

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 February 2020

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

Decision (including any steps ordered)

1. The complainant has requested information concerning a list of Articles in Directive 95/46/EC (the repealed Data Protection Directive) which the European Commission have alleged were not implemented properly by the UK Government via the provisions in the (repealed) Data Protection Act 1998 and identification of the sections in the 1998 Act to which each allegation relates. Department for Digital, Culture, Media & Sport withheld the information requested, initially under Section 27(1)(a)(prejudice to relations between the United Kingdom and any other State) and following internal review, under Sections 27(1)(b)(relations between the United Kingdom and any international organisation or international court), 27(2)(confidential information obtained from a State other than the United Kingdom or from an international organisation or international court) and 42(1)(legal professional privilege).
2. The Commissioner has concluded that the withheld information is exempt from disclosure on the basis of Section 27(1)(b) and that the balance of the public interest supports maintaining the exemption.
3. The Commissioner does not require Department for Digital, Culture, Media & Sport to take any steps.

Request and response

4. On 29 May 2018 the complainant wrote to Department for Digital, Culture, Media & Sport (DCMS) and requested information in the following terms:

'A list of Article(s) in Directive 95/46/EC (the repealed Data Protection Directive), which the European Commission alleged were not implemented properly by the UK Government via the provisions in the Data Protection Act 1998 (now fully repealed) and identification of the sections in the 1998 Act to which each allegation relates. In relation to each Article in the above list, information, preferably from the Commission, which explains why the European Commission made this claim. In relation to each Article in the above list, information which explains the UK stance as to why the Commission were wrong to allege improper implementation of a provision in the Directive. In relation to each Article in the above list, information which explains any agreement between the UK Government and the Commission concerning the resolution of the alleged infringement'.

5. DCMS responded on 22 June 2018. They confirmed that they held some information within scope of the request. The Department advised that the information was exempt from disclosure under Section 27(1)(a)(prejudice to relations between the United Kingdom and any other State) but did not provide any information specific explanation as to what prejudice would or would be likely to be caused. The response simply stated that, *'this exemption recognises the need to protect information that would be likely to damage the United Kingdom's international relations, its interests abroad or its ability to protect and promote those interests'.*
6. The public interest test was inadequate, being generic in nature with no application to the actual information requested. DCMS advised that they had decided that the balance of the public interest lay in withholding the information.
7. Following an internal review DCMS wrote to the complainant on 13 November 2018. The Department advised the complainant that whilst they considered that section 27(1)(a) *'may be relevant'*, they had decided to instead rely on sections 27(1)(b), 27(2) and 42(1) to withhold the requested information.
8. The Department provided the definitions of each of the three 'new' exemptions, but once again failed to explain why and how each exemption applied to the specific information requested. DCMS also wholly failed to address the arguments advanced by the complainant in his request for a review.
9. DCMS stated that the disclosure of the requested information would be likely to prejudice the UK's relationship with the EU. They advised that,

'the information was provided to the UK government in strict confidence and it would prejudice our relationship if we were to release this information'. DCMS explained that, 'if the EU are unable to trust that any information they provide to us in confidence will not be disclosed, then they would be likely to withhold other such confidential information from us. It is the exchange of confidential information, such as the information at hand, which allows both the EU and the UK government to conduct their business effectively and efficiently'.

10. DCMS informed the complainant that they had contacted the European Commission (EC) and they (EC) had confirmed that *'the information should be withheld as infringement proceedings are still open despite the enactment of the GDPR¹'*. The Department advised that the EC had confirmed that there was a requirement for *'unconstrained and confidential discussions to be had on this subject'*.
11. DCMS contended that there was a strong public interest in the UK's relationship with the EU, and it was not in the public interest for the requested information to be released *'if it would be likely to affect the outcome of infringement proceedings'*.

Scope of the case

12. The complainant contacted the Commissioner on 10 January 2019 to complain about the way his request for information had been handled.
13. The Commissioner has had sight of the withheld information and submissions from both parties.
14. The Commissioner considers that the scope of her investigation is to determine whether DCMS are entitled to rely on the exemptions applied as a basis for refusing to provide the withheld information.

Request history

15. The information requested by the complainant was previously the subject of an ICO decision notice in 2011. In that (Ministry of Justice) case (FS50290504), the Commissioner found that sections 27(1)(c) and 27(2) were engaged to most (but not all) of the information requested, and although most of the information was correctly withheld, the public

¹ General Data Protection Regulation, which came into force on 25 May 2018.

interest in maintaining the exemptions did not outweigh the public interest in disclosure of the summary information as to why the EC had made the claim that Directive 95/46/EC had not been implemented properly by the UK government.

16. That decision was the subject of an appeal and the decision of the First-Tier Tribunal on 23 July 2013 (EA/2012/0110) was that section 27(2) and section 35(1)(a)(formulation or development of government policy) were engaged to the information and that the public interest balance under section 27(2) only, favoured maintaining the exemption. The Tribunal substituted a decision notice to reflect their findings.

17. The Tribunal found as follows (paragraphs 119 to 121):

'This Tribunal however, has to consider the facts and circumstances of this particular case. Infraction proceedings started in 2004. They have been largely resolved. It appears that the outstanding issues have been parked and that the Regulations will replace the DPA in the foreseeable future. Draft Regulations are now out for consultation. The public interest in transparency and openness in knowing the outstanding issues, could contribute to understanding whether, and how, the draft Regulations deal with them and help provide meaningful public responses to the consultation on such an important area of human rights.

However, that is the position now and was not necessarily the position at the time of the request, which was some two years earlier. At that time the negotiations of the Regulations had at best just started and there was no public consultation. However, there was a need for confidentiality as explained above. Therefore, we find the need for transparency at the time of the request cannot be given significant weight.

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'.

18. On 27 July 2014, the complainant made a further request for the same information to DCMS. Referring to the Tribunal decision above, the complainant explained that:

'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 (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'.

19. In their substantive response of 13 October 2014, DCMS confirmed that they were withholding the information requested under sections 27(1)(b) and 27(2). This was upheld on internal review on 31 March 2015.
20. In her decision notice of 22 March 2016 (FS50577377), the Commissioner acknowledged her previous decision (FS50290504) and the subsequent Tribunal decision. However, the Commissioner noted that she was not bound by decisions of the First-Tier Tribunal.
21. Having considered the arguments put forward by DCMS, and having viewed the withheld information, the Commissioner was satisfied that there would be a real and significant risk of prejudice if the withheld information were to be disclosed. Agreeing that prejudice to the relationship between the UK and the European Commission, in the way contended by DCMS, would occur, the Commissioner accepted, in the circumstances of the case, that the higher threshold of likelihood was met. The Commissioner therefore found the requested information to be exempt from disclosure under section 27(1)(b).
22. The Commissioner was of the view that it is strongly in the public interest that the UK maintains good relations with the Commission. She considered 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.
23. The Commissioner recognised 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. The Commissioner was satisfied that such a broad prejudicial outcome was firmly against the public interest. Therefore, despite the public interest in favour of disclosing the withheld information, the Commissioner's view was that the public interest in maintaining the section 27(1)(b) exemption was greater, given the broad prejudicial consequences of disclosure.
24. The complainant did not appeal the Commissioner's decision in FS50577377. In submissions to the Commissioner in the current case, the complainant explained that he decided to instead make a repeat request for the information once the GDPR was in force and the DPA 1998 was replaced by the DPA 2018.
25. The complainant has noted that the Tribunal previously found (paragraph 97) that the section 27(1) exemptions were not engaged to the information that is also the subject of the current matter. The Tribunal's rationale for that finding was set out at paragraphs 95 and 96:

'At the time of the request it appears from the evidence that most issues had been resolved and there was very little, if any, negotiation taking place in relation to the infraction proceedings. The emphasis was then moving to the Regulations, which we can reasonably assume was because the negotiations would be likely to cover any remaining issues and dealt with in the Regulations. As (name redacted) explained, there was only a possibility of infraction proceedings on the matters remaining outstanding. We are not sure from the evidence whether at the time of the request this was 8 or 4 issues or somewhere in between. (name redacted) admitted he was not familiar with the outstanding issues and had not sought to clarify exactly what they were. To us, it looks as if the outstanding issues were in the process of being parked by both sides as they prepared for the introduction of the Regulations. The likelihood of infraction proceedings being taken in this case does not seem to us to be real, unless there is a failure to introduce the Regulations. We were not presented with any evidence to suggest this might happen. For this principal reason we find it difficult to accept that there was a very significant and weighty chance of prejudice to our relations with the EC or that any prejudice in the circumstances of this case was real, actual or of substance'.

Reasons for decision

26. Section 27(1)(b) of the FOIA states that:

'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice:

'relations between the United Kingdom and any international organisation or international court'.

Complainant's position

27. In his request to DCMS for an internal review, the complainant noted that previous FOI requests for the requested information had been refused using section 27(1)(a), on the grounds that there were 'ongoing' infringement proceedings against the UK with respect to the DPA 1998 implementing Directive 95/46/EC improperly. The complainant contended that these proceedings were no longer 'ongoing' as the DPA 1998 and its parent Directive had both been repealed.
28. The complainant contended that if section 27(1)(a) were deemed to be engaged, then it required DCMS to demonstrate that the requested information would 'prejudice' the relations between the UK and the EC. He contended that this prejudice threshold could not be reached because of the following reasons:

- It was Government policy for the UK to leave the EU on 29 March 2019, and *'there is no realistic prospect of the European Commission commencing infringement procedures against a country that will not be a Member State of the European Union after next March'*. The complainant contended that as there was no possibility of infringement proceedings there could be no 'prejudice' to international relations with respect to the UK's improper implementation of Directive 95/46/EC.
 - The complainant contended that the issues that could have been subject to such proceedings, if Directive 95/46/EC or DPA 1998 were still operative, no longer apply as the UK had implemented the GDPR in its DPA 2018. He stated that, *'there is no prospect of the Commission commencing infringement procedures with respect to the DPA 1998 being an improper implementation of Directive 95/46/EC, as both had been repealed'*. The complainant therefore contended that there could be no prejudice to international relations.
 - The complainant noted that the EC made no reference to the defective DPA 1998 in its text on page 17 of its document relating to 'no deal Brexit'. The text stated that, *'If the United Kingdom's level of personal data protection is essentially equivalent to that of the EU, the Commission would adopt an adequacy decision which allows for transfer of personal data to the United Kingdom without restrictions'*. The complainant contended that if the threat of infraction proceedings were real and there was the potential for such prejudice, then the text would read differently.
 - The complainant noted that in his speech to the 28th Congress of the International Federation for European Law on 26 May 2018, Michel Barnier, the EC's Chief Negotiator for Brexit, did not mention the DPA 1998 being an improper implementation of Directive 95/46/EC. In his speech, Mr Barnier listed several serious GDPR issues concerning Brexit, but nothing about the EC having ongoing infraction proceedings. The complainant contended that, *'the Commission's text and Mr Barnier's speech is evidence that no prejudice exists as to the requested information is quite simply 'data protection history'*.
29. In his subsequent complaint to the ICO, the complainant noted that his information request of 29 May 2018 was made at a time when the GDPR had come into effect and the DPA 1998 was repealed. He consequently contended that, *'there is no longer any harm that can be caused to UK relations with the EU (a body we are about to leave) over an investigation that is no longer taking place, over legislation that has now*

been repealed'. The complainant stated that he could not see why section 27 applied to the information requested.

30. In submissions to the Commissioner, the complainant provided a copy of a letter which had received from the EC on 16 December 2010. The Commission's letter provided summary information on the infringement proceedings against the UK. The letter confirmed that the case concerned '*an alleged failure of the UK Legislation to implement various provisions of the Directive 95/46/EC on data protection*', and confirmed that the provisions concerned were Articles 2, 3, 8, 10, 11, 12, 13, 22, 23, 25 and 28 of that Directive.
31. The Commission's letter provided the following information '*summarising the questions at stake in this infringement case against the UK*':
- The issue regarding Article 2 concerns the definition of "filing system" and the interpretation of this definition in the judgement in the Durant case, which appeared to be narrower than the Directive.
 - The issue regarding Article 3 relates to the inclusion, in the UK Data Protection Act, of the expression *including recreational purposes*, which appeared to be broader than mere household activities.
 - The issue regarding Article 8 is whether or not the UK Data Protection Act treated data relating to criminal offences differently to other categories of sensitive data.
 - Articles 10 and 11 of the Directive specify the information that data controllers should provide to data subjects, depending on whether this information was initially obtained from the data subject, or collected elsewhere. The Data Protection Act appeared to exempt data which the data controller is obliged to make public, from this requirement.
 - Article 12 of the Directive gives data subjects the right to check the accuracy of their data, ensure that the data are being kept up-to-date, and have their data rectified, erased or blocked if necessary. The Data Protection Act, however, appears to confer upon the courts a discretion to grant or refuse applications made by data subjects in this regard.
 - The issue regarding Article 13 relates to the exemption from the right of access of the data subject in the Data Protection Act to confidential references.
 - Article 22 of the Directive provides for judicial remedies, and Article 23 requires that Member States ensure compensation for any person who has suffered damage as a result of an unlawful data processing operation. The Data Protection Act appears to narrow the scope of non-material damage.

- The issue regarding Article 25 concerns the extent to which UK data controllers are monitored as to their assessment of adequacy of the level of protection in third countries to which they transferred personal data.
 - The issue regarding Article 28 concerns the sufficiency of the investigative powers of the supervisory authority.
32. The complainant provided the Commissioner with what he believes the current position to be with the aforementioned Articles. He stated as follows:
- *'The issue concerning Article 2 of Directive 95/45/EC has been resolved by the adoption of the GDPR's definition of "filing system" (the concept of Relevant Filing System in the DPA 1998 is not replicated in the DPA 2018).*
 - *The issue concerning Article 3 of Directive 95/45/EC has been resolved as the "domestic purpose exemption" of the DPA 1998 is not replicated in the DPA 2018.*
 - *The issue concerning Article 8 of Directive 95/45/EC has been resolved as criminal offence personal data are not treated as a Special Category of Personal Data in the DPA 2018. In the DPA 1998, criminal offence personal data were included in the definition of Sensitive Personal Data (which gave rise to the infraction query).*
 - *The issue concerning Articles 10 & 11 of Directive 95/45/EC has been resolved as the GDPR approach to the "right to be informed" has been adopted in the UK's new data protection regime; the approach to the exemption for personal data made public by law is covered in the commentary in Article 23(1)(e) (see bullet re Article 13 below).*
 - *The issue concerning Article 12 of Directive 95/45/EC has been resolved as the GDPR approach to the rights to correction, erasure and deletion has been added to the UK's new data protection regime.*
 - *The issue concerning Article 13 of the Directive has been resolved as the GDPR's approach to exemptions in Article 23(1)(e) allows Member States to implement exemptions in the "general public interest"; this includes confidential references and made public by law personal data exemptions as identified in the Commission's letter. As exemptions are being left to Member State law to define, they have no bearing on the Commission's adequacy decision. In summary, an exhaustive list of exemptions in Article 13 (which gave rise to the problem with the Directive) has been replaced by a non-exhaustive list of exemptions in Article 23 of the GDPR (which resolves the issue).*

- *The issue concerning Article 25 of Directive 95/45/EC has been resolved as under the GDPR controllers can no longer assess adequacy of protection of personal data (which they could do when dealing with transfers of personal data to Third Countries under the Eighth Data Protection Principle of the DPA 1998).*
 - *The issue concerning Article 28 of Directive 95/45/EC is, I suspect, the outstanding issue as the GDPR's approach to ICO powers will not be clear for some years. However, given the recent large fine announcements (e.g. British Airways) and increased powers in the wake of the Cambridge Analytica, I would be very surprised if ICO powers were assessed as being equivalent to those in the DPA 1998 in 2004'.*
33. In support of his submissions, the complainant provided the Commissioner with documentation concerning a complaint which the complainant had made to the European Ombudsman (the Ombudsman) about the EC's refusal to grant access to documents (such as those requested in the present case) relating to infringement proceedings against the UK for the improper implementation of Directive 95/46/EC. Although this documentation post-dates the complainant's request, the Commissioner has included the same in her consideration of this matter as the findings of the Ombudsman's inquiry and her decision are relevant to the issues involved in the present case.
34. The Ombudsman's inquiry team held an inspection meeting with the EC and in the context of the meeting the EC informed the Ombudsman's inquiry team that of the ten grievances which the EC had originally raised in infringement procedure 2004/2099, nine had now been resolved (seven having been resolved prior to the adoption of the GDPR and two subsequently). The infringement procedure is still ongoing, *'because one very specific area of concern remains unresolved'*.
35. The EC argued that there is a legal presumption, that disclosure of documents relating to an on-going infringement procedure would undermine the protection of the purpose of the investigations. They also stated that infringement procedure 2004/2099 is open and ongoing and that therefore it can be presumed that disclosure of documents related to that procedure would undermine the protection of the purpose of the infringement investigations.
36. As regards the Brexit negotiations, the EC argued that all rights and obligations of the Member States, and the mechanisms to ensure the respect of EU law, including the infringement procedures, will remain applicable with respect to the UK until it ceases to be an EU Member State. The EC told the Ombudsman's inquiry team that the infringement procedure had not been affected by Brexit.

37. The EC also cited case law according to which the aim of the exception (in Article 4(2), third indent, of Regulation 1049/2001) is not to protect the investigations as such, but rather to protect the purpose of the investigations, which is to induce the Member States concerned to comply with EU law. In this context, *'the Commission considered that there was a reasonably foreseeable risk that public disclosure of the requested documents, at this stage, would risk damaging the dialogue between the Commission and the UK authorities'*.
38. The Ombudsman agreed that infringement procedure 2004/2099 is still *formally* ongoing and her inspection also confirmed that the procedure had not been suspended due to a potential withdrawal of the UK from the EU. However, the Ombudsman noted that the aim of the relevant exception is to protect the purpose of the investigation, which, in the case of infringement proceedings, is to induce the Member State concerned to comply with EU law. The Ombudsman stated that, *'this aim has been attained regarding nine out of ten of the Commission's initial concerns. To that extent, there is no longer a need to consider infringement proceedings, as compliance with EU law has been achieved'*.
39. The Ombudsman was of the view that *'the remaining point relates to a very specific issue arising from UK law that can be clearly isolated from the resolved issues'*. The Ombudsman considered that this rebutted the general presumption that disclosure of any part of the infringement would undermine the protection of the purpose of the infringement. She stated that, *'revealing the documents relating to the nine resolved issues cannot now be presumed to undermine the purpose of the investigations into the unresolved severable issue'*. Consequentially, the Ombudsman proposed that the Commission should carry out a specific and individual examination of the relevant documents, with a view to determining if some of the documents, or parts of them, could be disclosed without undermining the on-going investigation.
40. The EC did not accept the Ombudsman's proposal, advising that any disclosure, even partial, would undermine the ongoing engagement with the UK's authorities, for which a climate of mutual trust is necessary. The Ombudsman was disappointed that the EC took such a *'formulistic and unhelpful stance'* in the matter and found the EC's decision not to reconsider its position constituted maladministration.
41. In submissions to the Commissioner, the complainant stated that *'the scope of remaining proceedings relates to 10% of the outstanding matters (i.e. 90% of infraction matters are resolved)'* and contended that the Commissioner should consider whether the risk of infraction proceedings is "real", rather than whether the proceedings were "open". The complainant stated that, *'if infraction proceedings are "open", it does not follow there is a real risk of them occurring, nor does it follow*

that there would be prejudice to those proceedings if they were to occur'.

42. In respect to information in the public domain about this issue, the complainant advised that he had been unable to identify *'any ICO written evidence to Parliament (or anything in any Annual Report) that expresses, in public, concern about (or relates to) the status of the Data Protection Act 1998 and the infringement proceedings that the Commission is supposed to be considering. If the issues were as serious as DCMS allege, one would expect them to be raised, by the Commissioner, as part of her Parliamentary evidence or in the ICO's Annual Reports since 2005'.*

DCMS position

43. In detailed submissions to the Commissioner, DCMS advised that while the UK had repealed and replaced the Data Protection Act 1998 with the Data Protection Act 2018, which implements the GDPR, the EC have been clear that they are not in favour of the UK releasing documents relating to the alleged infraction (infringement).
44. DCMS advised that The Data Protection Act 2018 has transposed some of the infringement concerns raised by the EC found in the Data Protection Act 1998. The EC consider that infringement proceedings remain open, despite the GDPR coming into force. DCMS therefore contended that there was still the need to preserve their ability to have unconstrained and confidential discussions.
45. DCMS contended that breach of confidence is a serious matter, *'even more so as the Department prepares to enter sensitive discussions on data adequacy with the Commission'.* DCMS stated that the GDPR and the Law Enforcement Directive allow personal data to be transferred freely between EEA countries. Following the UK's exit from the EU (and the end of any transition period), the Department advised that the uninterrupted free flow of personal data can only continue if the UK achieves adequacy decisions from the EC. DCMS stated that the continued free flow of personal data is an important underpinning feature of the future relationship between the EU and the UK for both economic and security purposes, and so obtaining adequacy decisions following EU exit is a departmental priority. The Department advised that an adequacy decision involves a forensic assessment of the country's level of protection, and it is crucial that the UK is able to have unconstrained discussions with the EU during the adequacy process.
46. With regard to the complainant's contention that the Law Enforcement Directive (LED) was not relevant as it does not apply to Directive 95/46/EC, DCMS agreed that neither the Directive nor the GDPR cover material which falls under the scope of the LED. However, DCMS

contended that the LED '*was not completely without relevance*' and explained that their reference to it was in the context of the UK seeking an adequacy decision under both the GDPR and LED. The Department stated that '*a damage to relations with the Commission, such as violating their confidentiality, could threaten the achievement of both adequacy decisions*'.

47. DCMS noted that at the time of providing submissions to the Commissioner, the UK was due to exit the EU on 31 October 2019. The Department advised that in the event that the UK exited the EU with a deal on that date (or potentially a later date), it is likely that there will be an 'Implementation Period' during which the UK will continue to be subject to EU law. The draft withdrawal text provides that this transition period will run until 31 December 2020 (but this could be extended by 2 years). The UK could be subject to enforcement action by the EU throughout this period. DCMS advised that it is '*highly likely that infringement proceedings commenced prior to the end of any transition period will continue to be relevant until they are concluded (even if the UK is no longer a Member State at the point of conclusion of the proceedings)*'.
48. DCMS advised the Commissioner that the EC had confirmed on 17 October 2018 that they were not in favour of the Department releasing the information requested for the same reasons as in the previous requests for the information. Despite the recent entry into application of GDPR, the infringement proceeding is still open. The EC considers that certain issues remain open and they need to preserve the possibility of unconstrained and confidential discussions. The Commissioner has had sight of the EC's written confirmation of 17 October 2018.
49. As regards the complainant's contention that there is now no prospect of infraction proceedings as the legislation has been repealed and replaced with the Data Protection Act 2018, and therefore no risk of prejudice, the Department stated that this is incorrect as the EC had confirmed that infringement proceedings are still open.
50. With reference to the Tribunal decision of 23 July 2013 (paragraph 17 above), DCMS noted that the Tribunal did not state that they *would* have come to a different conclusion. The Department also stated that '*it is important to note that the UK's current circumstances are significantly different to those at the date of the Tribunal decision. The refusal of this request for information is made against the backdrop of the UK's exit from the EU and the importance of the UK's negotiations of the terms of this exit and our future relationship with the EU and other Member States (in all policy areas not just data protection)*'.
51. DCMS advised the Commissioner that there is an adequacy assessment process (which is set out in Article 45 of the GDPR) that will take place.

The Department stated that the EU would take a number of factors into account, and that the adequacy assessment would include an assessment of the UK's data protection legislation and whether the legislation offered an essentially equivalent level of protection to that in the EU. DCMS stated that the UK's implementation of the GDPR and the previous Data Protection Directive were likely to be relevant.

52. DCMS stated that the absence of discussion of the UK's implementation of the Directive during the speech by Michel Barnier on 26 May 2018, *'is not evidence that the release of this information would cause no prejudice to our relations with the EU/EC'*.
53. In submissions to the Commissioner DCMS advised that the EC had repeatedly and recently requested that they (DCMS) treat these matters as confidential, and confirming or refuting the complainant's speculations would mean violating that confidentiality. They noted that it was not within their control to declare whether a particular point(s) is resolved, no matter what the Department's view on the particular arguments concerned. It is only the EC who can declare that a point(s) has been resolved.
54. DCMS contended to the Commissioner that were the Department to disclose information that the EC has repeatedly requested be kept confidential then this would harm relations and trust between the EC and the UK. The Department emphasised that maintaining an environment of trust, in particular for sharing further confidential documents, was especially important as the UK prepared to enter into negotiations and discussions with the EC on the future partnership.

The Commissioner's position

55. In order for a prejudice based exemption, such as section 27(1)(b) 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 against. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
 - 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; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.

56. Furthermore, the Commissioner has been guided by the comments of the Information Tribunal, which suggested that, in the context of section 27(1), prejudice can be real and of substance *'if it makes relations more difficult or calls for a particular damage limitation response to contain or limit damage which would not have otherwise been necessary'*.
57. With regard to the first criterion of the three limb test set out above, the Commissioner accepts that the potential prejudice described by DCMS clearly relates to the interests which the exemption at section 27(1)(b) is designed to protect.
58. It is the second criterion which the complainant has strongly disputed, for the reasons explained above. In his request for an internal review, the complainant correctly recognised that if the exemption (at that point section 27(1)(a)) were deemed to be engaged, then it required DCMS to demonstrate that disclosure of the requested information would 'prejudice' relations between the UK and the EC. Much of the complainant's contention that such prejudice cannot exist in this case concerns his assertion that *'there is no longer any harm that can be caused to UK relations with the EU (a body we are about to leave) over an investigation that is no longer taking place, over legislation that has now been repealed'*.
59. The Commissioner accepts that at the present time there are no infringement proceedings being brought against the UK by the EC. Nevertheless, the procedure, as the Ombudsman's inspection found, remains open despite the implementation of GDPR and the UK's projected withdrawal from the EU. As DCMS have noted in their submissions, even when the UK has exited the EU with a deal, a transition period will apply (currently until 31 December 2020 but potentially extendable) during which the UK will continue to be subject to EU law and potentially subject to enforcement action by the EU.
60. The complainant has contended that just because the infringement proceedings remain open, it does not necessarily follow that there is a real risk of them occurring or that disclosure would cause prejudice to such proceedings if they did occur. The complainant has asserted that the Commissioner should be considering whether the risk of infringement proceedings is real rather than on their present open state.

61. The Commissioner acknowledges the findings of the Ombudsman and her view that nine of the ten grievances originally raised in the infringement procedure have now been resolved. On that basis the Commissioner can understand and respect the Ombudsman's view that disclosure of the information *'relating to the nine resolved issues cannot now be presumed to undermine the purpose of the investigations into the unresolved severable issue'*. However, the EC have been clear that they do not accept the Ombudsman's proposal, and consider that any disclosure of the relevant information, even partial, would undermine ongoing engagement with the UK, for which a climate of mutual trust is necessary.
62. Section 27(1)(b) does not necessarily focus on the scale or importance of the issue or on the subject or type of information, but on whether relations between the UK and (in this case) the EC, would be prejudiced through the disclosure of the relevant information. Seen in this correct and wider context, the likelihood of infringement proceedings being brought against the UK by the EC is not the determinative factor in assessing whether prejudice would, or would be likely to be caused to relations between the UK and the EC.
63. The EC has been clear that they would not wish DCMS to disclose the withheld information in this matter and for it to be treated as confidential. Were DCMS to not respect this request for confidentiality, either through disclosing the withheld information or providing commentary or confirmation as to the complainant's speculations (para 31 above), then the Commissioner considers that it would clearly make relations between the UK and the EC more difficult. Specifically, it would not maintain or foster and would damage the environment of trust which is crucial for the sharing of further confidential information or documents, both with regard to this infringement issue and more widely, such as with regard to the negotiations and discussions on the future partnership between the UK and the EU.
64. As DCMS have stated, *'to release information that is part of live infraction proceedings, and would be released against the wishes of the EC, would prejudice relations between the UK and the EC. The EC have repeatedly asked for this information to remain confidential. If the EC are concerned that any information they provide to the department is not treated with the confidence with which it was provided, then they may be reticent to provide confidential information to us in future'*. It is the act of disclosing the withheld information against the wishes of the EC, more than the content of the actual information itself, which the Commissioner considers would cause prejudice to UK relations with the EC.
65. In this context, the Commissioner is satisfied that there is a causal link between disclosure of the withheld information and prejudice occurring

to the UK's relations with the EC. The Commissioner is satisfied that the resultant prejudice would be real and of substance, and that there is more than a hypothetical risk of it occurring. Consequently, the Commissioner finds that both the second and third criteria for the exemption are met. Section 27(1)(b) is therefore engaged.

Public interest test

Complainant's arguments

66. In his request for an internal review, the complainant contended that even if the exemption were judged as being engaged, then there remained an *'overriding public interest in disclosure'*. The complainant advised that the proposition underpinning the application of the exemption is that the EC concerns *'about the defective DPA 1998 remain prejudicial to the UK's interests'*. The complainant contended that if that proposition were true, then it follows that the DPA 2018 might not offer an adequate level of protection, because the defects in the DPA 1998 might carry over into the DPA 2018. If this were the case, the complainant contended that there is a public interest in disclosure as the UK public should know why the DPA 2018 is at risk of being judged to be inadequate by the EC. The complainant stated that the public interest requires that data controllers should plan to protect their transfers of personal data from the EU post Brexit, and data subjects be made aware to assess how they can protect their rights.
67. The complainant stated that the then Prime Minister, Theresa May, had *'misled the UK public'* when she had said (2 March 2018) that *'the UK has exceptionally high standards of data protection'*. The complainant contended that this statement was *'wholly inconsistent'* with the infringement proceedings open against the UK and that it was clear that the EC disagreed with the Prime Minister's proposition. The complainant submitted that the public interest would be served by disclosure of the withheld information *'as it would focus data protection debate on the Prime Minister's misleading assertions'*.
68. The complainant contended that a similar misleading assertion had been *'forced on Her Majesty in the Queen's Speech'* (June 2017) where she had said that a *'new (data protection) law will ensure that the United Kingdom retains its world-class regime protecting personal data'*. The complainant stated that the public interest would be served by *'exposing the fact that the European Commission doubts about the DPA 1998, infers that it has never thought that the UK offers 'world-class' data protection'*.
69. Finally, the complainant contended that another misleading statement had been made by DCMS in its factsheet on the DP Bill. That factsheet had stated that *'The Data Protection Act 1998 has placed the UK at the*

front of global data protection standards'. The complainant contended that 'it is in the public interest to correct the record, as the European Commission are clearly of the view that the UK is at the back of the queue with respect to European data protection standards'.

70. In submissions to the Commissioner, the complainant questioned why the Commissioner had changed her mind with regard to the public interest in this matter. The complainant highlighted paragraph 108 of the Tribunal decision in EA/2012/0110, in which the Tribunal noted that:

'The IC argues that there is very considerable public interest in disclosure of the details of why, in 2004 and 2006, the EC considered that the UK had fallen short of its obligations in terms of full implementation of the Data Protection Directive 95/46/EC, thereby failing (in the EC's view) to provide UK citizens with the full protection for the processing of their personal data which that Directive intends. Data protection is a crucial component of protection of privacy. It is increasingly important with the volume and complexity of data now held about individuals (financial and medical information for example) and rapid advances in technology (the internet, mobile telephones, social networks and other aspects of 21st century life which rely heavily on the processing of personal data). In short, data protection issues affect everyone, in numerous aspects of day-to-day life. If the European authorities responsible for supranational data protection consider that the UK's transposition of the Directive into national law has – for many years – failed to fully protect its citizens' interest in such matters, then there is very strong public interest in understanding the details of its concerns'.

71. The complainant contrasted the Commissioner's view in the above case with the Commissioner's view in FS50577377, where he contended that in general, she had '*dismissed EA/2012/0110 in one sentence*' when she should not have. The complainant stated that the Commissioner had presumed that infraction proceedings were very likely and ignored the Tribunal's implication that such proceedings were very remote.

DCMS arguments

72. In their internal review, the Department acknowledged the '*general public interest in transparency and accountability within government*', recognising that '*transparency allows the public to understand how government works, including in relation to our relationship with the EU, and allows them to see that government is working for the best interests of the public we serve*'.
73. In submissions to the Commissioner, DCMS acknowledged that the disclosure of the withheld information would help to '*provide a greater understanding of how the EC works and would increase public*

understanding of the UK's relationship with them'. The Department also recognised that *'there is a strong public interest in our relationship with the EU at this present time, given our impending exit from the EU'*. DCMS also advised that the disclosure of the information might also serve to alleviate some of the concerns which the complainant had regarding the DPA 1998 and how it implemented Directive 95/46/EC.

74. The Department advised the Commissioner that they would argue that the UK's data protection regime is of an exceptionally high standard, and that any statements made by former Prime Minister May and the Queen to that effect were not misleading. The UK would argue that there are respectable arguments for contesting the points that were raised in the EC's reasoned opinion.
75. However, whilst recognising the public interest merit in disclosing the withheld information for the reasons stated above, DCMS contended that the arguments in favour of maintaining the exemption, *'far outweigh'* those in favour of disclosure.
76. In their internal review, DCMS stated that there was a strong public interest in the UK's relationship with the EU, and it was not in the public interest for the withheld information to be disclosed *'if it would be likely to affect the outcome of infringement proceedings'*.
77. In submissions to the Commissioner, DCMS contended that the disclosure of the information would affect UK relations with the EC. The Department noted that the political climate was significantly different to the circumstances at the time of the last decision of the Commissioner on a request for this information. DCMS advised that *'the UK's uncertain position around our exit from the EU and our need to obtain data adequacy decisions and negotiate our future relationship means that this information takes on a whole new level of sensitivity'*.
78. The Department advised that the infraction concerned is listed as an *'active infringement case'* on the EC's own website. Therefore, to disclose information relating to such proceedings whilst they are ongoing, would be to inhibit the frank and confidential discussions on this matter, and similar infraction proceedings in the future.
79. DCMS stated that if the EC were concerned that any information they provided to the Department was not treated with the confidence with which it was provided then they may be reticent to provide confidential information to the Department in future. DCMS contended that any actions which they took which would prejudice UK relations with the EC and therefore affect the Department's ability to obtain adequacy decisions, *'would clearly not be in the public interest'*. DCMS stated that this was especially pertinent at the present time, not just around data adequacy, but around the UK's relationship with the EC more generally.

Commissioner's position

80. To be clear, the Commissioner has not changed her mind with regard to the public interest value and weight of the information requested by the complainant. The Commissioner fully acknowledges and accepts that there is a strong public interest in knowing precisely why the EC considered that the UK had fallen short of its obligations in terms of full implementation of Directive 95/46/EC, thereby failing (in the EC's view) to provide UK citizens with the full protection for the processing of their personal data which the Directive intends. Data protection is indeed a crucial component of the protection of privacy and affects the public both individually and as a whole. The legitimate and important arguments for due transparency and accountability have not waned with the passage of time and remain relevant given the open nature of the infringement proceedings.
81. As DCMS have acknowledged, the disclosure of the withheld information would provide the public with a greater understanding of how the EC works and would increase public understanding of the UK's relationship with them. More specifically, the Commissioner considers that the disclosure of the withheld information would provide the public with information and insight into the infringement concerns of the EC.
82. In FS50577377, the Commissioner noted that the withheld information '*may well be of interest to the public*' but did not give due weight and recognition to the public interest value and importance of the information itself.
83. However, the Commissioner was clear in FS50577377 as to the public interest in avoiding prejudice to UK/EC relations. The Commissioner's view was that '*it is strongly in the public interest that the UK maintains good relations with the Commission*' and she considered 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*'.
84. The Commissioner's view remains as stated in FS50577377. The EC have been clear (through DCMS) that they regard the withheld information as being confidential and that they would not wish the Department to disclose any of the same. Whilst the Commissioner is not persuaded that the disclosure of the withheld information would be likely to affect the *outcome* of the infringement proceedings (if brought against the UK by the EC), she does recognise that disclosure of the information, in circumstances where the EC have requested and expected confidentiality to be respected, would clearly damage the UK's relationship with the EC.

85. Importantly, the Commissioner recognises that such damage would not be restricted to the infringement issue, but has the potential to harm the relationship between the UK and the EC across a wider range of issues, including some of those noted by DCMS. In FS50577377 (March 2016), the Commissioner was satisfied that '*such a broad prejudicial outcome is firmly against the public interest*'. Since that time, as DCMS have correctly noted, the political climate has radically changed, with the UK in the process of exiting the EU. The need for good and cooperative relations between the UK and the EC has arguably never been greater. Those relations remain particularly sensitive in the context of Brexit.
86. Therefore, whilst the Commissioner fully acknowledges and accepts that there is a strong and entirely legitimate public interest in the withheld information with regard to the specific and significant infringement proceedings issue, she considers that there is a stronger and wider public interest in the UK maintaining good relations with the EC, and not taking any action which would unnecessarily or disproportionately harm the same. At the time of the complainant's request, and at the present time, the Commissioner is satisfied that the balance of the public interest favours withholding the requested information.

Right of appeal

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

88. 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.

89. 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

**Gerrard Tracey
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SK9 5AF**