

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 11 June 2007

Authority: Office for National Statistics
Address: Room 4200E
Segensworth Road
Fareham
Hampshire
PO15 5RR

Summary

1. The complainant requested information from the Authority relating to copy correspondence and/or emails that allegedly passed between various officers employed by the Authority. The request related to events which took place in 2001 and related directly to the boycott of the 2001 Census in Wales by the complainant and the Independent Wales Party. The Authority responded by disclosing a number of internal emails relating to the boycott. The complainant indicated to the Authority that the response was insufficient and further qualified his request. The Authority then refused the request by virtue of section 36 stating that the disclosure of the information would inhibit the "free and frank exchange of views" between officials. The Commissioner sought copies of the withheld information which was provided by the Authority. At this stage it became apparent that the withheld information related to internal communications between the Authority and its legal advisers. The Authority sought to rely on section 42 stating that the information was exempt from disclosure by way of legal privilege. The Commissioner decided, in this case, the authority applied the Act appropriately by refusing the request by virtue of section 42.

The Commissioner's Role

2. The Commissioner's duty is to decide whether a request for information made to an 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

3. The complainant has advised that on 14 February 2005 the following information was requested from the Authority in accordance with section 1 of the Act:

“Correspondence, including emails, between five named individuals, relating to what action should be taken by the ONS against the complainant and his colleague of the Independent Wales Party in consequence of the Wales census boycott.”

Copy of the email reply from one of the named individuals referred to in the email dated 25/07/2001, a copy of which (enclosed) had previously been released to me.”

4. The Authority responded to the complainant on 10 March 2005. The Authority provided copy correspondence relating to the subject matter of the request and further confirmed that certain aspects of the information requested was not held by the Authority.
5. The complainant reverted to the Authority on 11 March 2005 indicating that the documentation, previously disclosed, was not satisfactory for his purposes.
6. The Authority responded with a formal Refusal Notice dated 11 April 2005. The Refusal Notice stated *“any documents that we may hold be withheld under exemption 36(c) of the FOI Act. This exemption permits us to withhold anything which would be likely to inhibit the free and frank exchange of views provided by our officials.”*
7. In addition to the above, it should be noted that the Authority provided some additional information to the complainant but also gave further confirmation that they could find no record or documentation relating to some aspects of the complainant's request.
8. The complainant wrote to the Authority on 16 April 2005 appealing the Refusal Notice and requesting that the Authority respond to the points raised.
9. Having received no reply to his letter of 16 April 2005, the complainant again wrote to the Authority on 21 July 2005. Regrettably the Authority did not respond to this correspondence and the complainant wrote to the Information Commissioner's Office on 22 August 2005, requesting an investigation into his complaint.

The Investigation

Scope of the case

10. On 22 August 2005 the complainant contacted the Commissioner to complain

that whilst he had received correspondence from several officials at the Authority, and indeed a partial release of the information requested, the Authority appeared to be engaging in "*prevarication and obstructionism*" and that no real progress had been achieved.

11. The Commissioner has therefore considered whether the Authority fulfilled its duty to provide advice and assistance to the complainant, in accordance with section 16 of the Act.
12. Whilst the Refusal Notice dated 11 April 2005 makes reference to section 36 of the Act the Commissioner has not considered it necessary to consider section 36 within the scope of his investigations for the reasons below.
13. During the course of investigations the Authority has made available to the Commissioner the documentation that has thus far been withheld. The Authority, in correspondence dated 17 August 2006, indicated its intention to rely on section 42 (1) of the Freedom of Information Act on the grounds that the information in question related to correspondence between the Authority and the Authority's solicitor.
14. Accordingly, the Commissioner has considered the Authority's use of section 42 to refuse to provide the information requested.

Chronology of the case

15. The complainant made a complaint to the Commissioner on 22 August 2005. At this stage the Authority had issued a Refusal Notice on 11 April 2005 in accordance with section 17 of the Act.
16. The Commissioner wrote to the Authority on 19 June 2006 requesting further details in respect of the exemptions being relied upon. It was specifically requested that the Authority provide further details as to how it had applied section 36 of the Act, being the exemption initially relied upon.
17. The Authority failed to reply to the Commissioner's initial correspondence and further letters requesting a reply were sent on 17 July and 2 August 2006 respectively.
18. A substantive response had not been received from the Authority by 17 August 2006 and an Information Notice was duly prepared for service upon the Authority.
19. The Authority did however respond to the Commissioner and a letter dated 15 August was received at the Information Commissioner's Office on 17 August 2006. In the circumstances service of the Information Notice was withheld.
20. The Authority's letter of 15 August reiterated its position in respect of section 36 of the Act and requested that the Commissioner applied such arguments to the information attached. Upon consideration of the attached information it became apparent that it did not include any additional information that had not already been released to the complainant.

21. In order to clarify the position, the Commissioner telephoned the Authority on 17 August, to discuss the Authority's letter dated 15 August. The Commissioner was informed that further internal enquiries would be made.
22. The Authority confirmed via email, similarly dated 17 August 2006, that some additional information had been discovered. The information related to communications between the Authority and its legal adviser. After due consideration the Authority claimed that such information was exempt from disclosure by way of section 42 of the Act and not section 36 as previously stated.
23. Having considered the information the Commissioner wrote to the complainant setting out his views on the withheld information.
24. The complainant responded to the Commissioner disagreeing with the Commissioner's conclusions. However the complainant did not adduce any further evidence to persuade the Commissioner that the information should be disclosed or that further information might exist.

Findings of the case

25. The Authority's Refusal Notice of the 11 April 2005 refers to section 36 of the Act as it would appear that the Authority only became aware of the legal advice following its investigations made at the request of the Commissioner. Section 42 was only subsequently raised as the appropriate exemption following enquiries made by the Commissioner.
26. A substantial amount of information/documentation has already been disclosed by the Authority. The request for additional information relates specifically to emails or correspondence allegedly passing between employees at the Authority. The complainant is of the view that further documentation exists although it is noted that the complainant has not produced any evidence or conclusive proof confirming the existence of additional emails or correspondence.
27. It is the Authority's position that it has released all existing information, relevant to the complainant's request (save for that contained in legal advice) and that no additional documentation relating to the subject matter of the request can be located. On balance, the Commissioner is satisfied that it is unlikely that any such additional information, further to that which has been disclosed to the Commissioner, will be located.
28. The Authority has further speculated that had such information been previously available it may have been deleted or destroyed with the effluxion of time (some four years from the date of the incident to the request).
29. The Commissioner is satisfied that the Authority has taken sufficiently reasonable steps to locate and produce information relating to the subject matter of the complainant's request. Despite internal enquiries the Authority has been unable to discover any additional information other than the emails/correspondence already disclosed and communications between itself and the Authority's solicitor.

Analysis

30. The Commissioner has investigated this case with a view to ascertaining whether the public authority has complied with the Act. He has taken into account all relevant information and in particular has considered a copy of the legal advice together with a copy of the supporting e-mail. He will firstly consider the issue of procedural matters and thereafter the public authority's use of the exemptions. A full text of the relevant statutes referred to is contained in the legal annex.

Procedural matters

Section 17

31. Where a public authority refuses a request for information it is required under section 17 of the Act to provide to the applicant particulars of any procedure provided by the Authority for dealing with complaints about the handling of requests for information or state that the Authority does not provide such a procedure.
32. The Commissioner is of the view that the Authority has breached section 17 of the Act as it has failed to advise the complainant of its complaint handling procedure.

Exemptions

Section 36

33. The Authority's initial Refusal Notice cited section 36 of the Act as grounds for refusing to disclose the information requested. During the course of the Commissioner's investigation the Authority elected to rely upon section 42. Section 36 has not therefore been considered by the Commissioner.

Section 42

34. The Authority has sought to withhold several documents on the grounds that the information is exempt under section 42. This exemption acknowledges the importance of the confidentiality that exists between legal adviser and client. It is a class based exemption, which means that no prejudice need be demonstrated for it to apply. It is however, a qualified exemption and therefore subject to the public interest test.
35. The Authority has supplied the Commissioner with copies of the information in question. The Commissioner is satisfied that these documents contain communications and advice between a client (the Authority) and its legal advisor. As such the Commissioner accepts that the exemption is engaged in relation to these documents.

36. During the course of investigations the Commissioner found no evidence to suggest that legal professional privilege had at any time been waived by the Authority.

The public interest test

37. Having established that the exemption is engaged in respect of these documents, the Commissioner must make an assessment as to whether the public interest is best served through disclosure, or allowing the Authority to maintain its reliance on the exemption and continue to withhold the information.
38. The Commissioner recognises the strong inherent public interest in protecting confidential communication between client and legal advisor. It is certainly in the public interest that authorities have the ability to consult openly with their legal representatives and that forthright views can be expressed without fear of that advice subsequently being made public.
39. In making his assessment of where the balance lies the Commissioner is mindful of the Tribunal's decision in *Bellamy v The Information Commissioner and the DTI* (3 April 2006) Appeal Number: EA/2005/0023 (para. 35), the Tribunal stated '*... there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest*' and '*...it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear cut case...*'
40. It is of course the complainant's view that public interest would be best served by the disclosure of the legal advice provided to the Authority. Failure to disclose such information will, in the views of the complainant, "*damage...the integrity of the census process...and impact on the administration and effectiveness of the next national census in 2011.*"
41. Having considered the arguments of the complainant and in addition, having taken into account the public interest inherent in understanding an Authority's decision making process, the Commissioner is of the view that such public interest is not sufficiently strong to override the public interest served in protecting confidential communications between client and legal advisor. The complainant has not been able to adduce any evidence to suggest that a failure to disclose the information would "*damage...the integrity of the census process*", as stated previously. Nor indeed has the Commissioner been referred to any strong or persuasive countervailing considerations that might have led the Commissioner to conclude that, in this instance, the Authority's reliance on legal professional privilege ought to be overturned.
42. Whilst it will therefore sometimes be appropriate to overturn legal professional privilege where strong public interest exists in disclosure, it is the Commissioner's judgement that, in the circumstances of this case, the public interest in maintaining the exemption overrides the public interest in disclosure.

Other Matters

43. It is noted that following the original request an attempt was made by the Authority to satisfy the terms of the request as much as it was practicable.
44. However, following the issue of its Refusal Notice the complainant requested that the Authority undertake an internal review as he was dissatisfied with the outcome of its initial consideration. Having received no reply to his letter of 16 April 2005, appealing the initial decision, the complainant again wrote to the Authority on 21 July 2005. The Authority did not respond to this correspondence and it would appear from the file of papers that an internal review of the initial decision was not undertaken prior to the involvement of the Commissioner or at any point thereafter.
45. In this regard the Commissioner considers that the Authority has failed to satisfy the requirements of part 6 of the Secretary of State's Code of Practice issued under section 45 of the Act.
46. Having considered the chronology of the case and the Authority's dealings with the complainant and the Commissioner, the Commissioner is of the view that an Authority, such as the Office for National Statistics, should be able to comply with requests of this nature, in accordance with the Act, and without incurring substantial delays in dealing with the parties involved. The Commissioner would therefore recommend that the Authority undertake a review of its internal complaints procedure. Thereafter, the Commissioner would further recommend that the Authority implement an internal complaints procedure that would enable the Authority to comply with the terms of the Act.

The Decision

47. The Commissioner's decision in this matter is that the Authority has dealt with the complainant's request in accordance with the requirements of Part 1 of the Act because it applied the Act correctly in refusing the request by virtue of section 42.
48. The Commissioner further finds that the Authority breached section 17 of the Act in two respects:

Firstly it failed to specify particulars of any procedure provided by the Authority for dealing with complaints about the handling of requests for information or state that the Authority does not provide such a procedure

Secondly it failed to specify the appropriate exemption (section 42) in the refusal notice.

Steps Required

49. As the Commissioner's decision is that the Authority has responded to the complainant's request in accordance with the Act, no formal remedial steps are required.

Right of Appeal

50. 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@dca.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 11th June 2007

Signed

**Anne Jones
Assistant Commissioner**

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