

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 25 November 2009

Public Authority: National Offender Management Service
Address: The Ministry of Justice
Data Access & Compliance Unit
102 Petty France
London
SW1H 9AX

Summary

The complainant made a request to the National Offender Management Service (NOMS) for any briefings from HM Prison Service to the Prisons Minister concerning the Tasker investigation, dated 2006 and 2007. The public authority stated that it had conducted extensive searches and was unable to confirm the existence of any specific briefings submitted to the Prisons Minister. The Commissioner considered the searches undertaken by the public authority and suggested possible additional areas for enquiry. As a result of this, the public authority has confirmed that it holds information which is relevant to the complainant's request for information but due to the extensive nature of the material, estimates that the costs for disclosure exceed the statutory limit. The Commissioner agrees that the public authority's estimate of its costs for compliance with the request is reasonable and exceeds the limit of £600. He does however, find the public authority in breach of sections 1(1)(a), 10(1), 16, 17(3) and 17(5) 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.

Background

2. During 2006 and 2007 numerous Parliamentary Questions (PQs) were put to the Prisons Minister concerning an investigation by Mr Ron Tasker into activities at Wandsworth Prison. In answer to one of these questions, the

Prisons Minister at the time made reference to her, and her predecessors, having received:

“numerous written background briefings accompanying draft parliamentary questions, but the high number of questions involved means that it would involve significant disproportionate cost to establish the number and length of these briefings”.

3. A substantial majority of these questions, totalling several hundred overall, were put by the same Member of Parliament, with the balance being asked by two other Members of Parliament.

The Request

4. The Commissioner notes that the National Offender Management Service (NOMS) is not a public authority itself, but is part of the Ministry of Justice. Therefore the public authority in this case is actually the Ministry of Justice not NOMS. However, for the sake of clarity, this Decision Notice refers to NOMS as if it were the public authority.

5. On 2 July 2007 the complainant contacted the Ministry of Justice with the following request:

“I would be obliged if you could sent [sic] me any briefings from HM Prison Service to the Prisons Minister concerning the investigation being carried out by Ron Tasker. The briefings will be dated 2006 and 2007.

I would be happy to receive the briefings electronically if that is convenient.”

6. NOMS acknowledged the request on 12 July 2007 and sent a further reply on 30 July, stating that it had “[...] received the information and we are considering your request”. It advised the complainant that a public interest test would be required because the information had to be considered under the exemption contained within section 31(1)(g), by reference to section 31(2)(b) of the Act. Because of the need for a public interest test, the response would be delayed and the public authority aimed to respond by 30 August 2007.
7. On 30 August 2007, NOMS again wrote to the complainant to advise of a further delay in its assessment of the public interest test, and advising the complainant that it now aimed to provide its response by 28 September 2007.
8. On 28 September 2007, NOMS again wrote to the complainant to advise of a further delay in the assessment, and stating that it now aimed to provide its response by 26 October 2007.
9. On 14 October 2007 the complainant wrote to the Commissioner to complain about the public authority’s delays.

10. On 26 October 2007, NOMS again wrote to the complainant to advise of a further delay, and advising the complainant that it now aimed to provide its response by 23 November 2007.
11. On 7 November 2007, the Commissioner wrote to NOMS, reminding it of the Commissioner's guidance on the timescales for conducting a public interest test and advising it to make its response (if it had not already done so) within the next 20 working days.
12. On 23 November 2007, NOMS again wrote to the complainant to advise of a further delay in the assessment of the public interest test, and advising the complainant that it now aimed to provide its response by 28 December 2007.
13. On 20 December 2007, the Commissioner contacted NOMS, advising it that if no adequate response had been provided by 23 January, he intended to issue a Decision Notice concluding that the public authority had failed to comply with the Act and requiring it to give a substantive response to the complainant's request without further delay.
14. On 31 December 2007, NOMS again wrote to the complainant to advise of a further delay, and advising that it now aimed to provide its response by 5 February 2008.
15. On 30 January 2008 NOMS wrote to the complainant, advising that it had been *"unable to confirm the existence of any specific briefings submitted to the Prisons Minister"*. It indicated, however, that its searches had identified some material which it considered relevant, and it had conducted a public interest test in respect of the exemptions provided by sections 31(1)(g) and 31(2)(b) of the Act. It concluded that the exemptions were applicable, but the public interest lay in releasing the information to the complainant.
16. The public authority also indicated that it considered the exemptions provided by sections 36, 40(1) and 40(3) of the Act were also applicable to the material it had voluntarily disclosed to the complainant, but it had elected not to rely on those exemptions.
17. On 14 February 2008 the complainant wrote to NOMS, requesting that it review its response. The complainant argued that the material which had been provided did not meet the description in her request for information and, moreover, consisted partly of her own letters, or letters already sent to her by others. She criticised the relevance of the public authority's searches for the information and suggested a possible alternative location for the requested information, asking that the internal review confirm if searches had been made of this location.
18. On 9 April 2008, the complainant wrote to NOMS to remind it that she had not received a response to her request for internal review.
19. On 10 April 2008, NOMS acknowledged the complainant's letter in an email, advising that its response would be issued shortly.

20. On 2 May 2008 the public authority acknowledged the complainant's request for internal review and stated its aim to complete the review and provide its response by 23 May 2008.
21. On 5 May 2008, the complainant wrote to NOMS, to disagree with the proposed scope of the public authority's review and to indicate that she expected that review to either disclose the requested information, withhold the information or to deny that the information existed.
22. On 20 May 2008, NOMS wrote to the complainant with the outcome of its review, stating that it had conducted further searches, including the location suggested by the complainant, and confirmed that *"we do not hold any briefings, between 2006 and 2007, from HM Prison Service to the Prisons Minister concerning the investigation carried out by Ron Tasker"*. It also explained that its earlier response had included material broader in scope than her original request in an attempt to be helpful.

The Investigation

Scope of the case

23. On 25 May 2008 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider the following points.
 - NOMS claimed that the briefings she had requested were not held by it; however, the Prisons Minister (Maria Eagle MP) had referred to *"numerous written background briefings"* as well as two oral briefings in answer to a Parliamentary Question on 10 January 2008. The complainant provided copies of the relevant Hansard records, as reproduced on the 'TheyWorkForYou.com' website.
 - The complainant commented that she found it *"inconceivable that these briefings do not exist"* and stated her understanding that all briefings, including those accompanying Parliamentary Questions, would be retained. In the case of oral briefings, the complainant stated her belief that these would have been accompanied by notes; she indicated that she did not believe that the public authority had dealt with her request correctly.

Chronology

24. On 27 January 2009 the Commissioner wrote to the public authority, putting the complainant's arguments and requesting clarification of various matters. On 2 March 2009 the Commissioner wrote again to the public authority, requesting a response to his earlier letter and relaying further arguments which had been made to him by the complainant about the possible locations of relevant information.
25. The public authority acknowledged this second letter on 3 March 2009. On 16 March 2009 the Commissioner again contacted the public authority to request its response to his letters. On 18 March 2009, at the request of the public authority, the Commissioner sent fresh copies of his letters of 27 January and 2 March (dated 27 February) to a different, named individual within the public authority.
26. On 9 June 2009 the public authority replied to the Commissioner. NOMS stated that the series of letters indicating that a public interest test was being considered (in respect of the information and the exemption provided by section 31 of the Act) had been sent to the complainant without the writer actually having seen the information referred to (in the letter of 30 July). Following a thorough search, NOMS had discovered that no information was held. The public authority apologised for this lapse and accepted that it had failed to meet its obligations under section 1 of the Act.
27. The public authority also provided a copy of its document retention schedule, which indicates that briefing notes for Parliamentary Questions are kept for two years. In the absence of any recorded briefing, it concluded that the Minister may have received oral briefings.
28. It was also confirmed that the searches for information had been made at the records of the London Area Offender Management Service, the Prisons Minister's Private Office and the Ministerial Correspondence Unit.
29. On 16 June 2009 the Commissioner wrote back to NOMS, requesting it consider certain unresolved matters. Specifically, these were:
 - that further investigation might be advisable to establish whether briefing notes existed for any oral briefings and whether there existed any records of disposal of oral or written briefings;
 - the question of the reference to "*numerous written background briefings*" in the Minister's answer to a Parliamentary Question remained unexplained;
 - further explanation of why the searches had been carried out at the locations listed; and
 - whether the public authority had discounted such briefing notes for oral briefings from its consideration as being outside the scope of the complainant's original request.
30. On 6 July 2009, the Commissioner wrote to NOMS, requesting a response to the matters raised in his letter of 16 June.

31. On 8 July 2009, NOMS responded with additional clarification of the reasons why the searches had included the named locations.
32. On 9 July 2009, the Commissioner wrote to NOMS, indicating that there still remained some unresolved matters, specifically that the public authority's response could not be reconciled with the Hansard record of 10 January 2008 relating to the reply by Maria Eagle MP.
33. On 17 August 2009, the Commissioner wrote to NOMS to remind it that he had not received a response to his letter of 9 July, and referring also to the matters raised in his letters of 16 June and 6 July.
34. On 11 September 2009, the Commissioner telephoned NOMS to request a response. The public authority indicated that it could add nothing further to its previous responses. The Commissioner requested that the person who had given the oral briefings be contacted and asked if he held any information which might be relevant to the complainant's request.
35. On 16 September 2009 the public authority telephoned the Commissioner. The oral briefing had been given by two or three staff members, as the most expedient way to bring the Minister up to speed about the reasons for the large number of Parliamentary Questions on the subject. During the period, there had been approximately 500 questions, the great majority tabled by one MP with approximately 20 by a second MP and a small number by a third MP. The briefings for these questions would have made direct or indirect reference to the Tasker Report.
36. The public authority confirmed the telephone call in an email later on 16 September 2009.

Analysis

The 'Not-held' Response and Section 12

37. The Commissioner finds that the public authority's response to the complainant of 30 January 2008 (that it had been "*unable to confirm the existence of any specific briefings submitted to the Prisons Minister*") and its internal review response of 20 May 2008 (that "*we do not hold any briefings, between 2006 and 2007, from HM Prison Service to the Prisons Minister concerning the investigation carried out by Ron Tasker*") are not supported by the evidence.
38. NOMS has clarified the nature of the information it holds. It has explained that the detailed briefing about the Tasker Report was an oral briefing given by two staff members as this was the most expeditious way to inform the Minister in circumstances where she found herself in receipt of a large number of Parliamentary Questions on the subject. NOMS has indicated that that oral briefing was given by staff familiar with the subject and consequently it has not suggested that any notes were made in preparation for, or support of, that oral

- briefing. The estimated 500 Parliamentary Questions made by one specific Member of Parliament would each have had a short briefing note provided.
39. It is apparent that NOMS elected to consider these briefings as not relevant to the scope of the complainant's request.
40. The public authority has provided the Commissioner with a small sample of these briefing notes. To the extent that they refer to the Tasker Report, the references vary in relevance. On occasion, the Tasker Report is not explicitly mentioned, but the matters it is considering are addressed. Other references may have no relevance to the Tasker Report itself, beyond a comment that the Member asking the question is usually found to be asking questions which relate to the Tasker Report.
41. The public authority has provided the Commissioner with its initial assessment. It has located and printed-off *'approximately 700-800 Parliamentary Questions (PQs) [sic] that would fall within the scope of [the complainant's] request'*. It estimates that the cost of checking all its records for these Parliamentary Questions, to establish whether the briefings for each question contain direct, oblique or distant references to the Tasker Report will considerably exceed the limit of £600. It has estimated that this task alone would comprise approximately three weeks' work for one person, before consideration of any relevant exemptions.
42. The Commissioner agrees that the scrutiny of the records for 700-800 Parliamentary Questions will require a considerable period of time. If the earlier estimate of 500 Parliamentary Questions is considered, 3 weeks would afford approximately 15 minutes per Question file, to assess whether the briefing which may have accompanied it contains any pertinent reference to the Tasker Report named in the complainant's request. Accepting the higher figure of 800 records the time, per record, reduces to nine minutes per Question file.
43. The Commissioner observes that section 12 of the Act (costs for compliance) may be invoked in such circumstances if the public authority reasonably estimates that the cost of complying with the request would exceed the appropriate limit. For central government, that limit has been set at £600, which equates to 24 hours of work. Even assuming a shorter time of five minutes per file would be sufficient, and the smaller number of 500 questions is assessed, the time taken for the task would exceed 41 hours. The Commissioner therefore upholds the public authority's application of section 12.
44. The Commissioner's guidance on the refusal of a request under the provisions of section 12 of the Act¹ suggests that where an authority refuses a request because the appropriate limit has been exceeded, it should, bearing in mind the duty under section 16 of the FOIA to advise and assist an applicant, provide information on how the estimate has been arrived at and provide advice to the applicant as to how the request could be refined or limited to come within the cost limit.

¹ Available online, at

http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/fees_regulations_guidance_v2.pdf

45. The Commissioner considers that in the circumstances of this case it would have been appropriate for the public authority to advise the complainant of how it had calculated the costs and to have assisted her in making a new request, covering a more limited time period, in order to bring the costs under the appropriate limit. As the public authority only relied upon section 12 in the course of the Commissioner's investigation, it did not seek to provide any such advice and assistance to the complainant. The Commissioner therefore finds the public authority in breach of section 16(1) of the Act.

Procedural Requirements

46. By its failure to confirm information was held NOMS breached section 1(1)(a) of the Act.
47. By its failure to confirm information was held within the statutory time limit, NOMS breached section 10(1) of the Act.
48. In taking an unreasonable time period for the conduct of a public interest test, NOMS breached section 17(3) of the Act.
49. By its failure to issue a valid refusal notice stating its reliance on section 12 within the statutory time limit, NOMS breached section 17(5) of the Act.
50. By its failure to provide appropriate advice and assistance, NOMS breached section 16(1) of the Act.

The Decision

51. The Commissioner's decision is that the public authority dealt with the following aspects of the request for information in accordance with the Act.
- It correctly relied upon section 12(1) of the Act.
52. The Commissioner's decision is that the public authority did not deal with the following aspects of the request for information in accordance with the Act.
- By its failure to confirm information was held NOMS breached section 1(1)(a) of the Act.
 - By its failure to confirm information was held within the statutory time limit, NOMS breached section 10(1) of the Act.
 - In taking an unreasonable time period for the conduct of a public interest test, NOMS breached section 17(3) of the Act.
 - By its failure to issue a valid refusal notice stating its reliance on section 12 within the statutory time limit, NOMS breached section 17(5) of the Act.
 - By its failure to provide appropriate advice and assistance, NOMS breached section 16(1) of the Act.

Steps Required

53. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act.
- Confer with the complainant, in accordance with its responsibilities under section 16(1) of the Act, to enable the complainant to submit a revised or refined request for information, to which the public authority may be able to respond within the limits provided by section 12 of the Act.
54. The public authority must take the steps required by this notice within 35 calendar days of the date of this Notice.

Failure to comply

55. 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.

Other matters

56. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.
57. The Commissioner notes the extensive delay in the provision of the public authority's response to the complainant. The letters of 30 August, 28 September, 26 October, 23 November and 31 December 2007 are all similarly worded and appear to the Commissioner to be a standard letter which purports to require additional time in order to conduct a public interest test on the information to be disclosed.
58. The Commissioner was concerned to receive the public authority's admission that these letters had in fact been sent to the complainant without the public authority having seen any information.
59. It seems clear therefore that the public authority had issued five letters, at approximately monthly intervals, which had the effect of giving the public authority significantly more time to prepare its response, beyond the statutory 20 working days provided by section 10(1) or section 17 of the Act.
60. The Commissioner further notes that the public authority's response to the complainant of 30 January 2008 indicates that the information disclosed had been considered under various exemptions, including the section 31 exemption which required the public interest test, but that much of this information

- comprised the complainant's own correspondence and was not, in any event, relevant to the request.
61. On 22 February 2007, the Commissioner issued guidance on the time limits for considering the public interest test². This recommended that public authorities should aim to respond fully to all requests within 20 working days. Although it suggested that it may be reasonable to take longer where the public interest considerations are exceptionally complex, the guidance stated that in no case should the total time exceed 40 working days.
 62. The Commissioner is concerned that it took approximately 140 working days for NOMS to communicate the outcome to the complainant and that, for the greater part of that period, the argument for the requirement for a public interest test was spurious because the public authority had not yet seen the information it was referring to.
 63. The Commissioner is also concerned that the public authority's approach of relying upon an exemption without first extracting and viewing the relevant information meant that the public authority did not rely upon section 12 until some 27 months after receipt of the request. The Commissioner considers the approach taken by NOMS to the complainant's request to have been inappropriate in this respect. If the public authority had sought to view the information before applying the exemption, the need to assess a large volume of material for relevance could have been identified immediately and the complainant could have been advised of the public authority's reliance on section 12 within the statutory time limit for compliance.

2

http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/foi_good_practice_guidance_4.pdf

Right of Appeal

64. 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 25th day of November 2009

Signed

**Lisa Adshead
Senior FOI Policy Manager**

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

Legal Annex

S.1 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.'

S.10 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.'

S.12 Exemption where cost of compliance exceeds appropriate limit

Section 12(1) provides that –

'Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.'

Section 12(2) provides that –

'Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.'

Section 12(3) provides that –

'In subsections (1) and (2) 'the appropriate limit' means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.'

Section 12(4) provides that –

'The secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority –

(a) by one person, or

(b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,

the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.'

Section 12(5) – provides that

'The Secretary of State may by regulations make provision for the purposes of this section as to the costs to be estimated and as to the manner in which they are estimated.'

S.16 Duty to provide Advice and Assistance

Section 16(1) provides that -

'It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it'

Section 16(2) provides that -

'Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.'

S.17 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 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.'