

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 22 September 2008

Public Authority: Department for Business, Enterprise and Regulatory Reform
Address: 1 Victoria Street
London
SW1H 0ET

Summary

The complainant requested internal documents relating to the drafting of a consultation document on employment tribunals and the name(s) of the individuals involved. The Department for Business, Enterprise and Regulatory Reform (BERR) informed the complainant that aside from the information disclosed to him, no further documents are held relating to the drafting of the consultation document. BERR also refused to disclose the individuals name under section 40 of the Act. The Commissioner has investigated and finds that no further information is held regarding the consultation document and that BERR were correct in the application of section 40 to the individual's name.

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 made a request for information to the Department for Business Enterprise and Regulatory Reform (BERR) contained within his letter dated 5 October 2004:

"I would like to have explained to me which officials considered and why, that the Taskforce Recommendation in relation to the Public Register, was a highly relevant piece of information to include in the consultation document. How was this process embarked upon? What analysis of the 61

recommendations were undertaken and by whom? What weighting was given to them and which were deemed to be more important than others for specific inclusion, or less important?

Please advise were I might find the Officials who were involved, and the documentation, report or evidence that led to the high prominence given in the consultation document to the abolition of the Register. Clearly you must disclose what the Officials did and the process they followed, to give undue weight, which you now concede was given to the Public Register issues as opposed to others, which some might argue were far more important, in order to support the contentions you make out in paragraph 9 of your response.

3. The Commissioner notes that the time of the request the public authority was the Department for Trade and Industry (DTI) now known as the Department for Business, Enterprise and Regulatory Reform (BERR). As such this decision notice will refer to BERR as the public authority.
4. BERR responded on 7 December 2004. BERR explained that it had considered the request for information within the terms of the Code of Practice on Access to Government Information. In respect of the request for the names of individuals BERR stated this was covered by exemption 12; 'Privacy of an Individual' and in respect of the request for internal documents relating to the production of the consultation the information was covered by exemption 2; 'Internal Discussion and Advice'.
5. The complainant requested a review of this decision on 1 February 2005 stating:

"I would like your comments on paragraph 6 of [named individual's] letter of 7 December 2004, as to whether it is appropriate that we are not given the names of the individuals who, behind the scenes appear to have given undue prominence to one of the 61 recommendations in the Employment Tribunal System Taskforce Report, and why the documents that relate to this cannot be disclosed."
6. BERR responded on 30 March 2005 upholding its decision to withhold the internal discussions regarding the structure of the consultation document and the names of the officials involved as stated in the letter of 7 December 2004.

The Investigation

Scope of the case

7. On 8 April 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complaint stated that he was dissatisfied with the response given in relation to his information request. In his letter the complainant stated that the information being withheld is:

“documents relating to internal discussions regarding the structure of the consultation document and also the withholding of the names of the officials involved, as contained in DTI’s letter of 4 December 2004”

8. The Commissioner wrote to the complainant on 25 August 2005 explaining that BERR had agreed to reconsider his appeal against its decision to withhold the information requested. The Commissioner explained that this was necessary as at the time BERR considered the appeal the Act had replaced the Open Government Code (the Code) and whilst the Commissioner is the regulatory body for the Act he has no remit to investigate complaints made under the Code. To facilitate this, the Commissioner explained that BERR would apply the corresponding exemptions under the Act to their original decision and then process the appeal with reference to the Act. The Commissioner wrote to BERR on this date explaining that BERR now needed to consider the request under the Act. To assist BERR in this, the Commissioner sent BERR copies of the request made and its responses to the complainant under the Code.
9. In light of this the Commissioner’s investigation will focus on BERR’s handling of the information request under the Act and not its previous responses under the Code. He will therefore consider if any breaches of the Act occurred since the request was resent to BERR on 25 August 2005.

Chronology

10. BERR wrote to the complainant on 7 September 2005, BERR explained that:

“as regards the structuring of the consultation document in the light of the Employment Tribunal Taskforce Report recommendations relating to the public register, the department holds no specific records, although we do hold records relating to the development of the consultation document more generally”

BERR stated that the information the complainant sought was being withheld under the exemptions in sections 35 and 40 of the Act. In applying section 35 of the Act BERR stated it had balanced the public interest in withholding the information against the public interest in disclosing the information and whilst it recognised that there is a public interest in greater transparency there remains an overriding public interest in not undermining the candour of internal considerations. In light of the circumstances of the case BERR stated it would be immediately instigating an internal review of the refusal unless the complainant informed it otherwise.

11. The complainant responded on 14 September 2005 confirming that he wished BERR to undertake an internal review as outlined in its letter.
12. On 28 April 2006 BERR completed its internal review and communicated the findings to the complainant. The internal review found that the information previously withheld under section 35 could be disclosed as the public interest in maintaining the exemption was not outweighed by the public interest in disclosure

of the information. BERR therefore disclosed the versions of Chapter 3 from the draft consultation documents it holds on file. Chapter 3 specifically relates to 'The Public Register'. These were contained within Annexes A-C of the letter. The review also found that it was in the public interest to disclose part of the text of a submission to Gerry Sutcliffe MP, the Parliamentary Under-Secretary of State responsible, recommending the draft consultation document dated 18 November 2003. This was enclosed at Annex D. The remaining parts of this advice were withheld as BERR stated they were not relevant to the complaint. With regard to the second part of the complainant's request the internal review upheld the application of section 40 to the names of officials.

13. The complainant responded on 18 May 2006 expressing concern at the content and variances between the three drafts supplied to him in Annexes A-C of the 28 April 2006 letter. Specifically the complainant pointed to changes in the ordering of the recommendations within the drafts and requested the names of the officials who made the various changes and any documentation supporting their activities. The complainant stated he was entirely dissatisfied with the outcome of the internal review and BERR's refusal to provide the names of the officials and any other documents relevant to the initial inclusion of the Employment Tribunal System Taskforce recommendation to abolish the register would therefore be referred to the Information Commissioner.
14. BERR responded on 31 May 2006. BERR's letter stated that the complainant was requesting the release of documents concerning the reasons behind the reordering in the consultation document of options in relation to the future of the register of applications to the employment tribunal. BERR explained that its letter of 28 April 2006 explained that it considered that it was in the public interest to release to him the sections of the three draft consultation documents on file that relate to these options, and that these were disclosed along with part of the text of a submission to Gerry Sutcliffe MP recommending the draft consultation. BERR stated that there is nothing on file to suggest why the ordering of the options changed and there are no further documents to consider for release on this subject. In relation to the complainant's second request, for the names of the officials who were responsible for the reordering of the options, BERR stated that it was continuing to withhold this under section 40 of the Act.
15. The complainant responded on 14 June 2006 stating that if the file cannot assist with 'this curious' re-ordering of the options then there is even more reason to know who the officials were who changed the order so they can be asked questions on this matter or asked if they have notes which are not in 'the file'. The complainant informed BERR that he would be referring the refusal to release the names of the officials to the Commissioner.
16. On 21 June 2006 the complainant wrote to the Commissioner stating that:

"At no point have we have been given the names of the Official or any documentation explaining how the whole issue of the Employment Tribunal recommendation was put into Chapter 3 of the Consultation Document in the first place or now why it was repositioned where it was."

17. BERR wrote to the complainant on 17 July 2006 explaining that the Act only gives a right of access to recorded information and the only recorded information relevant to his request is that which was disclosed to him on 28 April 2006.
18. The Commissioner began his investigation on 10 January 2007 by writing to BERR. The Commissioner explained that in order to give the matter his full consideration it was necessary for him to see all the relevant documentation held by BERR. He therefore requested BERR to send him copies of all internal and external documents and correspondence in relation to the complainant's request. The Commissioner also requested details of the staff involved in the drafting of the consultation document and asked BERR to confirm that no records exist which give the reasons for the ordering of the consultative document. The Commissioner also asked BERR to provide further comments on its reliance on section 40.
19. BERR responded on 5 October 2007 explaining that it had had some difficulty in discerning what constitutes the relevant documentation. BERR explained that it understood the request to be for 'the names of the officials and any documentation supporting their activities in terms of the changes between the Chapter 3 draft of the 13 November 2003 and that of 18 November 2004'. Of this BERR stated that it had withheld official's names but provided the complainant with the relevant extracts from the consultation document as it stood on 13 November 2003, 18 November 2003 and 5 December 2003 and also provided a submission to the Minister in connection with the consultation document. BERR explained that it was happy to provide the Commissioner with correspondence between it and the complainant since the information request and explained that it also held a paper file and electronic records relating to the consultation which it was happy for the Commissioner to view.
20. During October 2007 the Commissioner attended a meeting with BERR and viewed all the papers held on the consultation document "*Employment Tribunal Draft Revised Regulations and Rules*".
21. BERR wrote to the Commissioner on 29 October 2007 providing further explanation for its reliance on section 40.

Findings of fact

22. In October 2001 the Government announced its intention to set up an Employment Tribunal System Taskforce. A consultation exercise was carried out with participants having sight of a consultation document. Following the consultation process a report was published by the Taskforce. Amongst the 61 recommendations contained within the report was a recommendation, at number 45, that the Register of Employment Tribunal Applications should be terminated.
23. Following the consultation process and the recommendations revised Employment Tribunals (Constitution and Rules of Procedures) Regulations 2004 came into force which resulted in the removal of the Public Register of Employment Tribunal Applications.

24. The complainant has been provided with three extracts from the draft consultation document dated 13 November 2003, 18 November 2003 and 5 December 2003. These extracts are from Chapter 3 entitled 'The Public Register'. He has also been provided with a copy of a submission to the Minister regarding the recommendations dated 18 November 2003.
25. In his correspondence with BERR the complainant has raised concerns regarding the changes between the three drafts leading him to clarify that the information he is now seeking is:
 - The names of the officials involved in the drafting process
 - Any documentation supporting their activities in terms of all the various changes between the Chapter 3 draft of 13 November 2003 and that of 18 November 2003

Analysis

Procedural matters: Section 1 'General Right of Access'

26. 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.
27. The complainant's original request was for the documents relating to internal discussions on the consultation document (in relation to the Register of Employment Tribunal Applications) and the names of the officials involved. At the internal review dated 28 April 2006 BERR disclosed to the complainant extracts from the three drafts of the consultation document and a submission to the Minister relating to the future of the Register and explained that the complainant would notice that the ordering of the options changes between the drafts but that there is no evidence why this happened. BERR also explained that the names of the officials were being withheld.
28. The complainant, on 18 May 2006, reiterated his request for all documents held on the structure of the consultation document specifically referring to the changes made between the three drafts of the consultation document and reiterated his request for the names of the officials involved in the drafting process. On 31 May 2006 BERR responded stating that there are no further documents to consider for release on the subject requested and there is nothing on file to suggest why the changes occurred between the drafts.
29. The Commissioner has examined the file BERR holds on the development of the consultation document and is satisfied that there are no documents other than those supplied to the complainant which fall within the scope of his request. As such the Commissioner is satisfied that BERR have complied with section 1(1) (a) by confirming what information is held and explaining following the reiteration of

the request on 18 May 2006 with reference to specific changes that no further information is held.

30. However, the Commissioner finds that BERR breached the requirements of section 10(1) in that it failed to disclose the information held falling within the scope of the request within twenty working days of the request.

Exemption: Section 40 'Personal Data'

31. Section 40(2) provides an exemption for information which is the personal data of any third party, where disclosure would contravene any of the data protection principles contained in the DPA.

32. In order to rely on the exemption provided by section 40, the information being requested must therefore constitute personal data as defined by the DPA. The DPA defines personal data 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 intention of the data controller or any other person in respect of the individual.'

33. The Commissioner has viewed the documentation held by BERR and notes that only one name was mentioned in the files such that it was reasonable to conclude that the one individual was closely involved with the drafting of the consultation document, including Chapter 3. The Commissioner accepts that the name of the individual is their personal data as defined by the DPA.

34. The Commissioner notes that BERR argue that disclosure of the names would be in breach of the first data protection principle as it would be unfair. The first data protection principle has two components:

"1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –
(a) at least one of the conditions of schedule 2 is met, and
(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is met."

35. In considering whether disclosure of the individual's name would be unfair and therefore contravene the requirements of the first data protection principle, the Commissioner has taken the following factors into account:

- The individual's reasonable expectations of what would happen to their personal data;
- The seniority of the individual;

- Whether disclosure would cause any unnecessary or unjustified damage to the individual; and
 - The legitimate interests of the public in knowing the name of the individual, against the effects of disclosure of their name.
36. BERR stated that disclosure of the individual's name would be unfair on the individual given the subjective, and by inference, critical, phrasing of the request. BERR explained that the individual was a middle ranking official with an inward facing role in his work on the consultation document. In addition, the individual no longer works in the Department.
37. The Commissioner's guidance on section 40 suggests that when considering what information third parties should expect to have disclosed about them, a distinction should be drawn as to whether the information relates to the third party's public or private lives. Although the guidance acknowledges that there are no hard and fast rules it states that:
- 'Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned.'*
38. On the basis of this guidance the Commissioner considers that public sector employees should expect some information about their roles and the decisions they take to be disclosed under the Act.
39. This approach is supported by the Information Tribunal decision (*House of Commons v Information Commissioner and Norman Baker MP EA2006/0015 and 0016*). This decision involved a request for information about the details of the travel allowances claimed by MPs. In its decision the Tribunal noted that:
- 'where data subjects carry out public functions, hold elective office or spend public funds they must have the expectation that their public actions will be subject to greater scrutiny than would be the case in respect of their private lives'*. (Tribunal at paragraph 78).
40. The Commissioner also believes that a distinction can be drawn between the levels of information which junior staff should expect to have disclosed about them compared to what information senior staff should expect to have disclosed about them. This is because the more senior a member of staff is the more likely it is that they will be responsible for making influential policy decisions and/or decisions related to the expenditure of significant amounts of public funds.
41. The Commissioner recognises that the individual concerned was a relatively junior member of staff with no outward facing role who would not have expected his name to be disclosed in relation to any work he undertook in this area. He also accepts that based on the above this expectation would have been a reasonable one.

42. BERR also explained that disclosure of the individual's name would be likely to cause the individual unnecessary harm. In support of this BERR stated they believe that the intention of the complainant is to track down the drafters of the document and to question them. In the complainant's letter to BERR on 14 June 2006 they state:

"..if the file cannot assist with this curious re-ordering of the options then that is more reason to know who the Officials were who changed the order, so they can be asked questions or asked if they have any notes that are not in 'the file'."

43. BERR explained that even though the individual has left the department he is still likely to have an expectation that his involvement with the consultation document would not be made public. In reaching this decision BERR considered the amount of correspondence it has received from the complaint regarding the subject and expressed its concern that the individual is protected from being unnecessarily harassed about an area of work they were involved with several years ago.
44. Whilst the Commissioner makes no comment about the intentions of the complainant in this particular case, he accepts that there would be an unjustified risk to the privacy of the individual were his name to be disclosed. He accepts that section 40 is engaged and that disclosure of the individual's name would breach the first data protection principle. As the Commissioner has found that disclosure would be unfair and therefore in breach of the first data protection principle there is no need to consider if the processing of the personal data would meet one of the conditions of Schedule 2.

The Decision

45. The Commissioner's decision is that the public authority dealt with the following aspects of the request for information in accordance with the Act:

(i) the application of section 40(2) to the name of the official requested

46. However, the Commissioner also finds that the public authority did not deal with the following aspects of the request for information in accordance with the Act:

(i) Breached the requirements of section 10(1) by failing to disclose the information held within twenty working days of the request.

Steps Required

47. The Commissioner requires no steps to be taken.

Right of Appeal

48. 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.
Website: www.informationtribunal.gov.uk

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.

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 22nd day of September 2008

Signed

**David Smith
Deputy Commissioner**

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