

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 27 July 2010

Public Authority: Office of Fair Trading
Address: Fleetbank House
2-6 Salisbury Square
London
EC4Y 8JX

Summary

The complainant requested information he believed was held by the Office of Fair Trading (the "OFT") concerning a competition for the Consumer Journalist of the Year Award in November 2007. The OFT had been involved in the competition. The Commissioner finds that the OFT correctly applied section 40(2) – personal information, and section 42 – legal professional privilege to the information it did hold. The Commissioner is also satisfied on a balance of probabilities that the OFT does not hold the remaining information requested by the complainant and therefore does not require the authority to take any steps. However, the Commissioner finds that the OFT has not met the requirements of section 10(1) and section 17(1) 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. The requested information related to a competition for the "Consumer Journalist of the Year" award that was held in 2007. The complainant requested the portfolio submitted by the Chief Trading Standards

Officer in support of [named journalist] when nominating her for this award.

3. During the course of the investigation the Commissioner asked the OFT to clarify the relationship between itself and the Trading Standards Institute (the "TSI"). The OFT explained that the TSI is a professional body with members from both public and private sector. It is independent from the OFT. The Awards were held as part of National Consumer Week which was organised by the TSI. Although the OFT supported the Awards by providing funds and the use of its offices for the judging and the Awards ceremony, the OFT did not create the portfolio or nomination statement and had no right of access to these documents.

The Request

4. The complainant made the following request for information from the OFT on 23 March 2008:
 - *Did the panel of judges know there was a dispute between [named person] and the Sunday Mail over the quotes in the article of 16th September?*
 - *Was that article, about me, shown to the panel of judges? It is quite unmistakable as it contained a full-page picture of me and labelled me 'The Worst Cowboy in the West'.*
 - *Will you as a senior officer of the Office of Fair Trading please produce for me your copy of the portfolio considered by the Panel, and any notes made by you, in deciding this particular award? If you decided you are unable to do this will you please accept this as an application for disclosure under the Freedom of Information Act.*
5. On 7 April 2008 he asked for further information:

"As this competition was funded jointly by Trading Standards Institute (TSI) and the Office of Fair Trading I would be grateful for answers to the following:

 - *Can you confirm public funds were involved and tell me how much was provided?*
 - *Was there a financial gift/element to the award and if so did the nominator as well as the winner receive a gift?*
 - *Can you advise me who Emailed you from TSI to tell you of the problem and supply me with a copy of both Email to you and your*

reply?

- *Can you confirm the existence of a file, held by the Office of Fair Trading/Consumer Direct on this joint enterprise*
- *[named journalist] won the Scottish Consumer Journalist of the Year at the same event last year. Can you tell me who nominated her? If not can you ask TSI for this information?*
- *Given the irregularities surrounding this award and the silence from Trading Standards Institute who were fully aware of the situation from 11th December onwards, will the Office of Fair Trading call in the police to investigate the circumstances? Public money was involved and I respectfully suggest an open investigation is essential."*

6. The complainant followed up this letter on 10 April 2008 when he asked for a copy of a 500 word statement by [named person] in support of [named journalist]'s nomination together with any attachments or articles that accompanied it. On 14 April 2008 he asked for the name, address and title of the Head of OFT. He repeated his request for two specific documents, as detailed above - the email and the reply to the email. The complainant asked further questions:

1. *Since receipt of my first letter to you has anyone at OFT been in communication with TSI over the matter. Please supply any letters, memos, Emails, and replies received. If there is nothing in writing can you please say why this is so in the circumstances?*
2. *I asked what public funds were involved but your answer is not satisfactory. Can you please state the total amount involved with the breakdown of the figures. I noticed OFT offices were used. Given the way budgets are managed was there a cost for this? A lunch was provided (see TSI website). Who provided it and where was it served? Was there a cost to OFT for this? Please supply copies of the accounts and paperwork involved from your file.*
3. *You stated you had no file about this competition. This is not possible since you were in partnership with TSI and this would need to be approved at various levels within the Department. Please supply any letters to and from TSI, internal minutes, notes, memos and Emails about the organisation of the Event. Was there a contract or a memorandum of understanding? If so, please provide copies.*
4. *Has the current situation been brought to the attention of the head of OFT and/or OFT's legal advisors. If so please provide copies of any letters (to and fro), notes, memos and Emails.*
5. *In my letter to you dated 10 April I made the point that this Event was clearly a joint venture by you and TSI. You have already told me that you provided the trophies and your*

premises were used for the awards ceremony. You can hardly be selective in what information you provide, and there is every reason why you should obtain a copy of [named person]'s submission to the panel of judges. This deal was a package and OFT had full involvement. Since I have raised doubts about this nomination I am entitled to see this and OFT as a partner in the enterprise (see the newsroom article) is obliged to provide it.

7. The OFT had previously provided a response to the complainant on 31 March 2008, and in answer to question 3, stated that the competition was run by the TSI and that any disclosure of information was not the OFT's decision.
8. The complainant requested an internal review of the OFT's decision in his letter of 14 April 2008. On 15 April 2008 the OFT responded to this third set of questions. On 6 May 2008 the OFT wrote to him in detail concerning the various letters and requests for information he had made. It was acknowledged that, although he had received a response to his 23 March 2008 request, this had not been done in accordance with FOI, though it was suggested that it was only the third question that was relevant to FOI. It was repeated that the TSI held the requested information and that any paperwork created during the competition had been handed to the TSI.
9. The internal review stated that the 7 April 2008 request was handled correctly with the exception of 2 points – the question of public funds and communications with the TSI. Accordingly more details were provided concerning funding and the requested email was produced. The requests of 10 and 14 April 2008 were examined. It was stated again that the 500 word statement relating to the nomination of [named journalist] was not held by the OFT but by the TSI. The rest of the documents requested on 14 April 2008 were gone through. The conclusion reached was that all the requested information had then either been provided, refused under section 40(2) or section 42, or was not held.
10. An internal review was carried out and the result, dated 12 September 2008, was sent to the complainant. Confirmation was again given that the OFT was not in possession of the portfolio relating to the nomination of [named journalist]. Some research had been carried out by the reviewer and details given of the involvement of the OFT in the awards and the subsequent judging and ceremony. Again it was stressed that both the portfolio and paperwork attached to the competition were handed to the TSI. A redacted version of the communications between the TSI and the OFT regarding the organisation of the awards was sent to the complainant. Similarly

paperwork and accounts which should have been provided earlier were sent to him regarding the provision of the awards. An email which should also have been provided to the complainant concerning communications between the TSI and the OFT since his initial request was provided to him on 6 May 2008. The OFT's communications with legal advisors were refused and section 42 of the FOIA cited which concerns legal professional privilege between lawyer and client. Questions outside the remit of the Freedom of Information Act were dealt with and the conclusion reached was that the complainant had now been provided with a response to his requests for information.

The Investigation

Scope of the case

11. On 16 May 2008 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 whether the OFT held the information it had claimed it did not. As outlined in paragraphs 13-20 the Commissioner closed the complaint but it was reopened in May 2010. When the complaint was reopened the scope of the investigation encompassed the following:
 - Whether further information was held by the OFT which had not been provided to the complainant after the internal review. This necessitated asking about the searches that had been made and how these had been conducted in order to try and establish if the OFT held information relating to the request/s that had not been provided
 - The application of section 40(2) with regard to the redaction of the staff names and signatures on the meeting notes, emails and invoices as requested in the complainant's 14 April 2008 request (point 1)
 - The application of section 42 to point 4 of the 10 April 2008 request
12. 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

13. On 21 August 2009 the Commissioner wrote to the complainant's father who was acting at the time on behalf of the complainant. In this letter he gave his view that legal professional privilege is rarely

overturned for reasons stated in the letter. Questions outside the remit of the Freedom of information Act were explained and the conclusion reached was that the complainant had now been provided with a response to his requests for information.

14. In this letter the Commissioner stated that he did not accept the complainant's contention that the OFT held information not already supplied to him. The answers they had supplied in various letters and the internal review led him to the conclusion that, on the balance of probability, the information is not held. It had been asserted several times that the OFT did not hold the requested file and that the competition portfolio was held by the TSI. Similarly any paperwork such as notes made during the competition by OFT panel members had been handed over to the TSI after the competition.
15. The Commissioner closed this case on 8 September 2009 having informed the complainant of his intention to do so.
16. On 4 January 2010 the complainant wrote to the Commissioner to enquire about the progress of his case.
17. The Commissioner replied on 11 January 2010 reiterating his view on this case and enclosing the letter of 21 August 2009 which had explained his intention to close the case.
18. The complainant replied on 19 January 2010 stating that he had never received the original 'closure' letter and asking that the Commissioner reconsider.
19. The Commissioner wrote back explaining that the case remained closed.
20. On 30 January 2010 the complainant appealed the decision to close the case and the case was later reopened.
21. The Commissioner wrote to the OFT on 17 May 2010 to explain that the case was being reopened. In this letter the Commissioner explained that he would be investigating whether the requested information was held/not held at the time of the request/s for information. He also explained that he would be looking at the application of section 40(2) and section 42.
22. Firstly, the Commissioner explained that in determining whether requested information is held, he uses the normal civil standard of proof, the balance of probabilities. Secondly, in order to assist with his determination, the Commissioner asked for more detailed information

regarding what searches had been carried out to establish whether the requested information was held or not held.

23. In order to assist the Commissioner's consideration of the application of section 40(2) and section 42, he asked the OFT:

- Please explain whose personal data the OFT considers the requested information to be.
- Has the OFT considered whether any of the withheld information also constitutes sensitive personal data? (Both 'personal data' and 'sensitive personal data' are defined by section 1(1) of the Data Protection Act 1998).
- Please confirm which of the data protection principles you believe would be breached if the withheld information was disclosed.

24. The Commissioner asked the OFT to confirm if it was relying on the fact that the withheld information is subject to legal advice privilege or litigation privilege.

25. Additionally the Commissioner asked the OFT to confirm that it was satisfied that privilege attached to the withheld information had not been waived and also asked:

- *What public interest arguments in favour of disclosing the information were taken into account?*
- *What public interest arguments in favour of maintaining the exemption were taken into account?*
- *Why do you consider that, on balance, the public interest in maintaining the exemption outweighs that of disclosing the withheld information. Please include details of any particular weighting exercise that has been carried out?*

26. The OFT responded on 15 June 2010 to questions asked by the Commissioner regarding what searches had been made to establish whether information was held or not held.

27. On 15 June 2010 the OFT also provided its public interest arguments in favour of disclosing the requested information and in favour of maintaining the exemption at section 42.

Analysis

Substantive Procedural Matters

Section 1

28. In making his decision as to whether the requested information is held/not held the Commissioner has considered:

- (1) the scope, quality, thoroughness and results of the searches and
- (2) other explanations offered as to why the information is not held.

29. The Commissioner asked the following questions on 17 May 2010 (in italicised bullet points) in order to establish whether information was held/not held by the OFT:

- *What searches were carried out for information falling within the scope of this request and why would these searches have been likely to retrieve any relevant information?*

The OFT stated that the requested portfolio which had been considered by the judging panel and the nomination statement for the Awards is not held. Judging took place in November 2007 and the portfolio and nomination statement were collected and held by the TSI. This information ceased to be held on 7 November 2007. For this reason no further searches were made.

30. However, searches were carried out for items 1-4 of the complainant's request made on 14 April 2008:

Item 1 of the request:

All communications between the OFT and TSI concerning the organisation of the Awards

The OFT concluded that many of these communications were verbal or informal, though searches carried out on the OFT's email system and the network drive of the OFT members in contact with the TSI at the time of the requested information revealed minutes of meetings dated 5 September 2007 and 8 October 2007 which were provided to the complainant on 12 September 2008.

31. Item 2 of the same request:

All paperwork, accounts etc concerning the funding of the Awards

The complainant was provided with a breakdown of the costs that the OFT had incurred during National Consumer Week which had included the Awards. When subsequently the complainant requested the paperwork from which the breakdown was derived 2 invoices were located by the OFT's Corporate Services Finance Department which were provided to the complainant on 12 September 2008.

32. Item 3 of the same request:

All communications between the OFT and TSI relating to the complainant's complaint since it was made on 23 March 2008

The complainant was given 2 emails between the TSI and the OFT, dated 28 March 2008. Further searches revealed an email, dated 28 April 2008 which was released to the complainant on 15 September 2008 as part of a subject access request under the Data Protection Act 1998.

33. Item 4 of the same request:

OFT internal communications relating to the matter being brought to the attention of the Head of the OFT and the OFT's legal advisors (see paragraphs 51-70 of this Decision Notice).

34. The Commissioner asked the OFT:

- *If searches included electronic data, please explain whether the search included information held locally on personal computers used by key officials (including laptop computers) and on networked resources and emails*

As detailed in items 1 to 3 above information was searched for on the OFT's email system and networked drives but the portfolio and nomination statement appear only to have existed as hard copies. In reply to another question the OFT stated that it did not know if electronic documents were held by the TSI.

35. The Commissioner asked the OFT:

- *If searches included electronic data, which search terms were used?*

The OFT's reply stated that, as the OFT staff involved in these searches in 2008 are no longer members of staff, it was not possible to determine what search terms were used at the time.

36. The OFT confirmed that it did not believe that there was any information it had held which was relevant to the request that had been destroyed or deleted. It explained that its formal records management policy regarding retention is based on administrative need and records can be kept for between 2 and 20 years, or longer. There was no particular business purpose or statutory requirement for the requested information to be held and the information that was held had been provided to the complainant.
37. The Commissioner has taken into account that the Tribunal in Bromley¹ said that as the Environment Agency did not own or take responsibility for a number of features to which some of the requested information related, it accepted that the public authority would not hold information on those features. The Tribunal felt supported in making this finding given that the applicants could not provide any evidence to the contrary (paragraphs 16, 20 and 27).
38. The Commissioner has considered the scope, quality, thoroughness and results of the searches made by the OFT and he has concluded that there is nothing that proves that any further information is held. Additionally, he is not persuaded by the complainant's view that the OFT does actually hold the requested information merely because the OFT had given some material assistance and lent its name to the Awards. The OFT has conducted a full search which has failed to locate anything further. Without any evidence to the contrary the Commissioner must conclude, on the balance of probabilities, that the information requested by the complainant is not held.

Exemptions

Section 40(2)

39. The OFT argued that the information that had been requested in relation to the complainant's requests for the communications between the TSI and the OFT concerning the organisation of the Awards and documents and paperwork relating to the funding of the Awards was exempt from disclosure under section 40(2). However, the exemption was only actually used to withhold names and signatures of the staff of the OFT, TSI and Consumer Direct in relation to the meeting minutes, email appointment and copy invoices which were provided to the complainant on 12 September 2008.

¹ Found at http://www.informationtribunal.gov.uk/Documents/decisions/EA20060072_lindabromleyVinfoor_31Aug07.pdf

40. Section 40(2) of the Act provides an exemption for information that constitutes the personal data of third parties:
- '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.'*
41. In this case the OFT stated that the requested information constituted the personal data of third parties and was therefore exempt under section 40(2) of the Act. In order to reach a view on the OFT's arguments the Commissioner has first considered whether the withheld information is the personal data of the third parties. Section 1 of the DPA defines personal data as information which relates to a living individual who can be identified:
- from that data, or
 - from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.

In this instance the information withheld is the names of staff and their signatures. The Commissioner believes that the third parties would clearly be identifiable from this information, and therefore he is satisfied that it is the personal data of those third parties.

42. Such information is exempt if either of the conditions set out in sections 40(3) or 40(4) are met. The relevant condition in this case is at section 40(3)(a)(i), where disclosure would breach any of the Data Protection Principles. The Data Protection Principles are set out in schedule 1 of the Data Protection Act 1998. The Commissioner considers that disclosure of the personal data would breach the first data protection principle, which states:

'Personal data shall be processed fairly and lawfully...'

43. In reaching the conclusion that disclosure of the requested information would contravene the first data protection principle the Commissioner has considered the following: -

How was the information obtained?

44. The information was obtained in the normal course of staff duties at meetings, exchanging email appointments and copy invoices of expenses etc. This information was provided to the complainant on 12 September 2008 with staff names redacted. The OFT has explained that it did not accept that staff names were relevant to the request and

that it was not reasonable to provide them without the consent of the staff members involved. Some of the staff involved are no longer employed by the OFT. It was also explained that these staff members were not known to the complainant and that they were not public-facing.

45. The Commissioner is satisfied that the information was held by the OFT for the purposes of staff administration in the normal course of its business. Staff therefore provided this information to the OFT for use in connection with its business purposes.

Reasonable Expectation of the Data Subject

46. The Commissioner does not believe that it would be reasonable to assume that those involved would have expected their names to be disclosed to a wider audience in relation to the requested information and considers that it would be potentially unfair to do so.
47. Despite a data subject's reasonable expectations or the possibility of any damage or distress being caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure, for example, in the case involving the MP's expenses the Tribunal said as follows: -

"...in relation to the general principle application of fairness under the first data protection principle, we find:

(..) the interests of data subjects, namely MPs in these appeals, are not necessarily the first and paramount consideration where the personal data being processed relate to their public lives"² (paragraph 79)

48. The Tribunal took the view that the need to demonstrate accountability and transparency in the spending of public funds outweighed the rights of the data subjects. However, the Commissioner has concluded in this case that the issue does not involve the spending of significant sums of public money and that the disclosure of staff names and signatures in this instance is not necessary to demonstrate accountability and transparency and would merely expose individuals unfairly when there is no significant public interest in disclosure.
49. Having considered the information involved and the purposes for which it was generated, the Commissioner has concluded that the OFT

² Found at http://www.informationtribunal.gov.uk/Documents/decisions/corpo officer_house_of_commons_v_infocomm.pdf

has applied the Act appropriately in withholding the information under section 40(2). He has concluded that it would be unfair and therefore a breach of the First Data Protection Principle to disclose it.

50. As the Commissioner has determined that disclosure of the information would be unfair he has not considered whether any other data protection principles would be breached if the information was disclosed.

Section 42

51. The Commissioner would like to make it clear that the legal advice sought was subsequent to the request for information being made. The internal review on 12 September 2008 confirmed that there was no legal advice at the point at which the request was made on 10 April 2008. When a response was sent on 15 April 2008 the position was that there was no legal advice extant. The Commissioner has nonetheless considered the exemption applied to the legal advice as it was extant by the time for compliance with sections 10 and 17 of the FOIA.
52. 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.”
53. Legal professional privilege (LPP) protects the confidentiality of communications between a lawyer and client. The Information Tribunal has described legal professional privilege in the case of *Bellamy v the Information Commissioner and the DTI (EA/2005/0023)* as:

“...a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and [third] parties if such communication or exchanges come into being for the purpose of preparing for litigation.” (paragraph 9)
54. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated. In both these cases, the communications must be confidential, made between a client and

professional legal adviser acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice.

55. After reviewing the documents, the Commissioner is satisfied that the relevant information is subject to legal advice privilege because it is clearly legal advice provided by an internal legal adviser to the OFT in May 2008 who advised on the application of the FOIA to the response to the requestor that was being drafted. It was provided for the sole and dominant purpose of providing legal advice. The Commissioner is therefore satisfied that section 42 is engaged.

Has legal professional privilege been waived by the OFT?

56. The OFT has confirmed that privilege has not been waived to anybody outside the OFT and this would be the only reason to order disclosure of the relevant information, given the fact that it was provided under the "advice" branch of legal professional privilege.
57. The Commissioner's view remains that, even if partial disclosure has taken place outside litigation, this will not constitute waiver of privilege. In the case of *Foreign & Commonwealth Office versus ICO (EA/2007/0092)* the Tribunal said that outside the context of litigation a party "...is entitled, provided of course he does not falsify, to advance his case in public debate to the best advantage; if so advised, by selective quotation. If he does so, an alert opponent...will demand disclosure of the whole advice, if he is to be persuaded. Such is the cut and thrust of public debate..." (paragraph 22).
58. As the Commissioner is satisfied section 42(1) is engaged, he has gone on to consider the public interest test below.

Public interest arguments in favour of disclosing the requested information

59. The OFT acknowledged that a public authority should be transparent in its decision-making and that it should be held accountable for its decisions.

Public interest arguments in favour of maintaining the exemption

60. The OFT argued that it was in the public interest for a public authority to properly respond to an FOIA request and that, if it was necessary to take legal advice to do so then that advice should remain confidential in order that it can be "open, reasoned and robust..."

61. The Commissioner is mindful of the fact that, generally speaking, legal advisers must be able to present a full and candid account of their advice – including the strengths and weaknesses of the client's position.

Balance of the public interest arguments

62. The OFT argued that the balance of the public interest test lay in maintaining the exemption. The reason it gave was that free communication was vital between public authorities and their legal advisers. It considered that FOIA had been correctly applied and that there were no special or exceptional circumstances in the complainant's case to tip the balance in favour of disclosure.
63. The Commissioner has carefully considered the weight that is placed on the right of the OFT to protect the advice it has received from its legal advisers. Whilst it is sometimes appropriate to overturn legal professional privilege where weighty public interest factors favour disclosure, there remains a strong public interest in protecting the confidentiality of legal advice. The Commissioner is of the view that public authorities need to be able to rely on legal professional privilege as a mechanism to help ensure that they are able to obtain full, accurate and relevant legal advice.
64. Although there will always be an initial weighting in favour of maintaining the exemption, the Commissioner recognises that there are circumstances where the public interest will favour disclosing the information. In order to determine whether this is indeed the case, the Commissioner has considered the likelihood and severity of the harm that would be suffered if the advice was disclosed by reference to the following criteria:
- how recent the advice is; and
 - whether it is still live.
65. In order to determine the weight that should be attributed to the factors in favour of disclosure the Commissioner has used the following criteria:
- the number of people affected by the decision to which the advice relates;
 - the amount of money involved; and
 - the transparency of the public authority's actions.
66. With regard to the age of the advice the Commissioner accepts the argument advanced on a number of occasions by the Information Tribunal that, as time passes, the principle of legal professional privilege diminishes. This is based on the concept that if advice is

recently obtained it is likely to be used in a variety of decision making processes and that these processes are likely to be harmed by disclosure. However, the older the advice the more likely it is to have served its purpose and the less likely it is to still be used as part of a decision making process.

67. In many cases the age of the advice is closely linked to whether the advice is still live; advice is said to be live if it is still being implemented or relied upon and therefore may continue to give rise to legal challenges by those unhappy with the course of action adopted.
68. The advice in this case dates from May 2008 and therefore the Commissioner accepts that at the time when the complainant submitted his request for information in April 2008, the advice had not yet been given. He therefore considers that the advice given is both recent and live.
69. The Commissioner does not regard the other criteria as adding any significant weight in this case. The legal advice does not affect a number of people, there is a limited amount of money involved and he does not accept that transparency has been compromised because the legal advice was sought in response to issues surrounding the complainant's request.
70. Having considered all the arguments, the Commissioner finds that, in all the circumstances of this case, the public interest in maintaining the exemption under section 42(1) outweighs the public interest in disclosing the information.

Procedural Requirements

Section 10(1): time for compliance

71. The Commissioner finds that the OFT breached sections 1(1)(a) and 10(1) in failing to confirm or deny within 20 working days of the complainant's original request whether it held information falling within the scope of that request

Section 17: refusal of request

72. Section 17(1) states 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."*

73. The Commissioner has considered whether the OFT has complied with section 17(1) of the Act.

In failing to supply a refusal notice within twenty working days following receipt of the complainant's original request for information the OFT did not comply with the FOIA.

The Commissioner therefore considers that the OFT breached section 17(1) in its handling of this request.

The Decision

74. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

Section 1(1)(a) and (b), section 40(2) and section 42.

However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

Section 10(1) and
Section 17(1).

Steps Required

75. The Commissioner requires no steps to be taken.

Right of Appeal

76. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

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 sent.

Dated the 27th day of July 2010

Signed

**David Smith
Deputy Commissioner**

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

Legal Annex

1 General right of access to information held by public authorities

(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.

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

(3) 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.

(4) 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.

(5) 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).

(6) 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”.

17 Refusal of request

(1) 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.

(2) 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.

(3) 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.

(4) 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.

(5) 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.

(6) 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.

(7) 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.

40 Personal information

(1) 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.

(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 [1998 c. 29.] 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 [1998 c. 29.] Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the [1998 c. 29.] 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).

(5) 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) the 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 [1998 c. 29.] 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 [1998 c. 29.] 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).

(6) 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 [1998 c. 29.] Data Protection Act 1998 shall be disregarded.

(7) In this section—

“the data protection principles” means the principles set out in Part I of Schedule 1 to the [1998 c. 29.] 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.

42 Legal professional privilege

(1) 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.

(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.