

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 30 March 2009

Public Authority: Department for Culture, Media and Sport
Address: 2 – 4 Cockspur Street
London
SW1Y 5DH

Summary

On 31 January 2007 the complainant wrote to the Department for Culture, Media and Sport (DCMS) to request information in relation to the European Commission's ongoing investigation of the UK measures notified to the Commission under Article 3a Television with Frontiers Directive. The DCMS refused to disclose this information relying on sections 27(1)(b), 27(1)(d) and 27(2) of the Act (the international relations exemption). The Commissioner has concluded that the information requested by the complainant is exempt from disclosure on the basis of section 27(1)(b) and in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

The complainant submitted a further request for the same information on 21 December 2007. The DCMS did not consider this as a request for information under the Act rather as a request to re-open its decision to refuse the first request of 31 January 2007. The Commissioner has concluded that complainant's letter of 21 December 2007 did constitute a valid request for information under the Act. However, the Commissioner has concluded that in December 2007, as in January 2007, the requested information was exempt from disclosure by virtue of section 27(1)(b) and the public interest favoured withholding the information.

In handling the complainant's two requests, the Commissioner has also concluded that the DCMS committed a number of procedural breaches of the Act.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the 'Act'). This Notice sets out his decision.

The Request

2. On 31 January 2007 the complainant wrote to the Department for Culture, Media and Sport (DCMS) in relation to the European Commission's (EC's) ongoing investigation of the UK measures notified to the Commissioner under Article 3a Television with Frontiers Directive.¹ The complainant specifically asked for copies of the following correspondence between the UK and the Directorate-General Information Society of the European Commission:
 1. Letter from the Commissioner to the UK of 2 August 2006;
 2. UK interim response to the Commission of 5 September 2006;
 3. UK response to the Commission of 15 November 2006.
3. On 6 March 2007 DCMS wrote to the complainant and informed it that although it held copies of the three documents requested, it considered them to be exempt from disclosure on the basis of section 27 of the Act.
4. On 20 March 2007 the complainant requested that the DCMS conduct an internal review of the decision to refuse to disclose the requested information.
5. The DCMS informed the complainant on 25 April 2007 that it had conducted an internal review and concluded that section 27 had been correctly applied. However, this internal review noted that 'once the European Commission's investigation has run its course, the Department will be prepared to re-examine its position with regard to the letter sent to the Commission by the UK on 5 September [document 2] and 15 November 2006 [document 3].'
6. On 21 December 2007 the complainant wrote to the DCMS again and referred to its suggestion in its early letter of 25 April 2007 that 'once the European Commission's investigation has run its course, the Department will be prepared to re-examine its position'. The complainant noted that the EC had now taken its decision on the compatibility of the list notified by the UK under Article 3a of the Television Without Frontiers Directive. Consequently, the complainant asked the DCMS 'to reconsider your position and provide us with a copy of the above mentioned documents. As you know the matter is currently before the Information Commissioner. We would not wish to pursue this matter if DCMS's view on disclosure has now changed in light of the Commission's approval'.
7. The DCMS contacted the complainant on 19 February 2008 and explained that it did not intend to reconsider its position with regard to the decision to refuse the original request of 31 January 2007. The DCMS explained that this was because 'as you note, that decision is the subject of an investigation by the Information Commissioner. The Department considers his investigation ought to be allowed to take its course and does not intend to reconsider that decision at this stage'.

¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997L0036:EN:NOT>

The Investigation

Scope of the case

8. On 17 July 2007 the complainant contacted the Commissioner to complain about the way its first request for information of 31 January 2007 had been handled. The complainant provided the Commissioner with detailed arguments to support its position that section 27 was not engaged, but even if the exemption was engaged then the public interest favoured disclosing the information. The complainant subsequently contacted the Commissioner in order to complain about the DCMS' failure to deal with its letter of 21 December 2007 as a further request for information.

Chronology

9. On 4 April 2008 the Commissioner wrote to the DCMS and asked to be provided with a copy of the three documents requested by the complainant along with a detailed explanation of why the DCMS considered this information to be exempt on the basis of section 27 of the Act.
10. On 16 May 2008 the DCMS provided the Commissioner with the copies of the three documents requested by the complainant. The DCMS also explained why it believed all three documents to be exempt from disclosure on the basis of sections 27(1)(b) and 27(1)(d) of the Act. The DCMS also explained that it considered document 3 to be exempt on the basis of section 27(2). With regard to the complainant's letter of 21 December 2007 the DCMS explained that:

‘Our position on this is that, while we would of course consider any fresh request made, we note that there are now challenges to the Commission's decision to verify the UK list. We would therefore have to consider any new request in the light of that ongoing litigation and the views of the Commission. Of course this is entirely separate to that which you are investigating – viz our reliance on section 27 at the time of the original request’.
11. On 16 June 2008 the Commissioner wrote to the DCMS in order to seek clarification on a number of issues. Firstly, the Commissioner noted that document 3 made reference to a number of annexes that were attached to this letter but the DCMS had not provided the Commissioner with copies of these annexes as part of its initial response of 16 May 2008; consequently the Commissioner asked the DCMS to provide copies of these annexes. Secondly, the Commissioner explained to the DCMS that with regard to the complainant's second request of 21 December 2007, he intended to consider this as part of the scope of this complaint. Therefore, the Commissioner asked the DCMS to confirm its position with regard to the application of the previously cited exemptions in relation to the second request. Finally, the Commissioner asked the DCMS to provide more detailed explanations and provide any evidence which supported why it considered the various exemptions to apply to the withheld information.

12. The Commissioner received a response from the DCMS on 22 July 2008. In this letter the DCMS provided the Commissioner with further detailed arguments to support its position that the requested information was exempt from disclosure on the basis of section 27 of the Act. (The Commissioner has not reproduced these submissions here as they are considered at length in the analysis section below). The Commissioner was also provided with the documents that were attached as annexes to document 3. With regard to the Commissioner's query about the complainant's second request of 21 December 2007, the DCMS explained that it did not treat this letter as a new FOI request for the following reasons:

'Their [the complainant's] letter is referenced to the case under investigation and the tone of the communication is different from previous FOI requests received from [the complainants] in this matter; with all other previous information requests relating to listed events, [the complainants] have been careful to state specifically when a letter is to be treated as a new request. Neither did DCMS consider it to be a request for internal review of our earlier decision. We considered the letter to be an approach from [the complainants] asking us to re-open the Department's decision on their request of 31 January 2007.'

DCMS disagrees that, in the context of the communications between it and [the complainants], the letter of 21 December [2007] amounted to a further FOI request, concerning which a complaint has been made to the ICO providing the ICO with jurisdiction to investigate. In our view, the letter was clear in that it sought to re-open the previous decision.'

13. The Commissioner contacted the DCMS again on 30 August 2008 and asked for additional clarification in relation to the application of section 27.
14. The DCMS provided this clarification to the Commissioner on 26 September 2008.

Background / Findings of fact

15. Under section 97 of the Broadcasting Act 1996 the Secretary of State can choose to list events of 'national interest' that must be shown on free-to-air television (i.e. BBC, ITV and Channel 4). These listed events cannot be shown live solely on pay-TV (e.g. Sky or Setanta).² Events currently on the UK list include a number of well known sporting events such as the Olympics, FIFA World Cup, European Football Championships and Wimbledon Finals.
16. Inclusion of an event on a list has two clear consequences: Firstly, it ensures free-to-air coverage of popular events – viewers can obtain, for free, events for which they may have otherwise have been charged. Secondly, listing restricts competition to the extent that sports organisers can only sell the rights for their events to certain specific broadcasters.

² Broadcasting Act 1996 http://www.opsi.gov.uk/Acts/acts1996/ukpga_19960055_en_1

17. Both UK and EC law require that listed events are not simply popular but also of major importance to society. For these reasons EC law requires that the list drawn up by each member country be notified to the EC to assess whether they comply with EC law and whether the events listed are genuinely of major importance to society.³
18. The EC is the executive branch of the European Union and is responsible for proposing legislation, implementing decisions, upholding the Union's treaties and the general day-to-day running of the Union. The EC operates a method of cabinet government with 27 Commissioners, one per member state. The term 'the EC' is usually used to refer to either the college of 27 Commissioners or the larger institution including around 25,000 European civil servants who are in departments called Directorates-General. Each Directorate-General covers a specific policy area or service with the Directorate-General Information Society and Media being responsible for member countries listing of sports events.
19. On 25 June 1998 the Secretary of State decided on the UK list and included all FIFA World Cup matches, as opposed to simply home team matches, semis and finals. The UK notified the UK list to the EC for the first time in 1998 and then after objections from the EC, a second time in amended form on 5 May 2000. The EC investigated and approved the revised version of the UK list on 28 July 2000.
20. The EC's approval of the revised version of the list was overturned by the European Court of First Instance in Case T-33/01 *Infront v Commission* on 15 December 2005.⁴
21. As a consequence of this judgement, the EC was forced to consider the list for a second time for compliance with EC law. The EC issued its further decision with regard to the list on 16 October 2007.
22. On 5 February 2008 UEFA made an application to the European Court of First Instance challenging the EC's re-verification of the UK list on 16 October 2007. On 6 February 2008 FIFA also made an application to the Court of First Instance challenging the verification of the list.
23. Meanwhile, on 9 March 2006 the EC received a complaint from a company called Infront asking it to take into account various issues when considering its further decision with regard to the list. The EC informed Infront of its preliminary position with regard to this complaint on 27 September 2006.
24. On 22 April 2008 the EC contacted the UK Permanent Representation to the EU and informed it that it intended to close the Infront complaint case. The EC formally closed this case on 6 May 2008.

³ Directive 89/552/EC

<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31989L0552:EN:HTML>

⁴ [http://curia.europa.eu/jurisp/cgi-](http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=T-33/01%20&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100)

[bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=T-33/01%20&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100](http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=T-33/01%20&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100)

25. EC Regulation 1049/2001 provides for a right of access by EU citizens or legal persons residing or having their registered office in a Member State to European Parliament, Council or Commission documents. The right of access applies to all documents in the possession of one or more of the institutions, including documents received by an institution from a Member State or third party. The right of access is subject to a number of exceptions and limitations relating to such matters as data protection, intellectual property, duties of confidence, the protection of investigations and the decision-making process.

Analysis

Procedural issues

The 'first request' of 31 January 2007

26. Section 1(1) of the Act states that:

‘Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him’.

(2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.’

27. Section 10(1) of the Act states that:

‘Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt’.

28. Section 17(1) of the Act requires

‘A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies’

29. The complainant submitted its first request on 31 January 2007, but the DCMS did not provide the complainant with a refusal notice until 6 March 2007. By failing

to issue this refusal notice within 20 working days the Commissioner has concluded that the DCMS breached section 17(1) of the Act.

30. Furthermore, the Commissioner has concluded that the DCMS has breached section 17(1)(b) because in its refusal notice it failed to cite the specific sub-sections of section 27 upon which it was relying to withhold the requested information.

The 'second request' of 21 December 2007

31. Section 8(1) of the Act states that:

'In this Act any reference to a "request for information" is a reference to such a request which –

- (a) is in writing,
- (b) states the name of the applicant and an address for correspondence, and
- (c) describes the information requested.'

32. As the above chronology makes clear, the DCMS did not accept that the complainant's letter of 21 December 2007 contained a valid request for information.

33. However, having reviewed the complainant's letter of 21 December 2007, the Commissioner disagrees with the DCMS and has concluded that this piece of correspondence does include a valid freedom of information request. This is because it is clear that the letter meets the three criteria set out in section 8(1). In the Commissioner's opinion DCMS cannot argue that the letter of 21 December 2007 did not contain a request simply because it contains a reference number applied to an earlier request nor can DCMS infer from the tone of the complainant's correspondence, or its prior knowledge of the complainant's behaviour, that the letter of 21 December 2007 was not a request. The Act is in fact applicant blind which means that a public authority, in all but a very limited number of circumstances, cannot make assumptions as to why an applicant is asking for information or what they may do with that information. Thus in this case any prior knowledge that the DCMS may have had in relation to the complainant's motives for submitting this request should have been discounted.

34. Therefore, the Commissioner believes that the DCMS were under a duty under section 1(1)(a) of the Act to respond to the complainant and confirm to it whether it held the information of the nature requested and under section 10(1) of the Act to provide this confirmation within 20 working days. By failing to do so, the Commissioner believes that the DCMS breached both section 1(1)(a) and section 10(1) of the Act. Furthermore, the Commissioner has concluded that DCMS breached section 17(1) by failing to provide the complainant with a refusal notice stating why it believed that the information falling within the scope of this further request was exempt from disclosure.

Exemptions

The DCMS' position regarding section 27(1)(b) and section 27(1)(d)

35. Section 27 of the Act states that:

'27(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) relations between the United Kingdom and any other State,
- (b) relations between the United Kingdom and any international organisation or international court,
- (c) the interests of the United Kingdom abroad, or
- (d) the promotion or protection by the United Kingdom of its interests abroad.

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

(3) For the purposes of this section, any information obtained from a State, organisation or court is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.'

36. The DCMS has argued that when it received the complainant's request of January 2007 it considered all three of the documents falling within the scope of the request to be exempt from disclosure by virtue of sections 27(1)(b) and 27(1)(d). The DCMS has also explained that it believed that document 1 was also exempt by virtue of sections 27(2) and 27(3).

37. Although the DCMS argued that the complainant's letter of 21 December 2007 did not constitute a valid request for information, it did explain to the Commissioner during the course of this investigation how it would deal with a similar request in the future. The DCMS explained that whilst it would consider any 'fresh request', it noted that although the EC issued its decision in October 2007, further litigation ensued and any request it received would have to be considered in light of that ongoing litigation, including the views of the Commission (see paragraph 21 of the findings of fact section above).

Section 27(1)(b)

38. Section 27(1)(b), as with the other sub-sections of section 27(1) is a prejudice based exemption. This means that information is exempt if its disclosure 'would, or would be likely to' result in the harm that the exemption is designed to protect. The Commissioner has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Information Tribunal decisions. With regard to 'likely to prejudice', the Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) confirmed that 'the chance of

prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (Tribunal at paragraph 15). With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026 & 0030) commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (Tribunal at paragraph 36).

39. In his correspondence, the Commissioner asked the DCMS to confirm which test of prejudice it had applied in reaching the conclusion that sections 27(1)(b) and 27(1)(d) were engaged. In response the DCMS informed the Commissioner that:

'We disagree that the test of prejudice connected with section 27 of the Freedom of Information Act amounts to the need to show real and significant evidence that disclosure would prejudice, or would be likely to prejudice, the UK's relations with the Commission. DCMS considers that this test sets the bar too high and is based on case law as regards exceptions to the processing of personal data, for which, understandably, a higher test of prejudice must be reached.'

40. Nevertheless, the DCMS explained that it believed that there was 'real and significant evidence that to release the information...would prejudice the UK's relations with the Commission'.
41. The DCMS then provided the Commissioner with the following details as to what it considered this evidence to be:
42. The DCMS highlighted the fact that at the time of the complainant's first request, the EC was still investigating the complaint that Infront had raised (see paragraph 23) as well as considering the UK list a second time for compliance with EC law (see paragraph 21). The DCMS argued that the EC believed that disclosure of the requested information could undermine the conduct of their investigation of Infront's complaint. It was on this basis, the DCMS explained, that it understands the EC refused to disclose this information when it received a request for the three documents under EC Regulation 1049/2001 - Public Access to Documents.⁵ (The DCMS explained that the EC has relied on Article 4(2) of the Regulation which states that institutions shall refuse access to a document where disclosure would undermine the protection of: commercial interests of a natural or legal person, including intellectual property; court proceedings and legal advice; and the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.) Therefore, the DCMS argued that if it released the requested documents domestically in response to this freedom of information request, then it 'would have seriously prejudiced our relations with the Commission' who had refused disclosure under EC access laws, and thus section 27(1)(b) was engaged.

Section 27(1)(d)

⁵ EC Regulation 1049/2001

http://www.europarl.europa.eu/RegData/PDF/r1049_en.pdf;jsessionid=6C23EA785E2EE5F0D3FF4B0C7EB2FEA2

43. In its submissions to the Commissioner, the DCMS was less clear in explaining why it believed that section 27(1)(d) was engaged. That is to say, the DCMS did not explicitly state which interests of the United Kingdom abroad would be harmed because disclosure of the requested information would, or would be likely to, be harmed because the United Kingdom could no longer promote or protect them. However, the DCMS did argue that given that disclosure of the requested information would prejudice its relations with the EC (i.e. section 27(1)(b)) then a further consequence would be to seriously undermine the integrity of any future discussions, or free and frank exchange of information, between the United Kingdom and the EC and other EU Member States facing similar challenges in court. Moreover, the DCMS explained that from the UK's point of view the exchanges with the EC were conducted on the basis of a shared assumption that they were held in confidence. Consequently, the UK's working relationship with the EC would be likely to be harmed because the EC would be reluctant to share information given in confidence with the UK if it feared that the UK would be required to disclose it and thus the UK's ability to defend promote or protect its interests would be harmed.

The Commissioner's position regarding the application of section 27(1)(b)

The 'first request' of 31 January 2007

44. The Commissioner rejects the DCMS' argument that the test of prejudice outlined above at paragraph 39 is an inappropriate one to apply section 27 of the Act; numerous Tribunals have indicated that the tests outlined in both the *John Connor* and *Hogan* decisions referenced above should be applied to all prejudice based exemptions contained within the Act. Consequently, the Commissioner has relied upon these two tests in order to determine if the exemption is engaged.
45. Having reviewed each of the documents in turn, the Commissioner has detailed below his findings in relation to the application of section 27(1)(b) at the time of the original request in January 2007.
46. In reaching these conclusions the Commissioner has also been guided by the Information Tribunal's comments in the decision *Campaign Against the Arms Trade v Information Commission (EA/2006/0040)* in which the Tribunal indicated how the prejudice section 27(1) was designed to protect could be recognised. At paragraph 81 of this decision the Tribunal noted that:
- 'in our judgement prejudice can be real and of substance if it makes relations more difficult or calls for particular diplomatic response to contain or limit damage which would not otherwise have been necessary. We do not consider that prejudice necessarily requires demonstration of actual harm to the relevant interests in terms of quantifiable loss or damage'
47. In the Commissioner's opinion the content of document 1 is clearly not of a trivial nature; rather it contains details of the complaint submitted to the EC by Infront (see paragraph 23); a detailed explanation of the EC's position and issues related to this complaint; and also contains details of what response the EC is seeking from the UK in response to this complaint. In light of the content of this document,

the Commissioner is satisfied that given the EC's refusal to disclose this document, and background surrounding the EC's ongoing consideration of the complaint as well as the ongoing litigation, the Commissioner accepts that disclosure of this document at the time of the complainant's first request in January 2007 may have prejudiced the UK's relationship with the EC. This is because disclosure would be likely to make relations between the UK and the EC more difficult and call for a specific diplomatic response, and thus the Commissioner is satisfied that the exemption at section 27(1)(b) of the Act is engaged with regard to document 1.

48. In contrast to document 1, the Commissioner has established that document 2 is a relatively short document that does not include the level of detail that document 1 does with regard to the basis of the EC's consideration of the complaint nor the level of response the DCMS provided in document 3. In comparison to the information contained in the other withheld documents, the Commissioner accepts that it could be argued that content of document 2 is relatively innocuous.
49. Moreover, the Commissioner is conscious that the argument being advanced by the DCMS with regard to the application of the exemption contained at section 27(1)(b) suggests that disclosure of a class of information – i.e. release of any correspondence exchanged between the UK and the EC in relation to this issue – will prejudice international relations. On the basis of the arguments advanced by the DCMS, there does not appear to be any acknowledgment that whilst disclosure of some information contained in such correspondence may well be prejudicial (because of the sensitive nature of such information), given the potentially trivial nature of some information contained in such documentation (e.g. perhaps document 2) disclosure of such information would not result in the prejudicial consequences outlined above.
50. Clearly, the Commissioner has some reluctance in accepting what could be perceived as a class based argument can be applied to what is a prejudice based exemption. Although the DCMS is clear that it believes that disclosure would be prejudicial because of the EC's refusal to disclose the same documents, to take such an argument to a logical conclusion, UK government departments would always consider disclosure of any information refused under EC access laws to be exempt under section 27 of the Act. The Commissioner does not accept that this can be logical position that can always be accepted; for example, what if the information was incorrectly withheld under EC access laws – would the UK still refuse to disclose any such documents on the basis of section 27? In essence, this becomes a self fulfilling prophecy with the UK refusing to disclose information that the EC has refused to disclose, and presumably vice versa, and therefore no regard is ever given when a request is made under the Act to the content of the information itself; rather the simple fact that the information was refused under EC access laws is enough to engage section 27. Furthermore, the Commissioner notes that there are significant distinctions between the Act and EC Regulation 1049/2001; for example, the two pieces of legislation contain different exemptions which have different thresholds for engagement. Therefore in the Commissioner's opinion it would be misleading to draw a direct comparison between the two access regimes.

51. However, the Commissioner is conscious of the fact that one of the reasons that he has concluded that section 27(1)(b) is engaged with regard to document 1 is because the EC has refused to disclose these documents under EC access laws. Consequently, in the context of this case, the exemption is engaged not only on the content of document being requested, but also because of the EC's established position with regard to these particular documents. Furthermore, whilst the Commissioner may consider that in comparison to the some of the other withheld information, document 2 is relatively innocuous, the EC may not agree with this conclusion. Rather the EC may believe that disclosure of this document may undermine its consideration of the Infront's complaint and further consideration of the list.
52. Furthermore, the Commissioner is conscious of the Tribunal's comments in the *Campaign Against the Arms Trade* decision quoted above – namely that prejudice in the context of section 27(1) could be said to be real and significant if disclosure of information results in a particular diplomatic response to contain or limit damage and that without such a disclosure, such a response would not have been necessary. In the Commissioner's opinion disclosure of document 2 would have been likely to call for such a diplomatic response given the fact that the EC was still investigating the UK's list. Therefore, the Commissioner has concluded that disclosure of document 2 would be likely to prejudice the UK's relations with the EC and section 27(1)(b) is engaged.
53. Finally, on the basis of similar reasoning outlined with regard to document 1, the Commissioner accepts that disclosure of document 3 would be likely to prejudice the UK's relations with the EC given that the content of this document not only outlines the issues being considered by the EC (i.e. a summary of document 1) but also includes the UK's response to these issues. On the basis of the DCMS' submission it would appear that the EC by refusing to disclose these documents was seeking to protect its processes and procedures surrounding its investigation of the complaint and reconsideration of the UK list. Consequently, the Commissioner accepts that disclosure of this document would be likely to prejudice the UK's relationship with the EC and thus this document is exempt on the basis of section 27(1)(b).
54. The Commissioner has carefully considered whether any of the annexes attached to document 3 can be disclosed or whether even disclosure of this information would be likely to result in prejudicial effects to the UK's international relations. The Commissioner is conscious of the fact the some of the information contained in the annexes may already be in the public domain. However, he agrees with the argument advanced by DCMS that disclosure of some of the information contained in the annexes, even information that may be in the public domain, would begin to lift the veil of the scope and content of the communications as a whole at a time when the EC's investigations were ongoing. Indeed some of the annexes are of central significance in relation to the EC's investigation into the UK list. On this basis the Commissioner accepts that disclosure of the information contained within the annexes would be likely to prejudice the UK's relations with

the EC and therefore the Commissioner is satisfied that the annexes are exempt from disclosure on the basis of section 27(1)(b).⁶

55. In summary, the Commissioner has concluded that section 27(1)(b) is engaged in respect of documents 1, 2 and 3 (including the annexes attached to document 3), on the basis that disclosure at the time of the first request would have been likely to prejudice the UK's relations with the EC. In reaching this conclusion the Commissioner wishes to emphasise that he has rejected the argument advanced by DCMS that prejudice would have occurred in respect of these documents if they were disclosed under the Act.

The 'second request' of 21 December 2007

56. As is noted in the background/findings of fact section above, although the party which lodged the complaint in relation to the EC's handling of the list, was informed of the outcome in September 2006, the EC did not formally close its investigation into this case until 6 May 2008. Consequently, when the complainant submitted its second freedom of information request in December 2007, the Commissioner understands that from the EC's point of view, its consideration of this complaint was not complete. Consequently, in the Commissioner's opinion the EC would still have expected the 3 documents (and the annexes attached to document 3) not to be disclosed and therefore he is

⁶ The Commissioner has established that the complainant was in fact provided with a copy of Annex A in relation to a previous FOI request in March 2005 (albeit that a number of minor redactions were made on the basis of section 41 of the Act.) These redactions related to the value of certain television rights contracts. However, DCMS explained that when considering the complainant's request of January 2007, although it had previously disclosed the majority of the information contained in Annex A, it did not believe that the complainant was aware that information contained in this Annex was in fact the information that it had previously been provided with; although the majority of the information contained in this Annex had previously been disclosed, it had not been disclosed in a context or format that linked it to the UK's correspondence with the EC on the issue in question. Therefore, as detailed in the body of the decision notice, DCMS felt that to begin to disclose information contained in the annexes would result in the lifting of the veil on the nature of the communications between the UK and EC and this would have a prejudicial effect. The Commissioner accepts the logic of this argument advanced by the DCMS and therefore in the decision notice is satisfied that at the time of both the complainant's requests, Annex A was exempt from disclosure on the basis of section 27(1)(b).

However, the DCMS has now explained to the Commissioner that the complainant, via a proceeding it is undertaking in the Court of the First Instance, is now aware that document which it had previously been provided with formed an Annex to UK's letter to the EC of 15 November 2006. The DCMS would not want to concede the principle that at the time of the complainant's requests Annex A was exempt from disclosure on the basis of section 27. This is because at the time of the request, the complainant did not know that this information was being used as part of the European Court of First Instance case. However if the DCMS received this request again, it would not seek to rely on section 27 of the Act to withhold this information because the use of these submissions as part of the court case was subsequently made public. It would however, withhold the value of the sports contracts on the basis of section 41.

However, the DCMS's amended position is not relevant to the Commissioner's consideration of this section 50 complaint; the Commissioner's role is limited to considering public authorities' application of exemptions as they relate to the information the time of requests. At the time of these requests the DCMS position remained that Annex A was exempt in its entirety on the basis of section 27; and section 41 was not formally relied upon to withhold information in relation to the requests which are the subject of this Notice.

satisfied that the exemption contained at section 27(1)(b) is engaged in December 2007 on the same basis as set out in paragraphs 44 to 55.

Public interest test

57. Section 27 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Arguments in favour of disclosing the information

58. The complainant has advanced a number of reasons as to why it believes that disclosure of the requested information would be in the public interest:
59. There is a general public interest in public authorities being accountable for, and transparent about, decisions taken by them along. Moreover, there is an underlying public interest in disclosure of information which reveals how Government works.
60. The complainant has argued that disclosure of this information would reveal the basis upon which the DCMS undertook its review of the UK list and the facts and circumstances in which that decision was taken.
61. The public interest in disclosure is heightened given what the complainant considers to be the 'material errors and omissions in the documents that the UK has already disclosed'.
62. Disclosure would allow the public and interested parties to see whether the UK has properly provided the EC with accurate and legitimate grounds to justify the list submitted to the EC.
63. Finally, the complainant argued that the EC directive dealing with listed sports events request the UK to act 'in a clear and transparent' manner when drawing up its list, such that EC law requires disclosure of such documents. The complainant noted that UK law should be interpreted in light of EC law and therefore the DCMS should apply the Act consistently with the EC law requiring transparency and therefore disclosure is required.⁷

Arguments in favour of withholding the information

64. The DCMS has advanced the following arguments in support of its position that the public interest favours withholding the requested information:
65. There is a public interest in preserving the integrity of ongoing investigations being conducted by European institutions.

⁷ In support of this point the complaint cited Case 6/64 Costa v Enel [1964] E.C.R. 585

66. It is in the public interest that information is shared freely and frankly between international institutions in order to ensure the effective conduct of international relations.
67. Disclosure of the information would result in countries and international organisations being less candid, and ultimately perhaps refuse to share information, again a consequence which would not be in the public interest.

Balance of public interest arguments

68. The Commissioner wishes to note that it is only issues that are inherent to the exemption which can be taken into account when balancing the public interest (or indeed considering whether a prejudice based exemption is engaged). Whilst the Commissioner recognises that there is a clear public interest in preserving the integrity of ongoing investigations being conducted by the EC, it is not the purpose of section 27 to protect the integrity of such investigations. Rather, section 27 is designed to protect the UK's relations with other States and international organisations or courts. Although it is the case that disclosure of the requested information would be likely to prejudice the EC's investigation and a consequence of this could be to prejudice the UK's relations with the EC, thus the exemption contained at section 27(1)(b) is engaged, the public interest argument in favour of non-disclosure would be to protect the UK's relations with the EC rather than the public interest in favour of protecting the EC's investigations.
69. This approach is consistent with the comments of the Tribunal in a number of decisions, including the case of *Bellamy v Information Commissioner and the DTI EA/2005/0023* in which the Tribunal noted that:

‘As section 2(2)(b) makes clear, the relevant exercise is to weigh the public interest in maintaining the exemption which is manifested by the relevant provisions against the public interest in disclosing the information. If the weighing process is in favour of the maintenance of the exemption, then any duty to communicate or disclose is disapplied. It necessarily follows that not all public interest considerations which might otherwise appear to be relevant to the subject matter should be taken into account. What has to be concentrated upon is the particular public interest necessarily inherent in the exemption or exemptions relied upon.’ (Tribunal at paragraph 5)⁸

70. With regard to the arguments advanced above, the Commissioner accepts that there is clearly a strong legitimate public interest in Government being accountable for, and transparent about, decisions that they have taken. Furthermore, in the circumstances of this case, the Commissioner also agrees that disclosure of the withheld information may reveal further details of DCMS' decision making process with regard to the compilation of the list. Moreover, it is clear, not least from the litigation which ensued following the UK's submission of the list (and is still continuing), that the decision by the UK to list all World Cup

⁸ The fact that only the particular public interest in the exemption should be considered, rather than all public interest considerations to subject is a point confirmed by the High Court in the case *Ofcom v the ICO and T-Mobile* [2008] EWHC 1445 (Admin) (08 April 2008).

events was seen as a controversial one and thus disclosure of information which could clarify DCMS' decision making process could be in the public interest.

71. However, the Commissioner notes that the substance of the arguments identified by the complainant focus on the errors and omissions allegedly made by the UK in submitting its list to the EC. However, the Commissioner understands that the Court of First Instance's annulment of the EC's decision in 2000 to verify the UK list was based upon the EC's apparent failure to follow correct procedures rather than on the content of the UK's submissions or the methodology employed by the UK. Consequently, although the Commissioner recognises that there is controversy surrounding the UK's list, this may not necessarily be due to the process by which the UK compiled the list. Therefore, to some extent, the arguments regarding the need for disclosure in order to ensure accountability and transparency because of alleged flaws in the UK's decision making process have to be considered on the basis of these facts. Furthermore, in the Commissioner's opinion there is nothing contained in document 2 which would add materially to the public's understanding of the issues in this case or make the UK or EC more accountable for the decisions that they had taken in relation to approval of the list.
72. Furthermore, the Commissioner is aware of the Tribunal's findings in the related case *DCMS v Information Commissioner (EA/2007/0090)* in which the applicant sought access to the information used by the DCMS in drawing up the list. Although the DCMS disclosed a number of documents to the applicant, it withheld a further documents on the basis of section 35(1)(a) of the Act which provides a qualified exemption for information held by government departments which relates to the formulation of development of government policy.⁹ In concluding that the public interest favoured withholding the undisclosed information in this case, the Tribunal noted that 'we do not believe, on the particular facts of this case, the issue of accountability would be served to any significant extent by disclosure of the disputed information' (Tribunal at paragraph 28) given the amount of information that was already in the public domain.
73. Clearly, as the withheld information in this case differs from the 'disputed information' considered by the Tribunal the Commissioner cannot simply adopt the Tribunal's line of argument in this case. Nevertheless, in balancing the public interest in this case the Commissioner is conscious of the amount of information that was placed in the public domain at the time the DCMS announced its decision along with the further information that has subsequently been placed in the public domain either through disclosures under the Act or through litigation in European courts. In making this point the Commissioner does however recognise that it could still be legitimately argued that there would be a public interest in disclosure of information because it would provide the public with the 'complete picture' of how the DCMS dealt with the EC's enquires.

⁹ In response to this earlier request, the applicant was provided with a significant amount of information considered by the members of the Advisory Group on Listed Events who were tasked with advising the Secretary of State on the compilation of the list. Information disclosed included summaries of responses to the consultation process, minutes of the Advisory Group, papers prepared by DCMS for the Advisory Group and some findings of the Group in relation to the 'problem' of listing events. Information not disclosed to the applicant, and thus the information considered by the Tribunal in *EA/2007/0090*, consisted of the final submissions by both civil servants and Ministers to the Secretary of State.

74. Furthermore, the Commissioner accepts that there is a strong public interest in the UK being able to maintain effective relations with the EC; the EC has a very wide influence on numerous aspects of UK Government policy and therefore the UK clearly needs to maintain effective and efficient relations with the EC. Whilst disclosure of this information would add to the public's knowledge in relation to the UK's decision in 1998 to list all World Cup matches, disclosure of the information would be likely to negatively affect the UK's relations with the EC (and more specifically the Directorate-General Information Society and Media) on other broadcast issues. Further disclosure could negatively affect other aspects of the UK's relations with the EC in a variety of policy areas.
75. In conclusion, the Commissioner has decided that in the circumstances of this case that the public interest in favour of maintaining the exemption outweighs the public interest in disclosure. In reaching this decision, the Commissioner accepts that disclosure of the information would clearly add to the public's understanding of the UK's decision making process surrounding the compilation of the list, something which in the circumstances of this case, i.e. the controversy surrounding the UK's inclusion of all World Cup matches has to be given particular weight. Disclosure may also add to the public's general understanding of the UK engaged with the EC. However, the Commissioner believes that this is outweighed by the strong public interest in ensuring that the UK's relations with the EC are not prejudiced; in reaching this decision the Commissioner is conscious that whilst disclosure of this information may inform the public about this particular aspect of UK broadcasting policy, disclosure of the information may affect the UK's relations with the EC on other, un-related issues, which given the importance of UK-EC relations in numerous other aspects of the UK Government's policy is something which is clearly not in the public interest.
76. The Commissioner is satisfied that the balance of the public interest is the same for all of the documents falling within the scope of the complainant's request and for both the request of 31 January 2007 and the request of 21 December 2007.
77. On the basis that the Commissioner has concluded that the information requested is exempt from disclosure on the basis of section 27(1)(b) of the Act, he has not considered whether the exemption contained at section 27(1)(d) has also been correctly applied nor whether the DCMS was also correct to withhold documents 1 and 2 on the basis of section 27(2).

The Decision

78. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- The DCMS was correct to withhold the requested information on the basis of section 27(1)(b) at the time of the complainant's first request in January 2007.

- The Commissioner has also concluded that the requested information was exempt from disclosure by virtue of section 27(1)(b) at the time of the complainant's second request in December 2007.

79. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- The DCMS breached section 17(1) of the Act by failing to provide the complainant with a refusal notice within 20 working days of its first request. The DCMS also breached section 17(1)(b) by failing to state in this refusal notice the specific sub-sections of section 27 upon which it was relying to withhold the requested information.
- The DCMS also breached sections 1(1)(a) and 10(1) by failing to provide the complainant with a response to the request of 21 December 2007 within 20 working days of the date of this request. Furthermore, the Commissioner has concluded that DCMS breached section 17(1) by failing to provide the complainant with a refusal notice stating why it believed that the information falling within the scope of this further request was exempt from disclosure.

Steps Required

80. The Commissioner requires no steps to be taken.

Right of Appeal

81. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 30th day of March 2009

Signed

**Anne Jones
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Freedom of Information Act 2000

Section 1(1) provides that -

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

Section 1(2) provides that -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

Section 2(2) provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

Section 10(1) provides that:

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt”.

Section 17(1) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 27(1) provides that –

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

- (a) relations between the United Kingdom and any other State,
- (b) relations between the United Kingdom and any international organisation or international court,
- (c) the interests of the United Kingdom abroad, or
- (d) the promotion or protection by the United Kingdom of its interests abroad.”

Section 27(2) provides that –

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

Section 27(3) provides that –

“For the purposes of this section, any information obtained from a State, organisation or court is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.”