

Freedom of Information Act 2000 (Section 50)

Decision Notice

23 February 2009

Public Authority: King's College London
Address: Strand
London
WC1R 2LS

Summary

The complainant requested a copy of a tender document that preceded a contract between the public authority and UK Sport for the public authority to carry out drug testing. The public authority initially refused the request on the grounds that the information was exempt under section 43(2) (commercial interests). Following the intervention of the Commissioner, the public authority altered its stance and stated that the information requested was not held. The Commissioner finds that the public authority is correct in stating that the information requested is not held and therefore that it is not obliged to disclose the information under section 1(1)(b) of the Act. However, in incorrectly confirming that the information was held when initially refusing the request it breached section 1(1)(a) of the Act. The Commissioner also finds that the public authority failed to comply with the requirements of sections 17(1)(b) and (c) and 17(3)(b) when issuing an inadequate refusal notice.

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. On 13 March 2006 the complainant requested the following information:

"1. The calibration curves and calibration data for my test results dated 21/06/1997 ATN number 010830

2. The contract for doping control/analysis of urine between UKS [UK Sport] and

DCC [Drug Control Centre] King's College

3. The tender document supplied by UKS for doping control / analysis from which the contract followed."

3. The public authority responded to this request on 3 April 2006. The request was refused with the following reasons given in response to each part of the request:
 1. The public authority cited the exemption provided by section 38 (health and safety). The public authority also noted the possibility that this information could be considered to constitute personal data relating to the complainant and that the complainant could have made a request for this information under section 7 of the Data Protection Act 1998. However, the public authority went on to confirm that its position was that this information did not constitute personal data relating to the complainant as it related to the testing process rather than to the complainant.
 2. The public authority cited sections 36 (prejudice to the effective conduct of public affairs) and section 43 (commercial interests).
 3. The public authority cited section 43 and also stated that it believed it would be more appropriate for the complainant to direct his request for this information to UK Sport as the originator of this information.
4. The public authority gave little by way of explanation as to why it believed that these exemptions applied and did not specify which subsections were relevant. Neither did the public authority address why it had concluded that the public interest favoured the maintenance of these exemptions.
5. The complainant subsequently requested an internal review of the handling of his request and the public authority responded with the outcome of its review on 26 June 2006. The review upheld the original refusal. No explanation was provided as to the reasons for this decision.

The Investigation

Scope of the case

6. The complainant contacted the Commissioner initially on 10 July 2006. At this stage all parts of the above request were within the scope of the complaint. During the Commissioner's investigation, parts 1 and 2 of the request were resolved as follows.
7. As noted above, the public authority had referred to the possibility that the information requested at part 1 of the request may constitute personal data relating to the complainant, but had concluded that it was not. In a letter to the Commissioner dated 5 December 2007, the public authority stated that it had altered its stance with regard to this part of the request and now considered that this information would, in fact, constitute personal data relating to the complainant

and cited the exemption provided by section 40(1).

8. In any situation where a public authority cites section 40(1), the Commissioner would expect the public authority to automatically handle the request as a subject access request made under section 7 of the Data Protection Act 1998. In this case the situation was complicated somewhat by the fact of the public authority being data processor and UK Sport being data controller for the information in question and the public authority having no means by which to link sample numbers to individuals.
9. Following the suggestion of the Commissioner, the public authority agreed to forward this part of the request to UK Sport for it to be handled as a subject access request made under section 7 of the Data Protection Act 1998. This part of the request is not considered further in this notice.
10. In connection with part 2 of the request, the public authority informed the Commissioner by letter dated 5 December 2007 that it now wished to exempt only parts of the contract requested at part 2 of the request, whereas this document had previously been withheld in its entirety. The public authority later confirmed to the Commissioner that a copy of the contract had been disclosed to the complainant, albeit with a small part of the content redacted that the public authority maintained was subject to section 43(2). The complainant subsequently indicated that he was satisfied with this disclosure and part 2 of the request is not considered further in this notice.
11. The remainder of this notice relates only to the provision of the information set out at the third part of the request, save where the procedural breaches in the handling of the first two parts of the request are recorded.

Chronology

12. The Commissioner initially contacted the public authority in connection with the third part of the request on 25 October 2007. At this stage the stance of the public authority was that this information was subject to the exemption provided by section 43(2). The public authority was asked to explain fully its reasoning for citing this exemption. The Commissioner also noted that tender documentation is generally widely available and that a search of the UK Sport website had revealed invitation to tender documents freely available. The public authority was asked to comment specifically on why the tender documentation requested in this case should be withheld given the general availability of this type of information.
13. The public authority responded by letter dated 5 December 2007. The public authority stated the following at that stage:

“After a further, thorough search of our records the College can confirm that no relevant documents are held and none have ever been created or received.”
14. The Commissioner contacted the public authority again on 13 March 2008 for further information concerning its revised position that no information within the

scope of the third part of the request is held. Specifically, the public authority was asked to respond to the following:

- Confirm that the process of King's College London securing the UK Sport drug testing contract took place without UK Sport supplying a tender document to King's College London.
 - Provide a brief description of the process that was undertaken that resulted in King's College London securing the UK Sport contract to carry out drug testing.
15. The public authority responded to this on 20 March 2008. In response to the first bullet above, the public authority stated that it was unable to confirm or deny whether a tender document had been provided to it by UK Sport. The public authority stated that this is a request for information that, had it existed, would have been created in 1997 and suggested that if any information had previously been held that fell within the scope of the request, it would since have been destroyed. Also, within the content of the contract in question is a term stating that it expires on 31 March 1998.
 16. In response to the second bullet, the public authority stated that it held no documentation detailing this process. The public authority believed that the only answer to this point would be through the recollections of individual staff members, with no way to guarantee the accuracy of such recollections.
 17. The public authority went on to describe the steps it had undertaken when searching for information falling within the scope of the third part of the request. The public authority stated that a thorough search had been carried out of the records of the Drug Control Centre for information relevant to the complainant's request and that no such information was held within the 'Archives' or the 'Corporate Records Services'.
 18. The public authority also stated that it had attempted to provide advice and assistance to the complainant by contacting UK Sport to ascertain whether it held information relevant to the request. UK Sport confirmed that it held no such information and that its retention policy for tender documentation is 6 years. Finally, the public authority confirmed again its revised position that it holds no information falling within the scope of the third part of the complainant's request.
 19. The public authority also later confirmed that it had no retention schedule for tender documents created and supplied to it by another organisation and confirmed that its archives had been searched for information falling within the scope of the request. The public authority was subsequently asked if there was a general retention schedule for documents in relation to which there is no specific retention schedule and which may apply to the information in question here. In response to this the public authority confirmed that it has no such retention schedule.

Analysis

Procedural matters

Section 1

20. In citing section 43 when it refused the request, the public authority effectively confirmed that it held information falling within the scope of the request. The public authority later altered its stance and stated that information falling within the scope of the request was not held.
21. In failing to accurately confirm or deny either in the refusal notice or via the internal review whether it held information falling within the scope of the request at the time of the request, the public authority failed to comply with the requirements of section 1(1)(a).
22. Turning to the issue of whether the public authority is correct in now stating that it does not hold information falling within the scope of the request, the description given by the public authority of the steps that it has taken to attempt to locate information falling within the scope of the request is given above at paragraph 17. The public authority has also described how it consulted with UK Sport about this request in an additional attempt to locate relevant information.
23. The stance of the complainant is that the information requested must be held by the public authority as UK Sport would be obliged to undertake a tender process prior to awarding a contract. The public authority has not disputed this specifically, but it has been unable to confirm whether it previously held a tender document that would have fallen within the scope of the request.
24. The Commissioner notes the assurances given by the public authority that it has taken appropriate steps to search for information falling within the scope of the request. The Commissioner also notes that the public authority has made additional efforts to locate information relevant to the request by contacting UK Sport in connection with the request.
25. In order for the Commissioner to conclude that the public authority has stated accurately that it does not hold information falling within the scope of the request, it is not the case that any theoretical possibility that the information requested may be held must be eliminated. Instead the Commissioner will reach a conclusion based on the balance of probabilities.
26. When investigating cases where it is disputed whether information is held by a public authority, the Commissioner has been guided by the approach the Information Tribunal adopted in the case *Linda Bromley and others v Information Commissioner and the Environment Agency (EA/2006/0072)*. In that case the Tribunal indicated that the test for establishing whether information was held by a public authority was not certainty, but rather whether on the balance of probabilities, the information is held.

27. In this case it may be argued that the stance of the public authority is questionable given that it effectively confirmed that it did hold information within the scope of the request at the time of the initial refusal. This position was maintained through the internal review process and it was not until the involvement of the Commissioner that the public authority stated that it did not hold this information. Whilst it is the case that the correct approach would have been to verify whether the information in question was held prior to citing an exemption, the Commissioner does not consider the change in stance by the public authority to be an indication that it is attempting to hide the existence of the requested information. Rather, the Commissioner considers this to be a procedural failing in the handling of the request and the breach of the Act resulting from this is recorded above at paragraph 21.
28. The description provided by the public authority of the searches undertaken to locate information falling within the scope of the request is not detailed. The public authority has stated that a thorough search was conducted of the Drug Control Centre and its archives and that this search failed to locate information falling within the scope of the request. As to whether the Commissioner can accept that this search was sufficiently thorough that it indicates that the public authority is now correct in stating that it does not hold information that falls within the scope of the request, the Commissioner has taken the following factors into account:
- whether this information has been held at any time, or if this has not been established the likelihood of this information having been held at any time.
 - the age of this information and the resulting impact of this on the likelihood of any relevant information held previously having been retained.
 - whether the public authority has taken any steps appropriate to its duty under section 16 to provide advice and assistance.
29. The public authority has been unable to confirm whether it previously held information falling within the scope of the request. On the issue of the likelihood of the public authority having previously held such information, the Commissioner considers this to be a realistic possibility. Whilst the Commissioner is not aware of the details of the process undertaken by UK Sport prior to awarding a contract, he does note that the provision of a tender document is commonly part of a process of this kind. It is also notable that the website of UK Sport includes tender documentation demonstrating that this process is followed by UK Sport in at least some instances.
30. The drug testing contract was awarded to the public authority in 1997, 9 years prior to the date of the request. The Commissioner considers it entirely reasonable that the public authority would not have retained a document that ceased to be relevant upon the signing of a contract finalised 9 years previously. The public authority has also stated that it does not have any retention schedule that applies specifically to tender documentation supplied to it by another organisation, or any more general retention schedule that may apply to the information in question here.
31. The public authority recognised in its initial refusal notice that UK Sport may be a

more appropriate avenue via which to access the information in question. The public authority also consulted with UK Sport as to whether it may have retained any relevant tender document. UK Sport confirmed that it had not retained it, presumably due to the period of time since this contracting process was completed. The Commissioner considers that this was an appropriate step for the public authority to take in line with its duty to provide advice and assistance in accordance with section 16.

32. In addition to the above, the Commissioner notes that the public authority did locate information relevant to the other parts of the complainant's request. Whilst those parts of the request are not the focus of this notice, the Commissioner takes this as an indication that the public authority did take appropriate steps to attempt to locate information relevant to the request.
33. The Commissioner concludes on the balance of probabilities that the public authority is correct in stating that it does not hold information that falls within the scope of the third part of the complainant's request. Although the public authority has not provided a detailed description of the actions undertaken to attempt to locate information falling within the scope of the request, the Commissioner notes that there is no obvious operational reason why the public authority would have retained a tender document 9 years after the finalising of the contract and 8 years after the term covered by the contract expired, even if it is accepted that it is likely that such a document was held by the public authority previously. The Commissioner also notes that the public authority contacted UK Sport when attempting to locate relevant information and that it did locate information falling within the scope of the other parts of the complainant's request, indicating its willingness to take appropriate steps to locate information in response to the request.

Section 17

34. When refusing the request the public authority failed to specify the relevant subsections of the exemptions cited (sections 36(2)(b)(i) or (ii) or 36(2)(c), 38(1)(a) or (b) and 43(2)) and did not give sufficient explanation as to why these exemptions were considered engaged. Neither did the public authority state why it decided that the public interest favoured the maintenance of the exemptions cited.
35. In failing to cite the relevant subsections of the exemptions cited and in failing to explain why it believed that these exemptions were engaged, the public authority did not comply with the requirements of sections 17(1)(b) and 17(1)(c). In failing to address why the public interest favoured the maintenance of the exemptions, the public authority failed to comply with the requirement of section 17(3)(b).

The Decision

36. The Commissioner's decision is that, on a balance of probabilities, no information falling within the scope of the third part of the request is held by the public

authority and therefore the public authority was under no obligation to disclose information under section 1(1)(b) of the Act.

37. The Commissioner has also decided the public authority did not deal with the third part of the request in accordance with section 1(1)(a) of the Act in that it incorrectly confirmed at the time of the request that information was held that fell within the scope of the request.
38. The Commissioner also finds that the public authority failed to comply with sections 17(1)(b) and (c) and 17(3)(b) in its refusal of the first, second and third parts of the request.

Steps Required

39. The Commissioner requires no steps to be taken.

Right of Appeal

40. 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

41. 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 23rd day of February 2009

Signed

**Nicole Duncan
Head of FOI Complaints**

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

Legal Annex

Section 1

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 17

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 -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

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 -

- (a) 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
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

Section 36

Section 36(2) provides that –

“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) would, or would be likely to, prejudice-
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or

- (iii) the work of the executive committee of the National Assembly for Wales,
- (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, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.”

Section 38

Section 38(1) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to-

- (a) endanger the physical or mental health of any individual, or
- (b) endanger the safety of any individual.”

Section 43

Section 43(2) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”