

## **Freedom of Information Act 2000 (Section 50)**

### **Decision Notice**

**Date: 8 August 2011**

**Public Authority:** Parliamentary and Health Service Ombudsman  
**Address:** Millbank Tower  
Millbank  
London  
SW1P 4QP

#### **Summary**

---

The complainant asked the Parliamentary and Health Service Ombudsman (the "PHSO") for the names of MPs who had referred complaints to the PHSO on behalf of constituents about premium rate telephone services (with respect to television phone-in shows). The PHSO explained that the Ombudsman is subject to a statutory bar contained in the Parliamentary Commissioner Act 1967. This prevents the release of information obtained by the Ombudsman, or officers acting on her behalf, in the course of (or for the purposes of) an investigation, except in very limited circumstances. The PHSO therefore refused to disclose this information under section 44(1)(a) of the Freedom of Information Act 2000 (the "Act"). The Commissioner finds that the PHSO was correct to apply section 44(1)(a) to the request. He also found some procedural breaches 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 background to this request concerns allegations over improper telephone practices adopted by television companies running phone-in quiz shows and the alleged failure of Ofcom to properly police these activities.

## The Request

---

3. On 7 December 2009 the complainant wrote to the PHSO and asked it for the following:

*'...I would like the Ombudsman to initiate a search for MPs who have made representations on behalf of constituents affected by PRS problems...'*

'PRS' stands for premium rate telephone services.

4. On 9 December 2009 the PHSO asked the complainant for clarification of his request.
5. On 9 December 2009 the complainant explained to the PHSO that he wanted this information so that he could contact those MPs to ask if their constituents were "alright" and assist them as appropriate.
6. On 18 January 2010 the PHSO responded to this request. It explained that by law the Ombudsman's investigations must be conducted in private. It explained that the Ombudsman is subject to a statutory bar contained in section 11 of the Parliamentary Commissioner Act 1967 (the "PCA"). This prevents the release of information obtained by the Ombudsman (or officers acting on her behalf) in the course of, or for the purposes of, an investigation, except in very limited circumstances. The PHSO did not consider that any of these limited circumstances applied here.
7. The PHSO explained that the information the complainant was seeking was caught by the statutory bar and could not therefore be disclosed. The information was also inaccessible to him under the Act because section 44 of the Act exempts information from disclosure if such disclosure would be prohibited by other legislation (such as section 11 of the PCA).
8. The PHSO also informed the complainant that even if the above constraints upon release did not exist, the Ombudsman would consider the exemption at section 36 of the Act (prejudicial to the conduct of public affairs) to apply.
9. On 19 September 2010 the complainant requested an internal review.
10. This was provided on 5 January 2011. The PHSO repeated its position that the information was exempt under section 44 of the Act as disclosure was prohibited by other legislation. In this case, section 11 of the PCA provided a statutory bar.

## The Investigation

---

### Scope of the case

11. On 26 November 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He specifically asked the Commissioner to consider the following points:
  - he argued that the Ombudsman should be required to release the names of the MPs who had complained to her office on behalf of constituents who had been “fleeced by the PRS scams orchestrated by Ofcom and PhonePayPlus Ltd”;
  - the matter had been passed to The City of London Police Fraud Squad for investigation; and
  - the request was essential to further proceedings in the High Court.

### Chronology

12. During January and February 2011 the complainant submitted further documents to the Commissioner in support of his argument that it was in the public interest that the Ombudsman should release the names of the MPs.
13. On 4 February 2011 the PHSO wrote to the Commissioner and reiterated its position.
14. On 21 February 2011 the complainant wrote to the Commissioner and argued that Ofcom’s collusion in PRS “scams” had been covered-up. He accused the Ombudsman of “unlawful behaviour”.
15. On 24 February 2011 the Commissioner explained to the complainant that section 44(1)(a) is not subject to the public interest test, so he could not take into account the related points the complainant had submitted.
16. On 24 February 2011 the complainant pointed out that he was not asking for information relating to investigations by the Ombudsman but names of MPs who had written to her.
17. On 20 March 2011 the complainant informed the Commissioner that the Ombudsman has never investigated complaints regarding premium-rate telephone scandals and that he considered the allegation of fraud should override any arguments in favour of privacy. He argued

that MPs and their constituents have an absolute right to know that they are victims of a £200 million fraud.

## Analysis

---

18. The full text of section 1(1), section 10(1), section 17(1) and section 44 is available in the Legal Annex at the end of this Notice.

## Exemptions

### Section 44(1)(a)

19. Section 44(1)(a) of the Act states that information is exempt if its disclosure by the public authority holding it is prohibited by or under any enactment. The relevant enactment in this case is section 11(2) of the PCA. This represents an absolute exemption from disclosure which cannot be overridden by public interest considerations.

## The Parliamentary Commissioner Act 1967

20. Section 7 of the PCA provides that the Ombudsman's investigations shall be conducted in private.
21. Section 11 of the PCA states that the information obtained in the course of, or for the purposes of, those investigations can only be disclosed in the very specific circumstances where a 'gateway' to disclosure is identified.
22. The 'gateways' to disclosure at sub-sections (a) – (c) of section 11(2) allow the Ombudsman to disclose the information for the purposes of:
- (a) the investigation concerned and any subsequent report;
  - (b) proceedings for an offence under the Official Secrets Act or for an offence of perjury, as allegedly committed by the Ombudsman or one of her officers; and
  - (c) any proceedings under section 9 of the PCA.
23. The PHSO has explained that the Ombudsman's investigations must by law be conducted in private. In addition, section 11 of the PCA prevents the release of information obtained by her, or officers acting on her behalf, in the course of, or for the purposes of, an investigation (including the assessment of a complaint), except in very limited circumstances which do not apply here.

24. The PHSO has also explained that in practice, information may be disclosed by the PHSO for the purpose of the investigation (eg to make enquiries of the body complained about) or for the purposes of an investigation report or decision letter.
25. The Commissioner does not consider that this applies to the current request. The Commissioner also accepts that responding to a freedom of information request is not one of the 'gateways' to disclosure.
26. The Commissioner accepts that section 11(2) of the PCA, acts as a statutory prohibition on the disclosure of information 'obtained' by the Ombudsman 'in the course of, or for the purposes of, an investigation under this Act'.
27. The issue to be considered is therefore whether the information requested by the complainant and withheld by the Ombudsman under section 44(1)(a) of the Act, can be said to have been obtained by the Ombudsman in the course of, or for the purposes of, an investigation under the PCA.
28. The withheld information consists of the names of the MPs who had referred complaints to the PHSO on behalf of constituents about premium rate telephone services.
29. The complainant has argued that he was not asking for information relating to investigations by the Ombudsman but names of MPs who had written to her.
30. However, the Ombudsman has argued that the fact that an MP has referred a complaint about PRS is information that the PHSO had obtained for the purposes of assessing that complaint. It had obtained and holds that information (and the names of the MPs involved) for that purpose alone. The Ombudsman has therefore argued that this information falls squarely under the statutory bar.
31. The Commissioner considers that the requested information falls under section 11 of the PCA and is therefore exempt from disclosure under section 44(1)(a) of the Act.
32. The Commissioner therefore considers that the PHSO was correct to refuse the disclosure of the requested information under section 44(1)(a) of the Act.
33. Section 44 is an absolute exemption and is not subject to the public interest test. There is therefore no requirement for the Commissioner

to consider the public interest arguments submitted by the complainant.

34. In view of his finding in relation to the above exemption, the Commissioner has not considered the other exemptions cited by the PHSO.

## **Procedural Requirements**

### **Section 10**

35. Section 10(1) of the Act states the following:

*"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."*

36. The clarified request was dated 9 December 2009. The PHSO provided an initial response to the complainant 26 working days after this date, on 18 January 2010.
37. The Commissioner therefore finds that the PHSO failed to comply with section 10(1) as it did not inform the complainant whether it held the information within 20 working days.

### **Section 17**

38. The request was dated 9 December 2009. The PHSO provided a response to the complainant 26 working days after this date, on 18 January 2010. The PHSO informed the complainant that the requested information was exempt under section 44 of the Act.
39. The Commissioner therefore finds that the PHSO failed to issue a refusal notice to the complainant within the statutory time period for compliance with section 1(1). The PHSO is therefore found to be in breach of section 17(1).
40. Section 17(1)(b) states that should a public authority claim that the information requested is exempt, it should specify the exemption in question. In its initial response and at internal review, the PHSO explained that it was not providing the information as it was exempt under section 44. In failing to cite the full exemption in its responses, the PHSO is found to be in breach of section 17(1)(b).

## The Decision

---

41. 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:

- the PHSO correctly applied section 44(1)(a) to the request for information.

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

- the PHSO failed to provide a response to the complainant within the statutory time period contained within the provisions set out in section 10(1);
- the PHSO failed to provide a failed to provide a refusal notice to the complainant within the statutory time period contained within the provisions set out in section 17(1); and
- the PHSO is found to be in breach of section 17(1)(b). It failed to cite the relevant exemption in this initial response and at internal review.

## Steps Required

---

43. The Commissioner requires no steps to be taken.

## Other matters

---

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

45. The complainant requested an internal review on 19 September 2010. This was not provided until 5 January 2011, 73 days later.

46. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority has 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 over 40 working days for an internal review to be completed, despite the publication of his guidance on the matter.



## Right of Appeal

---

47. 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](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

48. 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.
49. 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 8<sup>th</sup> day of August 2011**

**Signed .....**

**Faye Spencer  
Group Manager  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

---

### **General Right of Access**

**Section 1(1)** provides 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.”

### **Section 10**

Section 10(1) provides 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.”

### **Section 17**

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 44**

(1) 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.

(2) The duty to confirm or deny does not arise if the confirmation of 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)”.