

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 January 2019

Public Authority: UK Statistics Authority
Address: Segensworth Road
Titchfield
Fareham
Hants
PO15 5RR

Decision (including any steps ordered)

1. The complainant has requested all correspondence the UK Statistics Authority (UK SA) holds in relation to Sir David Norgrove's letter to the Foreign Secretary in September 2017 concerning the alleged misuse of official statistics. UK SA released some information by refused to disclose other information citing sections 36(2)(b)(ii) and 36(2)(c) of the FOIA.
2. The Commissioner's decision is that UK SA is entitled to rely on section 36(2)(b)(ii) of the FOIA in this case and the public interest in favour of disclosure is outweighed by the public interest in maintaining the exemption.
3. The Commissioner does not require any further action to be taken.

Request and response

4. On 18 September 2017, the complainant wrote to UK SA and requested information in the following terms:

"On Sunday 17 September 2017 the chair of the UK Statistics Authority ("UK SA"), Sir David Norgrove, felt compelled to write a letter to the Foreign Secretary alleging "a clear misuse of official statistics" (the "Letter").

That letter quickly found its way into the public domain, being reported by the BBC (amongst other media outlets).

The BBC new website (article entitled "Brexit: Boris Johnson and stats chief in row over £350m figure") on Monday 18 September 2017 reported that: "Sir David Norgrove said he was "disappointed" the foreign secretary had revived Vote Leave's pledge of £350m a week extra for the NHS."

My FOI request is for publication of:

1. All internal correspondence of the UK SA (including emails) concerning the preparation, drafting and approval of the above Letter.
2. All correspondence (including internal and external emails) relating to the UK SA and the media (including the BBC) concerning (i) the authoring and publication of that Letter (ii) the publicity then attracted by the publication of that Letter and (iii) further comments made and reported to the media by or on behalf Sir David Norgrove arising from that Letter."
5. The UK SA responded on 5 October 2017. It stated that it had received a large number of requests for very similar information and under section 14(2) it is able as a public authority to refuse a request that is identical or substantially similar to a previous request submitted by the same individual. It stated that to determine whether any of these requests could be considered vexatious or repetitious it needs to satisfy itself as to the identity of the requesters. It therefore asked the complainant to provide proof of identity.
6. The complainant responded on 5 October 2017. He stated that he had provide sufficient information to verify his identity. He stated that his name was unique, as is his address and this information is verifiable from publicly available information. He stated that if this information is not sufficient the UK SA should contact him by telephone to discuss further. He commented that there is nothing in the FOIA which says he is required to provide the information being requested.
7. The complainant sent further emails to the UK SA on 31 October and 2 November 2017 chasing a response.
8. The UK SA responded on 3 November 2017. It apologised for the delay and confirmed that it would respond as soon as possible.
9. The UK SA issued a response to the request on 24 November 2017. It disclosed some information but withheld other information citing sections 36(2)(b)(ii) and (c) and 40 of the FOIA.

10. The complainant requested an internal review on 24 November 2017.
11. The UK SA completed the internal review on 21 December 2017 and notified the complainant of its findings. It upheld the manner in which this request was handled and the applications of section 36(2)(b)(ii) and (c) and 40 of the FOIA.

Scope of the case

12. The complainant contacted the Commissioner on 20 March 2018 to complain about the way his request for information had been handled. He disagrees with the application of section 36(2)(b)(ii) and (c) and considers further information could be legitimately disclosed under FOIA. He also raises concerns over the initial response he received from UK SA dated 5 October 2017 in which it appeared UK SA had already deemed the request vexatious under section 14(2) of the FOIA and asked for proof of identity. The complainant considers the request for proof of identity was unreasonable, intrusive and not permitted by FOIA. He also considers this initial response effectively delayed UK SA's response to the request and compounded the length of this delay.
13. No complaint was made about UK SA's application of section 40 of the FOIA.
14. During the Commissioner's investigation further information was disclosed to the complainant.
15. The Commissioner will first consider the initial application of section 14(2) to the request and the request for proof of identity. She will then go on to consider whether the remaining withheld information is exempt from disclosure, or not, under section 36(2)(b)(ii) or (c).

Reasons for decision

Section 14(2) vexatious/repeated requests

16. UK SA applied section 14(2) initially to the request, as a result of it wishing to question the identity of the complainant due to a sudden influx of requests for same or very similar information from a number of applicants it considered may be acting in concert, had used inappropriate language or had made the requests using a pseudonym. It stated that it did not wish to treat any of the applicants differently and so corresponded with them all equally and asked for proof of identity.

17. The complainant disagrees that UK SA was entitled to ask for proof of identity and felt it was clear from the information he had provided in his request that he was using his real name.
18. Section 14(2) states that where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request.
19. The Commissioner considers this exemption may only be applied when all three of the following criteria have been fulfilled;
 - the request is identical or substantially similar to a previous request from the same requester;
 - the authority has previously provided the information to the requester or confirmed that it is not held in response to the earlier FOIA request; and
 - a reasonable interval has not elapsed between the new request and compliance with the previous request.
20. UK SA has confirmed that it did not apply this exemption for the above reasons, instead it applied the exemption because it wished to question the validity of a number of similar requests received around the same time on the same topic; some of which used pseudonyms, inappropriate language and either raised concerns that they were all from the same applicant or from a number acting in concert.
21. As section 14(2) is concerned with repeated requests from the same applicant for similar or substantially similar information to which the public authority has already complied or confirmed the information is not held, the Commissioner considers in this case it was applied by UK SA in error.
22. However, this is not to say that a public authority is not permitted to enquire about the identity of a requester if it has reason to believe that they have not provided their real name. It is under section 8 of the FOIA. Section 8 of the FOIA states that if the applicant has not used their real name it is not a valid request.
23. In practice, however, the Commissioner is of the opinion that if there is no obvious indication that the requester has not used their real name, the authority should not take steps to check the requester's identity. In most cases it will be appropriate to accept the name that has been provided at face value and respond to the request in the normal way.

24. In this case, it is noted that the complainant's full name, postal address and email address were provided. On the face of it, considering each request on its own merits, this does not look like the actions of an applicant wishing to conceal their real name and make a request for information using a pseudonym. To the Commissioner it meets the requirements of section 8 and UK SA should have accepted it at face value and processed the requested in the normal manner.
25. This is not to say that UK SA could not question the validity of the other requests it received. If obvious pseudonyms had been used UK SA could have relied on section 8 of the FOIA for these. For those applicants which used inappropriate language, UK SA could have considered section 14(1) (vexatious). Similarly section 14(1) can be considered in circumstances where a public authority considers a number of applicants are acting in concert wishing to disrupt the public authority. There appears to be no compelling evidence to suggest that is the case here.

Section 10 – statutory time for compliance

26. As UK SA failed to respond to the complainant's request within 20 working days of receipt it breached section 10 of the FOIA. The Commissioner also accepts that some of this delay could have been avoided had UK SA accepted the request at face value and processed it as a valid request from the outset.

Section 36 – prejudice to the effective conduct of public affairs

27. Section 36(2) states that information is exempt from disclosure if, in the reasonable opinion of the qualified person, disclosure of the information –
 - (b) would, or would be likely to, prejudice-
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
 - (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
28. The UK SA confirmed that the qualified person for the purposes of section 36 of the FOIA received a detailed submission setting out the request, the nature of the withheld information and the arguments for and against disclosure. Mr John Pullinger, the Chief Executive of UK SA and the UK's National Statistician authorised the use of section 36(2)(b) and (c) of the FOIA in this case on 8 November 2017.

29. UK SA has applied both section 36(2)(b)(ii) and 36(2)(c). The Commissioner will first consider UK SA's application of section 36(2)(b)(ii). She will only go on to consider section 36(2)(c) if it is found that section 36(2)(b)(ii) does not comply to some or all the remaining withheld information.
30. The Commissioner must first consider whether this opinion is a reasonable opinion to hold. It is important to highlight that it is not necessary for the Commissioner to agree with the opinion of the qualified person in a particular case. The opinion also does not have to be the only reasonable opinion that could be held or the 'most' reasonable opinion. The Commissioner only needs to satisfy herself that the opinion is reasonable or, in other words, it is an opinion that a reasonable person could hold.
31. UK SA advised that it is the qualified person's opinion that disclosure of the remaining withheld information would be likely to prejudice the free and frank exchange of views for the course of deliberation. It explained that the UK SA Board is appointed by Parliament and has a statutory role under section 8 of the Statistics and Registration Service Act 2007 to report concerns they may have with regards to good practice in relation to official statistics. It stated that this is a function they exercise with a certain level of discretion as many of the issues the Board is asked to intervene on are politically sensitive and may impact political debate. Interventions are purely based within a statistical context but can be easily misconstrued and it can often be implied as support for one side or another.
32. It argued that for UK SA to maintain its trusted reputation as an independent body it is absolutely vital that the Statistics Board is seen to be impartial and not perceived to have acted in any way that would infer political bias. UK SA said that it is the qualified person's opinion that in order to fully consider matters of a politically sensitive nature, officials must be able to advise the Board when it is appropriate to intervene. It stated that this must be done with no risk of a 'chilling effect' where officials cannot put views to the Board due to fear that these views or opinions will be misinterpreted or subsequently published in a way that implies bias. In the qualified person's opinion it is therefore important that a safe space be maintained. If disclosure were ordered officials may be reluctant to offer open and honest views in the future and that may subsequently impact on the future use and representation of statistics in the public domain.
33. The Commissioner is satisfied that the qualified person's opinion that disclosure would be likely to prejudice the free and frank exchange of views for the purposes of deliberation (section 36(2)(b)(ii)) is a reasonable opinion to hold. She can see how the qualified person

reached the opinion that disclosure would be likely to deter officials from providing free and frank views in similar situations. If they feared their views would be routinely disclosed into the public domain they may be less candid, open and to the point in future deliberations. The Commissioner accepts that public authorities do require a safe space to deliberate free and frankly without the fear of premature public scrutiny. They need a safe space to debate and deliberate to enable them to reach the most appropriate and informed decision in a given situation. If officials were reluctant to offer their free and frank views going forward the Commissioner can see how this would have a negative effect on the future use and representation of statistics and hinder UK SA's ability to carry out its statutory role to report concerns. Similar can be said if UK SA lost the safe space it requires to deliberate on important decision making or if its safe space was diminished in anyway.

34. For the above reasons, the Commissioner is satisfied that section 36(2)(b)(ii) applies to all remaining withheld information. There is no need for her to consider section 36(2)(c) but as section 36 is a qualified exemption it is now necessary for her to consider the public interest test.

Public interest test

35. In favour of disclosure, UK SA said that it recognises the public interest in the promotion of transparency and public accountability. It stated that Brexit and the £350 million claim are very much at the forefront of public debate.
36. However, it stated that to release the information would not provide any further detail about its views on the matter at hand than what is already publicly available. UK SA also stated that it is in the public interest to maintain a safe space for current and future discussions with internal and external stakeholders. It argued that it would not be in the public interest for one of the key functions of the UK SA to be undermined in such a way that key stakeholders were no longer comfortable with making difficult decisions. UK SA said that in an era where fake news is prevalent, its role to intervene on situations where statistics are misused is more important than ever. Ensuring that it is able to carry out its functions in a safe space is critical for assuring the public that statistics are being used appropriately and that they can trust the figures that politicians, other figures and organisations in the public eye are quoting. It stated that if key stakeholders were no longer comfortable involving themselves openly and honestly in difficult decision making it could lead to the misuse of statistics without suitable reproach in the future, which again is not in the best interests of the public. It could severely impact public trust into statistics leading to poorer statistics and poorer decisions.

37. Therefore UK SA concluded by saying that overall it considered the public interest rested in maintaining the exemption.
38. The Commissioner considers the public interest test considerations under section 36 of the FOIA require her to consider the extent, severity and frequency of the inhibitions claimed by the public authority.
39. The Commissioner recognises the public interest in openness, transparency and accountability and in members of the public having access to information which enables them to understand more clearly why certain decisions have been made and the public authority's rationale and reasoning. Disclosing information enhances public debate and allows the public to properly scrutinise public authority decision making and spending.
40. She also notes that the withheld information relates to matters which attracted significant media coverage and public interest at the time. Brexit has and will continue to be a highly sensitive political debate which will inevitably attract further coverage and public interest. In this case it is apparent that the UK SA felt it was appropriate and in line with its statutory function to write to the Foreign Secretary in relation to the statistic he used. Understandably the public will wish to know why UK SA took the action it did and the rationale behind that decision. Disclosure of the remaining withheld information would provide further insight into this.
41. However, in this case the Commissioner is of the opinion that the public interest rests in maintaining the exemption. The request was made a day after UK SA's letter to the Foreign Secretary. At this time the matter was very much live and current and considering the matter at hand one could expect the action taken to generate media coverage, public interest and possibly further deliberation and discussion. The Commissioner considers that had disclosure of the remaining withheld information taken place at this point it would have been likely to have fairly extensive and severe inhibitions on the likelihood and willingness of officials to openly discuss, debate and freely and frankly provide their views going forward. The Commissioner considers UK SA is entitled to a safe space to discuss and deliberate without the fear of premature public intrusion. Safe space is required to consider options, discuss candidly, freely and frankly so as to enable the public authority to reach and make the most appropriate and informed decisions. The Commissioner does not consider it is in the public interest to hinder UK SA's safe space or discourage its officials from deliberating in a free and frank manner. These are required to ensure that the best policy decisions are made and that it meets its statutory functions.

42. For these reasons, the Commissioner is satisfied that although there are compelling public interest arguments in favour of disclosure, there are more compelling public interest arguments in this case in favour of maintaining the exemption considering the timing of the request and the circumstances at that time.

Right of appeal

43. 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

44. 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.
45. 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

Samantha Coward
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