

FREEDOM OF INFORMATION ACT 2000

DECISION NOTICE

Date 5 October 2006

Public Authority: Office of Government Commerce
Address: Trevelyan House,
26-30 Great Peter Street,
London
SW1P 2 BY

Summary Decision and Action Required

The Commissioner's decision in the matter is that the Office of Government Commerce ("the OGC") has not dealt with the complainant's request in accordance with Part 1 of the Freedom of Information Act 2000 ("the Act") in that it has failed to comply with its obligations under section 1(1).

This Decision Notice has been issued against the OGC following communications between the Commissioner, HM Treasury and the OGC, subsequent to which it has been accepted that the information requested by the complainant in the case of FS50083104 was in fact a request to the OGC and not HM Treasury. The Decision Notice issued against the Treasury in the case of FS50083104 has therefore now been withdrawn and the Commissioner substitutes this one against the OGC. This Decision Notice explains the reasoning behind the Commissioner's decision.

The Commissioner requires that the OGC shall, within 35 calendar days of the date of this Decision Notice, provide the complainant with all the information he requested in February 2005.

Freedom of Information Act 2000 (the 'Act') – Application for a Decision and the Duty of the Commissioner

1. The Commissioner has received an application for a decision whether the complainant's request for information made to the Public Authority has been dealt with in accordance with the requirements of Part I of the Act.
2. Where a complainant has made an application for a decision, unless:
 - the complainant has failed to exhaust a local complaints procedure, or
 - the application is frivolous or vexatious, or
 - the application has been subject to undue delay, or
 - the application has been withdrawn or abandoned,

the Commissioner is under a duty to make a decision.

3. The Commissioner shall either notify the complainant that he has not made a decision (and his grounds for not doing so) or shall serve a notice of his decision on both the complainant and the public authority.

The Complaint

4. The complainant has advised that he submitted the following written Parliamentary Question (Question number 217772) for answer on 25 February 2005:

“To ask the Chancellor of the Exchequer what traffic light status was awarded to the identity cards scheme by the Office of Government Commerce at the Gateway Review 1 Stage”

5. The OGC has stated that the Gateway Review process examines the progress of high to medium risk governmental projects at five critical stages of their life-cycle. Reviews are mandatory for projects which are classified as high or medium risk. In addition there is a Gate Zero stage at which the feasibility of a project or programme is assessed at its outset. A Traffic Light status (RAG status) is awarded to the project at the end of each stage. Red status means the project team should take action immediately in order to achieve success. Amber status means the project should go forward with actions to be carried out or recommendations to be acted on, before the next OGC Gateway Review of the project. Green status means the project is on target to succeed but may benefit from the uptake of recommendations
6. The complainant was provided with a holding answer on 25 February 2005 and a written answer was provided on 16 March 2005 by Mr Paul Boateng, the Chief Secretary of the Treasury at the time and the Minister responsible for the OGC.
7. Mr Boateng stated that the ID cards programme had not yet undergone a Gate One Review, but had undergone two Gate Zero Reviews. Mr Boateng declined to reveal the traffic light status awarded in connection with these Reviews because he argued that the information was exempt from disclosure by virtue of s.33 (audit functions) and s.35 (formulation of government policy) of the Act. Mr Boateng argued that the public interest in disclosure was outweighed by the public interest in maintaining the exemption. The complainant was not satisfied with this response and wrote to Mr Boateng on 16 March 2005 to request a review of the original decision not to disclose the information.
8. The Financial Secretary to the Treasury, John Healey MP replied to the complainant on the 22 June 2005 maintaining the decision to withhold the requested information. S.33 and s.35 were again invoked as the basis for withholding the information.
9. The complainant appealed to the Commissioner on the 11 July 2005.
10. Mr Healey advised the Commissioner by letter dated 26 September 2005 that the initial response provided to the Parliamentary Question was consistent with that which would have been given had a Freedom of Information request been made.

He also confirmed that the complainant's letter of the 16 March 2005 requesting an internal review was dealt with as an FOI request. It should be noted that the Commissioner does not consider a Parliamentary Question to be a valid request for the purposes of the Act. However it is clear from subsequent correspondence between Ministers of the Treasury and the complainant that both parties were content for the request to be considered as if it had been made under the Act. The Commissioner is therefore prepared to consider the request as valid for the purposes of the Act. Alternatively the Commissioner takes the view that the request for an internal review to the Treasury Minister can be treated as the freedom of information request. In considering the application for a decision by the Commissioner under s.50(2) of the Act, the Commissioner has decided that the complainant has effectively exhausted the internal complaints procedure and the Commissioner is therefore able to make a decision under s.50.

Relevant Statutory Obligations under the Act

11. **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.”

12. **Section 33** provides that –

“(1) This section applies to any public authority which has functions in relation to-

- (a) the audit of the accounts of other public authorities, or
- (b) the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions.

(2) Information held by a public authority to which this section applies is exempt information if its disclosure would, or would be likely to, prejudice the exercise of any of the authority's functions in relation to any of the matters referred to in subsection (1).

(3) The duty to confirm or deny does not arise in relation to a public authority to which this section applies if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the exercise of any of the authority's functions in relation to any of the matters referred to in subsection (1).”

13. **Section 35 (1)** provides that –

“Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (a) the formulation or development of government policy,
- (b) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or
- (d) the operation of any Ministerial private office. “

Review of the case

14. The complainant wrote to the Commissioner on the 11 July 2005 expressing his dissatisfaction with the decision by the public authority to withhold the requested information.
15. The Commissioner's investigation focused on whether the public authority was justified in relying on the exemptions at s.33 and s.35 of the Act as its basis for withholding the requested information.
16. In the course of correspondence with the Commissioner Mr Healey explained that he was aware the Commissioner already had a copy of the information requested by the complainant. This was because the Commissioner was investigating another complaint about the OGC's ID card programme Gateway Reviews. The Commissioner had therefore seen the information requested by the complainant in this case.
17. Gateway Reviews are undertaken by the Office of Government Commerce (OGC). The OGC carried out an internal review of the original decision to withhold the requested information. The outcome of that review was to maintain the decision to withhold the requested information. Mr Healey confirmed to the complainant that he agreed with this outcome and the complainant was advised accordingly on 22 June 2005.
18. Mr Healey also confirmed to the Commissioner in his letter of 26 September 2005 that the OGC has made a number of comments about the information requested in the two cases that the Commissioner is investigating. These comments are about the application of the exemptions and the balance of the public interest. The Commissioner is satisfied that the comments made are relevant to this case and has taken them into account when reaching his decision in this case.

The Commissioner's investigation

19. On 25 July 2005 the Commissioner began his investigation by writing to Mr Healey at the Treasury address, inviting him to make any further comments in support of the public authority's decision to withhold the information. The

Commissioner also explained his reasons for accepting the request as valid for the purposes of the Act, as set out in point 10 above.

20. A reply was received from the Assistant Private Secretary to the Financial Secretary to the Treasury on the 20 September 2005 apologising for the delay and promising a substantive response no later than 30 September 2005.
21. Mr Healey replied on 26 September 2005. He explained that FOI requests which were made in parallel or subsequent to Parliamentary Questions are dealt with in accordance with the Act, including where correspondence follows up a previous Parliamentary Question. He therefore confirmed that he was content for the Commissioner to proceed with his investigation on the basis that the complainant's letter of 16 March 2005 was a valid FOI request. He also made reference to another case being investigated by the Commissioner and confirmed that he was content for the Commissioner to take into account the arguments presented in the other case. He also said he had attached copies of those arguments to his letter.
22. The documents referred to by Mr Healey in his letter of 26 September 2005 were not attached. These were sent separately on 6 October 2005.
23. On receipt of the documents the Commissioner considered the application of the exemptions and the public interest arguments as they related to this and the other case he was investigating.
24. A Decision Notice was subsequently issued against the Treasury on 31 July 2006 (reference FS50083104) ordering disclosure of the requested information referred to in this Decision Notice. At that time the Commissioner took the view that the Treasury had in fact responded to the request for information and had continued to do so as the public authority responsible holding the information requested.
25. After the Decision Notice had been served, correspondence took place between the Treasury, the OGC and the Commissioner in which the Treasury explained its view that the correct public authority for the purpose of the Decision Notice was in fact the OGC. The Treasury argued that this was because in answering the parliamentary question on 25 February 2005 the Minister was responding as the Minister responsible for the OGC. Secondly it explained that the OGC hold the information referred to in the Decision Notice and thirdly it was the OGC who conducted the internal review of the original refusal.
26. The Commissioner notes that confusion has arisen in this case because the background to the FOI request clearly lies in a parliamentary question submitted by the complainant and answered by the then Chief Secretary to the Treasury. All further correspondence was then dealt with at Ministerial level in line with the convention for correspondence with Members of Parliament
27. The Commissioner has considered the comments made by the Treasury and the OGC. He is of the view confusion has arisen in this case partly because correspondence between the Treasury and the Commissioner's office failed to clarify on whose behalf the Minister was responding and did not correct

references made by all parties that the FOI complaint was against the Treasury. However having reviewed the case the Commissioner accepts that the correct public authority for the purpose of this request is the OGC. As a result he has withdrawn the Decision Notice against the Treasury and substitutes this one against the OGC.

The exemptions

Section 33 – Audit Functions

28. The OGC has explained that one of its functions is to examine and review the ID card programme, at critical stages in its lifecycle, to assess whether it can progress successfully and make the necessary recommendations in order for it to do so. The Commissioner is therefore satisfied the OGC does examine the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions. Therefore the Commissioner is satisfied that OGC is a public authority to which the exemption at s.33 of the Act applies.
29. Section 33 allows a public authority to refuse to disclose information if disclosure would, or would be likely to, prejudice the exercise of the public authority's functions in relation to the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions.
30. The OGC has argued that the release of information provided to it in confidence on a voluntary basis may inhibit the frankness, candour and general co-operation of interviewees for further Gates in connection with this programme and future programmes or projects. The OGC has provided the Commissioner with statements from those involved in Gateway Reviews confirming that they would be less willing to cooperate fully if information was likely to be disclosed. It is therefore the OGC's view that the disclosure of the traffic light status of the two Gate Zero reviews would severely prejudice its ability to carry out its functions effectively. It argues that the Gateway process is unique and that disclosure or the threat of disclosure of this information would harm this process. If it is weakened in this way there is presently no other process to replace it.
31. The Commissioner is not persuaded that disclosing the traffic light status of the Gate Zero Reviews in this case would discourage cooperation by those who may be asked to provide information to the OGC in the future. In addition, the Commissioner does not accept that those contributing information as part of the Gateway Review process do so on a genuinely voluntary basis, or that they are at liberty to refuse to co-operate with future Gateway Reviews. Those contributing information do so in a professional capacity. It is part of their official responsibilities to participate fully and frankly with Gateway Reviews and similar initiatives. The Commissioner does not accept that the officials responsible for gathering and collating the requested information would cease to perform their duties on the grounds that the information may be disclosed. Government departments, such as the OGC, are expected to provide accurate information when they are asked to do so. The Commissioner does not accept that the release of the requested information will result in government departments failing

to provide information or in their providing incomplete or inaccurate information to other government departments. Civil servants would be in breach of their duty, and would damage their integrity as servants of the Crown, should they deliberately withhold relevant information or provide information other than the best they believe they can give. It is a matter for the bodies concerned, including the OGC, to ensure that their officials continue to perform their duties according to the required ethical standard, including the completion of reports such as those falling within the Complainant's request.

32. The OGC has not demonstrated that release of the requested information would, or would be likely to prejudice the exercise of its audit functions. The Commissioner's decision therefore is that the requested information is not exempt from disclosure by virtue of the exemption at s.33 of the Act.

Section 35 (Formulation and development of Government Policy)

33. The OGC also argued that the requested information was exempt from disclosure by virtue of s.35 of the Act. Section 35 exempts information held by a government department from disclosure if it relates to the formulation or development of government policy.
34. It is arguable whether the exemption at s.35 (1) (a) is engaged in respect of the requested information. There is a strong argument that the information contained in these Gate Zero Reports in fact relates to the implementation of the ID card project, rather than to the formulation or development of government policy on ID cards. The original Identity Card Bill was announced in the Queen's Speech of November 2004. The Act of 2006 has now received royal assent and is on the statute book. Therefore it is arguable whether Government policy on identity cards was still being formulated or developed when this request was made. However, the Commissioner is willing to accept that the information does relate to the development of government policy. He is therefore prepared to accept that s.35 is engaged.
35. Section 35 is a qualified exemption and is subject to a public interest test. The OGC assert that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
36. The complainant has put forward what he considers to be strong public interest arguments in favour of the release of the requested information. These are:
- There is a public interest in accountability in view of the scale, expense and constitutional implications of the scheme. This provides a clear public interest case for disclosure
 - Disclosure would enable the public to form a view on whether the recommendations of the review were being implemented. There is a public interest in transparency to allow public scrutiny of whether the programme is being managed effectively and responding properly to information contained in Gateway reports, including recommendations and issues connected to the RAG status.

- It would also allow the public to understand whether the Gateway process was generally effective.
37. The OGC put forward the following public interest arguments in favour of maintaining the exemption:
- It argues that a key consideration is the need to protect the integrity of the Gateway process. Disclosure of the RAG status will adversely affect the candour and frankness of interviewees and promptness of the Reviews. This in turn may then affect the outcome of the traffic light status. The OGC has pointed out that it considers that the importance and success of the reviews are based fundamentally on the underlying candour, confidentiality and promptness. The reviewers have indicated that nothing is held back, there are no taboo subjects and concerns and criticisms are freely expressed and discussed. The OGC explained that the same interviewees may be expected to participate in future Gateway Reviews of the same programme and projects. They may be less willing to do so if this results in the traffic light status awarded being disclosed
 - This lack of candour may reduce the likelihood of adverse recommendations being made to the Senior Responsible Officers leading to a less reliable process. This in turn would harm the public interest because the recommendations that would offer the greatest benefit would be less likely to emerge. Again this would have an impact on the resulting traffic light status awarded to the Gateway Review
 - The Government considers that the Gateway process has been very successful, leading to demonstrable value for money gains across central government. The Gateway process is presently unique and any threat to it would not be in the public interest
 - Disclosure of the information could undermine the still live policy development process

The Commissioner's Decision

38. The Commissioner's decision is that the exemption at s.33 of the Act is not engaged in respect of the requested information.
39. In order to decide whether the public authority has dealt with the complainant's request for information in accordance with the requirements of Part 1 of the Act, the Commissioner must assess whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. In coming to his decision the Commissioner has taken the following factors into account:

Importance of the Gateway Review Process

40. The Commissioner is aware of the importance the Government attaches to the Gateway Review process. He recognises that there is a balance to be drawn

between the competing societal objectives of public accountability and transparency and the importance of maintaining public confidence in the robustness and effectiveness of the Gateway review process. The Commissioner has taken these competing objectives into account in reaching his decision.

Nature of the Project being reviewed

41. The subject of these Reports, i.e. identity cards, will have a significant impact on the lives of individuals and their relationship with the state. The Commissioner considers that this in itself presents a very strong argument in favour of disclosure. The public should therefore be kept informed as far as possible as to how the programme is progressing and what the impact on them of identity cards will be. Disclosure is likely to enhance public debate of issues such as the programme's feasibility and how it is being managed. It will also allow the identification of project risks and practical concerns. It could also go some way towards educating the public by allowing it to develop a better understanding of the issues surrounding the development of identity cards. In the Commissioner's view the nature of the identity card project and its implication for citizens is in itself a highly significant factor in deciding in favour of disclosure.
42. The Commissioner is mindful of the OGC's view that because the programme is of such great public importance, there is a strong public interest in the programme being successful. The OGC argues that it is therefore essential that the integrity of the Gateway Process is maintained and not damaged in any way. The Commissioner has taken this into account but still considers that allowing the public an opportunity to better understand the development of the ID card programme outweighs the public interest arguments put forward by the OGC. In any event, the Commissioner is not persuaded that disclosure of the requested information will damage the Gateway Process in the way the OGC has suggested it will.

Contents of the Reports and the impact on candour of Interviewees

43. The Commissioner is mindful of the OGC's view that the release of information showing the ID card scheme's traffic light status would make future prospective interviewees and interviewers less willing to participate in the Gateway Process, or that they may be less candid or frank with their comments. However, in this case he is not persuaded by this argument.
44. In the Commissioner's opinion the Reports do not contain any information which would cause participants to be less willing to contribute openly and fully to future Gateway Reviews. The Commissioner has noted that during his discussions with the OGC it accepted that these Reports were prepared at a very early stage in the life of a project. Because these Gate Zero Reviews were carried out at an early stage, they concentrate primarily on the practical issues of ensuring the right personnel and management structure is in place. It is difficult to envisage how disclosure of information of this sort could lead to contributors being less candid with their views. The Commissioner is satisfied that the Reports consist of material one would expect to see in relation to the early stages of any major governmental programme.

45. Gateway Reports do not attribute comments to any particular person, although the Commissioner recognises that in some cases the nature of the information is such that it may be possible to attribute content to a particular individual. However, even if it is possible to do this, the Commissioner is still not convinced that disclosure of the requested information would, or would be likely to, lead to contributors being less candid in future reports. Should there be evidence of this, the organisations involved must take the necessary measures to ensure that their staff continue to deliver the quality of advice that they are expected to provide as part of their official duties.
46. In any event in this case the complainant has only asked for the status of the Gateway Review. In the Commissioner's opinion disclosing the status will not reveal details of the concerns or recommendations that may have been raised by participants. He is therefore unable to accept that interviewees will be less frank with their comments if the traffic light status is disclosed.

Timing and Stage of Report

47. The Commissioner has noted that these two Reports were carried out in June 2003 and January 2004. A Home Office press release confirmed in April 2004 that the Gate Zero Review of the ID card programme was successfully completed in January 2004. In the Commissioner's opinion the timing of the ID card programme, and the stage it was at, is a crucial consideration in deciding whether the requested information should be released. The Commissioner has also taken into account the fact that the Review process has now moved on to the Gate One Stage. As such the Gate Zero Reports contain information that is essentially historical. This is an additional factor that militates against withholding the information on public interest grounds.
48. His assessment is that the public interest in maintaining the exemption does not outweigh the public interest in disclosing the information.

The Commissioner's decision in this case is therefore that, for the reasons set out above, the OGC has not dealt with the complainant's request in accordance with the requirements of Part 1 of the Act.

Action Required

49. In view of these matters the Commissioner hereby gives notice that in exercise of his powers under section 50 of the Act he requires the OGC to disclose the information requested by the complainant within 35 calendar days of the date of this Decision Notice.

Right of Appeal

50. Either party has the right to appeal against this Decision Notice to the Information Tribunal (the "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@dca.gsi.gov.uk

- 7.2 Any Notice of Appeal should be served on the Tribunal within 28 days of the date on which this Decision Notice is served.

Dated 5 day of October 2006

Signed:

**Graham Smith
Deputy Commissioner**

**Information Commissioner
Wycliffe House
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SK9 5AF**