

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 01 March 2010

Public Authority: The Serious Fraud Office
Address: Elm House
10 – 16 Elm Street
London
WC1X 0BJ

Summary

The complainant requested information relating to fraud in landed property. The Serious Fraud Office initially refused to disclose the information, citing section 21 (information accessible by other means) and section 31(1)(a) (law enforcement). In its internal review correspondence it referred to section 12 (cost of compliance exceeds appropriate limit).

The Commissioner is satisfied that it would exceed the cost limit for the Serious Fraud Office to comply with the request. However he identified procedural shortcomings on the part of the public authority relating to its provision of advice and assistance and in relation to its citing of section 12.

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 Serious Fraud Office was established by the Criminal Justice Act 1987, following the 1986 Fraud Trials Committee Report (the Roskill Report). It is an independent Government department that investigates and prosecutes serious or complex fraud and corruption. It is part of the UK criminal justice system with jurisdiction in England, Wales and Northern Ireland but not in Scotland, the Isle of Man or the Channel Islands.

The Request

3. The complainant wrote to the Serious Fraud Office (SFO) on 9 February 2009 requesting:

'All records, information and data re fraud in landed property'.
4. The Serious Fraud Office responded on 10 February 2009 asking him to clarify what he meant by *'fraud in landed property'*.
5. The complainant replied on the same day (10 February 2009), explaining that

'Fraud means civil or criminal fraud, (as defined by the relevant legislation). In the case of the SFO it means the latter. So I am seeking all information, records and data in your possession pertaining to actual and potential fraudulent opportunities in and involving landed property (of which mortgage fraud is the obvious example) including past criminal prosecutions and convictions, money laundering, racketeering and conspiracy by individuals, groups and organised crime. I do not want to prejudice on going criminal investigations or delve into your methods of investigation, but presumably the SFO produces data about its activities and can also divulge non-sensitive information, including, for instance, about the size, range and participants in criminal fraud and other tasks and duties falling within its jurisdiction. To summarise, I am seeking whatever records and information the SFO has in its possession which it can legally release to me about any aspect of criminal fraud (which will obviously be of a substantial nature) directly or indirectly connected with the use of and / or investment in landed property. At this stage I cannot be more specific as I do not know precisely what records and other information the SFO stores. I trust this clarifies my request, and would appreciate your assistance'.
6. The Serious Fraud Office (SFO) responded on 9 March 2009 advising the complainant that information about completed investigations was available on the SFO website and was therefore exempt under section 21 of the Act. In addition, in relation to current investigations, it told him that under section 31(1)(a) of the Act it was neither able to confirm nor deny that the requested information exists.
7. The complainant requested an internal review of this decision on 13 March 2009.
8. The SFO responded on 18 May 2009. In its response, the SFO told the complainant that, despite his clarification, his request remained very broad. In relation to its citing of section 31(1)(a), the SFO described its reference to this exemption as being *'helpful for the sake of completeness'*. However, the SFO acknowledged that the complainant had specifically stated that he did not want to prejudice on-going criminal investigations nor *'delve into your [the SFO's] methods of investigation'*. Additionally, it acknowledged that it *'should have mentioned section 12 of the Act at an early point'* but concluded that *'there would have been no practical difference to the outcome'*.

The Investigation

Scope of the case

9. On 21 May 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The Commissioner notes that the complainant made no reference to the fact that he had been referred by the Serious Fraud Office (SFO) to relevant information available on the SFO website.
10. He also notes that while, in his request for internal review, the complainant raised issues in relation to the SFO's citing of section 31 and in respect of the SFO's internal review process, he did not refer to the SFO's citing of section 21.
11. Further, the complainant has brought to the Commissioner's attention various arguments in favour of disclosure, arguing that:

'I do not subscribe to the theory that because public (including law enforcement agencies) agencies hold information it is their property and therefore unavailable to outsiders'.
12. The Commissioner understands this to mean that the complainant does not accept that there is no further information, relevant to his request and to which he considers he is entitled, held by the SFO. Accordingly, the Commissioner has focussed his investigation in this case on the SFO's citing of section 12.

Chronology

13. Having received confirmation that it was relying on section 12(1) in respect of all the information requested by the complainant, the Commissioner wrote to the Serious Fraud Office on 10 November 2009. In his correspondence, he asked the SFO for further explanation of its reasons for citing section 12 in relation to this request.
14. The Serious Fraud Office responded on 8 December 2009. In this correspondence, the Serious Fraud Office clarified the basis on which it was claiming that it would exceed the fees limit to comply with the request.

Analysis

Substantive Procedural Matters

Section 1 General right of access

15. Section 1(1) of the Act states:

'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.'

16. Section 1(1) therefore creates two obligations on the public authority: the duty to confirm or deny to the applicant whether the information is held, and the duty to communicate the information to the applicant.

Section 12 - Cost of compliance exceeds appropriate limit

17. Section 12(1) states:

'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) states 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.'

18. Accordingly, section 12(1) provides that a public authority is not obliged to comply with a request for information if it estimates that meeting the request would exceed the appropriate cost limit. Section 12(2) removes the requirement to comply with section 1(1)(a) if the cost of doing so would exceed the appropriate limit. The appropriate limit is currently set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Regulations'). These state that the cost limit is £600 for central government, legislative bodies and the armed forces and £450 for all other public authorities.

For the SFO, the £450 cost ceiling equates to 18 hours of staff time, calculated on the basis of £25 per hour.

19. A public authority may take into account the cost of determining whether the information is held, locating, retrieving and extracting the requested information in performing its calculation. In this case, the Serious Fraud Office (SFO) has confirmed its view that, given the breadth of both the initial and the clarified request, it would exceed the prescribed cost limit to comply with the request. The Commissioner understands this to mean providing the complainant with the information relevant to his request.

20. In support of this argument, the SFO has told the Commissioner that:

'The request was so wide as to require identifying, locating and extracting the relevant [sic] from every operational file in the SFO's possession'.

21. The Commissioner notes that the SFO explained to the complainant in its internal review correspondence that referring to section 12 of the Act when it initially asked him for clarification of his request:

'would have made the point that while it might be practicable to search internally for this data, doing so would probably exceed the cost limit'.

Estimated Costs

22. In estimating whether complying with a request would exceed the appropriate limit, Regulation 4(3) states that an authority can only take into account the costs it reasonably expects to incur in:

- determining whether it holds the information;
- locating the information or a document containing it;
- retrieving the information, or a document containing it; and
- extracting the information from a document containing it.

23. Section 12 of the Act makes it clear that a public authority does not have to make a precise calculation of the costs of complying with a request. Only an estimate is required. However, the estimate must be reasonable and can only be based on the four activities identified above.

24. During the course of his investigation, the Serious Fraud Office has provided the Commissioner with two estimates for the cost of complying with the complainant's request. In this respect, it has told the Commissioner that it has based the estimates firstly on the complainant's '*narrower, original request (where he does not also require information on further /related offences such as money laundering, conspiracy)*' and secondly on mortgage fraud only, this being the example provided by the complainant in his attempt to clarify his request.

25. In estimating the cost of retrieval, the SFO has explained to the Commissioner that while some of its recorded information is held on-site, many of its completed

- cases are held offsite. It has provided the Commissioner with details of the cost of retrieval for both versions of the estimate.
26. It has also provided details of the steps involved in retrieving information within the scope of both versions of the request and then of extracting the requested information, taking into account any that is already in the public domain. In this regard, it has based its costs firstly on searching three SFO datasets to identify relevant material, secondly on locating and retrieving the archive boxes which are held offsite, and then extracting the relevant data from the boxes. It stated that the number of standard archive boxes that would need to be retrieved, and their contents examined, for the purpose of the two estimates is 35 and 25 respectively, and it considered that each box would take around one hour to search. Given the nature of the request, the Commissioner considers this to be reasonable.
27. To comply with the version of the request covering mortgage fraud only, and with the complainant's original request, the SFO has estimated that it would cost £1,134.75 and £1,494.25 respectively. Both of these figures are clearly well in excess of the £450 appropriate limit set out in the regulations under section 12 of the Act. The Commissioner considers that even allowing a considerable margin for any overstatement of the time required to carry out the work, the cost limit would still be likely to be greatly exceeded. He notes that searching the archive boxes alone would be likely to exceed 18 hours' work.
28. Having examined the evidence, and considered the estimates put forward by the Serious Fraud Office, the Commissioner is satisfied that section 12(1) has been correctly applied in this case.

Procedural Requirements

Section 16 Duty to provide advice and assistance

29. 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.'*
30. Section 16(1) of the Act therefore requires a public authority to provide reasonable advice and assistance to applicants. Section 16(2) outlines that any public authority which conforms with the Code of Practice issued under section 45 of the Act (the 'Code') is to be taken as having complied with the duty imposed by section 16(1).
31. In the Information Tribunal case of *Barber v The Information Commissioner* (EA2005/0004) the Tribunal stated that it will generally be appropriate for the Commissioner to consider whether it was reasonable to expect a public authority to have provided more advice and assistance and, if had it done so, whether this might have had an impact upon how the request was handled.

32. The Serious Fraud Office (SFO) has explained that it considered it was reasonable to ask the complainant for clarification, given the nature of his request *'which could in theory encompass all 21 years of the SFO's existence'*.
33. The Commissioner accepts that the SFO contacted the complainant on receipt of his request and asked him to clarify what he meant by 'fraud in landed property'.
34. Paragraphs 8 to 11 of the section 45 Code deal with 'clarifying the request' and relate specifically to circumstances where a public authority needs more detail to enable it to identify and locate the information sought. Paragraph 8 says that public authorities are entitled to ask for more detail, if needed, to enable them to identify and locate the information sought. Part 10 of the Code provides examples of what kind of advice and assistance might be appropriate.
35. In relation to the need for clarification, the SFO told the complainant in its internal review correspondence that :

'[the SFO's] email might helpfully have indicated the need for some precision in clarification'.
36. During the course of the Commissioner's investigation, the SFO acknowledged that, in its view, the complainant's response *'broadens his original request as it refers to further possible related offences such as conspiracy and money laundering and the more generic "organised crime"'*.
37. In the Commissioner's view, the SFO could have been more rigorous in specifying the clarification it needed from the complainant in order to help reduce the scope of his request. In failing to conform with the section 45 Code of Practice, the Commissioner's view is that the SFO failed to comply with its duty to provide adequate advice and assistance in relation to the clarification of the request.
38. The Code also outlines that where an authority is not obliged to comply with a request for information because the cost of complying would exceed the 'appropriate limit', the authority should consider providing an indication of what, if any, information could be provided within the cost ceiling. The authority should also consider advising the applicant that by reforming or re-focusing their request, information may be able to be supplied for a lower or no fee.
39. In applying section 12, a public authority is obliged to provide a complainant with advice and assistance to enable him to refine his request so as to bring it within the cost limit. As it was not clear in this case that the SFO was citing section 12, the complainant was not given this opportunity.
40. In failing to conform with the section 45 Code of Practice, the Commissioner's view is that the SFO failed to comply with its duty to provide adequate advice and assistance in relation to the cost limit.

41. However, in this case, having seen the estimates provided by the SFO during the course of his investigation, the Commissioner accepts that it may not be possible to keep within the cost limit even if the complainant refines his request.

Section 17 Refusal notice

42. Section 17(5) of the Act states that a public authority which is relying on a claim that section 12 or 14 applies must give the applicant a notice stating that fact.
43. In this case, the Commissioner notes that no reference was made to section 12(1) of the Act in the SFO's initial refusal letter. Although referring to section 12 in its internal review correspondence of 18 May 2009, in the Commissioner's view the SFO did not clearly specify its reliance on the application of this section to the extent that there was no doubt that it was citing section 12 at this stage. The Commissioner therefore finds that the SFO breached the requirements of section 17(5) of the Act.

The Decision

44. The Commissioner's decision is that the Serious Fraud Office dealt with the following elements of the request for information in accordance with the Act:
- the Serious Fraud Office correctly applied section 12(1) to the request, as to comply with the request would exceed the cost limit.
45. However, the Commissioner has also decided that the Serious Fraud Office did not deal with the request for information in accordance with Part 1 of the Act in that it breached the following provisions:
- section 17(5) for failing to issue an adequate refusal notice within the statutory time limit;
 - section 17(5) for failing to specify its reliance on the application of section 12(1) in its refusal notice;
 - section 16(1) for failing to provide reasonable advice and assistance to the applicant in clarifying his request; and
 - section 16(1) for failing to provide reasonable advice and assistance to the applicant in refining his request.

Steps Required

46. The Commissioner requires the public authority to take the following step to ensure compliance with the Act:
- Provide the complainant with an indication of what could be provided within the appropriate limit to enable the complainant to refine his request.

47. The public authority must take the step required by this notice within 35 calendar days of the date of this notice.

Failure to comply

48. Failure to comply with the step 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

49. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matter of concern.
50. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his '*Good Practice Guidance No 5*', published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it took approximately 42 working days for an internal review to be completed.

Right of Appeal

51. Either party has the right to appeal against this Decision Notice to the First-Tier Tribunal. 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 served.

Dated the 01st day of March 2010

Signed

**Anne Jones
Assistant Commissioner**

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

Legal Annex

Section 12 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.

Section 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 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.”