

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 October 2024

Public Authority: Advice, Conciliation and Arbitration Service
Address: 50 Victoria Street
London
SW1H 0TL

Decision (including any steps ordered)

1. The complainant has requested information about correspondence with DCMS. The above public authority ("the public authority") relied on section 44 of FOIA (statutory prohibition) to withhold the information.
2. The Commissioner's decision is that the public authority is not entitled to rely on section 44 to withhold the information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information it has relied on section 44 to withhold. The public authority may make appropriate redactions to comply with its data protection obligations.
4. The public authority must take these steps within 30 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 7 April 2024 the complainant requested information of the following description:

“Please send to me all of the communications, including but not limited to, emails and attachments between ACAS and the DCMS between the 21st March 2023 and August 31st 2023 inclusive.”
6. On 3 May 2024, the public authority responded. It refused to provide the requested information. The public authority relied on section 44 of FOIA to withhold the information. It upheld this stance following an internal review.

Reasons for decision

7. Section 44 of FOIA allows a public authority to withhold information if another piece of legislation would prevent that information’s publication.
8. In this case, the public authority has pointed to section 251B of the Trade Union and Labour Relations (Consolidation) Act 1992. Section 251B(1) of that Act prevents the public authority from disclosing information if that information relates to an identifiable employee, employer or trade union and is held in connection with the provision, by the public authority, of its services.
9. Section 251B(6) states that information held by an employee of the public authority who has been appointed in an arbitration or conciliation role will be information that is held in connection with the provision of a service.
10. There are some circumstances in which a disclosure may be lawful, but none would apply to publication in these circumstances.
11. The withheld information in this case comprises three chains of emails exchanged between the public authority, the Department for Culture, Media and Sport (DCMS) and third parties. None of the chains appears to relate to any process of arbitration or conciliation.
12. The public authority explained that it had been:

“asked to provide advice and guidance to organisations. In this instance the officer was invited to take part in a roundtable discussion regarding the Creative Industries. Creative Industries and DCMS are

customers of Acas so warranting the application of section 251B of the Trade Union and Labour Relations Act 1992.”

13. The Commissioner expressed some concern about the expansive definition of the word “service” that the public authority appeared to have applied, noting the reference to statutory functions in section 251B(6). He asked the public authority to provide some further clarity about which “service” this information was held in connection to.
14. The public authority explained that it considered itself to be providing an advisory service to the DCMS by providing guidance and support to roundtable meetings.

The Commissioner’s view

15. There is no precise definition, within the Trade Union and Labour Relations Act 1992, of what constitutes a “service” for the purposes of section 251B(1).
16. The Commissioner has had regard to the wording of section 251B, as well as the purpose of that section, the legislation as a whole and the operation of similar pieces of legislation.
17. The wording of section 251B implies that a “service” does not cover every activity the public authority or its officers might engage in. Given that it creates a specific criminal offence for an unlawful disclosure, the provision must relate to specific categories of information. Section 251B(6) provides further support to this interpretation.
18. The Act as a whole establishes the public authority and appoints it as the independent body that will mediate in industrial disputes or between employers and employees.
19. As part of that role in mediating disputes, the public authority may sometimes need access to information that the respective parties may not want revealed, either to each other, or more widely. In some circumstances the public authority can compel certain information to be provided.
20. The corollary of this is that the public authority must keep that information safe and must not reveal it to anyone else except in limited circumstances. It cannot perform its role unless it gains and retains the confidence of the parties involved.
21. This is consistent with similar legislative provisions such as section 23 of the Commissioners for Revenue and Customs Act 2005, section 348 of the Financial Services and Markets Act 2000 and section 132 of the Data Protection Act 2018. In each case the provision does not cover all

information that public authority holds – only the information that relates to the performance of statutory functions.

22. The parties mentioned in the withheld information may have used the public authority's arbitration or conciliation services previously. However, the withheld information does not relate to the provision of such a service.
23. The public authority's interpretation of this section would appear to cover almost every activity it participated in that involved third parties. It would also appear to cover any correspondence with any third party that had ever used a statutory service in the past – regardless of whether the information related to the provision of that service.
24. In the Commissioner's view, in order to be covered by section 251B, the information needs to relate to a statutory service that the public authority provides. The withheld information does not relate to such a service and therefore the Commissioner does not consider that section 251B would prevent its disclosure.
25. Consequently, section 44 of FOIA is not engaged.
26. The public authority, in its follow up response to the Commissioner indicated that, if section 44 were not found to apply, it would wish to rely on section 40(2) of FOIA to withhold personal information.
27. The Commissioner notes that the withheld information contains the names of several staff members of the public authority, DCMS and others. It also contains numerous email addresses and other contact details. He accepts contact details and the names of junior staff members will be covered by section 40(2) of FOIA and need not be disclosed.
28. The public authority has not cited any other exemption in respect of the remaining information. It must therefore be disclosed.

Right of appeal

29. 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

30. 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.
31. 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

Roger Cawthorne
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF