

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 June 2023

Public Authority: HM Treasury
Address: 1 Horse Guards Road
London
SW1A 2HQ

Decision (including any steps ordered)

1. The complainant has submitted a request to HM Treasury (HMT) seeking information about applications submitted to the Office of Financial Sanctions Implementation from individuals subject to the 'Russia (Sanctions) (EU Exit) Regulations 2019' who wish to pursue defamation cases. HMT disclosed the number of such applications and approvals but sought to withhold the names of those who applied, as well as copies of any applications, on the basis of sections 31(1)(a) (law enforcement), 40(2) (personal data) and 41(1) (information provided in confidence) of FOIA.
2. The Commissioner's decision is that the withheld information is exempt from disclosure on the basis of section 41(1) of FOIA.
3. The Commissioner does not require further steps.

Request and response

4. The complainant submitted a request to HMT on 26 May 2022 seeking the following information:
"1) The total number of applications for licences/authorisations from the Office of Financial Sanctions Implementation (OFSI) by individuals

sanctioned under the Russia (Sanctions) (EU Exit) Regulations 2019 for the purposes of defamation actions.

2) The total number of granted licences/authorisations from OFSI by individuals sanctioned under the Russia (Sanctions) (EU Exit) Regulations 2019 for the purposes of defamation actions.

3) The names of sanctioned individuals who applied for licenses/authorisations by OFSI to pursue legal actions for defamation.

4) The names of sanctioned individuals granted licenses/authorisations by OFSI to pursue legal actions for defamation.

5) Copies of all applications for OFSI licences/authorisations for defamation claims (whether those applications were approved by OFSI or not)”

5. HMT responded on 27 June 2022. In relation to questions 1 and 2 it confirmed that less than five licence applications have been received by OFSI in relation to individuals seeking licences for the purpose of defamation actions under the Russia (Sanctions) (EU Exit) Regulations 2019. HMT also confirmed that less than five licence applications were granted. However, it argued that disclosure of the exact figure for questions 1 and 2 would result in the disclosure of personal data, the disclosure of which would contravene the first data protection principle. It was therefore seeking to withhold the exact figures on the basis of section 40(2) (personal data) of FOIA. HMT explained that it also considered the information sought by questions 3, 4 and 5 to be exempt from disclosure on the basis of section 40(2) of FOIA.
6. The complainant contacted HMT on 3 August 2022 and asked it to conduct an internal review of this decision.
7. HMT informed the complainant of the outcome of internal review on 24 August 2022. It upheld the application of section 40(2) on the grounds set out in the refusal notice.

Scope of the case

8. The complainant contacted the Commissioner on 20 September 2022 in order to complain about HMT’s decision to withhold the information sought by his request.
9. During the course of the Commissioner’s investigation, on 27 April 2023 HMT contacted the complainant and explained that having reviewed the information within scope it had concluded that it was not entitled to

withhold the information sought by questions 1 and 2 on the basis of section 40(2) of FOIA. HMT explained that it no longer considered that releasing the figures sought would reveal personal data. HMT therefore confirmed that OFSI had received one licence application in relation to individuals seeking licences for the purpose of defamation actions under the Russia (Sanctions) (EU Exit) Regulations 2019. It also confirmed that one licence application has been granted.

10. In addition, during the course of the Commissioner's investigation, HMT explained that it now considered the withheld information falling within the scope of questions 2, 4 and 5 to be exempt in its entirety from disclosure on the basis of sections 31(1)(a) (the prevention or detection of crime) and section 41(1) (information provided in confidence) of FOIA. It also confirmed that it remained of the view that the information sought by question 3 and 4 was exempt on the basis of section 40(2), as was the majority of the information falling within the scope of question 5.
11. The Commissioner considers that the scope of his investigation is to determine whether the information falling within the scope of questions 3, 4 and 5 is exempt from disclosure on the basis of the exemptions cited by HMT.

Reasons for decision

Section 41 – information provided in confidence

12. Section 41(1) of FOIA states that:

'(1) Information is exempt information if—

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.'

13. Therefore, for this exemption to be engaged two criteria have to be met; the public authority has to have obtained the information from a third party **and** the disclosure of that information has to constitute an actionable breach of confidence.
14. With regard to whether disclosure would constitute an actionable breach of confidence the Commissioner follows the test of confidence set out in *Coco v A N Clark (Engineering) Ltd* [1968] FSR 415. This judgment

suggested that the following three limbed test should be considered in order to determine if information was confidential:

- whether the information had the necessary quality of confidence;
 - whether the information was imparted in circumstances importing an obligation of confidence; and,
 - whether an unauthorised use of the information would result in detriment to the confider.
15. However, further case law has argued that where the information is of a personal nature it is not necessary to establish whether the confider will suffer a detriment as a result of disclosure.
16. The Commissioner has assessed each of these criteria in turn, taking into account the submissions provided to him by both HMT and the complainant.

Was the information obtained from another person?

17. With regard to the requirements of section 41(1)(a), HMT explained that the licence application, ie the information sought by question 5 - and which contains the information sought by questions 3 and 4 - was submitted to OFSI by a law firm who submitted it on behalf of a designated individual. Therefore the Commissioner is therefore satisfied that section 41(1)(a) of FOIA is clearly met.

Does the information have the necessary quality of confidence?

18. In the Commissioner's view, information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial.
19. HMT argued that the information was clearly more than trivial in that it contains personal data and information regarding legal claims pursued by a designated individual. The information also contains detailed information on the operation of the law firm which have been provided to aid OFSI's assessment of the licence application.
20. The complainant argued that legal actions, including for defamation, once filed are public and cases are made available on court lists containing both the claimants and defendants. The complainant argued that the claimants therefore have no realistic expectation of privacy of non-closure of their filing a defamation action in the UK.
21. Having examined the withheld information, the Commissioner agrees with HMT's assessment of it, namely that is clearly not trivial

information. With regard to the complainant's point, the Commissioner is not aware of the particular information falling within the scope of this request being in the public domain. The Commissioner therefore accepts that the information clearly has the quality of confidence.

Was the information imparted in circumstances importing an obligation of confidence?

22. HMT explained that once completed, licence applications are sent to OFSI with an expectation that they are treated in confidence. In this specific case, the licence application within scope was sent to OFSI with caveats about the information being provided in confidence, including that the accompanying documents were marked as 'strictly private and confidential'. Based on the content of the information, and the manner in which it was shared with OFSI, and taking into account the expectation that licence applications will be treated confidentially, the Commissioner is satisfied that this criterion is met.

Would disclosure be of detriment to the confider?

23. HMT argued that the right to access legal advice is a fundamental principle, which needs to be protected. In this case, it took the view that releasing the information would have a detrimental impact on the designated individual as release could adversely impact their ability to access legal advice. Releasing the information would also have a detrimental impact on the law firm involved and their ability to conduct their work, which could undermine the quality of their legal advice.
24. The Commissioner notes that the withheld information contains detailed information regarding the designated individual and their legal position, as well as detailed about the operation of the form in question. Given the nature of this information, the accepts that disclosure of it would be likely to be detrimental to both parties.

Is there a public interest defence to the disclosure of the information?

25. Section 41 is an absolute exemption and so there is no requirement for an application of the conventional public interest test. However, the common law duty of confidence contains an inherent public interest test. This test assumes that information should be withheld unless the public interest in disclosure outweighs the public interest in maintaining the duty of confidence (and is the reverse of that normally applied under FOIA). British courts have historically recognised the importance of maintaining a duty of confidence, so it follows that strong public interest grounds would be required to outweigh such a duty.
26. However, disclosure of confidential information where there is an overriding public interest is a defence to an action for breach of

confidentiality. The Commissioner is therefore required to consider whether HMT could successfully rely on such a public interest defence to an action for breach of confidence in this case.

27. The complainant argued that the use of the court system to suppress and attack legitimate public discussion is itself a matter of legitimate public debate. In support of this point the complainant noted that recent parliamentary select committees have heard witnesses on the matter of abuse of the legal system by Russian oligarchs and other 'Putinist' regime figures. He also noted that the Ministry of Justice has recently held a consultation on SLAPP (abusive litigation) reforms and has published proposals to tackle such. In the complainant's view individuals sanctioned under recent legislation aimed at deterring the Russian invasion of Ukraine have no expectation of privacy in respect of defamation claims.
28. For its part, HMT recognised that there is a legitimate interest in transparency in relation to the work of OFSI and, more widely, the Government's response to the invasion of Ukraine. However, it argued that any public interest in release would be outweighed by the obligation of confidence owed by HMT to those submitting licence applications to OFSI.
29. HMT noted that the caselaw on the duty of confidence is clear that the circumstances in which the public interest in the information being disclosed outweighs the public interest in the duty of confidence being upheld are limited.
30. In addition to the detrimental effects of disclosure set out above, HMT argued that it was also important that OFSI maintains confidentiality when it comes to licence applications to ensure their operational duties are not hindered. HMT emphasised that OFSI is responsible for ensuring financial sanctions are properly understood, implemented and enforced in the UK and that such sanctions are an important policy tool in protecting the UK's security, and global security more broadly. HMT further explained that financial sanctions are organised in "regimes" designed to achieve a specific foreign policy or national security objective. HMT argued that OFSI's scrutiny and decision-making role when it comes to licence applications could be hindered if licence applicants refrained from being frank in their application due to fear of the information being released.
31. As a result, HMT argued that there are there are extremely weighty grounds for preserving the confidence in this case, both from the point of view of the licence applicants, and the wider public interest.

32. The Commissioner appreciates that there is a public interest in relation to disclosure of information regarding sanctions, and more specifically in the context of this case, the basis upon which OFSI has considered applications regarding defamation actions. Disclosure of withheld the information would provide an insight into one such application.
33. However, the Commissioner is not persuaded that this is a sufficiently compelling argument to support a public interest defence against an action for breach of confidence. In reaching this conclusion the Commissioner has taken into account the potential consequences of disclosure, namely the detriment identified above both in relation to those subject to sanctions, those representing them, as well as the impact disclosure could have on OPSI's ability to effectively consider applications in the future. Taking together the cumulative negative effects of these outcomes, allied to the general public interest in ensuring that confidences are maintained, has led the Commissioner to conclude that the withheld information is exempt from disclosure on the basis of section 41(1) of FOIA.
34. In light of this decision the Commissioner has not considered HMT's reliance on the other exemptions cited.

Right of appeal

35. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

36. 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.
37. 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

Jonathan Slee
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