

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 19 June 2012

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

#### Decision (including any steps ordered)

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1. The complainant has requested a copy of legal advice referred to by an employee of the public authority in a newspaper article. The public authority stated that this information was not held. The complainant referred to a piece of legal advice that had been discussed at the Leveson Inquiry (the "Inquiry advice") and queried whether this fell within the scope of his request. The public authority stated that the Inquiry advice did not fall within the scope of the request. However, it did disclose an extract of this advice to the complainant.
2. The complainant complained that by failing to refer to the Inquiry advice the public authority had failed in its duty to provide advice and assistance (section 16 FOIA). He also queried whether the Inquiry advice fell within the scope of his request, and (if so) argued that he should have been provided with a full copy of it (section 1 FOIA).
3. The Commissioner's decision is that the Inquiry advice did not fall under the scope of the complainant's request. As such, he considers that the public authority was not required to inform the complainant of this advice under section 16. As he has decided that the Inquiry advice did not fall under the scope of the request, the Commissioner has not gone on to consider whether this advice should have been disclosed to the complainant in full.
4. The Commissioner does not require any steps to be taken.

## Request and response

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5. On 15 September 2011 an article was published in the Independent newspaper entitled, *'David Smith: View from Information Commissioner's Office: we were frustrated – and still are'*.<sup>1</sup> This article reported the comments of David Smith, Deputy Commissioner at the public authority, and related to the decision by the public authority not to prosecute any journalists following the information uncovered by Operation Motorman. The contents of this article form the focus of the complainant's request.
6. On the same day as this article was published the complainant wrote to the public authority and made the following request:

*"In the Independent this morning, David Smith made the following statement.*

*'Our decision was based on expert legal advice that pursuing prosecutions would not be in the public interest, because of the difficulty in proving beyond all reasonable doubt that the journalists who received information from Mr Whittamore knew it could only be obtained illegally.'*

*I would like to request a copy of the legal advice Mr Smith refers to here. I assume you will consider the application of Section 42. Please take into account the following factors – Mr Smith has revealed the content of the legal advice, and disclosure of it is vital in terms of the public interest. The nature of the advice would assist in revealing whether allegations made in the Independent by a former ICO employee about the reasons for non-prosecution of journalists have any foundation."*

7. The public authority responded on 11 October 2011 and stated that this information was not held. It did not provide any further explanation as to why this information was not held.
8. The complainant requested an internal review on 6 December 2011. He queried whether the requested information was held, and noted that this information appeared to have been provided to the Leveson Inquiry on 5 December 2011 (i.e. the Inquiry advice). He asked for further details of

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<sup>1</sup> <http://www.independent.co.uk/opinion/commentators/david-smith-view-from-information-commissioners-office-we-were-frustrated-ndash-and-still-are-2354971.html>

the searches that had been carried out to try and locate the requested information. He also stated that if the requested information and the Inquiry advice were not the same thing, he wanted to know why he had not been provided with advice and assistance (under section 16 FOIA), as he considered that he should have been informed that *"a separate and remarkably similar piece of legal advice"* was held.

9. On 13 January 2012 the public authority wrote to the complainant with the details of the result of the internal review. It provided details of the searches it had carried out, and in particular confirmed that David Smith had been approached when the request had been received. It explained that the context of the newspaper article was its disappointment with the outcome of Operation Motorman in court, and the sentencing of Steven Whittamore (in April 2005). It explained that the article was also based on a section of the 'What Price Privacy?' report (published in May 2006), which also related to the sentencing of Mr Whittamore. Therefore, it upheld its previous conclusion that the requested information was not held. In relation to the duty to provide advice and assistance, it noted that although it did hold some legal advice concerning the prosecution of Mr Whittamore and others, this did not focus on the potential prosecution of journalists. As such, it did not fall under the scope of the request. Therefore, it did not accept that it had been under a duty to inform the complainant of the Inquiry advice under section 16. However, it noted that given what had subsequently come to light and been referred to at the Leveson Inquiry it would now disclose extracts from the Inquiry advice (previously provided to the Inquiry on 5 December 2011).

## Scope of the case

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10. The complainant contacted the Commissioner to complain about the way his request for information had been handled. In particular he argued that:
  - in the refusal notice the public authority had failed to provide advice and assistance, by not referring to the Inquiry advice; and
  - that the Inquiry advice fell under the scope of the request, and as such he should have been provided with a full copy of this advice.
11. At the outset of the investigation the Commissioner wrote to the complainant and stated that he intended the scope of this case to be to consider:
  - whether the Inquiry advice falls within the scope of the request;

- if so, whether the public authority should disclose the Inquiry advice; and
  - whether the public authority failed to meet with the requirements of section 16 to provide advice and assistance.
12. On 2 April 2012 the complainant responded, and confirmed that he was content with the suggested scope of the case.

## Reasons for decision

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### Does the Inquiry advice fall within the scope of the request?

13. The Commissioner has first considered whether the Inquiry advice falls within the scope of the request.
14. The request in this case focuses on the legal advice referred to in the Independent article of 15 September 2011. The article refers to legal advice used by the public authority in its decision not to prosecute journalists who had obtained information from Mr Whittamore.
15. In the internal review the public authority stated that it had approached the employee that was quoted in the article (David Smith). He had stated that his comments were based on *"his understanding of the situation at that time and the documentation he had seen"* and on the contents of a section of the 'What Price Privacy?' report. It confirmed that he had not seen, and was not aware of, the Inquiry advice. The public authority pointed out that the Inquiry advice did not focus on journalists, and therefore related to a different topic to that referred to in the request. As the request was very specifically for a copy of the advice referred to in the Independent article (regarding the decision not to prosecute journalists) the Inquiry advice did not fall within the scope of the request.
16. During the investigation the Commissioner contacted the public authority. He noted that the request was clearly focused on the legal advice referred to in the Independent article, and that from reading that article it appeared that the advice had been used by the public authority in its decision not to prosecute journalists who had obtained information from Mr Whittamore. The advice also appeared to have focused on *"the difficulty in proving beyond all reasonable doubt that the journalists [...] knew it could only be obtained illegally."* However, he noted that the article did not provide any further details of the advice it referred to, nor any background information that would put it in context (such as the date the advice was obtained). Bearing this in mind, he asked the public authority to provide him with a further explanation as to why it did not

believe that the Inquiry advice fell within the scope of the request, and to clarify (as far as possible) what advice was being referred to in the Independent article. Finally, he also asked it to provide him with a full copy of the Inquiry advice.

17. In response the public authority confirmed that it had spoken again to the employee quoted in the article, and he had explained that his comments had been based on his understanding of *"the totality of internal and external advice"* and the contents of the 'What Price Privacy?' report. He had clarified that he was not referring to any one piece of legal advice, and had specifically confirmed that he was not referring to the Inquiry advice. Finally, it also provided the Commissioner with a copy of the Inquiry advice.
18. In reaching a view on whether the Inquiry advice falls within the scope of the request the Commissioner has in particular noted the clear statement, by the employee quoted in the article, that he was not referring to the Inquiry advice or indeed any specific piece of legal advice when he made the comments that were reported in the Independent article. After considering the full text of the Inquiry advice, the Commissioner is also satisfied that it does not contain any actual advice as to whether or not to prosecute journalists, and is instead concerned about the potential prosecution of certain individuals involved with Mr Whittamore.
19. Taking into account the explanations given in the internal review and the subsequent submissions provided during the course of the investigation, the Commissioner is satisfied that the Inquiry advice falls outside the scope of the request.
20. As such he has not gone on to consider should disclose a full copy of the Inquiry advice as a result of this request.

### **Section 16 – The duty to provide advice and assistance**

21. The complainant has argued that the public authority failed to provide advice and assistance when dealing with his request. Specifically, he has complained that the initial refusal notice failed to provide appropriate advice and assistance by not informing him of the Inquiry advice. In particular he has asked, *"...why I was not provided with advice and assistance that a separate and remarkably similar piece of legal advice was held by the Information Commissioner's Office."*
22. In the internal review the public authority stated that as the Inquiry advice did not fall within the scope of the request it had been under no duty to inform the complainant of this advice under section 16.

23. Section 16(1) provides an obligation for a public authority to provide advice and assistance to a person making a request, so far as it would be reasonable to do so. Section 16(2) states that a public authority is to be taken to have complied with its section 16 duty in any particular case if it has conformed with the provisions in the Section 45 Code of Practice (the "Code") in relation to the provision of advice and assistance in that case.
24. Paragraphs 8 to 11 of the Code outline the situations when a public authority would be expected to go back to the complainant and clarify his request for information. It states this would be expected when the public authority is not able to identify and locate the information sought.
25. As noted above, the public authority noted in the internal review that the request was very specifically for the legal advice referred to in the Independent article. It had also spoken to the individual quoted in the article, who had confirmed that he had not been referring to the Inquiry advice when he made his comments. Therefore, it considers that the Inquiry advice falls outside the scope of the request.
26. In relation to paragraphs 8 to 11 of the Code, the Commissioner is satisfied that given the clear nature of the request these did not apply as given the unambiguous nature of the request, it was clear what was being requested. As such, he does not consider that the public authority needed to go back to the complainant to enable it to identify and locate the information sought.
27. In addition, the Commissioner does not consider that there are any other relevant paragraphs in the Code that relate to the issues that the complainant has mentioned.
28. The Commissioner is concerned about the contents of the refusal notice – which provided no explanation as to why the requested information was not held. In particular, given the context of the request, and the contents of the Independent article, he considers that the refusal notice did not represent best practice. However, this does not mean in itself that the public authority failed to meet the requirements of section 16. He has commented further on these concerns in the 'Other matters' section below.
29. Given the clear wording of the request for the legal advice referred to in the Independent article, and his decision that the article was not referring to the Inquiry advice, the Commissioner does not consider that the public authority was obliged (under section 16) to inform the complainant of this advice. Therefore, the Commissioner is satisfied that the public authority did not fail to meet the requirements of section 16(1) of the FOIA.

## Other matters

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30. The request in this case was clearly prompted by the Independent article and its comment that the decision not to prosecute journalists “...was based on expert legal advice...” As noted above, the request was clearly focused on the advice referred to in this article.
31. Whilst the Commissioner is satisfied that the comments of the public authority’s employee reported in the article were not actually referring to a single piece of legal advice, given the wording of the article he considers that it would be very easy for even the most informed reader to consider that they were.
32. However, the response of the public authority to the request simply stated that this information was not held, and informed the complainant of his right to request an internal review. It did not provide any further explanation as to why this information was not held.
33. Given the wording of the Independent article, the fact that the request was clearly for the ‘expert legal advice’ referred to in this article, and the indication in the article that a specific piece of advice was held, the Commissioner considers that it would have been good practice for the public authority to give some explanation at this stage as to why the requested information was not held. Therefore, he considers that the refusal notice did not represent best practice. He would expect the public authority, in similar circumstances in the future, to provide some explanation as to why information is not held.

## Right of appeal

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34. 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,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

35. 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.
36. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed** .....

**Gerrard Tracey**  
**Principal Adviser**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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**Cheshire**  
**SK9 5AF**