

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 17 March 2011

Public Authority: Cabinet Office
Address: Admiralty Arch
North Entrance
The Mall
London
SW1A 2WH

Summary

The complainant asked the public authority to provide information about communications sent or received by a specified individual and their line manager and direct or indirect reports in relation to the company Phorm. Although the Cabinet Office initially confirmed it held some requested information to which it applied the exemption at section 27(1)(b) (prejudice to international relations), it subsequently issued a refusal notice citing section 14 (vexatious requests), and at the internal review stage it stated that it held no information. During the Commissioner's investigation the public authority sought to rely on the exemption provided by section 40(5)(b)(i), stating that it should instead have given a 'neither confirm nor deny' response. The Commissioner finds that section 40(5)(b)(i) does not apply and that the public authority should now confirm or deny whether it holds the requested information or apply an appropriate exemption. The Commissioner also finds that the public authority did not comply with all of its procedural obligations under 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 submitted a request to the Cabinet Office on 20 October 2010 via the *whatdotheyknow.com* website for the following information:

"Please release the first communication received electronically by the cabinet office in relation to the company "Phorm" by [specified individual name redacted] of the office (the email address will be her name plus cabinet-office.x.gsi.gov.uk).

Also, release all communication (sent or received) by [specified individual name redacted], or her line manager, or her direct or indirect reports, associated with the subject of Phorm and the meeting held at 1 Victoria Street, 10:30am 5th Aug 2008.

If any emails cannot be released due to exclusion under the FOI Act, please redact the contents, leaving the recipients' and senders' department names and dates and times of the communications that took place visible."

3. The Cabinet Office provided a response to the complainant on 17 November 2009 in which it confirmed that it held *"information falling within the terms of [your] request"*. It refused to disclose the information requested on the basis of the exemption contained in section 27(1)(b) of the Act (international relations). It advised that it would need an estimated additional 20 days to consider the public interest test in relation to this exemption and would respond by 15 December 2009.
4. The complainant requested a review of the public authority's decision on 17 December 2009 when it had not provided him with its response by 15 December 2009. He sent a further reminder on 16 January 2010, which was acknowledged by the Cabinet Office on 25 January 2010.
5. On 3 February 2010 the Cabinet Office wrote to the complainant issuing a refusal notice stating that it had applied section 14 (vexatious requests) to his request. It offered him an internal review of its decision. The response referred to the Commissioner's guidance on vexatious requests and stated that this guidance had been attached.
6. The complainant requested an internal review on 3 February 2010 and advised the Cabinet Office that the guidance had been omitted from its response. On 4 February 2010 the Cabinet Office advised that it would forward the review request to the correct address, and sent the complainant a copy of the omitted ICO guidance on vexatious requests. Having forwarded the review request to the correct address, this part

of the Cabinet Office acknowledged receipt of the internal review request.

7. On 21 March 2010 the complainant wrote to the Cabinet Office requesting an update on his internal review request.
8. The Cabinet Office provided him with the result of its internal review via the *whatdotheyknow.com* website on 15 September 2010. It advised that it had considered the application of section 14 to his request, but now changed its response to state that it did not hold the requested information.

The Investigation

Scope of the case

9. On 19 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 the Cabinet Office's application of section 14 in the context of him having submitted only one other request to the Cabinet Office.
10. However, during the course of the Commissioner's investigation, the Cabinet Office cited section 40(5)(b)(i), and therefore indicated that it was neither confirming nor denying whether it held the requested information.

Chronology

11. Given that the Cabinet Office had not sought to apply any exemptions at the internal review stage, the Commissioner commenced his investigation by considering the Cabinet Office's application of section 14 to the request.
12. The Commissioner therefore wrote to the complainant on 8 December 2010 to advise him of the scope of the investigation and requesting that he provide details of any identical or substantially similar requests made to the Cabinet Office.

The complainant responded to the Commissioner on 8 and 15 December 2010, confirming that he had made one previous request to the Cabinet Office on 13 July 2009 and providing the details of this request.

13. On 13 December 2010 the Commissioner wrote to the Cabinet Office asking it to provide its arguments in support of its application of section 14.

14. Following several telephone calls from the Commissioner seeking the Cabinet Office's response to his investigation, the public authority provided its response on 2 March 2011. At this stage, the Cabinet Office argued that it should have applied the exemption at section 40(5)(b)(i) to the request such that it should have issued a refusal notice which neither confirmed nor denied whether the requested information was held.

Analysis

Exemption

Section 40(5)(b)(i)

15. The full text of the relevant provisions of the Act referred to in this section is contained within the Legal Annex.
16. Section 40(5)(b)(i) provides that a public authority is not obliged to confirm or deny whether requested information is held if to do so would:
- constitute a disclosure of personal data, and
 - this disclosure would breach any of the data protection principles or section 10 of the Data Protection Act (DPA).
17. The Commissioner's analysis of whether the above criteria would be satisfied follows.

Would confirming or denying that the requested information is held constitute a disclosure of personal data?

18. The DPA defines personal information as:

"...data which relate to a living individual who can be identified

a) from those data, or

b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the data controller or any person in respect of the individual."

19. In his guidance on the section 40 exemption¹, the Commissioner expanded on what constituted personal data:

“The two main elements of personal data are that information must ‘relate to’ a living person, and that person must be identifiable. Information will ‘relate to’ a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way.”

20. On the basis of the way in which the request is formulated, the Commissioner considers that, if any information were held which fell within scope, some at least of it could have the potential to be personal data. Confirming or denying that such information is held could itself potentially also disclose personal data (for instance, by confirming or refuting that the individual specified in the request is employed by the Cabinet Office). However, the Commissioner does not consider it likely that sensitive personal data would be disclosed, so Schedule 3 is not an issue.

Would disclosure of this personal data breach a data protection principle?

21. The Commissioner considers that the first data protection principle is the one most likely to be relevant here. This requires that personal data is processed fairly and lawfully and that:
- at least one of the conditions in Schedule 2 is met, and
 - in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.
22. In assessing the question of fairness, the Commissioner considers a number of factors, including whether the data subject has consented to disclosure; whether the data subject has actively put some or all of the requested information into the public domain; the consequences of any disclosure; and the reasonable expectations of the data subject.
23. In this case, insofar as any personal data might be disclosed by confirmation or denial, the Commissioner takes the view that it would not be unfair to disclose such personal data. In reaching this conclusion, he has had particular regard to the following factors:

1

http://www.ico.gov.uk/upload/documents/library/freedom_of_information/de-tailed_specialist_guides/personal_information.pdf

- the fact that the specified individual is involved in a professional rather than private capacity;
 - the professional role and grade of the specified individual;
 - the fact that the reference in the request to the specified individual was to “signpost” the likely location of the requested information, rather than representing a substantive interest in the role of the individual in the matters at issue;
 - the fact that involvement of this specified individual in issues relating to Phorm at the Cabinet Office is ascertainable from the website from which the request in this case was made.
 - that disclosure would not cause any unwarranted intrusion or damage to the data subject.
24. In relation to the issue of lawfulness, the Commissioner does not consider it to be likely that disclosure of any personal data in this case, if held, would be unlawful.
25. In order for disclosure to be fair and lawful and therefore in accordance with the first data protection principle, one of the conditions in schedule 2 of the DPA must also be satisfied. In this case the Commissioner considers that the most relevant condition would likely be the sixth. This states that:
- “the processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject”.*
26. In deciding whether condition 6 would be met in this case the Commissioner has considered the decision of the Information Tribunal in *House of Commons v ICO & Leapman, Brooke, Thomas* [EA/2007/0060 etc]. In that case the Tribunal established the following three-part test that must be satisfied before the sixth condition will be met:
- there must be legitimate interests in disclosing the information;
 - the disclosure must be necessary for a legitimate interest of the public;
 - even where disclosure is necessary it nevertheless must not cause unwarranted interference or prejudice to the rights, freedoms and legitimate interests of the data subject.

It further clarified, at paragraph 55, that "*The public interest in disclosure of official information is an interest which is relevant for the purposes of condition 6*".

27. The Commissioner has applied these factors to the personal data that might be likely to be disclosed from a confirm or deny response in this case. He is satisfied that there are legitimate interests of the public involved in disclosure of information related to a high-profile issue such as Phorm, which generated a great deal of concern, in addition to the broad principles of accountability and transparency associated with government handling of an issue like this. He has also concluded that these legitimate interests could not be satisfied in some way other than by disclosure of the requested information. Accordingly, his conclusion is that in this case the sixth condition provided by schedule 2 was met for the purposes of the first data protection principle.

Conclusion

28. Leading on from these considerations, the Commissioner has determined that section 40(5)(b)(i) was not engaged, and that the public authority should now confirm or deny whether the requested information is held or else apply an appropriate exemption or exclusion.

The Decision

29. The Commissioner's decision is that the public authority incorrectly cited the exemption that it is now seeking to rely on (section 40(5)(b)(i)) until the Commissioner had commenced his investigation; therefore the Commissioner has found that the public authority did not deal with the request for information in accordance with the Act.
30. In addition, it breached its procedural obligations under the Act as follows.
- In failing to accurately confirm or deny that it held information falling within the request by the time of the internal review, it breached sections 1(1)(a) and 10(1).
 - In failing to issue a refusal notice within 20 working days, it breached section 17(1).
 - In failing to explain adequately the exemptions which it was citing, without providing rectification by the time of its internal review, it breached section 17(1)(c).

- In failing to explain that it was relying on an exemption, and which exemption applied to the requested information, the public authority breached section 17(1)(a) and (b).
- Having extended the time limit to consider the public interest, by failing to provide its resulting assessment within a reasonable timescale the public authority breached section 17(3) of the Act.

Steps Required

31. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
 - confirm or deny whether the requested information is held and, in relation to any information which is held, either disclose it or issue a valid refusal notice citing an appropriate exemption or exclusion.
32. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

33. 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.

Other matters

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

Internal Review

35. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have 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 150 working days for an internal review to be completed, despite the publication of his guidance on the matter.

Late application of exemption

36. As detailed in the decision of the Information Tribunal in *Bowbrick v Information Commissioner & Nottingham City Council* [2006] the fact that an exemption is introduced after the initial refusal does not in itself disentitle an authority from relying upon it. However, as detailed in 'The Decision' section of this Notice, the Commissioner would inevitably find that the authority had breached the requirements of section 17 by failing to inform the applicant of the exemption it sought to rely on within the appropriate timescale. In effect, the authority would be providing part of its refusal notice too late. Furthermore, the application of an alternative or additional exemption at a late stage may suggest the initial refusal or internal review (or possibly both) was not afforded appropriate consideration. In light of this the Commissioner expects the public authority to take steps to minimise the likelihood of additional exemptions being applied during the course of future investigations.

Right of Appeal

37. 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

38. 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.
39. 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 March 2011

Signed

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

Legal Annex

Freedom of Information Act 2000

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 1(2) provides that -

"Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14."

Section 1(3) provides that –

"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."

Section 1(4) provides that –

"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."

Section 1(5) provides that –

“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).”

Section 1(6) provides that –

“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

Time for Compliance

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.”

Refusal of Request

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 -

(c) states that fact,

(d) specifies the exemption in question, and

(e) states (if that would not otherwise be apparent) why the exemption applies.”

Section 17(2) states –

“Where–

(f) in relation to any request for information, a public authority is, as respects any information, relying on a claim-

1. that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
2. that the information is exempt information only by virtue of a provision not specified in section 2(3), and

(g) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached."

Section 17(3) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (h) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
- (i) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

Section 17(4) provides that -

"A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

Section 17(5) provides that -

"A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact."

Section 17(6) provides that –

“Subsection (5) does not apply where –

- (j) the public authority is relying on a claim that section 14 applies,
- (k) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
- (l) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.”

Section 17(7) provides that –

“A notice under section (1), (3) or (5) must –

- (m) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (n) contain particulars of the right conferred by section 50.”

Section 40

Section 40(5) provides that –

“The duty to confirm or deny-

- (a) *does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and*
- (b) *does not arise in relation to other information if or to the extent that either-*
 - (i) *he giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or*
 - (ii) *by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).”*

Data Protection Act 1998

Section 1(1) provides that –

“‘personal data’ means data which relate to a living individual who can be identified-

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.”

The first data protection principle provides that –

“Personal data shall be processed fairly and lawfully...”