

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 19 October 2009

Public Authority: The Treasury Solicitor's Department
Address: Queen Anne's Chambers
28 Broadway
London
SW1H 9JS

Summary

The complainant requested that the Treasury Solicitor's Department ("TSOL") provided him with the identity of the individual(s) whose allegations culminated in him being declared a vexatious litigant. TSOL refused to disclose the information on grounds provided by section 30 (investigations and proceedings conducted by public authorities) or, in the alternative, section 31 (law enforcement) of the Act. The Commissioner has concluded that the information is the personal information of the complainant and therefore exempt under section 40(1) of the Act and that the public authority should have treated the request as a subject access request under section 7 of the Data Protection Act 1998 (DPA).

The Commissioner's Role

1. The Commissioner's role 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.

Background

2. The Commissioner notes that the role of Treasury Solicitor's Department ("TSOL") in determining whether a person should be deemed to be a vexatious litigant commences once a complaint is made about a litigant's allegedly litigious conduct. It is then investigated by TSOL, who acts for the Attorney General in these actions. Information in respect of the individual whom is the subject of the complaint is gathered with the assistance of the complainants and/or their solicitors'. TSOL will advise the Attorney General on the merits of making an application to the High Court to have the litigant declared a "vexatious litigant".

3. Where the High Court grants the Order it has the effect of halting all existing claims by the "vexatious litigant". This means that they cannot commence any new legal proceedings, nor can they continue with any current claims or pending applications whatsoever without the express permission of a High Court Judge. The Order is usually indefinite, although the Court has power to make the Orders last for a specified period of time, for example 10 or 15 years. The Order is then sent to all Courts in England and Wales and the litigant's name is entered onto the Court records, which will prevent them from issuing further claims without permission.

The Request

4. The complainant, on 26 March 2006, requested that the TSOL provided him with the identity of the individual(s) whose allegations subsequently culminated in him being declared a vexatious litigant pursuant to section 42 of the Supreme Court Act 1981.
5. TSOL, in a letter dated 26 April 2006, refused to disclose the information on grounds provided by section 30 (investigations and proceedings conducted by public authorities) and in the alternative, section 31 (law enforcement) of the Act and that the public interest lay with the maintenance of the exemptions .
6. The complainant requested an internal review of the public authority's decision on 28 April 2006. On 1 June 2006, TSOL informed the complainant that the internal review had been carried out and it had upheld the original decision.

The Investigation

Scope of the case

7. On 9 June 2006, the complainant contacted the Commissioner to complain about the handling of his request for information by TSOL.
8. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

Chronology

9. The investigation commenced with the Commissioner writing to both parties (on 5 September 2007) seeking relevant documents and information. In particular, he asked TSOL for a copy of the information it withheld following the internal review. On the 22 October 2007, TSOL provided a copy of the withheld information. The Commissioner's subsequent attempts to resolve this matter informally were unsuccessful.

Findings of fact

10. On 9 December 1996, pursuant to section 42 of the Supreme Court Act 1981, the complainant was declared a vexatious litigant by the High Court. This decision arose out of allegations made against the complainant received by the TSOL. As a vexatious litigant the complainant is forbidden to issue civil proceedings in any court in England and Wales without permission.

Analysis

Exemption

11. Whilst the public authority did not seek to rely on the exemption provided for by section 40 the Commissioner nonetheless used his discretion to consider the applicability of section 40. The reason for this is that the Commissioner is, as stated by the Information Tribunal (*Bowbrick v Nottingham City Council*, EA/2005/0006), “the guardian of both the rights of data subjects under the Data Protection Act 1998 (DPA) and of the rights of people seeking information under FOIA”. It would be inappropriate for the Commissioner not to consider data protection issues apparent in a freedom of information matter.

12. Section 40(1)

Under section 40(1) information that constitutes the applicant's ‘personal data’ is exempt information. This exemption is absolute and requires no public interest test to be conducted. In addition, in relation to such information public authorities are not obliged to comply with section 1(1) (a) by virtue of section 40 (5) (a).

13. Section 40(1) states that:

“(1) any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject”.

14. Subsection (5) (a) states that:

In order to rely on the exemption provided by section 40, the information being requested must 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 to the individual’.

15. The Commissioner's understanding of the nature of personal data is informed by the recent discussions by the Article 29 Working Party (a European advisory body on data protection and privacy). The Working Party worked to harmonise the interpretation of the definition of the nature of personal data.
16. The Commissioner's Guidance can be viewed in full at the following link:
http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf
17. The Commissioner considers that the complainant would be the 'data subject' within the meaning of the DPA and that the requested information is his personal data. This is because the Commissioner is satisfied that the information requested (i.e. "who complained about me") relates to the complainant and in the context of a complaint about him, identifies the complainant. In any case there is other information which is in the possession of the data controller and which enables the complainant to be identified, in particular the complaint itself and the information collated as part of the investigation into whether an application to the High Court should be made to have the complainant declared as a vexatious litigant.
18. In light of this the Commissioner is satisfied that the requested information is complainant's personal information and exempt under section 40(1) of the Act.
19. As the Commissioner has concluded that the withheld information is exempt under section 40(1) and therefore he has not gone on to consider the application by the public authority of section 30 and 32(1)(c) of the Act.

The Decision

20. The Commissioner has concluded that the complainant's request for information would be exempt from disclosure on the basis of section 40(1) and the public authority should have identified this as request that needed to be considered under the DPA.

Other matters

21. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matter of concern. Section 7 of the DPA gives an individual the right to request copies of personal data held about them – this is referred to as a right of Subject Access. As the information being sought was in fact the complainant's personal data this request should have been dealt with as a subject access request rather than a request under the Act. The Commissioner encourages public authorities to consider requests under the correct regime in the first instance. In the Commissioner's opinion responsibility for applying exemptions and determining whether a request should be considered under the Act or the DPA rests with the public authority and not the requestor.

Right of Appeal

22. 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 19th day of October 2009

Signed

**David Smith
Deputy Commissioner**

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

Legal Annex

Legal Annex

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.”

Investigations and proceedings conducted by public authorities.

Section 30 provides that –

(1) “Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-

(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained-

(i) whether a person should be charged with an offence, or

(ii) whether a person charged with an offence is guilty of it,

(b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or

(c) any criminal proceedings which the authority has power to conduct.”

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),

(h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty’s prerogative or by virtue of powers conferred by or under an enactment, or

(2) The purposes referred to in subsection (1)(g) to (i) are—

(a) the purpose of ascertaining whether any person has failed to comply with the law,

Section 30(2) provides that –

“Information held by a public authority is exempt information if-

- (a) it was obtained or recorded by the authority for the purposes of its functions relating to-
 - (i) investigations falling within subsection (1)(a) or (b),
 - (ii) criminal proceedings which the authority has power to conduct,
 - (iii) investigations (other than investigations falling within subsection (1)(a) or (b)) which are conducted by the authority for any of the purposes specified in section 31(2) and either by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under any enactment, or
 - (iv) civil proceedings which are brought by or on behalf of the authority and arise out of such investigations, and
- (b) it relates to the obtaining of information from confidential sources.”

Section 30(3) provides that –

“The duty to confirm or deny 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) or (2).”

Section 30(4) provides that –

“In relation to the institution or conduct of criminal proceedings or the power to conduct them, references in subsection (1)(b) or (c) and subsection (2)(a) to the public authority include references-

- (a) to any officer of the authority,

Law enforcement

Section 31(1) provides that –

“Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (c) the administration of justice,

Personal information.

Section 40(1) provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

Section 40(2) provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1),
and
- (b) either the first or the second condition below is satisfied.”

Section 40(3) provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A (1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”