

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 28 January 2010

Public Authority: Ministry of Defence
Address: Main Building
Whitehall
London
SW1A 2HB

Summary

The complainant requested all communications held between MOD and other government departments relating to a previous FOI request he had made held within the MOD 'FOI Case Management System ('CMS'). The complainant also requested details of the internal review relating to that request. The MOD exempted this information under section 36(2)(b) and (c) of the Act as well as section 40(2) of the Act. The Commissioner has found that all of the information requested is the personal data of the complainant and as such is exempt by virtue of section 40(1) of the Act and should have been considered as a request for personal information under section 7 of the Data Protection Act 1998.

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 the 17 February 2006, the complainant made the following request:

"I wish to make a request under FOIA for all communications between MOD and other government departments and agencies relating to the handling of my recent FOIA request, 06-12-2005-111523-015, requesting FOI data contained within the MOD FOI CMS, and the internal review of that request."

3. On the 17 March 2006 the MOD wrote to the complainant and stated that they estimated that it would have a response to his request with him by the 18 April 2006.
4. On the 19 April 2006 the complainant asked about the status of his request having not had reply from the MOD.
5. The MOD replied to the complainant on the 27 April 2006 and gave him a further estimated date of reply of the 17 May 2006.
6. On the 28 April 2006 the complainant requested an internal review.
7. On the 17 May 2006 the MOD further extended the time for consideration of the public interest until 31 May 2006.
8. On the 31 May 2006 the MOD emailed the complainant and again extended the time period for dealing with this request until the 09 June 2006
9. On the 08 June 2006 the MOD issued their refusal notice. MOD refused the request relying on section 36 and section 40. The refusal notice did not cite any subsections to the exemptions that the Mod intended to rely upon.
10. On the 10 June 2006 the complainant requested an internal review. The complainant attached two pages released by the Canadian Department of Justice by way of illustration of the Canadian Access to Information Act.
11. In an undated letter (confirmed to the Commissioner to have been sent by the MOD on the 21 June 2006) the MOD completed their internal review. In that review the MOD assessed their procedural handling of this request as well as confirming their reliance on section 36 and section 40 of the Act.

The Investigation

Scope of the case

12. On the 21 June 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points: his disagreement with the internal review decision; the redaction of information as well as arguments in relation to prejudice to public affairs having not been substantiated. The complainant stated that in his view the claim that he would be able to 'circumvent the enforcement process' [if the information were to be released] would not be established. The Commissioner proceeded to investigate MOD's handling of this case and their application of the exemptions in this case. For the reasons set out at paragraphs 19 to 22 below the Commissioner considers the information requested to be the personal data of the complainant. The Commissioner has therefore found all of the information to be exempt by virtue of the exemption at section 40(1) of the Act. The Commissioner has carried

out a separate Request for Assessment under section 42 of the Data Protection Act 1998 ('DPA') in relation to the requested information outside of this decision notice.

Chronology

13. On the 28 January 2008 the Commissioner contacted the MOD asking them a series of questions regarding the handling of this case. The Commissioner also requested the exempt information in this case.
14. The MOD wrote to the Commissioner on the 20 February 2008 requesting an extension to deal with his enquiry. The MOD wished to extend the deadline to the 12 March 2008. The Commissioner granted the extension but put the MOD on notice that he would begin the process of issuing an information notice if a response was not forthcoming. The MOD asked for a further extension until the 19 March 2008. The MOD responded to the Commissioner in a letter dated the 17 March 2008.
15. Following this letter the Commissioner contacted the MOD discussing the possibility of releasing a schedule of dates to the complainant for communications between the MOD and the Ministry of Justice in relation to the complainant's previous request for information (reference 06-12-2005-111523-015, which was for FOI data contained in the Mod Access to Information Toolkit ('AIT')). After consideration the MOD released these dates to the complainant in correspondence dated 23 April 2008.
16. On the 23 April 2008 the complainant emailed the Commissioner. He stated to the Commissioner that he did not consider the schedule of dates offered to be informal resolution of his case. The Commissioner confirmed with the complainant and the MOD that he would be completing a decision notice in this case.

Findings of fact

17. The complainant requested all communications between the MOD and other government departments and agencies relating to the handling of request '06-12-2005-111523-015 as well as information contained within the internal review of that request. The complainant's previous request (their reference 06-12-2005-111523-015) sought communications between the MOD, other government departments and agencies for FOI data contained within the MOD Access to Information Toolkit (AIT) and the subsequent internal review in that particular request. Some of the communications sought by the complainant involved communications with the Central Clearing House. The Central Clearing House was established by government in 2004. Part of the Ministry of Justice, its primary functions relate to the Freedom of Information Act and the Environmental Information Regulations. The remit of the unit is to provide expert advice on complex, sensitive, or high profile requests for information; This unit ensures consistency across central government in the handling of these types of request;

it works to develop, through litigation, the boundaries of the legislation in accordance with government policy¹

Analysis

Exemptions

Section 40(1) – Personal data of which the applicant is the data subject.

18. Having viewed the withheld information in this case the Commissioner considers that all the information requested is the personal data of the complainant. Information is exempt from disclosure under the Act if it constitutes personal data of which the applicant is the data subject as defined by section 1(1) DPA and further detailed in a legal annex of this decision notice. Section 40(1) of the Act creates an absolute exemption in relation to information of which the applicant is the data subject. The effect of this is to remove all of the individual's personal information entirely from the regime of the Act, leaving them subject instead to the regime of the DPA. Section 7 of the DPA gives individuals the right to request access to personal data held about them by data controllers. This is referred to as the right of subject access.
19. Whilst the MOD did not apply the exemption at section 40(1) of the Act to any of the information the Commissioner considered that it was appropriate for him to consider its application in this case. For section 40(1) to be engaged the information requested must be the personal information of the data subject.

Personal information is defined as any information relating to a living individual. Section 1(1) of the DPA provides that

“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.”

20. The Commissioner considers that all the information identified by the MOD in this case is the personal data of the complainant. The Commissioner accepts, in principle, that information held in relation to a 'meta-request' (an FOI request for information about a previous FOI request) could potentially fall outside the definition of personal data, but he considers that this does not apply in this case. In the Commissioner's view all of the information in this case is sufficiently related to the complainant as to constitute his own personal data.

¹ For further information on the Clearing House please see 'Procedural Guidance: Chapter 11, Clearing House Toolkit <http://www.justice.gov.uk/guidance/docs/foi-clearing-house.pdf>'

21. The Commissioner has carried out a separate Request for Assessment under section 42 of the DPA in relation to the personal information of the requestor which he has identified above. He has provided the MOD and the complainant with a copy of this outside of this decision notice. He considers this information to be personal to the complainant as he can be identified from it and it relates to him and his correspondence with the MOD about the handling of his request and his previous contact with the MOD. As all of the information requested is exempt by virtue of the absolute exemption at section 40(1) the Commissioner has not considered any further provisions under the Act.

The Decision

22. The Commissioner's decision is that the MOD should have treated this request as a Subject Access Request under the DPA, and that therefore the appropriate response under the Act would have been to refuse the request under section 40(1).
23. Notwithstanding the above, the MOD's final position was reliance upon section 36(2)(b) and (c) and section 40(2) and the Commissioner has therefore considered the adequacy of its refusal in reliance upon these sections against the provisions of section 17. The Commissioner finds that the MOD did not deal with the following elements of the request in accordance with the requirements of the Act:
- (i) The MOD did not comply with section 17(1) as it did not state its reliance upon section 40(2) within the statutory time limit set out at section 10 of the Act.
 - (ii) The MOD did not comply with section 17(1) as it did not state its reliance upon section 36(2)(b) and (c) within the statutory time limit set out at section 10 of the Act.
 - (iii) The MOD did not comply with section 17(1)(b) as it did not advise the complainant of the subsections of sections 36 and 40 upon which it was relying.

Steps Required

24. The Commissioner has not ordered the MOD to take any steps under this decision notice.

Failure to comply

25. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

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

First-tier Tribunal (Information Rights)
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 28th day of January 2010

Signed

Lisa Adshead
Senior FOI Policy Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Legal Annex

Section 1 (1) of the Data Protection Act 1998

Data subject “means an individual who is the subject of personal data”

“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”

The Commissioner has referred to sections of the Freedom of Information Act 2000 throughout this decision notice and these legal annexes are included for reference

Section 1 of the Freedom of Information Act provides -

- (1) 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 36 of the Freedom of Information Act provides –

(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—

- (a) would, or would be likely to, prejudice—
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
 - (iii) the work of the executive committee of the National Assembly for Wales,

(b) would, or would be likely to, inhibit—

- (i) the free and frank provision of advice, or
- (ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs

Section 40 (1) of the Freedom of Information Act 2000 provides:

“ 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) of the Freedom of Information Act 2000 provides:

“(2) 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.

(3) 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 of the exemptions in section 33 A (1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.