

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 March 2017

Public Authority: Department for Work and Pensions
Address: Caxton House
6 -12 Tothill Street
London
SW1H 9NA

Decision (including any steps ordered)

1. The complainant has requested the names of particular computer folders held by the Department for Work and Pensions (DWP). The Commissioner's decision is that the DWP incorrectly relied upon section 31(1)(a) and 40(2) to withhold the requested information.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Release to the complainant the names of all 270 subfolders of the purdah folder.
3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

4. Purdah is the pre-election period in the UK; specifically, the time between an announced election and the final election results.
5. It is an established convention that incumbent ministers should not have access to any documents written by a predecessor of a different administration other than those which were published or put in the public domain by their predecessors. Nor should incumbent ministers have access to departmental papers which would inform them, either

directly or indirectly, of their predecessors' views. Information which constitutes papers of a previous administration is still subject to the FOIA but is subject to special handling procedures within government to comply with this convention.

6. Following the normal convention all the shared folders and email accounts for each Ministerial Private Office were archived into a special area called the purdah folder prior to the 2015 general election. The information sought therefore relates to the Coalition Government's period of government

Request and response

7. On 18 October 2016, the complainant wrote to the DWP and requested information in the following terms:
 - "Please provide the names of all 270 subfolders of the purdah folder."
8. The DWP responded on 15 November 2016 and refused to provide the requested information citing the following FOIA exemptions;
 - Section 40(2)
 - Section 31(1)(a)
9. Following an internal review the DWP wrote to the complainant on 16 December 2016. It stated that it upheld its original decision.

Scope of the case

10. The complainant contacted the Commissioner on 22 December 2016 to complain about the way his request for information had been handled.

Reasons for decision

11. To be clear, the complainant is seeking the names of 270 electronic subfolders of the purdah folder, not their contents.

Section 31(1)(a) – Prevention or detection of crime

12. Computer security, also known as cybersecurity, is the protection of computer systems from the theft or damage to the hardware, software or the information on them, as well as from disruption or misdirection of the services they provide.

13. The DWP is relying on sections 31(1)(a) to withhold the requested information. This states that:

“Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

(a) the prevention or detection of crime,”

14. Section 31 is a prejudice based exemption and is subject to the public interest test. This means that not only does the information have to prejudice one of the purposes listed but, before the information can be withheld, the public interest in the maintenance of the exemption must outweigh the public interest in disclosure.

15. In order to be engaged, the following criteria must be met:

- the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
- the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
- it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie disclosure ‘would be likely’ to result in prejudice or disclosure ‘would’ result in prejudice.

16. The relevant applicable interests cited in this exemption are the prevention or detection of crime.

17. With regard to the first criterion of the three limb prejudice test described above the Commissioner accepts that potential prejudice to law enforcement activity, which the DWP alleges would be a consequence of disclosing the requested information, relates to the interests which the exemption contained at section 31(1)(a) is designed to protect.

18. However, having had the benefit of examining the withheld information and the submissions of the DWP the Commissioner is not persuaded that there is a clear causal relationship between the information being withheld and the prejudice identified. Therefore nor does the Commissioner consider that the disclosure of the requested information would be likely to represent a real and significant risk to the prevention or detection of crime. Simply put, releasing the names of the folders would not be likely to aid those who would wish to electronically access

the contents of the folders unlawfully. Therefore, the Commissioner is not satisfied that the exemption contained at section 31(1)(a) is engaged.

19. As this is a public notice, given the sensitive nature of the analysis applied to this case the Commissioner is unable to set out in the body of this notice the DWP's specific arguments as to why the exemption applies, nor her view as to why she is unpersuaded. However, this analysis has been set out in full in a confidential annex to this notice which is being provided to the DWP only.

Section 40(2) – Personal data

20. Section 40(2) of the FOIA states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure under the FOIA would breach any of the data protection principles or section 10 of the Data Protection Act 1998 ('the DPA').
21. The DWP considers that the five first names that form parts of file names constitutes the personal data of the individuals concerned and that disclosure would breach the first data protection principle.
22. In order to rely on the exemption provided by section 40, the information being requested must constitute personal data as defined by section 1 of the DPA. It defines personal information as data which relates to a living individual who can be identified:
- From that data
 - or from that data and other information which is in the possession of ,or is likely to come into the possession of, the data controller.
23. In considering whether the information requested is "personal data", the Commissioner has taken into account her own guidance on the issue¹. The two main elements of personal data are that the information must "relate to" a living person, and that person must be identifiable. Information will "relate to" a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts them in any way.

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http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Data_Protection/Detailed_specialist_guides/PERSONAL_DATA_FLOWCHART_V1_WITH_PREFACE001.ashx

24. The Commissioner does not accept that individuals would be identifiable from the information withheld solely by reference to section 40(2) i.e. their first names and any other information that maybe in the public domain. The Commissioner therefore does not accept that the information (i.e. the five first names) in the context of this request is personal data as defined by the DPA and thus there is no engagement of the exemption provided by section 40(2).
25. The Commissioner, finding that the exemptions relied upon by the DWP are not engaged, orders that the complainant be provided with the withheld information.

Right of appeal

26. 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,
LEICESTER,
LE1 8DJ

Tel: 0300 123 4504
Fax: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

27. 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.
28. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Alexander Ganotis
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Wilmslow
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SK9 5AF