard to the rights and freedoms or legitimate interests of any person, the disclosure is necessary in the public interest.

(3) Any person who knowingly or recklessly discloses information in contravention of subsection (1) is guilty of an offence.