

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 18 November 2010

Public Authority: The Governing Body of the Open University

Address: Walton Hall
Milton Keynes
MK7 6AA

Summary

The complainant made requests for information, including correspondence, related to the work carried out for an external organisation by a lecturer employed by the public authority. The public authority contended that the lecturer's involvement with the organisation was in a purely personal capacity and not as its employee. The Commissioner has decided that the public authority does not hold the information relevant to the requests under section 1(1)(a) of the Act as under section 3(2)(a) the information is held on behalf of another person.

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 Requests

Request 1

2. On 25 November 2008 the complainant asked to receive "...copies of any correspondence between [a named lecturer] and [a named BBC employee] in the period 1 July 2005 and 30 June 2006." This request related to seminars run by the named lecturer and BBC employee

through an organisation called the Cambridge Media and Environment Programme ("CMEP").

3. On 15 December 2008 the public authority emailed the complainant to inform him that it did not hold any information falling within the scope of his request. It explained that the lecturer had not retained any emails from that period and that it did not retain backups from that time. Further, it stated that the lecturer had confirmed that any correspondence with the BBC employee would not have been University business.
4. On 16 December 2008 the complainant emailed the public authority and asked "...to extend this request to cover the period of my original request to date."
5. On 16 January 2009 the public authority informed the complainant that the lecturer had confirmed that the correspondence covered by the request was private, not Open University, business. Consequently this information was not held by the University.
6. On 18 January 2009 the complainant requested an internal review of the public authority's decision. He disputed that the information covered by his request was private in nature.
7. On 13 February 2009 the public authority informed the complainant that the outcome of the internal review was to uphold its original decision.

Request 2

8. On 18 January 2009 the complainant requested to be provided with "...details of
 - (i) all amounts paid by Open University to the Cambridge Media and Environment Programme in the last five years
 - (ii) the name of the person authorising this expenditure
 - (iii) copies of any documentation, including but not limited to purchase orders and invoices, relating to this expenditure
 - (iv) please could you also provide copies of any correspondence relating to CMEP that is held by Open University (where this is not already covered by my earlier requests re [named lecturer])."

9. On 13 February 2009 the public authority informed the complainant that it held no information in relation to (i), (ii) and (iii) and that the only information that existed that fell within (iv) was also covered by his earlier request of 16 December 2008.
10. On 3 April 2009 the complainant wrote to the public authority and provided evidence which he stated suggested that it had funded some of the lecturer's work in the areas covered by his request.
11. On 5 May 2009 the public authority wrote to the complainant and continued to assert that the requested emails in relation to the organisation of seminars by the Cambridge Media and Enterprise Programme ("CMEP") were private and not held by the University.
12. On 5 May 2009 the complainant requested an internal review of the public authority's decision. Having not received a response by 19 June 2009, he made a complaint to the Commissioner.
13. On 26 August 2009, following the Commissioner's intervention, the public authority provided the result of its internal review to the complainant. This upheld its previous decision. It stated that the emails and correspondence around the organisation of the CMEP seminars were not held by the University as the seminars were organised and attended in a private capacity by the lecturer.

The Investigation

Scope of the case

14. On 7 September 2009 the complainant contacted the Commissioner to complain about the way his requests for information had been handled. He argued that any correspondence that fell within the scope of his requests was not private as the public authority contended. The Commissioner therefore considered whether the information falling within the scope of the complainant's requests that was held by the Open University as a public authority within the Act.

Chronology

15. The Commissioner has identified below his main correspondence with the complainant and the public authority.

16. On 3 October 2009 the Commissioner asked the public authority for its initial submissions as to the basis on which the requested information was withheld.
17. On 29 November 2009 the public authority provided its initial submissions together with supporting documents.
18. On 20 January 2010 the Commissioner wrote to the public authority seeking further arguments and copies of any information covered by the requests.
19. On 1 April 2010 the public authority provided a copy of the information covered by the complainant's requests and further details as to why it believed that it did not hold this information for the purposes of the Act.
20. The Commissioner was then involved in further correspondence with the complainant and the public authority concerning issues raised by the complainant regarding a request to the same public authority. This was linked to the requests considered in this notice.

Analysis

Substantive Procedural Matters

21. 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."*

22. The Commissioner considered whether the information falling within the scope of the complainant's requests was held by the public authority.
23. Section 3(2) provides that

"For the purposes of this Act, information is held by a public authority if –

(a) it is held by the authority, otherwise than on behalf of another person, or

(b) it is held by another person on behalf of the authority."

24. In relation to request 1, the public authority was of the view that it did not hold the emails and correspondence around the organisation of the CMEP seminars as the seminars were organised and attended by the lecturer in a private capacity. The public authority confirmed that none of the work to which any of the correspondence related was undertaken by the lecturer as part of his contractual duties to the University. It stated that was undertaken in the lecturer's own time and that he had taken annual leave to participate in the seminars. The public authority informed the Commissioner that it did not provide the lecturer with financial support for the work to which the correspondence related. It also confirmed that it did not receive any payments in respect of any of the work to which any of the correspondence related.
25. The public authority provided the Commissioner with copies of the emails between the lecturer and the BBC employee that came from or were sent to the lecturer's University email account. This was to assist the Commissioner in determining whether the correspondence was of a private nature. The emails mainly contain discussions on who might be invited to attend the CMEP seminars, what those invited might contribute and copies of invitations to specific individuals.
26. The Commissioner understands that the lecturer and the BBC employee, to whom the request relates, are involved in the running of CMEP. Over the last few years CMEP has organised and run a series of seminars which are intended to facilitate discussions amongst broadcasters and experts about world issues and how they are covered in the media. The Commissioner is not aware of any evidence that the public authority has provided any funding to CMEP or any evidence to suggest that CMEP is not a separate organisation operating independently of the public authority.
27. The complainant argued that the correspondence covered by his request was emails between two public servants using publicly funded email systems and involving activities of CMEP that were publicly funded (by the BBC and certain higher education institutions). It was therefore public in nature, not private.

28. The public authority accepted that the lecturer concerned had used the University's email system to contact some people about the seminars. However, it stated that reasonable personal use of computers was permitted under its policies.
29. The Commissioner is satisfied that the fact that the lecturer used the public authority's email system for some of his communications related to organising seminars for CMEP does not in itself mean that they were not private communications. He considered a similar situation in a decision notice issued in relation to the University of Plymouth (FS50245527).
30. The Commissioner has taken into account the public authority's and the lecturer's submissions that he was acting in a purely personal capacity in relation to the requested information. In FS50245527 the Commissioner stated that he was

"... mindful of a previous decision notice issued on case reference FS5082767. In this case the Commissioner concluded that correspondence between a named employee and another individual was not held by the public authority as the public authority had no interest in, or control over the information as it considered it to be private correspondence. The Commissioner accepted that in common with some of the named employee's other non-business related personal papers and correspondence, it was purely a matter of circumstance that the requested information was in the possession of the public authority." (para 21)

31. The Commissioner sees no reason to depart from his view in this particular case. He considers that the public authority and the lecturer were both of the belief that the lecturer was acting in a private capacity and outside the scope of his employment when he sent the emails that fall within the scope of the requests. He is also of the view that the public authority had no interest in, or control over, the requested information. The Commissioner can only therefore conclude that the information was not held under section 1(1)(a) of the Act as under section 3(2)(a) the information was only held on behalf of another person. Having viewed the requested emails, the Commissioner can confirm that there is nothing contained in those emails that contradicts his findings.
32. The complainant also raised the argument that the lecturer had stated in a journal article that he had written that the Open University's Geography Department had funded the transcription of the tapes that were made during one of the seminars to which the correspondence

- related. In the complainant's view, this clearly demonstrated that the activity referred to was public, not private, because the public authority clearly had a direct financial interest in it.
33. The public authority explained that it had funded the transcriptions of the seminar out of its research budget in support of a piece of research by the lecturer which drew upon both transcriptions of some workshop sessions at CMEP seminars and of interviews undertaken elsewhere.
 34. The Commissioner notes that the public authority did not pay any money to CMEP but paid for the transcribing of tape recordings to assist the lecturer with research that he was carrying out. This clearly may raise issues as to whether the information that was transcribed from those tapes then became information that was held by the public authority. However, in the Commissioner's view, it does not change the fact that the seminars from which the information was obtained were a private activity carried out by the lecturer outside the scope of his employment. Consequently, communications about the setting up and organising of those seminars took place outside the scope of his employment. Those communications were therefore not held by the public authority under section 1(1)(a) of the Act as under section 3(2)(a) the information was only held on behalf of another person.
 35. In relation to request 2, the public authority explained that it could find no evidence that it had paid any money to CMEP or provided any facilities. It had been unable to establish any involvement with CMEP, apart from the named lecturer's private activity. It confirmed that it held no documentation or correspondence in relation to CMEP.
 36. In determining whether he believes that the public authority holds any information falling within parts (i)-(iv) of request 2, the Commissioner has applied the civil standard of proof of the balance of probabilities as outlined by the Information Tribunal in the case of *Bromley v Information Commissioner and the Environment Agency (EA/2006/0072)*. In deciding where the balance of probability lies, the Commissioner considered the scope, quality, thoroughness and results of the searches carried out by the public authority.
 37. The public authority provided the Commissioner with details of the searches that it had undertaken which had led it to the conclusion that it held no relevant information in relation to request 2. These included discussions with individual staff, searches of the Faculty records, searches of payments and purchasing records in its Finance Division, searches for records or knowledge of CMEP in its Open Broadcasting Unit which has links with the BBC, searching its intranet for information

about CMEP and searching the internet to identify any links between the public authority and CMEP.

38. After considering the evidence provided by the public authority, the Commissioner is satisfied that, on the balance of probabilities, it did not hold information falling within request 2. The only information linked to request 2 was the lecturer's private correspondence which was covered by request 1. As stated above, the Commissioner has determined that this correspondence was not held by the public authority.

The Decision

39. The Commissioner's decision is that the public authority dealt with the requests for information in accordance with the Act.

Steps Required

40. The Commissioner requires no steps to be taken.

Other matters

41. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
42. The Commissioner notes that the complainant requested an internal review of the public authority's decision in relation to his second request on 5 May 2009. However, the public authority did not provide a response until 26 August 2009, and only after the Commissioner had contacted the public authority himself over its failure to respond.
43. The Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review, and in no case should the total time exceed 40 working days. The time that the public authority took in providing a response substantially exceeded both of these time periods. The Commissioner would expect in future that the public authority would ensure that it generally completes internal reviews within 20 working days and that the time that it takes never exceeds 40 working days.

Right of Appeal

44. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

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 sent.

Dated the 18th day of November 2010

Signed

Steve Wood
Head of Policy Delivery

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

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."

Section 1(2) provides that -

"Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14."

Section 1(3) provides that –

"Where a public authority –

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information."

Section 1(4) provides that –

"The information –

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request."

Section 1(5) provides that –

“A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).”

Section 1(6) provides that –

“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.”

Public Authorities

Section 3(1) provides that –

“in this Act “public authority” means –

- (a) subject to section 4(4), any body which, any other person who, or the holder of any office which –
 - (i) is listed in Schedule 1, or
 - (ii) is designated by order under section 5, or
- (b) a publicly-owned company as defined by section 6”

Section 3(2) provides that –

“For the purposes of this Act, information is held by a public authority if –

- (a) it is held by the authority, otherwise than on behalf of another person, or
- (b) it is held by another person on behalf of the authority.”