

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 11 September 2008

Public Authority: The Child Support Agency (an executive agency of the Department for Work and Pensions)

Address: 1 – 11 John Adam Street
London
WC2N 6HT

Summary

The complainant requested the name and address of the solicitor who had provided advice to the Child Support Agency (the CSA) in relation to an application for a special payment referral. The CSA provided the name of the corporate section in which the solicitor worked and its address, but refused to disclose the actual name of the solicitor citing the exemptions at sections 36(2)(c) and 38 of the Act. During the Commissioner's investigation the public authority also cited the exemption at section 40(2) of the Act. The Commissioner finds that the information is the personal data of the solicitor, the disclosure of which would breach the first data protection principle. Accordingly, the Commissioner finds that the public authority applied the Act appropriately in citing the section 40(2) exemption. However, the Commissioner decided that the authority initially breached sections 10 and 17 of the Act.

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 Commissioner notes that the Child Support Agency (the CSA) is not a public authority for the purposes of the Act, but is actually an executive agency of the Department for Work and Pensions. Whilst the CSA responded to the initial request for information and the Department for Work and Pensions conducted the internal review in this case, the public authority for the purposes of the Act is the

Department for Work and Pensions and not the CSA. All references to the 'public authority' in this Notice are therefore to the Department for Work and Pensions.

3. The complainant has advised that on 20 October 2006 he wrote to the CSA raising a number of issues in relation to his request for a special payment referral. Amongst other issues, the complainant requested the name and work address of the solicitor who had provided advice to the CSA regarding his case. The complainant refers to two telephone conversations of 10 October 2006 and 11 October 2006 in which he had made verbal requests for this information.
4. The CSA wrote to the complainant on 3 and 8 November 2006, responding to points raised in his 20 October letter but not providing a substantive response to his request for information. Both letters acknowledge receipt of the request and state that it is being considered.
5. On 1 December 2006 the complainant telephoned the CSA repeating his request for the name and address of the solicitor. It appears that the CSA provided the address of the solicitor verbally during this telephone call. However, he was not given the name of the solicitor.
6. On 4 December 2006 the CSA wrote to the complainant providing the address of the solicitor and citing 'Sol A4' as the name of the corporate legal section responsible for the advice. The CSA does not appear to have considered this response to constitute a refusal notice, because information was provided. Nevertheless, the letter contains no mention of the name of the individual solicitor.
7. The complainant wrote to the Chief Executive of the CSA on 17 December 2006 raising a number of additional issues. In terms of his information request, he repeated his request for the name of the solicitor and made a subsequent request for the direct telephone number of the solicitor.
8. On 10 January 2007 the CSA wrote again to the complainant, informing him that "Legal advice is not supplied on an individual basis but by the DWP Solicitor's Office, Sol A4." The letter provided details of the CSA's internal complaints procedure and the complainant's rights under section 50 of the Act. It also addressed other issues outside the scope of the Act.
9. On 14 January 2007 the complainant wrote to the CSA requesting an internal review in relation to his information request. In a letter to the CSA dated 20 January 2007 he made further reference to his request for information and on 17 February 2007 repeated his request for an internal review.
10. The CSA wrote to the complainant on 2 March 2007 giving him the name of the individual who would conduct the review and informing him that he could expect a reply by 23 March 2007. The complainant was sent a further holding letter on 29 March 2007.
11. On 4 April 2007, the public authority wrote to the complainant, providing the outcome of the internal review. The review acknowledged that the initial

response to the complainant's request was not strictly in accordance with the Act, but upheld the decision not to disclose the name of the solicitor. The review concluded that it was arguable that the request had been complied with in full, on the grounds that "... the individual solicitor concerned is not working in an individual capacity but is working as an employee and was acting in the course of employment as required and directed by line managers." However, the review went on to cite the exemptions at sections 36(2)(c) and 38 of the Act.

The Investigation

Scope of the case

12. On 2 April 2007 the complainant contacted the Commissioner to complain that the information he had requested in October 2006 had only been provided in part and at that stage the internal review he had requested on 14 January 2007 had still not been completed. The complainant stated the delay was unacceptable and explained that he had not been given any reason for the delay.

Chronology of the case

13. On 2 May 2007 the Commissioner asked the public authority for a copy of the letter sent to the complainant on 4 April 2007 detailing the outcome of its internal review. The public authority replied on 14 May 2007, attaching a copy of the requested letter.
14. Following an initial review of the case, the Commissioner reached a preliminary view that the information requested was likely to constitute 'personal data' and be exempt from disclosure by virtue of section 40(2) of the Act. On 18 March 2008 the Commissioner wrote to the complainant informing him that, in the light of these preliminary findings, it was unlikely that he would receive the information he was requesting. No response was received to this letter and so on 22 April 2008 the Commissioner wrote again to the complainant, informing him that since the Commissioner had received no response to his 18 March letter, the case would be closed.
15. The complainant contacted the Commissioner on 9 June 2008 seeking an update on progress in his case. He stated that he had not received either of the above letters. The Commissioner therefore agreed to re-open the complaint.
16. On 19 June 2008 the Commissioner contacted the public authority seeking further information in respect of the use of sections 36(2)(c) and 38. In relation to section 36(2)(c) the Commissioner sought confirmation of the 'qualified person' and the date the opinion was given. The public authority was also asked to provide information regarding the structure of the Legal Department in which the solicitor is based and for complete copies of correspondence between the CSA and the complainant. In addition, the Commissioner noted that the public authority had not relied on the exemption at section 40 of the Act and asked for any comments on that decision.

17. The public authority responded to this request on 3 July 2008 by providing the Commissioner with further information regarding the application of the exemptions at sections 36(2)(c) and 38, and providing the name of the qualified person and the date he had made the decision that section 36(2)(c) was engaged. The public authority confirmed that although it had not originally considered the section 40 exemption, "... with the passage of time and taking into account the Commissioner's views described in guidance and various Decision Notices, we are now inclined to do so in such requests." A copy of the Legal Group Organisation Chart was also provided.
18. The Commissioner wrote to the public authority again on 11 July 2008 requesting full copies of letters only partially in his possession, copies of other letters referred to in the material previously sent, the name of the individual solicitor and details of the solicitor's role within the structure of the relevant legal team/department.
19. The public authority responded on 31 July 2008 attaching all of the information requested with the exception of a letter dated 8 November 2006 which it could not trace and what appeared to be a different letter dated 10 January 2007 to the one previously referred to in this case. The information sent confirmed the name and role of the solicitor within the legal department.
20. On 4 August 2008, the Commissioner contacted the public authority for a copy of the correct letter dated 10 January 2007 which was received on 15 August 2007.

Findings of fact

21. The Commissioner recognises that there is a considerable volume of correspondence between the CSA and the complainant on a variety of issues, the majority of which are beyond the remit of the Commissioner. However, the Commissioner's investigation is restricted to the public authority's response to the complainant's request for information.
22. The Commissioner notes that the public authority has a policy of not disclosing the names of government lawyers who are below the level of the Senior Civil Service. The solicitor in question was employed at a level below that of the Senior Civil Service at the time of the request for information.

Analysis

Procedural matters

Section 10(1)

23. Section 10(1) of the Act states that any 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. All sections of the Act referred to in this Notice are reproduced in full in the attached Legal Annex.

24. The public authority did not disclose the address of the solicitor in writing until 4 December 2006 which was in excess of the specified time for compliance under section 10(1) of the Act.
25. The public authority did not confirm that it held the name of the solicitor, in accordance with section 1(1)(a) of the Act, until the internal review stage. This was outside the time for compliance under section 10(1) of the Act.

Section 17

26. Any public authority wishing to refuse a request for information must do so in compliance with the requirements of section 17 of the Act. Section 17(1) of the Act requires a public authority, in refusing a request, to give an applicant a notice that states the fact, specifies the exemption in question and (if necessary) explain why the exemption applies. This notice must be issued within the time for complying with section 1(1).
27. The public authority does not appear to have issued a formal refusal notice at any time in relation to this request for information, although the request is referred to in a number of pieces of correspondence. It was not until the internal review was completed, however, that the public authority made any reference to the exemptions within the Act that it considered to be engaged in this case. The Commissioner considers this to constitute a breach of section 17(1).
28. Section 17(7)(a) states that a public authority must provide to the applicant particulars of any procedure provided by the authority for dealing with complaints about the handling of requests for information (or state that the authority does not provide such a procedure). Section 17(7)(b) states that a public authority must provide the applicant with details of his rights under section 50 of the Act. The letter from the public authority dated 4 December 2006 does not contain details of either. These details were however subsequently provided in its letter of 10 January 2007, before the completion of the internal review process.
29. The Commissioner therefore considers that the authority breached section 10(1), section 17(1) and section 17(7)(a) of the Act in its response to the complainant's request for information.

Exemptions

Section 40(2)

30. Section 40(2) provides an exemption for information which is the personal data of any third party, where disclosure would breach any of the data protection principles as set out in Schedule 1 of the Data Protection Act 1998 (the DPA).

Is the information 'personal data'?

31. In order to rely on the exemption provided by section 40(2), the requested information must constitute personal data as set out in section 1(1) of the DPA. This states:

“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”

32. The complainant has requested the name of the individual solicitor who provided advice in relation to his application for a special payment referral. In this case, the Commissioner is satisfied that a living individual can be identified by the information requested.
33. Furthermore, the Commissioner believes that the information relates directly to the individual solicitor. Any disclosure would identify the individual who provided advice in relation to the complainant's application for a special payments referral. The Commissioner therefore believes that this information constitutes the personal data as defined above.

Would disclosure breach any of the data protection principles?

34. Having concluded that the information does fall within the definition of 'personal data', the Commissioner has also considered whether disclosure of the information breaches any of the eight data protection principles as set out in schedule 1 of the DPA.
35. The first data protection principle requires that the processing of personal data should be fair and lawful and that personal data should not be processed unless at least one of the conditions in Schedule 2 of the DPA is met.
36. The term 'processing' has a wide definition and includes disclosure of information to a third party. Therefore, for personal data to be disclosed in accordance with the first principle, the authority must satisfy three tests; that the disclosure is fair, that it is lawful, and that at least one of the conditions in Schedule 2 is met.
37. In considering whether the disclosure of the requested information would be fair, the Commissioner has considered the legitimate expectations of the data subject. In order to establish these expectations the Commissioner has paid particular attention to the solicitor's status within the legal department in which he/she was employed, the nature of the role performed by the solicitor and the solicitor's own

views when informed that the CSA was considering disclosure under the provisions of the Act.

38. The Commissioner accepts that the solicitor was in a relatively junior role within the authority at the time of the request. In particular, he notes that the data subject was at a level below that of the Senior Civil Service, and the public authority's policy was not to disclose the names of individual government lawyers below that grade.
39. Whilst the public authority's policy is not of itself sufficient to make disclosure unfair, the Commissioner has taken also into account the role of the solicitor in the public authority. He understands that this is to provide legal advice to the authority itself rather than to any individual. It is not in any way a public-facing role and does not involve interaction with members of the public or include responsibility for making policy decisions.
40. Finally, the Commissioner notes that the public authority sought the views of the solicitor in question following the receipt of the request. The solicitor objected to any such disclosure.
41. The Commissioner accepts that employees of public authorities should be open to scrutiny and accountability because their jobs are funded by the public purse. However, the Commissioner also believes that not all staff should be subject to the same level of scrutiny and that there should be a distinction between what information should be released about senior executives responsible for making policy decisions and the appropriate level of disclosure in relation to more junior employees. In this instance the Commissioner believes that disclosure of the solicitor's name would not be fair.
42. Finally, the Commissioner has considered whether any of the conditions in Schedule 2 of the DPA would be met. Condition 6(1) of Schedule 2 provides a condition for processing personal data where:

"The processing is necessary for the purposes of the legitimate interests pursued by the data controller or by a third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject."
43. In order to process personal data in accordance with condition 6(1), therefore, there must be a legitimate interest in disclosure, the disclosure must be necessary for that legitimate interest and the disclosure must not cause unwarranted interference to the rights and freedoms of the data subject.
44. In this case, the Commissioner has been unable to identify any legitimate interest in disclosure of the name of the solicitor. He notes that any legitimate interest (for example in enabling an individual to make a complaint or conduct correspondence) has been fulfilled by providing the name of the department and its address.

45. Accordingly, the Commissioner believes that disclosure of this information would contravene the first data protection principle, and therefore the public authority applied the exemption at section 40(2) of the Act appropriately.

Section 36(2)(c) and section 38

46. As a result of its internal review, the public authority sought to rely on the exemptions at section 36(2)(c) and section 38 of the Act. However, as the Commissioner has decided that the exemption at section 40(2) of the Act is engaged he has not considered these exemptions.

The Decision

47. The Commissioner's decision is that the public authority has dealt with the complainant's request for information in accordance with Part 1 of the Act in that it has applied the Act appropriately in withholding the name of the individual solicitor by virtue of the exemption at section 40(2) of the Act.
48. The Commissioner further finds that the public authority breached section 10(1) of the Act in that it did not disclose the address of the solicitor, or confirm whether it held the name of the solicitor in question, within the time for compliance. In failing to provide an adequate refusal notice within the time for compliance, the Commissioner further finds that the Authority breached section 17(1) and section 17(7)(a) of the Act.

Steps Required

49. As the Commissioner's decision is that the public authority has responded to the complainant's request in accordance with the Act, no remedial steps are required.

Other matters

50. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
51. On the 14 January 2007, the complainant requested an internal review of the CSA's decision to withhold the information he had requested. The CSA provided a response to this request on the 4 April 2007, over 40 working days later.
52. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information. As he has made clear in his 'Good Practice Guidance No 5', published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a

reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. Whilst he recognises that in this case, the delay occurred before the publication of his guidance on the matter, the Commissioner remains concerned that it took over 40 working days for an internal review to be completed.

Right of Appeal

53. 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.
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 served.

Dated the 11th day of September 2008

Signed

**Gerrard Tracey
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.”

Section 1(2) provides that -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

Section 1(3) provides that –

“Where a public authority –

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.”

Section 1(4) provides that –

“The information –

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.”

Section 1(5) provides that –

“A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).”

Section 1(6) provides that –

“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.”

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.”

Section 10(2) provides that –

“Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.”

Section 10(3) provides that –

“If, and to the extent that –

- (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
- (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.”

Section 10(4) provides that –

“The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.”

Section 10(5) provides that –

“Regulations under subsection (4) may –

- (a) prescribe different days in relation to different cases, and
- (b) confer a discretion on the Commissioner.”

Section 10(6) provides that –

“In this section –

“the date of receipt” means –

- (a) the day on which the public authority receives the request for information, or
- (b) if later, the day on which it receives the information referred to in section 1(3);

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.”

Refusal of Request

Section 17(1) provides that -

“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.”

Section 17(2) states –

“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.”

Section 17(3) provides that -

“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.”

Section 17(4) provides that -

“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.

Section 17(5) provides that –

“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.”

Section 17(6) provides that –

“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.”

Section 17(7) provides that –

“A notice under section (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(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.”

Section 40(2) provides that –

“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.”

Section 40(3) provides that –

“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 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 Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

Section 40(4) provides that –

“The second condition is that by virtue of any provision of Part IV of the 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).”

Section 40(5) provides that –

“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) he 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 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 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).”

Section 40(6) provides that –

“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 Data Protection Act 1998 shall be disregarded.”

Section 40(7) provides that –

In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the 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.