

Freedom of Information Act 2000 (Section 50)

Decision Notice

4 February 2009

Public Authority: Student Loans Company
Address: Student Loans Company Limited
100 Bothwell Street
Glasgow
G2 7JD

Summary

The complainant made a request under the Freedom of Information Act 2000 (the "Act") to the Student Loans Company (the "Company") on 28 December 2006 for a document entitled "CLASS Training Manual". The Company refused to provide this information to the complainant citing the exemption contained at section 43 of the Act relating to commercial interests. The Company's refusal to provide the information by virtue of the exemption contained at section 43 was investigated by the Information Commissioner's Office (ICO). A decision notice was issued on 30 July 2008 requiring the Company to disclose the requested information as it concluded that the exemption contained at section 43 had not been correctly engaged in that case. The Company supplied the requested information to the complainant in hard copy format. The complainant highlighted to the Company that at the time of making his request he specified that if held in electronic form the information should be supplied preferably in electronic format. The Company refused to provide the information in electronic format due to issues surrounding copyright and confidentiality. The complainant made a subsequent complaint to the ICO regarding the format in which the information had been provided to him. The Commissioner considers that section 11(1) of the Act has been breached as the complainant specified his preferred format at the time of making his request and the arguments put forward by the Company do not in the Commissioner's view indicate that it would not be reasonably practicable to provide the information in electronic format.

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. On 28 December 2006 the complainant made a request to the Company for a document entitled "CLASS Training Manual".
3. The Company refused to provide the information to the complainant by virtue of the exemption contained at section 43 of the Act relating to commercial interests. The Company's refusal to provide the information was investigated by the ICO. A decision notice was issued on 30 July 2008 which required the Company to disclose the requested information as it was concluded that the section 43 exemption had been incorrectly engaged in that case. The decision notice issued can be accessed on the ICO's website under reference FS50156040. On 31 July 2008 the complainant highlighted to the Company that at the time of making his request he had specified that if held in electronic form the information should be supplied preferably in electronic format. The Company refused to provide the information in electronic format due to issues surrounding copyright and confidentiality. The Company supplied the requested information to the complainant in hard copy form on 1 September 2008.
4. On 8 September 2008 the complainant wrote to the Company to express his dissatisfaction with its failure to supply the requested information in the specified format. He again asked for the information to be provided in electronic format.
5. On 10 September the Company wrote to the complainant again refusing to supply the information in electronic format. It explained that due to concerns surrounding copyright and confidentiality it could not provide the information in electronic format.

The Investigation

Scope of the case

6. On 2 October 2008 the complainant contacted the Commissioner to make a complaint as the company had failed to provide the information requested in the complainant's preferred format which he had specified at the time of making his request.
7. The issue relating to format was not considered within the original investigation, case reference FS50156040, as it did not form part of the complainant's original complaint to the Information Commissioner's

Office nor was the issue raised by the public authority during the course of that investigation.

Chronology

8. On 20 October 2008 the Commissioner wrote to the Company to determine whether or not it had complied with the Act in relation to the format in which it had provided the requested information.
9. The Commissioner explained that under section 11 of the Act a public authority should provide requested information in the preferred means of communication specified by the applicant on making his request unless it is not reasonably practicable to do so. The Commissioner also referred the Company to Awareness Guidance 29 which outlines at point 9 what a public authority can consider when deciding whether it is reasonably practicable to agree to the preference. The Commissioner explained that in his view the reasons put forward by the Company for not providing the information in electronic format (copyright and confidentiality) were not valid grounds for not complying with the complainant's format preference, and he clarified his own reasons for holding that view.
10. The Commissioner asked the Company to clarify whether in light of his explanation it would now be willing to provide the information in the requested format or alternatively to provide arguments as to why it would not be reasonably practicable to do so.
11. On 23 October 2008 the Company responded to the Commissioner. It explained that under section 21 of the Act a public authority does not need to provide information under section 1(1)(b) of the Act if that information is reasonably accessible to the applicant by other means. It clarified that section 21 is not subject to the public interest test, it explained that if the information requested is accessible to the applicant by other means, then it is exempt. It clarified that its position was that the information had already been provided under the Act and therefore there is no further obligation upon the Company to re-issue the information in an alternative format.
12. The Company further stated that section 11 of the Act refers to "a preference for communication by any one or more of the following means". It argued that the wording of the Act is not entirely prescriptive in that it does not actually stipulate that a public authority must adhere to the preference expressed by the applicant. Furthermore it argued that the Commissioner's Guidance No. 29 states that it is for the public authority to decide what is reasonable, and the public authority need only agree to the applicant's preference "so far as is reasonably practicable". In relation to this definition it explained that if the information were to be released in electronic format it would have concerns in relation to copyright and confidentiality. It is the Company's

view that in order to ensure that neither confidentiality nor copyright were breached, it would have had to put safeguards in place to ensure that the Manual was not posted on websites nor reproduced without permission. In order to be effective, it explained that this would require a carefully drafted legal document, signed by the complainant agreeing to these terms. It is the Company's position that in light of the costs and time required to prepare such a document, it would not be reasonably practicable to issue this in electronic format as requested.

Analysis

Procedural matters

Section 11

13. Section 11(1) of the Act states that:

"Where, on making his request for information, the applicant expresses a preference for communication by one or more of the following means, namely

- (a) the provision to the applicant of a copy of the information in permanent form or in another form acceptable to the applicant,
- (b) the provision to the applicant of a reasonable opportunity to inspect a record containing the information, and
- (c) the provision to the applicant of a digest or summary of the information in permanent form or in another form acceptable to the applicant.

the public authority shall so far as is reasonably practicable give effect to that preference."

Section 11(2) of the Act states that:

"In determining for the purposes of this section whether it is reasonably practicable to communicate information by a particular means, the public authority may have regard to all the circumstances, including the cost of doing so."

A full text of section 11 is available in the Legal Annex at the end of this notice.

14. In this case the complainant did specify his preferred format, that being electronic format, at the time of making his request.

15. The Commissioner has considered in particular the Company's response to him as set out at paragraph 12 above. The Company expressed its concerns in relation to breach of copyright law and confidentiality. With regard to copyright, the Commissioner considers that FOI does not provide an implied licence for commercial or other exploitation of released information, and that any person to whom information is released is still bound by an obligation to respect any intellectual property rights held within it. However he considers that issues of possible copyright infringement fall outside the scope of the Act and that if any breaches of such legislation were to transpire then the Company should more properly address these elsewhere.. The Commissioner notes that the Company did alert the complainant to copyright limitations when it provided him with the hard copy version of the Training Manual, in response to the earlier Decision Notice.
16. The Commissioner notes that in the earlier investigation the Company raised similar concerns relating to the confidentiality and security of its information, when it originally withheld the Manual under section 43(1), claiming that it constituted a trade secret. The arguments were considered and dealt with in that earlier Decision Notice and the Company was required to release the Manual to the complainant. The Company has advanced no substantive further argument as to why release of an electronic version would be any more likely to compromise the confidentiality or security with which it is concerned.
17. To demonstrate that to provide the requested information in electronic format would not be reasonably practicable, the Company then focused upon the safeguards it would have to put in place to prevent its concerns surrounding copyright and confidentiality from being realised. As explained in paragraph 12 above this would include the drafting of a carefully worded legal document.
18. The Commissioner has explained above why he does not consider issues regarding copyright and confidentiality fall within the scope of section 11 of the Act. This is because they do not deal with the question of whether it would be reasonably practicable to provide the information in the preferred format. Therefore the Commissioner considers any steps the Company considers it needs to take in order to allay its concerns in relation to copyright and confidentiality can also not be taken into account

Exemption

Section 21

19. Section 21(1) of the Act states that:

“Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.”

A full text of section 21 is available in the Legal Annex at the end of this notice.

20. The Company also endeavoured to rely upon the exemption contained at section 21 of the Act to prevent it from disclosing the information in electronic format to the complainant. It argued that the information was already accessible as it had provided it to the complainant in hard copy format.
21. The Commissioner considers that section 21(1) is applicable when the information is readily accessible by other means outside of the Act at the time of the request. In this case the information requested by the complainant on 28 December 2006 was not readily accessible at the time of his request but was subsequently provided under section 1 of the Act following the Commissioner's decision in the case of FS50156040. The issue which is the subject of this notice purely relates to the format in which that information has been provided.

The Decision

22. The Commissioner's decision is that the Company did not comply with section 11(1) of the Act, in that it did not give effect to the requester's preference for format when he made the request.

Steps Required

- 23 The Commissioner requires the Company to provide the requested information in the complainant's preferred format, that being electronic format, in accordance with section 11 of the Act.
- 24 The Company must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

- 25 Failure to comply with the steps 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.

Right of Appeal

26. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.

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 4th day of February 2009

Signed

**Anne Jones
Assistant Commissioner**

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

Legal Annex

Means by which communication can be made

Section 11(1) provides that –

“Where, on making his request for information, the applicant expresses a preference for communication by one or more of the following means, namely –

- (d) the provision to the applicant of a copy of the information in permanent form or in another form acceptable to the applicant,
- (e) the provision to the applicant of a reasonable opportunity to inspect a record containing the information, and
- (f) the provision to the applicant of a digest or summary of the information in permanent form or in another form acceptable to the applicant.

The public shall so far as is reasonably practicable give effect to that preference.”

Section 11(2) provides that –

“In determining for the purposes of this section whether it is reasonably practicable to communicate information by a particular means, the public authority may have regard to all the circumstances, including the cost of doing so”

Section 11(3) provides that –

“Where a public authority determines that it is not reasonably practicable to comply with any preference expressed by the applicant in making his request, the authority shall notify the applicant of the reasons for its determination

Section 11(4) provides that –

“Subject to subsection (1), a public authority may comply with a request by communicating information by any means which are reasonable in the circumstances.”

Information Accessible by other Means

Section 21(1) provides that –

“Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.”

Section 21(2) provides that –

“For the purposes of subsection (1)-

- (a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and
- (b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.”

Section 21(3) provides that –

“For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.”