

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 22 January 2007

Public Authority: The Medicines and Healthcare Products Regulatory Agency
(an executive agency of the Department of Health)

Address: Market Towers
1 Nine Elms Lane
London
SW8 5NQ

Summary

A request for information was made on 20 January 2005 and the public authority responded on 16 March 2005. The public authority's response provided some information, redacted some information under section 40 of the Act, and withheld some information under section 42. The complainant disputed the application of the section 42 exemption and did not accept that all the information held by the public authority had been provided. The Commissioner accepted that the public authority had provided all the information it held, except for that which it withheld under the exemptions. The Commissioner's decision is to uphold the section 42 exemption. He finds that the public authority breached section 10 of the Act in that its response was outside the twenty day time limit.

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 Commissioner notes that under the Act the MHRA is not a public authority itself, but is actually an executive agency of the Department of Health. The public authority in this case therefore is actually the Department of Health not MHRA. However, for sake of clarity, this decision notice refers to MHRA as if it were the public authority.

The Request

2. The substance of a request was made on 20 January 2005 was as follows:

Request number 1 - "all information relating to contact between Sir Graham Hart and MCA between 25 September 2001 and 1 March 2002....based upon any correspondence from [name redacted]....."

and

Request number 2 - "in full any advice, comment or written review pertaining to the formal report dated 7 June 2001 received from any Government, Department of Health or MCA legal advisor"

3. A full transcription of the detailed wording of the requests can be found at Annex 1 to this Notice.
4. The initials MCA refer to the Medicines Control Agency, which was the previous name of the Medicines and Healthcare Products Regulatory Agency.
5. The public authority responded on 16 March 2005.
6. For request number 1 it provided ten documents, redacting information from two of these citing the section 40 exemption for personal data. It also withheld further documents citing the section 42 exemption for legal professional privilege.
7. For request number 2 it did not provide any information but withheld information citing the section 42 exemption for legal professional privilege.
8. The complainant requested a review of the public authority's decision for request 2 on 8 April 2005, and requested a review of its decision for request 1 on 11 April 2005.
9. The public authority conducted an internal review of both requests and on 6 May 2005 advised the complainant that it upheld both its previous decisions.

The Investigation

Scope of the case

10. On 20 June 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant did not contest the redactions made under section 40 of the Act for personal data and so the Commissioner did not consider this exemption. The complainant specifically asked the Commissioner to consider his view that further documents relevant to

the request had been withheld and to review the application of the section 42 exemption.

11. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

Chronology

12. The Commissioner contacted the complainant on 19 August 2006 to confirm the nature of his complaint. The complainant responded on 4 September 2006.
13. The Commissioner contacted the public authority on 8 September 2006. He asked the public authority to provide copies of all withheld information and to provide arguments in support of its application of the exemptions. He also asked it to provide further explanation of why it believed certain documents identified by the complainant were not held. The public authority responded on 25 October 2006 and this response is considered in the analysis section of this notice.

Findings of Fact

14. The public authority's response to the complainant's request was provided outside the 20 working day time limit specified at section 10 of the Act.

Analysis

Procedural matters

15. The public authority continues to maintain that certain documents identified by the complainant are not held. Both in the result of its internal review and in its response to the Information Commissioner, it accepts that there is some evidence to suggest that it may have held these documents in the past, but states that it cannot conclude this for certain. In any case it is adamant that it checked all its relevant records and the documents were not held at the date of the Freedom of Information request and are not held now.
16. The Commissioner has considered the public authority's explanation. He considers that for one document, an internal note entitled "Comments on [name redacted's] letter dated 31/10/01" the complainant has provided strong evidence that it was held by the public authority in the past and that it related to the request. The evidence that it was held in the past is that it had been provided by the public authority in response to a separate subject access request made in 2003. The evidence that it related to the request is that the letter referred to was sent to Sir Graham Hart in relation to the matter in question and that the source of the comments was the public authority. However he considers that evidence that this document was held in the past is not the same as evidence that it was held at the date of the Freedom of Information request.

17. The Commissioner considers that the complainant has reasonable grounds for believing that other documents may have been held by the public authority at some time. These grounds are that other documents that have been released imply this when they make reference to previous contact or ask questions that would seem to require an answer. The public authority has accepted that the existence of further documents is implied but has said that this cannot be concluded for certain. The Commissioner accepts that no definite conclusions can be made, but he considers that it is more likely than not that some further documents were held by the public authority at some time in the past. He concludes though, that even if documents were held in the past this does not necessarily mean that they were held at the date of the Freedom of Information request.
18. In its internal review and in response to questions asked by the Commissioner the public authority provided a summary of the search it had undertaken and an explanation of its records management in relation to this matter. It stated that it held an un-indexed and un-numbered file specifically about this matter that had been created by a staff member for their own use, and that each document in this file had been checked. It stated that it also held registered and indexed files for related matters and that every document in these files had also been checked. It identified that one of the difficulties in concluding for certain whether the information identified by the complaint had ever been held, and of identifying if items were missing, was the lack of an indexing system for the un-numbered file. The public authority undertook to properly index all future correspondence in relation to this matter. The Commissioner considers that whilst the public authority has itself identified shortcomings in its record keeping for this matter, there is no evidence to suggest that it has deliberately concealed any information or that it has failed to conduct a thorough search. He therefore accepts that at the date of the Freedom of Information request the public authority did not hold the documents that the complainant identified in his request for an internal review.

Exemption

19. The Commissioner has reviewed the information withheld by the public authority under the exemption for legal professional privilege and concludes that the exemption has been correctly applied.
20. The Commissioner considers the withheld information to be communications between a client and their legal advisor for the dominant purpose of obtaining legal advice. The section 42 exemption is therefore engaged.
21. The Commissioner has not found any evidence to support the complainant's view that privilege in respect of these items should cease to exist because the withheld information conceals fraud, crime or the innocence of an individual.
22. The exemption given at section 42 is a qualified exemption. This means that even where the exemption is engaged, information is only exempt from release if the public interest in maintaining the exemption outweighs the public interest in disclosing the requested information.

23. The Commissioner considers that the public interest factors in favour of maintaining the exemption for legal professional privilege have been well established in previous cases considered by the Information Commissioner and by the Information Tribunal. He considers that these factors apply in this case can be briefly summarised as follows:
- the inherent public interest in protecting the established principle of confidentiality between a client and their legal advisor so that clients are encouraged to seek legal advice;
 - the public interest in the proper administration of justice which is best served by free and frank exchanges between lawyers and clients so that advice can be given based on full rather than partial knowledge of circumstances; and
 - the improved quality of decision making that results from being able to seek legal advice without fear of future disclosure.
24. The Commissioner considers that the public interest in favour of disclosing the withheld information is the inherent public interest that public authorities are transparent in the decisions they take in order to promote accountability. If reasons for decisions are made public there is an argument that this should improve the quality of future decisions.
25. The Commissioner considers that, with reference to the Information Tribunal decision in the case *Bellamy v Information Commissioner (2006)*, there is a strong element of public interest inbuilt into legal professional privilege and that in order to outweigh this equally strong counter arguments would need to be presented.
26. The Commissioner considers that in all the circumstances of this case equally strong counter arguments have not been presented, and therefore the public interest in maintaining the exemption, outweighs the public interest in releasing the information.

The Decision

27. The Commissioner's decision is that the public authority complied with section 1 (1) of the Act in that it confirmed to the complainant what information it held and, where that information was not considered exempt, communicated it to him.
28. The public authority also complied with section 1 (1) of the Act in that it correctly applied the exemption provided at section 42 of the Act.
29. The Commissioner's decision is that the public authority did not comply with section 10 of the Act as it did not reply within the twenty working day time limit.

Steps Required

30. The Commissioner requires no steps to be taken.

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@tribunals.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 22nd day of January 2006

Signed

**Richard Thomas
Information Commissioner**

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

Annex 1

The full wording of the request was as follows :

“ Request number 1

Can I please receive all information relating to contact between Sir Graham Hart and MCA (and any of its officers/employees) between 25 September 2001 and 1 March 2002? I specifically refer to any internal MCA file notes in relation to such contact, any correspondence between Sir Graham Hart and MCA (and any of its officer/employees), any internal minutes, any internal file notes of conversation and, in particular, any comments provided to Sir Graham Hart by MCA (and any of its officers/employees) based upon any correspondence from NAME REDACTED. I also require relevant dates and identities of MCA officers engaged in any such contact with Sir Graham Hart. If any confidential names or other sensitive data is included please redact them from the substantive items sent. I don't include any Public Employees acting in regard to their paid duties in this last statement.

Request number 2

I have attached a formal MCA report dated 7 June 2001, a draft report of same marked “Agreed by Rachel 6/6” and an email from Mr John Taylor to NAME REDACTED dated 31 May 2001. For purposes of this request I make the assumption that “Rachel” was a legal advisor purely from the comments contained in Mr Taylor's email.

Can I request in full any advice comment or written review pertaining to the formal report dated 7 June 2001 received from any Government, Department of Health or MCA legal advisor before the formal report dated 7 June 2001 was received by NAME REDACTED later in June 2001? Can I also receive a full copy or summary of the grounds upon which the draft report was “Agreed by Rachel” on 6 June 2001? If any confidential names or other sensitive data is included please redact them from the substantive items sent. I don't include any Public Employees acting in regard to their paid duties in this last statement.”

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.”

Time for Compliance

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Legal Professional Privilege

Section 42(1) provides that –

“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.”