

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 March 2016

Public Authority: Department for Culture, Media and Sport
Address: 100 Parliament Street
London
SW1A 2BQ

Decision (including any steps ordered)

1. The complainant requested information relating to correspondence from the European Commission to the United Kingdom about the Data Protection Act. The Ministry of Justice (MoJ) refused to provide the requested information citing sections 27(1) and (2) of FOIA (international relations).
2. The Commissioner's decision is that the information is exempt from disclosure on the basis of section 27(1)(b) of FOIA and that in all the circumstances of the case the public interest favours maintaining the exemption. The Commissioner did not proceed to consider MoJ's application of section 27(2) to the same information. The Department for Culture Media and Sport (DCMS) is not required to take any steps as a result of this notice.

Background

3. While MoJ is the Government Department referred to throughout this notice, during the course of the Commissioner's investigation, MoJ advised that the business unit with policy responsibility for this request had moved, following a machinery of Government change, to the Department for Culture Media & Sport (DCMS). DCMS is therefore the appropriate public authority to be issued with the DN in this case.
4. The background to this case is complex and includes a previous Tribunal decision, dated 23 July 2013, regarding an earlier, related, request the MoJ.

5. That Tribunal decision of 23 July 2013 states:

"In a letter dated 9 July 2004, the European Commission ("EC") wrote to the UK government concerning prospective infraction proceedings against the UK government due to what the EC considered to be deficiencies in the UK's transposition of the EU's Directive 95/46/EC ("the Data Protection Directive") in national law by means of the Data Protection Act 1998 ("DPA"). The UK government formally responded in a letter dated 17 November 2005. On 4 April 2006, the EC again wrote to the UK government explaining its concerns about the UK's implementation of the Data Protection Directive".

6. Regarding the request in this case the complainant told the Commissioner:

"This case involves the identical request as in FS50290504 which was subject to Tribunal appeal at Case No. EA/2012/0110; in this case the request was dated 2 October 2009, the Decision Notice was dated 31 March 2011 and the Tribunal Decision was 23 July 2013.

At the end of the Tribunal adjudication, which had to consider my request as if it were the time of the request (i.e. about 4 years earlier), the Tribunal said at para 121

'We find having weighed the public interest factors to and for disclosure that at the time of the request the balance narrowly favours maintaining the exemption. If the request was made today we may have come to another conclusion but we are bound by the law to consider the public interest test as at the time of the request'.

Hence, a year later, I repeated the same request sent to the MoJ on 27 July 2014".

7. The Tribunal described the request in case FS50290504 as being for "the full information the IC considered in relation to his earlier FOIA request made to the MOJ on 1 October 2009". That request was for:

"(i) A list of which Article(s) in Directive 95/46/EC (the Data Protection Directive) the European Commission have alleged have not been implemented properly by the UK Government.

(ii) In relation to each Article, summary information as to why the European Commission has made this claim.

- (iii) In relation to each Article, summary information as to why the UK Government thinks that the European Commission is wrong in its claim*
- iv) Summary information as to whether or not any differences in opinion about implementation have now been resolved."*

Request and response

8. On 27 July 2014, the complainant wrote to MoJ saying:

*"I refer to the recent Tribunal Decision (EA/2012/0110)
http://www.informationtribunal.gov.uk/DBFiles/Decision/i1048/EA-2012-0110_23-07-2013.pdf*

I want to make exactly the same FOI request as in that Decision. This is because the Tribunal upheld the MoJ case mainly on the grounds that they had to consider the case at the time the request was made (in 12 May 2011). It is clear that the Tribunal concluded that if it had considered the case at the time of the Tribunal Hearing, then it could have come to a different conclusion. See para 121 of the Decision.... "

9. MoJ responded on 21 August 2014 explaining that it considered that the exemptions at sections 27(1), 27(2) and 35(1) of FOIA apply in this case but that it required further time to consider the public interest test in respect of those exemptions.
10. MoJ provided its substantive response on 13 October 2014. It refused to provide the requested information, describing it as:

"the exchange of letters and associated correspondence between the European Commission and the UK in respect of prospective infraction proceedings against the UK Government on the grounds of alleged deficiencies in the UK transposition of the EU Directive 95/46EC (the Data Protection Directive)".

11. MoJ cited the exemptions in sections 27(1)(b) and 27(2) of FOIA (international relations) as its basis for refusing to provide that information. No reference was made to section 35. Following an internal review, MoJ wrote to the complainant on 31 March 2015 upholding its position.

Scope of the case

12. The complainant contacted the Commissioner on 1 April 2015 to complain about the way his request for information had been handled.

13. Given the complex background to this case, and for the avoidance of doubt, the Commissioner asked the complainant to confirm what he considers to be the information at issue in this case.

14. By way of clarification, the complainant responded:

"I don't know what information the Tribunal saw in July 2013 but that is the information I am requesting. I am reluctant to depart from this construction because I do not want to introduce any new information and I do not want any variation of the request..."

15. Quoting from the Tribunal finding, he told the Commissioner:

"Para 18 of the Tribunal notes that "on 12 May 2011, [name redacted] requested the full information the IC considered in relation to his earlier FOIA request made to the MOJ on 1 October 2009 – see paragraph 8 above".

and

"19. MOJ clarified with [name redacted] that his request was for 'the letters of formal notice in which the European Commission alleged that the Directive 95/46/EC have not been implemented properly by the UK Government' and he agreed."

16. In light of the above, the Commissioner considers that the withheld information within the scope of this request comprises the letters from the EC to the UK government - the letters of formal notice.

17. Whilst acknowledging the existence of a related case having been investigated, (FS50290504) and mindful of there being a Tribunal decision in that case, the Commissioner's duty is to decide, on a case-by-case basis, whether a request for information has been dealt with in accordance with FOIA. The Commissioner also notes that he is not bound by First-tier Tribunal decisions such as the one referred to above.

18. The analysis below considers MoJ's application of section 27 of the FOIA to the information it holds within the scope of the request.

Reasons for decision

Section 27 international relations

19. Section 27(1) provides that –

“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,

(b) relations between the United Kingdom and any international organisation or international court,

(c) the interests of the United Kingdom abroad, or

(d) the promotion or protection by the United Kingdom of its interests abroad.”

20. Section 27(2) provides that –

“Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.”

21. In other words, section 27(1) focuses on the effects of the disclosure of the information, while section 27(2) relates to the circumstances under which it was obtained and the conditions placed on it by its supplier, and does not relate primarily to the subject of the information or the harm that may result from its disclosure. In the Commissioner's view, such information is confidential for as long as the state, organisation or court expects it to be so held.

22. During the course of the Commissioner's investigation, MoJ confirmed that it is relying on both subsections (1)(b) and (2) of section 27. The Commissioner has first considered its application of section 27(1)(b).

23. In order for a prejudice based exemption, such as that set out in section 27(1), to be engaged 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 – ie 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.

24. Disputing its application of section 27, the complainant told the MoJ:

"There is no prejudice to International relations because there are no infraction proceedings in the offing".

25. In correspondence with the complainant, MoJ acknowledged that the key aspect in the Tribunal's deliberations in 2013 with respect to section 27 appeared to relate to the lack of evidence to demonstrate that the infraction proceedings were an ongoing concern.

26. As a result, MoJ explained that it had consulted with the Commission on a number of occasions in relation to its handling of this request. It told the complainant:

"the Ministry of Justice has sought to clarify with the Commission its intention in relation to the infraction, and critically, whether they still consider it to be a live issue. Officials from the department contacted the Commission and had an exchange of correspondence in February and March 2013 (following the Tribunal hearing), again in January 2014 and then, more recently, at the end of September/beginning of October 2014 seeking their views following this latest FOI request. On each occasion, the Commission confirmed that the proceedings remain live, that the particular information remains under consideration and therefore should not be released at this time".

27. MoJ confirmed, as a result of its consultation:

"the Commission remains firmly of the view that these letters should not be released".

28. MoJ told the complainant that it considered that the negative impact of disclosure would be likely to be wider "than simply this infraction". In its view, disclosure would be at least likely to have some negative impact on its wider relations with the Commission "in this policy area". In that

respect it told him that it considered that disclosure would be likely to prejudice UK-Commission relations:

"particularly at a time when negotiations on the proposed General Data Protection Regulation are at a critical stage and due to be concluded in the short term".

29. MoJ explained to the complainant that, as a government department it has a responsibility:

"to take full account of the views and opinions of other international organisations affected by any decision to disclose information and whether acting contrary to their views would have a detrimental impact on ongoing relations with the UK".

30. MoJ provided the Commissioner with further arguments identifying the particular harm it considers may arise from disclosure of the withheld information in this case. For example it said that it considered that the European Commission would be less willing to share confidential information with the UK if it believed that such information could be disclosed at a later date.
31. The Commissioner accepts that the alleged prejudicial effects of disclosing the withheld information – for example causing damage to the relations between the United Kingdom and EC - relate to the applicable interests in section 27(1). He is also satisfied that the disclosure of the information at issue is at least capable of harming the interests in some way, for example by damaging the UK's reputation for handling confidential information, and that there is a causal link between the disclosure and the prejudice claimed.
32. With respect to the likelihood of prejudice occurring, MoJ told the complainant that it considered that disclosure in this case *"would undermine its good relationship with the Commission"*. Similarly, it told the Commissioner it was satisfied that if disclosure of confidential information related to infraction proceedings were to become regular practice this would have a wider impact for the United Kingdom. In other words, it considered that the higher level of prejudice applied.
33. Having duly considered the arguments put forward by MoJ, and having viewed the withheld information, the Commissioner is satisfied that there would be a real and significant risk of prejudice if the withheld information were to be disclosed. Acknowledging that prejudice to the relationship between the UK and the European Commission - in the way predicted by MoJ - would occur, the Commissioner accepts that, in the circumstances of this case, the higher threshold of likelihood is met.

34. He therefore finds the exemption engaged in relation to the information withheld by virtue of section 27(1)(b) and has carried this higher level of likelihood through to the public interest test.

The public interest test

35. 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

36. The complainant put forward a number of arguments in support of his view that the information should be disclosed. For example he considers that it is in the public interest to know that any Government's re-negotiation objectives *"involve knowledge about the deficiencies in the UK's DPA"*.

37. He also told MoJ that disclosure in this case would:

- inform public debate in relation to Ministerial claims that personal data are protected by the DPA when in fact these claims might be misleading as to matters of fact;
- aid the public in understanding the European Commission's constructive role in protecting the privacy of UK citizens as part of the referendum political debate; and
- encourage informed debate in relation to the proposed Data Protection Regulation and produce greater transparency around infraction proceedings.

38. In correspondence with the Commissioner, MoJ accepts that there is a public interest in disclosure to the extent that disclosure would help the public understand how the UK Government works with the European Commission on matters such as alleged breaches of European legislation.

39. MoJ also acknowledged that:

"releasing the information would also promote an understanding of the nature of any dialogue about the UK's implementation of the Data Protection Directive"

and

"the public have a right to understand how data protection works, and disclosure could promote a better understanding of whether the UK has implemented the Directive correctly".

Public interest arguments in favour of maintaining the exemption

40. In favour of maintaining the exemption, MoJ explained to the complainant that it considers it important to maintain good relations with the Commission:

"not only in relation to settling the infraction proceedings but also in terms of maintaining the mutual trust and respect that exists in the UK's ongoing working relationship with the Commission".

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. The Commissioner recognises that the Tribunal, in the earlier, related case, stated:

"We are concerned with the public interest factors existing at the time of the request which is roughly between the date of the request (12 May 2011) and the resolution of the internal review (12 August 2011). Public interest factors existing at the time of [name redacted]'s other requests which were considered by the IC (and another Tribunal) in previous decision notices may or may not be relevant, but if relevant the weight given may now be different".

43. In the same way, and in line with his guidance on the public interest test¹, in this case the Commissioner will consider the situation at the

¹ https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf

time of the request or within the time of the compliance with section 10 and 17 of FOIA.

44. The Commissioner accepts that, in the circumstances of this case, disclosure of the withheld information may well be of interest to the public. However, notwithstanding that, his decision must be with regard to whether or not disclosure is in the public interest, which requires more objective consideration.
45. He is also mindful that the public interest to be balanced with that in disclosure is, in this case, the public interest in avoiding prejudice to UK/EC relations.
46. In the Commissioner's view it is strongly in the public interest that the UK maintains good relations with the Commission. He considers that it would not be in the public interest if there were to be a negative impact on those relations as a result of the release of the information at issue in this case.
47. In his view, it is clear that disclosure in this case would not only damage the UK's relationship with the Commission on this particular issue, but has the potential to harm the relationship between the two across a wider range of issues.
48. From the evidence he has seen, the Commissioner is satisfied that disclosure of the withheld information represents a significant and real risk to the UK's working relationship with the Commission. Furthermore, the Commissioner recognises that disclosure of the withheld information when the potential for infraction proceedings against the UK remains live would be particularly damaging to the UK's relations with the EC on that issue and more widely.
49. The Commissioner is satisfied that such a broad prejudicial outcome is firmly against the public interest.
50. Therefore, despite the public interest in favour of disclosing the withheld information, the Commissioner's view is that the public interest in maintaining the exemption is greater in this case, given those broad prejudicial consequences of disclosure. The balance of the public interests therefore favours withholding the requested information.
51. Given his findings in relation to the MoJ's application of section 27(1)(b), the Commissioner has not gone on to consider its reliance on 27(2).

Right of appeal

52. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

53. 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.
54. 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

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