

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 11 August 2010

Public Authority: Department of Health
Address: Richmond House
79 Whitehall
London
SW1A 2NS

Summary

The complainant requested a copy of a briefing document prepared for a Minister by a DoH official. The DoH initially cited section 14(1), and refused to deal with the request on the grounds that it was vexatious. During the Commissioner's investigation he found that some of the requested information was, in fact, the complainant's personal data – and this was instead considered for disclosure by the DoH under section 7 of the Data Protection Act 1998. In relation to the outstanding information, which was not the personal data of the complainant, the DoH dropped its use of section 14(1), and instead disclosed the information to him. As the information which is the personal data of the applicant is absolutely exempt from disclosure under the Act under section 40(1), and as the information which was not his personal data has now been disclosed, there are no steps the Commissioner can order to be taken. However, in failing to disclose the non-personal data within 20 working days, the Commissioner finds that the DoH did not meet the requirements of section 10 of the Act.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. The complainant wrote to the Department of Health (the "DoH") on 27 October 2009 for,

"...the full documentation provided by [civil servant A] to the Minister O'Brien.

Proof that this was sent by [civil servant A] is a email [sic] of 15 July 2009 from [civil servant B] who drafted the reply to the said minister: see comments below which clearly state: "background for minister will be in the form of submission from [civil servant A]"."

3. By way of background, the complainant had been in correspondence with the DoH regarding another issue about the complainant's company, and a commercial decision regarding a product produced by that company. After an exchange of correspondence, the DoH had informed the complainant that it would no longer correspond with the complainant about that issue. The information requested in this case is a briefing document prepared for a Minister about the DoH's decision to take that position.
4. The DoH responded to the complainant on 25 November 2009 and stated that it believed that this request was vexatious. Therefore it believed that section 14(1) applied, and as such it was under no duty to comply with the request.
5. The complainant contacted the DoH on 26 November 2009 and asked for an internal review of this decision.
6. The DoH responded on 16 December 2009 and upheld its use of section 14(1). It informed the complainant of his right to complain to the Commissioner.

The Investigation

Scope of the case

7. The complainant contacted the Commissioner on 13 January 2010 to complain about the way his request for information had been handled.

8. During the course of the Commissioner's investigation he found that some of the requested information was, in fact, the complainant's personal data – and this was instead considered for disclosure by the DoH under section 7 of the Data Protection Act 1998 (the "DPA"). In relation to the outstanding information, which was not the personal data of the applicant, the DoH dropped its use of section 14(1), and instead disclosed the information to him. Therefore the Commissioner has not gone on to consider the DoH's initial use of section 14(1) to refuse the request.
9. The Commissioner wrote to the complainant on 22 July 2010 and advised him that as the non-personal data had now been disclosed to him, and the information that was his personal data was now being considered for disclosure under the DPA, there were no further steps he could take. The complainant wrote to the Commissioner on the same day and stated that despite this he wanted a Decision Notice for this case.
10. As the information which is the personal data of the applicant is absolutely exempt from disclosure under the Act under section 40(1), and as the information which was not his personal data has now been disclosed, this Decision Notice focuses on whether the DoH met the requirements of section 10.

Chronology

11. The Commissioner contacted the DoH on 17 June 2010 and asked for a copy of the requested information. The DoH provided this information on 22 June 2010.
12. The Commissioner contacted the DoH on 23 June 2010 and informed it that his initial view was that some of the requested information was the personal data of the complainant. He noted that the DoH had responded to another request from the complainant for similar information (which had been dealt with under both the Act and the DPA), and asked whether any of the requested information in this case had been disclosed to the complainant as a result of his other request.
13. In an email dated 23 June 2010 the DoH informed the Commissioner that the requested information in this case had not been considered in relation to the other request referred to above.
14. The Commissioner contacted the DoH by way of an email on 30 June 2010 and informed it that it was his view that a substantive part of the requested information was the personal data of the complainant. He detailed which parts of the information was the personal data of the

- complainant, and asked the DoH to confirm whether it agreed with this view. He also pointed out that if this information was the personal data of the complainant, the DoH would now have to consider whether this information should be disclosed to him under section 7 of the DPA. In relation to the outstanding requested information, which was not the personal data of the complainant, the Commissioner noted the relatively small volume of this information and invited the DoH to reconsider its application of section 14(1). If it did still wish to rely upon this exemption, he asked it to provide further submissions.
15. On the same day the Commissioner contacted the complainant and informed him that he was considering whether any of the requested information was his personal data.
 16. The DoH responded in an email dated 13 July 2010. In relation to the Commissioner's view that a substantive part of the requested information was the personal data of the complainant, the DoH informed him that it agreed with this view. Therefore, the DoH informed the Commissioner that it would now consider the disclosure of this information under section 7 of the DPA. In regard to outstanding requested information, which was not the personal data of the complainant, the DoH informed him that it was now prepared to disclose this information to the complainant.
 17. The Commissioner emailed the DoH on 19 July 2010 and asked it to disclose the non-personal information to the complainant. The DoH responded to the Commissioner on 22 July 2010 and informed him that it had now disclosed this information to the complainant. It also informed the Commissioner that it had let the complainant know that the outstanding information was now being considered for disclosure under the DPA.
 18. As noted above, the Commissioner wrote to the complainant on 22 July 2010 and advised him that as the non-personal data had now been disclosed to him, and the information that was his personal data was now being considered for disclosure under the DPA, there were no further steps he could take. The complainant responded on the same day, and stated that despite this he wanted a Decision Notice for this case. In addition to this, he also stated that he had not yet received the information that the DoH had stated had now been disclosed to him.
 19. The Commissioner contacted the DoH on 3 August 2010 and asked it to resend the information that had been disclosed to the complainant. The DoH responded on the same day and confirmed that this information had been resent.

20. The Commissioner contacted the complainant on the same day and informed him that the DoH had resent this information. He also confirmed that he would now issue a Decision Notice for this case.

Analysis

Procedural Requirements

21. Section 1(1) states 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.”

22. Section 10(1) states 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.”

23. As noted above, during the course of the investigation the DoH informed the Commissioner that it no longer sought to rely upon any exemption in relation to some of the previously withheld information. As this information was not disclosed within 20 working days of the request the Commissioner believes that this constitutes a breach of section 1(1)(b). Furthermore, by failing to provide this information within 20 working days of the request the DoH also breached section 10(1).
24. The full texts of sections 1 and 10 can be found in the Legal Annex at the end of this Notice.

The Decision

25. The Commissioner’s decision is that the DoH did not deal with the request for information in accordance with section 1(1)(b) insofar as it

inappropriately relied upon section 14(1) to withhold some of the requested information. In failing to comply with the requirements of section 1(1)(b) within 20 working days it also breached section 10(1).

Steps Required

26. The Commissioner requires no steps to be taken.

Other matters

27. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

Section 7 of the DPA gives an individual the right to request copies of personal data held about them – this is referred to as the right of Subject Access. The Commissioner notes that part of this request should have been dealt with as a subject access request, under section 7 of the DPA from the outset, and he would encourage public authorities to consider requests under the correct access regime at first instance

Right of Appeal

28. 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 11th day of August 2010

Signed

**David Smith
Deputy Commissioner**

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

Legal Annex

Section 1

- (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 the 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”.

Section 10

- (1) 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.
- (2) 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.
- (3) 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.
- (4) The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.
- (5) Regulations under subsection (4) may –
 - (a) prescribe different days in relation to different cases, and
 - (b) confer a discretion on the Commissioner.
- (6) In this section –

“the date of receipt” means –

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

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