

Freedom Of Information Act 2015
DECISION NOTICE
Section 42

Decision Number: 2016/001

Public Authority: Cabinet Office

Address: Head Office
Third Floor
Government Office
Bucks Road
Douglas
IM1 3PN

Decision Date: 26 August 2016

Decision & steps to be taken by the Public Authority

1. The review applicant made a request to the Cabinet Office for: *"All information held by the Cabinet Office concerning a complaint which I made against [named officer]."* That request was subsequently refined.
2. The Cabinet Office refused to give the information requested citing the exemptions set out in Sections 20, 40 and 25(1)(a) and, after review, confirmed that decision.
3. The review applicant applied for a review of that decision by the Information Commissioner.
4. The Information Commissioner investigated and his decision is:-
 - a) The Cabinet Office applied the exemptions set out in Sections 20 and 40 to information it did not hold and was not required to give to the applicant, and
 - b) while the Cabinet Office was justified in applying the exemption set out in Section 25(1)(a) to some of the information it holds, the Cabinet Office applied that exemption to information that was not the review applicant's personal data and therefore the Cabinet Office was not justified in refusing to give the information requested.
5. The Information Commissioner requires the Cabinet Office to take the following steps:

To the extent that the Cabinet Office holds the information requested, the Cabinet Office must, within 30 days of the date of this Decision Notice, either disclose the information requested to the review applicant or give the review applicant a further Refusal Notice in accordance with section 17.

Reasons for the Decision

Background

6. The review applicant made a request for information to the Cabinet Office on 22 February 2016 for: *"All information held by the Cabinet Office concerning a complaint which I made against [named officer]"*
7. The Cabinet office sought clarification in order to identify and locate the information requested. The review applicant provided additional information and, as a result, the request was considered to be:

"All information held by the OHR (which is part of the Cabinet Office), the Chief Secretary's Office (which is part of the Cabinet Office) and the Office of the Chief Minister (which is part of the Cabinet Office) concerning my complaint against [named officer], who is now an Executive Director of the Cabinet Office. Period – 4th February 2015 to 26th February 2016"

8. On 18 March 2016, the Cabinet Office responded to the review applicant. The PA refused to provide any information to the applicant citing the following exemptions:
 - Section 20: Information accessible to applicant by other means,
 - Section 40: Legal professional privilege, and
 - Section 25(1)(a): Absolutely exempt personal information.
9. On 4 April 2016, the review applicant requested a review by the Cabinet Office and in doing so made some detailed comments and observations.
10. On 6 June 2016, the Cabinet Office responded to some of the comments made by the review applicant and confirmed its original decision.
11. On 7 June 2016, the applicant made an application for a review of the decision of the public authority by the Information Commissioner ('Commissioner').

Initial Review

12. On 8 June 2016, the application for review by the Commissioner under section 42 of the Freedom of Information Act 2015 ('FOIA') was accepted as valid and receipt acknowledged. Information was sought from the Cabinet Office which was provided on 17 June 2016.

Commissioner's Analysis and Findings

13. In coming to a decision the Commissioner has considered all the information provided to him.
14. The Commissioner is satisfied that the Cabinet Office undertook a reasonable search, as required by section 1.4 of the Code of Practice, to locate the information requested.
15. The Commissioner noted that the search included the files of the former Civil Service Commission (CSC) and the Public Services Commission (PSC). The search also acquired some information in the form of email correspondence from the Cabinet Office's files.
16. The right of access to information is set out in section 8. Section 8(2)(a) expressly excludes information from the right of access that is held by the public authority on behalf of another

person.

17. It appears to the Commissioner that, having acquired this information, not enough consideration was given by Cabinet Office as to whether the information was held by the Cabinet Office, or, held by the Cabinet Office on behalf of another person.

Complaint against the named officer

18. The review applicant had been in correspondence with the named officer with regard to the formation of the Cabinet Office. Correspondence commenced on 6 August 2014 and continued up to the 19 November 2014 when the named officer informed the review applicant that he could provide no further useful assistance or information.
19. The review applicant's complaint against the named officer was made to the then Vice Chair of the CSC on 4 February 2015.
20. Information held by the Cabinet Office dated prior to 4 February 2015 is outside the scope of the information requested by the review applicant and has not been further considered.
21. With regard to the information that dated from 4 February 2015 to 11 October 2015, the Commissioner found that, in summary, the information consisted of: the review applicant's complaint to the CSC, correspondence between the review applicant and members of the CSC some of which was copied to the CSC Assistant Secretary, the CSC's consideration of the review applicant's complaint including the seeking and obtaining of advice, the CSC's findings, communication of those findings to the review applicant by the CSC and the review applicant's further correspondence to a member of the CSC and the Chairman of the CSC.
22. The definition of "held" set out in section 8(2) states:
- "In this Act, information is "held" by a public authority if it is held –*
(a) by the public authority, otherwise than on behalf of another person
(b) by another person for or on behalf of the public authority."
23. The Commissioner found that the information referred to in paragraph 21 is not held by the Cabinet Office, but is held on behalf of the CSC, which is not a public authority for the purposes of FOIA.

Complaint against the CSC

24. On 11 October 2015, in an email, the review applicant forwarded copies of three letters he had sent to one member of the CSC to the Chief Minister.
25. On 11 November 2015, the review applicant sent an email to the Chief Minister's private secretary, which he copied to the Chief Minister. That email attached copies of some of the information relating to the review applicant's complaint against the named officer.
26. Examination of the information provided to the Commissioner dating from 11 October 2015 to 26 February 2016, found that the information mainly consists of the review applicant's correspondence. That correspondence is not concerned with the review applicant's complaint against the named officer but another, albeit consequential, complaint the review applicant had made against the CSC to the Chief Minister.
27. The Commissioner therefore finds that in general the information mentioned in paragraph 26,

while it is held by the Cabinet Office, is held in relation to a complaint the review applicant made against the CSC to the Chief Minister and therefore does not form part of the information requested.

28. However, with regard to the emails mentioned in paragraphs 24 and 25, the Commissioner finds that the information is held by the Cabinet Office and some of that information does relate to the review applicant's complaint against the named officer.
29. In addition, the Commissioner noted that a review of both complaints was undertaken by Cabinet Office and this review appears to have informed the Chief Minister's response to the review applicant.
30. The Commissioner finds that some of the information contained in that review, although intertwined with the review applicant's complaint against the CSC, does relate to the review applicant's complaint against the named officer.

Refusal to give information requested

31. In refusing to give the information requested the Cabinet Office cited three exemptions, namely:-

Section 20: Information accessible to applicant by other means,
Section 40: Legal professional privilege,
and
Section 25(1)(a): Absolutely exempt personal information.

Section 20 & Section 40

32. The exemptions set out in Sections 20 and 40 were applied by the Cabinet Office to information it held on behalf of the CSC.
33. As the information is not held by the Cabinet Office, it is not necessary to consider the application of these exemptions.

Section 25(1)(a)

34. Most of the information requested consists of the review applicant's correspondence and, as such, contains personal data relating to the review applicant.
35. The Cabinet Office applied the absolute exemption set out in Section 25(1)(a), "*...personal data of which the applicant is the data subject*", to that information.
36. The Commissioner finds that the Cabinet Office was correct to apply this exemption to the extent that the information contained in that correspondence was the applicant's personal data.
37. However the Cabinet Office did not limit the application of the exemption to the review applicant's personal data and instead applied the exemption to all the information contained in the review applicant's correspondence.
38. The Commissioner therefore finds that the Cabinet Office erred in its application of the exemption set out in section 25(1)(a).

Decision

39. The Commissioner's decision is that:

- a) The Cabinet Office applied the exemptions set out in Sections 20 and 40 to information it did not hold and was not required to give to the applicant, and
- b) while the Cabinet Office was justified in applying the exemption set out in Section 25(1)(a) to some of the information it holds, the Cabinet office applied that exemption to information that was not the review applicant's personal data and therefore the Cabinet Office was not justified in refusing to give the information requested.

40. The Commissioner therefore partially upholds the review applicant's complaint.

Further Consideration

41. Accordingly, the Commissioner must consider what steps should be taken by the Cabinet Office and, in doing so, the Commissioner bears in mind the purpose of FOIA set out in section 3:

"...

(a) *information should be available to the public to promote the public interest; and*

(b) *exceptions to the right of access are necessary to maintain a balance with rights to privacy effective government and value for the taxpayer."*

42. The request related to a complaint about a named officer and information about the disciplinary process undertaken as a result of that complaint.

43. There is an expectation of confidentiality in disciplinary matters which is expressly stated in the Code of Practice on Disciplinary and Grievance Procedures 2007 made under section 171 of The Employment Act 2005.

44. The Commissioner concurs with the UK Information Commissioner's comment in paragraph 22 of decision FS50597460 dated 26 January 2016, relating to Cheshire East Council which states:

"The Commissioner recognises that information relating to complaints against individuals carries a strong general expectation of privacy due to the likelihood that disclosure could cause the data subject's distress and could also cause permanent damage to their future prospects and general reputation."

45. The UK Information Commissioner's guidance on personal data in relation to Section 40 of the UK Freedom of Information Act 2000 states:

"information relating to an internal investigation or disciplinary hearing will carry a strong expectation of privacy"

<https://ico.org.uk/media/1213/personal-information-section-40-and-regulation-13-foia-and-eir-guidance.pdf>

46. In EA/2008/0038, 29 December 2008, *Rob Waugh v Information Commissioner and Doncaster College*, the then UK Information Tribunal stated:

"...there is a recognised expectation that the internal disciplinary matters of an individual will

be private. Even among senior members of staff there would still be a high expectation of privacy between an employee and his employer in respect of disciplinary matters."

Section 20 Exemption

47. Section 20 provides an absolute exemption for information that is reasonably accessible to the applicant.
48. Advice on the UK Information Commissioner's website in relation to the equivalent Section 21 exemption states:

"This exemption applies if the information requested is already accessible to the requester. You could apply this if you know that the requester already has the information ..."

<https://ico.org.uk/for-organisations/guide-to-freedom-of-information/refusing-a-request/>

49. The Scottish Information Commissioner's briefing note for the equivalent section 25 exemption states:

"Section 25 of the Freedom of Information (Scotland) Act 2002 (FOISA) exempts information from disclosure where the requester can reasonably obtain the information without asking for it under FOISA. It has a different focus from most other exemptions. It is not about withholding the information from the public, but recognises that where information is already available to the requester, there is no need to provide an alternative right of access to it through FOISA."

and

"On the other hand, information might be reasonably obtainable by the requester (e.g. because they already have a copy of the information), ..."

www.itspubliknowledge.info/Law/FOISA-EIRsGuidance/section25/Section25.aspx

50. With regard to the review applicant's correspondence, the Commissioner's view is that the information is reasonably accessible to the review applicant and therefore the Cabinet Office could have applied the exemption set out in section 20.

Steps to be taken

51. Recognising the strong expectation that disciplinary matters should be confidential, and that most of the information requested is reasonably accessible to the review applicant, the Commissioner considers that it would be wrong to require the Cabinet Office to disclose the information requested without further consideration as to what, if any, other exemptions may apply to the information held by the Cabinet Office.
52. The Commissioner, therefore, requires:

To the extent that the Cabinet Office holds the information requested, the Cabinet Office must, within 30 days of the date of this Decision Notice, either disclose the information requested to the review applicant or give the review applicant a further Refusal Notice in accordance with section 17.

53. For clarity, the Cabinet Office is required to only consider the information it holds, which relates to the review applicant's request for "All information...concerning my complaint against [named officer]...", dating between 11 October 2015 and 26 February 2016.

54. If the Cabinet Office decides to refuse to give the information requested then the review applicant has the right to apply for a review of that decision by Commissioner under section 42.

Appeal

55. Section 50(1) provides that either party has the right to appeal against this Decision Notice to the High Court on a point of law. An Appeal must be filed within 28 (calendar) days from the date of this Decision Note. Further information about the Appeal process can be found on the General Registry's web site at: <https://www.courts.im/courtprocedures/AppealsCivil/>

An appeal should be filed at or sent to:

The Court Office
Isle of Man Courts of Justice
Deemsters Walk
Bucks Road
Douglas
Isle of Man
IM1 3AR

Enforcement

56. Section 48 provides that if the Cabinet Office fails to comply with this Decision Notice by not taking the steps it is required to take, then the Commissioner may certify in writing to the High Court that the Cabinet Office has failed to comply. The Court must inquire into the matter and may deal with the Cabinet Office as if it had committed a contempt of court.

Publication

57. Unless the Commissioner is informed in writing by either party that an Appeal against this Decision Notice has been filed with the High Court, the Commissioner will publish this Decision Notice as soon as practical after the period for an Appeal has expired.

Iain McDonald
Isle of Man Information Commissioner

26 August 2016