

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 17 January 2011

Public Authority: The Information Commissioner
Address: Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Note:

The complaint in this case was made against the Information Commissioner. Since the Commissioner is himself a public authority for the purposes of the Freedom of Information Act 2000 (the "Act"), he is under a duty to make a formal determination of a complaint made against himself. It should be noted, however, that the complainant has a right of appeal against the Commissioner's decision, details of which are given at the end of this Notice.

For the sake of clarity, in this notice the term "ICO" is used to denote the ICO dealing with the *request*, and the term "Commissioner" denotes the ICO dealing with the *complaint*.

Summary

The complainant requested information held by the ICO in relation to various trade union groups. The ICO confirmed that it held the relevant information but refused to provide it on the grounds that it was exempt from disclosure under section 44(1)(a) of the Freedom of Information Act 2000 by virtue of section 59(1) of the Data Protection Act 1998. This Decision Notice upholds the ICO's use of section 44(1)(a). The Commissioner requires no steps to be taken.

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 complainant requested the information in question on behalf of five trade union organisations. The information relating to these organisations was originally seized by the Investigations Department at the Information Commissioner's Office ("the ICO") as part of an investigation concerning the unlawful access of information on behalf of News International Ltd.

The Request

3. On 23 December 2009 the complainant wrote to the ICO and made the following request for information:

"Please could you supply me with a copy of all files held by the Information Commissioner's Office, and which were formally held by the Consulting Association, that contain references to the following organisations:

UCATT (Union of Construction Allied Trades and Technicians)

ASW (Amalgamated Society of Woodworkers)

The Amalgamated Society of Painters and Decorators

The Association of Building Technicians

The Amalgamated Union of Building Trades Workers".

4. The ICO wrote to the complainant on 20 January 2010 and stated that some of the requested information was publicly available via its website. The ICO stated that other information specifically relating to UCATT had been withheld by virtue of section 44(1)(a) of the Act. The ICO stated that it was unable to provide information relating to ASW, the Amalgamated Society of Painters and Decorators, the Association of Building Technicians, or the Amalgamated Union of Building Trades Workers as the cost of complying with the request would exceed the

'appropriate limit', therefore the ICO would not be obliged to comply with the request by virtue of section 12 of the Act.

5. On 23 February 2010 the complainant's solicitor wrote to the ICO on behalf of the complainant and requested an internal review of its decision to withhold the requested information. The solicitor also explained that the complainant would be willing to cover the costs of complying with the request in respect of ASW, the Amalgamated Society of Painters and Decorators, the Association of Building Technicians, and the Amalgamated Union of Building Trades Workers. The complainant's solicitor argued that release of the withheld information should not present a problem, due to the fact that "a considerable amount" of information had already been published via the ICO website.
6. The ICO wrote to the complainant's solicitor on 8 April 2010 to provide the outcome of its internal review. The ICO upheld its decision to withhold information relating to UCATT by virtue of section 44 of the Act. Whilst the ICO upheld its decision to withhold information relating to ASW, the Amalgamated Society of Painters and Decorators, the Association of Building Technicians, and the Amalgamated Union of Building Trades Workers by virtue of section 12, it also stated that all of the information would, in fact, be exempt by virtue of section 44 of the Act even if the cost of complying with the request did not exceed the appropriate limit. Therefore, even if the complainant covered the cost of complying with the request in respect of these four organisations, the information in question would remain withheld by virtue of section 44(1)(a).

The Investigation

Scope of the case

7. On 18 June 2010 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 his view that section 59(2)(e) of the DPA gave the Commissioner 'lawful authority' to disclose the information he had requested.

Chronology

8. On 12 August 2010, the Commissioner wrote to the ICO to request further arguments in support of its decision to withhold the requested information, and to request copies of the withheld information.

9. On 27 September 2010, the ICO wrote to the Commissioner and confirmed its intention to rely on section 44(1)(a) of the Act in respect of the withheld information in its entirety. The ICO also provided further arguments to support its application of section 44(1)(a) to the requested information, and provided copies of the withheld information.

Analysis

Exemptions

10. The relevant legislation is set out in full in the legal annex to this Notice.

Section 44

11. The Commissioner has considered whether the requested information is exempt under section 44(1)(a) of the Act.

12. Section 44(1)(a) provides that:

“Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –

(a) is prohibited by or under any enactment”.

13. The exemption under section 44 is absolute and there is no need to consider the public interest in disclosure against the public interest in withholding the information.

14. The relevant enactment is section 59(1) of the Data Protection Act 1998 (“the DPA”).

Section 59(1) of the Data Protection Act 1998

15. Section 59(1) of the DPA provides that:

“No person who is or has been the Commissioner, a member of the Commissioner’s staff or an agent of the Commissioner shall disclose any information which –

(a) has been obtained by, or furnished to, the Commissioner under or for the purposes of the information Acts,

- (b) *relates to an identified or identifiable individual or business, and*
- (c) *is not at the time of the disclosure, and has not previously been, available to the public from other sources, unless the disclosure is made with lawful authority.*

16. In an earlier Decision Notice, issued under reference FS50126668, the Commissioner described section 59(1)(a) as referring to "...all information held by the Commissioner for the purposes of and in relation to investigations that he conducts following complaints about compliance with the legislation over which he has jurisdiction".
17. In relation to section 59(1)(b), the Commissioner notes that the withheld information in question relates to several businesses and to identifiable individuals.
18. With regard to section 59(1)(c), the Commissioner notes that the information in question has not been disclosed to the public.
19. The Commissioner is therefore satisfied that the information requested falls within the definition set out in section 59(1), and meets all of the criteria. This is factual and not disputed by the complainant. The investigation therefore focused on whether lawful authority could be established.

Section 59(2) of the Data Protection Act 1998

20. Section 59(2) of the DPA provides for a number of scenarios in which information falling within the description of section 59(1) may be disclosed. The complainant has suggested that section 59(2)(e) is relevant in this case.
21. Section 59(2)(e) provides that:

"For the purposes of subsection (1) a disclosure of information is made with lawful authority only if, and to the extent that –

(e) having regard to the rights and freedoms or legitimate interests of any person, the disclosure is necessary in the public interest".
22. It should be noted that, when assessing whether disclosure is "necessary in the public interest", the Commissioner is not restricted to considering only the factors he would be able to take into account if he

were conducting a public interest test under section 2 of the Act. He has therefore considered all factors relevant to this particular case.

23. The threshold as to what constitutes a “necessary” disclosure is very high. This is unlike the public interest test under section 2 of the Act which requires only that the public interest in maintaining the exemption does not outweigh the public interest in disclosure.

Is disclosure ‘necessary in the public interest’? – the complainant’s view

24. The complainant considers that disclosure of the information is necessary in the public interest. The complainant provided arguments that the information and documentation would have great relevance for the unions in question and their members, and that it is likely that the information would have had a direct bearing on the welfare, livelihood and privacy of officials and members.
25. The complainant also argued that the issue of blacklisting is very much in the public domain and it is of enormous public interest that the nature of the information collected and obtained is released to the organisation which has the responsibility and duty to its members and officials.
26. The complainant also argued that the information in question would have relevance to the members’ and officials’ rights in relation to their privacy and also their rights to join a trade union. It would be relevant to their right to work and contract - and therefore support themselves and their families - without interference from employers. Therefore, the complainant argued that members and officials would have legitimate interest in disclosure of the documentation.

Is disclosure ‘necessary in the public interest’? – the ICO’s view

27. The ICO suggested that the arguments submitted by the complainant constituted arguments relating to the private interests of the members and officials of the trade union organisations in question, rather than a legitimate public interest in disclosure. Therefore it would be of personal interest to the individuals and organisations affected, but not necessarily in the public interest to disclose this information to the world at large under the provisions of the Act.
28. The ICO argued that the information in question was seized as part of a criminal investigation and therefore was obtained by the ICO as part of its regulatory functions. The ICO explained that, as a regulator, it is not in a position to decide what is necessary for an organisation or individual to be provided with to take their own legal action.

29. The ICO also argued that it needs to demonstrate the application of a consistent approach to all requests for copies of the information in question. The ICO stated that in all similar requests the applicant has been advised to obtain a court order (thus providing the ICO with lawful authority to disclose it).

The Commissioner's view

30. The Commissioner recognises that there is a general public interest in the transparency of the way he conducts his investigations and carries out his functions. The Commissioner has reviewed the specific information in question. He does not consider that disclosure of the information would particularly enlighten the public as to how effectively he carries out his functions. Therefore, whilst he has afforded some weight to the general public interest in openness and transparency, he affords no additional weight specific to the disclosure of the particular information in this case.
31. The Commissioner accepts the ongoing public interest in the issue of blacklisting itself. Whilst the Commissioner notes the points raised by the ICO, that the public interest arguments from the complainant appear to demonstrate the private interests of the trade unions and their members rather than the interests of the public at large, he considers that the number of individual private interests that the disclosure would serve would, in fact, be likely to equate to a public interest in disclosure. Further, the withheld information would serve the public interest by informing the debate on the issue of blacklists, the threats to employment opportunities posed by the operation of such lists and the integrity of employers in the construction industry. It may also shape public opinion on the penalties that are appropriate for operating or accessing such lists.
32. Whilst the Commissioner accepts that there are clear public interest arguments in favour of disclosure, he considers there to be an overwhelming public interest against disclosure of the information. Disclosure under the Act is disclosure to the world at large, not just the individuals and organisations in question. The ICO's regulatory action was carried out in order to take the information out of circulation to prevent access to it in order to protect the individuals in question. The Commissioner also considers that there is a strong public interest in maintaining the exemption regarding this type of information as it enables the Commissioner to regulate in an effective way. The Commissioner considers that some aspects of his regulatory functions must be carried out in private due to the nature of the investigations. The Commissioner also believes that in this case there is a greater

interest in protecting the integrity of the Commissioner's regulatory functions and that disclosure could damage the public trust in the Commissioner's processes.

33. As a result of the arguments set out above, the Commissioner is satisfied that disclosure of the requested information was not necessary in the public interest. Therefore, the Commissioner is satisfied that no lawful authority was in place to allow the information to be released.
34. The Commissioner is satisfied that section 59 of the DPA was applied correctly to the information requested. Given that lawful authority to release the information cannot be demonstrated, this section provides statutory prohibition on disclosure of the information requested. Therefore the Commissioner considers that section 44(1)(a) of the Act was correctly applied to the withheld information.

The Decision

35. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act. The exemption at section 44 of the Act was applied correctly in conjunction with section 59 of the DPA.

Steps Required

The Commissioner requires no steps to be taken.

Right of Appeal

36. 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 17th day of January 2011

Signed

**Anne Jones
Assistant Commissioner**

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

Legal Annex

Prohibitions on disclosure.

Section 44(1) provides that –

“Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-

- (a) is prohibited by or under any enactment,
- (b) is incompatible with any Community obligation, or
- (c) would constitute or be punishable as a contempt of court.”

Section 44(2) provides that –

“The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).”

Data Protection Act 1998

Information provided to Commissioner or Tribunal

Section 59(1) provides that –

“No person who is or has been the Commissioner, a member of the Commissioner’s staff or an agent of the Commissioner shall disclose any information which –

- (a) has been obtained by, or furnished to, the Commissioner under or for the purposes of this Act,
- (b) relates to an identified or identifiable individual or business, and
- (c) is not at the time of the disclosure, and has not previously been, available to the public from other sources,

unless the disclosure is made with lawful authority”.

Section 59(2) provides that –

“For the purposes of subsection (1) a disclosure of information is made with lawful authority only if, and to the extent that-

- (a) the disclosure is made with the consent of the individual or of the person for the time being carrying on the business,
- (b) the information was provided for the purpose of its being made available to the public (in whatever manner) under any provision of this Act,
- (c) the disclosure is made for the purposes of, and is necessary for, the discharge of-

- (i) any functions under this Act, or
- (ii) any Community obligation,
- (d) the disclosure is made for the purposes of any proceedings, whether criminal or civil and whether arising under, or by virtue of, this Act or otherwise, or
- (e) having regard to the rights and freedoms of legitimate interests of any person, the disclosure is necessary in the public interest".

Section 59(3) provides that –

“Any person who knowingly or recklessly discloses information in contravention of subsection (1) is guilty of an offence”.