

Freedom of Information Act 2000 (Section 50)

Decision Notice

11 August 2008

Public Authority: Ministry of Defence
Address: Main Building
Whitehall
London SW1A 2HB

Summary

The complainant made a successful information request to MOD under the Act. Subsequently he asked to see copies of the documentation created during the consideration of that request. MOD, although it did agree to provide the complainant with a summary setting out the main stages of the process it had gone through, refused to provide the information sought and cited section 36 of the Act. The Commissioner took the view that, apart from a small amount of information and the names of the staff who had dealt with the matter, section 36 had not been applied correctly and that the information should be released.

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 primarily successful request to the Ministry of Defence (MOD) under the Act for information relating to the pre-contract evaluations of a company called DML Ltd in respect of their capability to manage a project (for which they were awarded the tender) at Devonport Dockyard. On 21 September 2005 the complainant asked to see "all correspondence, communications and memos" relating to this request.
3. Following interim replies, in which MOD make it clear that more time was needed to consider the public interest aspect, a substantive reply was sent to the complainant on 1 December 2005. MOD said that the information requested consisted of internal emails and documents, and of correspondence between

MOD and industry. MOD said that the information sought fell within the scope of both section 36 (Prejudice to effective conduct of public affairs) and section 43 (Commercial interests). MOD had, however, decided only to apply section 36. As required, MOD had considered the question of the public interest and concluded that it fell in this case in favour of maintaining the exemption. While recognising that there was a public interest in transparency, which was broad enough to include the way in which MOD operated the Act, MOD took the view that the free and frank exchange of views about information requests would be inhibited if this kind of information were to be released, and that this would not be in the public interest. MOD also thought that releasing the information sought would circumvent the review process set out in the legislation.

4. On 2 December 2005 the complainant asked for a review. He said that he disagreed with the reasons set out by MOD for withholding the information. MOD replied on 2 February 2006, informing the complainant that the appropriate qualified person (a Minister) had, in accordance with the legislation, formed the reasonable opinion that the information sought fell within section 36. MOD confirmed its earlier decision saying that, if the deliberations of officials considering information requests were to be made public, it would have an inhibiting effect which would lead to poorer analysis and decision-making and, the more sensitive the material, the more likely this was to be the case. MOD also said that the public interest in ensuring that the legislation was being implemented correctly was catered for through the work of the Information Commissioner and the Information Tribunal. MOD recognised, and apologised for, some minor errors in handling the request.

The Investigation

Scope of the case

5. On 6 February 2006 the complainant contacted the Commissioner. He said that he had no complaints to make about the way in which MOD had handled his request. He did, however, believe that the information he had requested should have been released to him and he asked the Commissioner to investigate the matter. He said that it had taken four months for his original request to be processed, during which time MOD had contacted DML Ltd as part of its consideration of his request. He thought that release of the information he had asked for would throw light on how MOD handled requests under the Act, not least how they took account of the views of commercial organisations that might be affected by any release.

Chronology

6. On 28 March 2007 the Commissioner wrote to MOD and to the complainant to begin the investigation. MOD responded on 18 April 2007. The Commissioner has had access to the information that forms the subject of the complainant's request. At one stage the Commissioner, with the agreement of the MOD, invited the complainant to consider whether or not he would be content with a summary of the information he had requested (which was sent to him) but the complainant, having considered the summary, said that he was not satisfied with this as an outcome of his complaint.

Findings of fact

7. In March 1997 DML Ltd was awarded the contract to provide upgraded nuclear submarine refitting and refuelling facilities at Devonport dockyard. The contractual performance of the company in respect of this project was subject to a study by the National Audit Office, and subsequently considered by the Public Accounts Committee (PAC). The PAC report, containing a number of recommendations, was published in September 2003. The project remains a matter of considerable national and local media interest.

Analysis

Section 36

8. In citing this section of the Act MOD has made specific reference to section 36 (2) (b), which refers to information the release of which would, or would be likely to, inhibit (i) the free and frank provision of advice, or (ii) the free and frank exchange of views for the purposes of deliberation. The Commissioner's first task is to determine whether or not he believes that the exemption can be properly applied to the information at issue.
9. The material at issue in this case constitutes, as described in MOD's refusal notice of 1 December 2005: `emails made by civil servants who were involved in processing the FOI request, correspondence between MOD and industry discussing the FOI request and internal documents used by MOD personnel to process the FOI request.` In that letter, and in the subsequent review letter of 2 February 2006, MOD accepted that there was a legitimate public interest in how the department was administering the Act but took the view that, in order for it to administer the Act effectively, expressions of opinion needed to be as full and frank as possible, particularly in the case of sensitive material: release of the information sought would have an inhibitory effect, which would not be in the public interest when future information requests were under consideration. MOD also said that releasing this kind of information would prevent an effective review from taking place, which would cause prejudice to the proper operation of the statutory enforcement framework. In respect of the qualified person, MOD confirmed that the opinion of the qualified person (a Minister) had been sought.

10. In his letter to the Commissioner of 6 February 2006 the complainant said that his original request to see the pre-contract evaluations had taken four months to process and that MOD had, in the course of dealing with that request, discussed the matter with the company. He thought that having access to the documents dealing with the request might provide further information about the contract itself but would also throw light on the way in which MOD handled such requests.
11. In subsequent correspondence with MOD the Commissioner sought for further details about the submission of the complainant's request to the qualified person. MOD would not release to the Commissioner a copy of the actual submission to the Minister concerned (Lord Drayson) but confirmed that the submission had been made on 22 November 2005, that the Minister had been given the details of the complainant's earlier information request, and had been told in broad terms the nature of the information covered by the current request. The public interest arguments on both sides had been set out for him to consider. The Minister had replied on 29 November 2005 to the effect that he thought disclosure would cause harm of the kind set out in the submission and that the request should therefore be refused.
12. MOD also confirmed that, while it accepted that there was a public interest in the Act being applied appropriately by public authorities, it thought that this need was more properly met through the activities of the Commissioner himself and, where necessary, the Information Tribunal. MOD also said that, as internal reviews were conducted on the basis of first principles and that the Commissioner's role was an inquisitorial one, the requester would not be prejudiced in making an effective appeal by not having access to the internal advice and discussion relating to his original request.
13. In accordance with the requirements set out by the Information Tribunal in the case of *Guardian Newspapers and Heather Brooke v Information Commissioner (EA/2006/0011 and 0013)* the Commissioner, in determining whether or not the opinion of the qualified person has been properly sought, needs to satisfy himself not only that the opinion arrived at is reasonable in itself but that the process by which it has been reached is reasonable also. The Commissioner has not seen the submission to the Minister but has been provided with details of it in broad terms. On the basis of those details he is satisfied that the process by which MOD sought the Minister's opinion was reasonable. In terms of the opinion itself, that disclosure of the information would, or would be likely to, cause prejudice or have the inhibitory effects described earlier, the Commissioner recognises (as did the Tribunal in the case referred to above) the difficulties of producing evidence to support an assertion which essentially relates to future behaviour. However, in terms of MOD's view that disclosure of the requested information would be likely to have the inhibitory effects described in section 36(2)(b)(i) and (ii), he is satisfied that such an opinion is a reasonable one to reach. It is a reasonable opinion that disclosure may have the effect of undermining the MOD's ability to discuss FOI requests in a free and frank manner. The Commissioner is also satisfied that the information MOD wishes to withhold is information of the kind that the exemption is intended to cover: on that basis the Commissioner is satisfied that the exemption is engaged. As, however, this is a qualified

exemption, the Commissioner now needs to go on to consider the question of the public interest test.

Public Interest Test

14. In his response to the MOD's refusal notice the complainant argued, in his letter of 2 December 2005, that there was a particularly strong public interest in transparency when sensitive cases such as this one, which dealt with the award of a major contract, were under consideration. Nor did he accept the view that release of the information he sought would undermine the appeals procedure as, had the information been released when he first requested it, he would have had no need to make any kind of appeal. In correspondence with the Commissioner the complainant said that he thought that the documents he had requested might contain 'important information about the way MOD treats requests for such sensitive information, and the influence a commercial company can have on the way the Act is implemented by MOD.' He also said that 'I believe that the documents relating to those deliberations may contain important further information about the contract itself...'
15. In its initial response to the complainant MOD recognised (see paragraph 9) that there was a public interest in the way in which the department administered the Act. But, while acknowledging that, MOD thought that it was also in the public interest that it should be able to handle requests under the Act as robustly as possible through allowing a free exchange of opinions. Release of information of the kind sought by the complainant would inevitably make that more difficult as those engaged in dealing with such requests would be less willing to be forthcoming if they thought that their views would become publicly available, which would not be in the public interest. MOD also thought that release of the information sought would be prejudicial to the functioning of the statutory enforcement system as providing an applicant with that kind of information in advance of a review would effectively prevent the review from taking place. MOD was also concerned, in this particular instance, about the burden being placed on a public authority to release information in respect of the handling of a largely successful FOI request: this, MOD thought, was not in the public interest either. In subsequent correspondence with the Commissioner, MOD took the view that public interest in the way in which the FOI legislation was being implemented by public authorities was best met through the oversight of the Information Commissioner and the Information Tribunal, as provided for in statute.
16. The Commissioner has examined the relevant information in this case. MOD has already agreed to the release of a summary which sets out, in brief, the key dates and actions taken in respect of the handling of this particular information request. And, although the complainant has expressed himself dissatisfied with that as a substantive response to his request, it does mean that he has now been made aware of the general steps taken by MOD in dealing with the original request. The matter for the Commissioner to consider is whether or not the complainant has an entitlement to the more detailed information contained in the documents that the Commissioner has seen, documents which effectively record the day to day handling of his information request from start to finish.

17. MOD has argued that releasing the information sought by the complainant would prevent the statutory enforcement processes from being carried out properly and that it is the role of the Commissioner and the Tribunal to determine how public sector bodies have fulfilled their responsibilities in this area. As a general proposition, the Commissioner has no difficulties with that. When the Commissioner investigates a complaint put to him under the Act he will usually look at how the public authority handled the complaint and determine if the statutory procedures were carried out correctly. The only circumstances in which he is unlikely to do that are when the complainant has made it clear that the complaint is only about the refusal of information: even then, the Commissioner can still find the public authority in breach of procedural aspects of the Act and might choose to draw attention to it in the interests of future good practice even if it did not form part of the formal complaint resolution. However, all of this is almost certainly going to take place in the context of an information request that has been, totally or in part, refused. In this case the complainant's request to MOD for information about the pre-evaluation reports was, with one or two slight exceptions, met in full. If he was (as appeared to be the case) willing to accept that decision but still wished to have released to him under the Act entirely separate information relating to the processing of his request rather than to the substance of it, then it appears to the Commissioner that the complainant would have no option but to do as he did and submit a new request for that information to MOD.
18. In terms of the public interest, the Commissioner is clear that it is in the public interest for requests made under the Act to be dealt with rigorously and that it would not be in the public interest if those involved in considering such requests felt unable to express themselves as fully as they might for fear of future public disclosure. Whether that would actually turn out to be an outcome of public disclosure is inevitably difficult to determine, although the Commissioner is minded to take the view that fear of future disclosure might have the opposite, and more positive, effect of ensuring that officials are more accurate and clearer in what they record. Much of the documentation seen by the Commissioner in this case is routine and mundane, for example one official emailing another to seek an opinion on the request by a particular date: such uncontroversial exchanges form the bread and butter of dealing with any such information request. Even though much of it could be described as routine and mundane disclosing this information would have the benefit of enabling the public to understand, in a positive way, how a major public authority has approached the question of the release of information that was, at one time, quite sensitive. He is not of the view that, once a request has been completed and the passage of time has excluded all possibility of an appeal, as is the case here, public disclosure of the way in which that request had been handled would significantly affect the nature of such exchanges in the future. The Commissioner therefore considers that the severity of the prejudice that would result is not substantial.
19. Bearing in mind the principle underlying the legislation that information should be released unless there are reasons for withholding it, the Commissioner is therefore of the view that, in all the circumstances of this case, the public interest in maintaining the exemption does not outweigh the public interest in disclosing

the information. He believes, therefore, that the information should be released. There are however two caveats to be added in relation to that judgement. The first is that in a small number of instances reference is made in the documents to information related to the subject matter of this request, although not directly covered by it that is not in the public domain; it is the Commissioner's view that, for this information the public interest is in favour of maintaining the exemption. The letter to the MOD accompanying this Decision Notice identifies that specific information. Secondly, the Commissioner's view is that the public interest favours maintaining the exemption for the names of the any individuals who were involved with the internal handling of this particular request. These are not senior staff engaged in a major policy decision: they are relatively junior staff engaged in processing a routine piece of casework. In that context the Commissioner proposes to follow the line taken by the Tribunal in the case of *Department for Education & Skills v Information Commissioner & Evening Standard (EA/2006/0006)* in respect of the level of public interest that exists in revealing the names of more junior staff who would not, in the usual course of events, have any legitimate expectation of their names being released into the public domain. Names of front facing staff that the complainant would have already been aware of through the handling of his request can be disclosed.

The Decision

20. The Commissioner's decision is that the public authority did not apply section 36 of the Act correctly to the majority of the information requested by the complainant.

Steps Required

21. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- Release to the complainant the information requested by him other than the information specifically referred to in the letter to the public authority accompanying this Decision Notice.

Failure to comply

22. 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

23. 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 11 day of August 2008

Signed

Steve Wood
Assistant Commissioner

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

Legal Annex

Section 36 (2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

- (a)
- (b) would, or would be likely to, inhibit-
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation