

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 11 November 2015

**Public Authority:** Ministry of Justice

**Address:** 102 Petty France  
London  
SW1H 9AJ

### Decision (including any steps ordered)

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1. The complainant requested information from the Ministry of Justice (MoJ) relating to advice provided on draft proposed legislation to regulate the provision of electricity on Sark.
2. The MoJ initially withheld the information on the basis of section 27 of FOIA (international relations). During the course of the Commissioner's investigation it also relied on section 42 (legal professional privilege).
3. The Commissioner has investigated MoJ's application of section 27(1)(a). He has concluded that the requested information is exempt from disclosure on the basis of section 27(1)(a) and that the public interest favours maintaining the exemption.
4. He requires no steps to be taken as a result of this decision.

### Background

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5. By way of background to this request, MoJ told the Commissioner:

*"The "Crown Dependencies" comprise the Bailiwick of Guernsey (including the jurisdictions of Guernsey, Alderney and Sark), the Isle of Man and the Bailiwick of Jersey.*

*They are self-governing Dependencies of the Crown, with their own representative democratic institutions included in the term "British Islands". They are not part of UK and have no representation in the UK Parliament.*

*The FOIA does not extend to the Crown Dependencies and, for the purposes of the Act, they are considered foreign states.*

*The UK Government is responsible for the Crown Dependencies' international relations; this responsibility is exercised by UK Government ministers, acting in their capacity as Privy Counsellors".*

6. The Commissioner also understands that<sup>1</sup>:

*"The Islands' legislatures make their own domestic legislation. Primary legislation passed in Jersey, Guernsey, Alderney and Sark requires Royal Assent from The Privy Council. ....*

*The Ministry of Justice examines legislation from the Crown Dependencies to ensure in particular that there is no conflict with international obligations or any fundamental constitutional principles. This enables the Lord Chancellor to advise The Privy Council whether Her Majesty in Council can be advised to make an Assenting Order, and thereby grant Royal Assent".*

7. The Commissioner's guidance on section 27<sup>2</sup> of FOIA acknowledges that Crown Dependencies such as the Channel Islands come within the remit of the exemption.

## **Request and response**

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8. On 16 February 2015 the complainant wrote to MoJ and requested information in the following terms:

*"For the attention of the Crown Dependencies Team: I am writing under the Freedom of Information Act to request a copy of the draft proposed legislation, and any associated advice, to regulate the provision of electricity to the population of the island of Sark in the*

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<sup>1</sup> [https://www.justice.gov.uk/downloads/about/moj/our-responsibilities/Background Briefing on the Crown Dependencies2.pdf](https://www.justice.gov.uk/downloads/about/moj/our-responsibilities/Background%20Briefing%20on%20the%20Crown%20Dependencies2.pdf)

<sup>2</sup> [https://ico.org.uk/media/for-organisations/documents/1184/awareness\\_guidance\\_14\\_-\\_international\\_relations.pdf](https://ico.org.uk/media/for-organisations/documents/1184/awareness_guidance_14_-_international_relations.pdf)

*Bailiwick of Guernsey, which I understand was sent to the Ministry of Justice in 2014."*

9. MoJ responded on 23 March 2015. It confirmed it holds the requested information but refused to provide it, citing section 27(1)(a) and 27(2) of FOIA (international relations) as its basis for doing so.
10. The complainant wrote to MoJ on 6 April 2015, no longer asking to be provided with a copy of the draft proposed legislation. Modifying the scope of his request to information provided by the UK Government, he wrote:

*"You confirmed that the Ministry of Justice has in its possession proposed legislation to regulate the provision of electricity to the population of the Island of Sark in the Bailiwick of Guernsey.*

*I accept that the legislation itself was provided in confidence, but I am writing under the Freedom of Information Act to request copies of any advice or opinions given by the UK government on this proposed legislation and on any related matters".*

11. MoJ treated that correspondence as a request for an internal review. MoJ sent him the outcome of its internal review on 15 June 2015, upholding its original position. It clarified that any advice or opinions given by the UK government on this issue would have been provided in confidence.

## **Scope of the case**

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12. The complainant contacted the Commissioner on 29 June 2015 to complain about the way his request for information had been handled.

13. He told the Commissioner:

*"I just want to see what advice was given about the document".*

14. Referring to MoJ's view that some of the information within the scope of the original wording of his request was provided directly to the UK government by the Chief Pleas of Sark (the parliament of Sark), and was provided on a confidential basis, the complainant told the Commissioner:

*"The updated request acknowledges this and accepts that 27.2 of the FOI act excludes information provided by a Foreign state and accepts the confidentiality of the law provided to the MoJ by Sark.*

*However, responses by HM government staff are not exempted by the FOI act and should be available to a UK taxpayer on request".*

15. During the course of the Commissioner's investigation, MoJ advised that it additionally wished to rely on section 42(1) (legal professional privilege) in relation to some of the information within the scope of the request.

16. Having had the opportunity to consider the application of that additional exemption, the complainant confirmed to the Commissioner that he considered that it is in the public interest:

*"to see exactly what advice is being given to this state [Sark]".*

17. In light of the complainant's comments, and mindful of the wording of the request, the analysis below considers MoJ's application of sections 27(1) and 42(1) to the requested information. That information relates to any advice given by the UK government on draft proposed legislation to regulate the provision of electricity to the population of the Island of Sark and related matters.

## **Reasons for decision**

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### *Section 27 international relations*

18. The Commissioner has first considered MoJ's application of section 27(1).

19. During the course of the Commissioner's investigation, MoJ confirmed that it considers that section 27(1)(a) applies to all the withheld information.

20. Section 27(1)(a) provides that:

*"(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-*

*(a) relations between the United Kingdom and any other State".*

### *Is the exemption engaged – section 27(1)*

21. Section 27(1) focuses on the effects of the disclosure of the information, with section 27(1)(a) providing that information is exempt if its disclosure would, or would be likely to, prejudice relations between the UK and any other State.

22. In order for a prejudice based exemption, such as that set out in section 27(1), to be engaged the Commissioner considers that three criteria must be met:
- firstly, 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;
  - secondly, 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;
  - thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e. disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; there must be a real and significant risk. With regard to the higher threshold, this places a stronger evidential burden on the public authority.
23. With the above in mind, the Commissioner has considered the withheld information and MoJ's submissions in support of its reliance on section 27(1)(a).
24. Section 17(1)(c) of the FOIA requires a public authority relying on an exemption in Part II of the FOIA to explain the reasons for its decision to rely on that section. In the case of a prejudice based exemption such as section 27, this will mean explaining - in some detail - exactly how disclosing the information, or confirming or denying whether it is held, would lead to the prejudice set out in the exemption.
25. In the Commissioner's view, the MoJ appears to have relied, to a large degree, on the requested material being self-evidently exempt. For example, it told the complainant:
- "We are not obliged to provide information if its release would prejudice international relations. In this case, we believe that releasing the information would be likely to prejudice the relations between the United Kingdom and any other State, in this instance, Sark which is part of the Bailiwick of Guernsey (section 27(1)(a) of the Act)".*
26. Similarly, in correspondence with the Commissioner, MoJ said:

*"Under the provisions of Section 27(1) we assessed the impact of its release on the relationship between Sark and the UK, Guernsey and the UK, Sark and Guernsey and the wider Crown Dependencies' relationship with the UK".*

27. Explaining why it considers the exemption applies, MoJ simply told the Commissioner:

*"We determined that the information should be withheld under Section 27 (1) (a) of the FOIA and replied to [the complainant] accordingly ...".*

28. It then went on to describe the public interest arguments it had considered. However, the Commissioner considers those arguments are more relevant to how the requested information meets the test set out in the exemption.

29. In support of its application of section 27, albeit by way of public interest arguments, MoJ referred to section 27(1)(a) recognising that the effective conduct of international relations depends upon maintaining trust and confidence between governments and organisations. In the context of the request in this case MoJ told the complainant:

*"...the information was provided directly to the UK government by the Chief Pleas of Sark, and was provided on a confidential basis. I judge it reasonable for the Chief Pleas to expect that the UK Government would not share the information with third parties and that if we were to do so it may harm future relations with the government of Sark and may discourage them from sharing information with the MoJ and wider UK government in future. This also applies to any documents, discussions, or advice, which the Sark authorities would also expect to be treated on a confidential basis".*

30. MoJ also argued that disclosure of information such as that in this case would undermine trust between the UK, Sark and the other Crown Dependencies. In that respect, MoJ said:

*"This trust is fundamental to the governance relationship and it is my assessment that disclosure would affect the MoJ's ability to influence and assist the Crown Dependencies as required of the governance role".*

31. Having viewed the withheld information and considered the arguments put forward by MoJ the Commissioner accepts that potential prejudice to the UK's relations with Sark relates to the interests which the exemption contained at section 27(1)(a) is designed to protect. Furthermore, he

considers that the prejudice will not be trivial or insignificant but real and of substance.

32. Acknowledging that prejudice to the relationship between the UK and the Crown Dependencies - in the way predicted by MoJ - would occur, the Commissioner accepts that, in the circumstances of this case, the higher threshold - *would* prejudice - is met.
33. He therefore finds the exemption engaged in relation to the information withheld by virtue of section 27(1)(a) and has carried his finding that prejudice to relations between the UK and Sark *would* occur as a result of disclosure of the information in question through to the public interest test.

*The public interest test*

34. Section 27(1) is a qualified exemption and is subject to a public interest test. This means that, even where its provisions are engaged, it is necessary to decide whether it serves the public interest better to disclose the requested information or to withhold it because of the interests served by maintaining the relevant exemption. If the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information in question must be disclosed.

*Public interest arguments in favour of disclosing the requested information*

35. The complainant told the Commissioner:

*"Sark is a Crown Dependency of about 500 inhabitants and, as one of the Channel Islands it does not contribute to the UK Exchequer.*

*....*

*This jurisdiction of 500 people is costing the UK taxpayer a substantial amount of money and it is clearly in the public interest to know whether advice they are receiving from the UK government is going to stem these costs or exacerbate them".*

36. In favour of disclosure, the complainant said:

*"While the disclosure of advice given to the foreign state might embarrass HM government, it would not surprise the foreign state, as they have already seen it.*

*... - Again, I have not requested to see the information provided in confidence (by a foreign state) only the advice provided by HM government. This does not breach the trust given by a foreign*

*government when they disclose to the UK, as this was not a request for any information provided by a foreign government, just for the advice GIVEN TO IT. Releasing it simply allows a concerned UK citizen to oversee the actions of his government”.*

37. In correspondence with the complainant, MoJ acknowledged that disclosure would support general transparency principles by releasing the contents of documents in the possession of the department.
38. It also accepted that disclosure of any advice about the proposed legislation would help to bring about a greater understanding of the UK’s relationship with the island of Sark.

#### *Public interest arguments in favour of maintaining the exemption*

39. In favour of maintaining the exemption, MoJ explained to the complainant that it considers it important for non-UK governments or bodies to know that they can discuss and agree issues with the UK Government in an atmosphere of confidentiality. It told him:

*“As such, it is of prime importance that the UK maintains consistency in this area; the potential impact of disclosure has wider implications than the relationship between the MoJ and Sark”.*

40. In correspondence with the Commissioner, MoJ confirmed its view that disclosure in this case may harm future relations with the government of Sark and may discourage them from sharing information with the MoJ and the wider UK Government in future. It explained that that in turn:

*“may have consequences for the UK with its constitutional responsibility for good government for which the MoJ exercises oversight on behalf of the Crown”.*

#### *Balance of the public interest arguments*

41. When balancing the opposing public interests in a case, the Commissioner is deciding whether it serves the public interest better to disclose the requested information or to withhold it because of the interests served by maintaining the relevant exemption. If the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information in question must be disclosed.
42. In terms of the arguments in favour of disclosure, the Commissioner recognises that there is clearly a public interest in the UK being open and transparent about the way in which it engages with other States. He accepts that disclosure of the withheld information in this case would

provide the public with an insight into the nature of the UK's relations with Sark concerning the proposed legislation.

43. However, in the Commissioner's view it is strongly in the public interest that the UK maintains good international relations. He considers that there is a significant public interest in avoiding causing damage to relations between the UK and other States. It would clearly be counter to the public interest if there were to be a negative impact on the effective conduct of international relations as a result of the release of the information at issue in this case.
44. In the circumstances of this case, the Commissioner notes that the public interest against disclosure is that in avoiding prejudice to international relations, specifically UK/Sark relations but also - more widely - relations between UK and the Crown Dependencies. The Commissioner agrees with the MoJ that it is in the public interest to avoid prejudice between the UK and the Crown Dependencies.
45. Furthermore, the Commissioner attaches considerable weight to such arguments in view of his acceptance that prejudice would not be *likely* to, rather it *would* result from disclosure.
46. As disclosure risks undermining the UK's ability to maintain effective relations with the Crown Dependencies in general, not just with Sark, the Commissioner has concluded that the balance of the public interest favours maintaining the exemption provided by section 27(1)(a).

#### *Other exemptions*

47. In light of that conclusion, the Commissioner has not gone on to consider MoJ's application of other exemptions to the same information.

## Right of appeal

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48. 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 1234504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

49. 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.
50. 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 .....**

**Jon Manners**  
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