

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 19 August 2010

Public Authority: Department for Business Innovation & Skills
Address: Kingsgate House
66-74 Victoria Street
London
SW1E 6SW

Summary

The public authority requested the formal notice and other additional information in relation to infraction proceedings brought against the UK Government by the European Commission regarding the transposition of Council Directive 2000/78/EC (establishing a general framework for equal treatment in employment and occupation). The public authority refused to disclose the information on the basis of the exemptions at sections 27(1)(b) and 36(2)(c), and additionally sought to rely on the exemption at section 27(1)(c) during the course of the Commissioner's investigation. The Commissioner found that section 27(1)(b) was not engaged but concluded that the exemption at section 36(2)(c) was correctly engaged. The Commissioner also found that in all the circumstances of the case the public interest was in favour of maintaining the exemption at section 36(2)(c). The Commissioner did not therefore need to exercise his discretion as to whether or not to accept the late reliance on the section 27(1)(c).

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.

Background

2. EU Directive 2000/78/EC prohibits employment discrimination on the grounds of religion or belief, disability, age or sexual orientation. On 23 March 2007, the Commission issued a letter of formal notice¹ (as part of the Commission's infraction or infringement process) to the UK government regarding the transposition of the parts of the Directive (primarily to do with the exemptions afforded to religious groups) into UK law. The complainant's request relates to information held about the infringement proceedings.
3. The public authority confirmed that the infringement proceedings were ongoing at the time of the request and pointed out that the Commission had since issued a Reasoned Opinion² on 20 November 2009.

The Request

4. On 05 August 2008, the complainant requested;
5. "The letter of formal notice including any attachments issued by the European Commission (Commission) in relation to infringements proceedings against the UK with regards the transposition of EU Directive 2000/78/EC and any subsequent exchanges between the Government and the Commission as a result of the proceedings."
6. On 20 August 2008, the public authority responded. It confirmed that it held information relevant to the request but refused to disclose it on the basis of the exemptions at sections 27(1)(b) and 27(2) of the Act.
7. On 13 October 2008, the complainant requested a review of the public authority's decision to withhold the information held.
8. On 21 December 2008, the public authority wrote back with details of the outcome of the review. It upheld the original decision to withhold the information on the basis of the exemption at section 27(1)(b) only and additionally relied on the exemption at section 36(2)(c).

¹ It is also referred to as an Article 226 (now Article 258) letter and offers the Member State an opportunity to respond to an allegation that it is in breach of Community law.

² This is a formal notification by the Commission to a Member State that it is in breach of its Treaty obligations and describes the necessary rectifying action. The Member State is required to comply with its EC obligations - not only to reply to the reasoned opinion

The Investigation

Scope of the case

9. On 19 February 2009 the complainant contacted the Commissioner to complain about the way the request for information had been handled. The complainant specifically asked the Commissioner to consider whether the public authority had correctly engaged the exemptions relied on and, if applicable, also consider whether the public interest in disclosure outweighed the public interest in maintaining the exemptions.

Chronology

10. The Commissioner wrote to the public authority on 21 October 2009 and requested copies of the disputed information. He also invited the public authority to submit additional representations on the application of the exemptions at sections 27(1)(b) and 36(2)(c) of the Act.
11. On 21 December 2009, the public authority provided the Commissioner with copies of the withheld information and also made additional representations to support its application of exemptions. It also argued that in addition to the exemptions already relied on, section 27(1)(c) of the Act was also engaged.

Analysis

12. The statutory provisions referred to below can be found in the legal annex to this Notice.

Exemptions

Disputed Information

13. The public authority identified the following documents as falling within the scope of the request:

Letter from the European Commission dated 23 March 2007 – letter of formal notice of Infringement No. 2006/2450 (item A),

Letter from the Office of the UK Permanent Representation dated 2 July 2007 (item B),

Supplementary European Commission letter dated 29 June 2007 (item C), and

Letter from UKRep dated 4 July 2007 (item D).

Section 27(1)(b)

14. Information is exempt on the basis of section 27(1)(b) if its disclosure under the Act would or would be likely to prejudice relations between the UK and any international organisation or international court.
15. The exemptions at section 27(1) are prejudiced based exemptions; therefore the public authority would need to demonstrate that disclosure of the disputed information at the time of the request would, or would have been likely, to prejudice relations between the UK and the Commission.
16. The public authority argued that disclosure of the disputed information would have been likely to prejudice relations between the UK and the European Commission because the information related to ongoing infraction proceedings. According to the public authority, the 'UK needs to conduct infraction correspondence away from public scrutiny.... [and] if such information was disclosed, it would be likely to prejudice the UK's position in any negotiations with the Commission.'
17. In *Hogan v the ICO and Oxford City Council* (EA/2005/0026 & EA/2005/0030), the Information Tribunal (Tribunal) noted that; 'The application of the 'prejudice' test should be considered as involving a number of steps. First, there is a need to identify the applicable interest(s) within the relevant exemption.....Second, the nature of 'prejudice' being claimed must be consideredA third step for the decision-maker concerns the likelihood of occurrence of prejudice.' (Paragraphs 28 to 34).
18. It is clear from the exemption that it seeks to protect the UK's relationship with international organisations. It goes without saying therefore that the disclosure of the information being withheld pursuant to the exemption would, or would be likely to, have a prejudicial effect on that relationship.
19. The disputed information consists of a letter of formal notice and an additional letter of formal notice from the Commission to the UK government (in relation to the transposition of Directive 2000/78/EC), and the UK's responses to both notices.
20. The Commissioner is not persuaded by the reasons given by the public authority for engaging the exemption at section 27(1)(b). The

Commissioner understands the need for the UK to be able to be able to take part in infraction proceedings away from constant public scrutiny. He is however not persuaded that this is a relevant consideration under section 27(1)(b). The public authority also explained that infraction proceedings call for cooperation and an atmosphere of mutual trust between the Commission and the UK government so as to enable the parties open discussions with a view to a rapid resolution of the dispute.

21. The Commissioner has carefully considered the disputed information. The formal notices detail the Commission's queries in relation to the transposition of different aspects of the Directive into UK law. The UK's responses cover each of the points made by the Commission. The Commissioner is not persuaded that the disclosure of this information would have been likely to affect the cooperation between both parties in the course of the infraction proceedings and consequently relations between them. An argument could perhaps be made that disclosure would probably not have been in the UK's best interest because it could have undermined the UK's position and consequently its ability to negotiate effectively. However, this would not have necessarily prejudiced relations between the UK government and the Commission. In the Commissioner's opinion, it is highly unlikely that the letters would have revealed any information which the Commission would have considered prejudicial to its relations with the UK government generally, and particularly in the context of infraction proceedings. As already noted, the information therein consists primarily of the Commission's queries in relation to the level at which specific provisions of the Directive had been transposed and the UK's responses to those queries. The Commissioner is not persuaded therefore that disclosure would have been likely to prejudice relations between both parties.
22. In the Commissioner's view, 'likely to prejudice' means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote. The Commissioner is not persuaded that the possibility of prejudice to relations between the UK and the Commission would have been real and significant in the event of the disclosure of the disputed information.
23. Therefore, for the above reasons, the Commissioner finds that the exemption at section 27(1)(b) was not engaged in respect of the disputed information.

Section 36(2)(c)

24. Information is exempt from disclosure on the basis of section 36(2)(c) if, in the reasonable opinion of a qualified person, disclosure of the

information under the Act would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

25. The public authority explained that Pat McFadden MP, then Minister of State for Employment Relations and Postal Affairs at the public authority was the qualified person (QP) whose opinion was sought and received. The Commissioner is satisfied that the Minister was the correct QP by virtue of the provisions of section 36(2)(c) which clearly states that any Minister of the Crown is a QP in relation to information held by a government department.
26. The public authority explained that the QP's opinion was sought on 08 December 2008 and it was provided on 10 December 2008. It also provided the Commissioner with copies of the submissions and the QP's opinion. The QP essentially agreed with a recommendation by officials that the exemption was engaged because 'the conduct of public affairs could be interpreted broadly to include the UK's infringement negotiations with the European Commission'. The Commissioner accepts that the UK's infraction proceedings fall within the scope of the exemption at section 36(2)(c). It is in the interest of good government to ensure that the UK is able to respond effectively to allegations of infraction and in the Commissioner's opinion, this falls within the scope of public affairs.
27. It was not clear whether the QP considered the prejudice to infringement negotiations between the UK government and the Commission 'would' or 'would be likely to' occur. However, in *McIntyre v The Information Commissioner and the Ministry of Defence (EA/2007/0068)*, the Tribunal commented at paragraph 45;

'We consider that where the qualified person does not designate the level of prejudice, that Parliament still intended that the reasonableness of the opinion should be assessed by the Commissioner but in the absence of designation as to level of prejudice that the lower threshold of prejudice applies, unless there is other clear evidence that it should be at the higher level.'
28. As far as the Commissioner can see, the public authority's arguments were not suggestive that the prejudicial effect of disclosure on the infringement proceedings 'would' occur. The Commissioner therefore considered whether the QP's opinion was reasonable in substance based on the likelihood of prejudice to the ongoing infringement proceedings.
29. The infringement proceedings in relation to the Directive were ongoing at the time of the request. The Commissioner considers that the disclosure of the disputed information in those circumstances could

have affected the UK government's ability to effectively respond to the formal notices issued by the Commission. Disclosure may have placed the government in a position whereby in addition to negotiating with the Commission, it had to at the same time address the political fallout from the detailed exposure of its position to external commentators. This would have been likely to hamper its ability to effectively defend its position before the Commission. In the Commissioner's view, Member States are entitled to reasonable expectations of confidentiality in correspondence with the Commission which may lead to a Reasoned Opinion or referral to the European Court of Justice (ECJ).

30. The Commissioner is therefore satisfied that, in respect of all the withheld information, the QP's opinion was reasonably arrived at and reasonable in substance. He therefore finds that disclosure would have been likely to prejudice the UK's negotiations with the Commission in the course of the infringement proceedings and the exemption at section 36(2)(c) was therefore correctly engaged.

Public Interest Test

31. The exemptions at section 36 are qualified. The Commissioner therefore needs to also determine whether in all the circumstances of the case the public interest in favour of disclosure is outweighed by the public interest in maintaining the exemption.

Public interest arguments in favour of disclosing the requested information

32. The public authority recognised the general public interest in making government more transparent and accountable by making information available to the public. It also recognised that this would enable the public to contribute more effectively to policy making.
33. The Commissioner considers that there was a public interest in knowing details of the alleged infringements by the government to allow the public to form constructive opinions regarding the transposition of the Directive.
34. The Commissioner also agrees with the complainant that there was a public interest in fully understanding whether the exemptions on religious grounds which were subsequently included in the Employment Equality (Religion or Belief) Regulations 2003 (2003 Regulations) reflect the spirit and aspirational aims of the Directive. The disclosure of the disputed information could have shed more light on the Commission's interpretation of the UK's religious exemption provisions.

Public interest arguments in favour of maintaining the exemption

35. The public authority explained that there was a public interest in ensuring that the government was able to undertake rigorous and candid assessment of its options whilst the infringement proceedings were still ongoing. Disclosure of the disputed information would have therefore run contrary to this public interest because the consideration of various options could have been hindered by constant external and/or media involvement.
36. The public authority therefore concluded that on balance the public interest lay with the need for the government to be able to effectively conduct infringement negotiations with a view to avoiding referral to the ECJ.

Balance of the public interest arguments

37. The Commissioner considers that there was a significant public interest in knowing the details of the Commission's position as well as that of the government in relation to parts of this specific Directive which the Commission considered had been incorrectly transposed.
38. In the Commissioner's view however, the timing of the request is crucial in this case. The Commission had not withdrawn the infraction proceedings or issued a reasoned opinion at the time of the request.³ He therefore agrees with the public authority that there was a need to preserve safe space for officials to be able to consider various options during their negotiations with the Commission.
39. In addition, the Commissioner considers that there was significant public interest in ensuring that constant exposure to external comments and/or media comments during those deliberations did not affect the frankness and candour of officials in their deliberations to the detriment of the UK's position in the infringement proceedings. The Commissioner can certainly see the argument that in the face of constant external and/or media scrutiny, the written responses from UK officials are likely to have been less candid. It was therefore important in the Commissioner's view for the negotiations to be conducted without such distractions so as not hamper the government's ability to defend its position before the Commission.
40. For the above reasons, the Commissioner finds that in all the circumstances of the case, the public interest in maintaining the exemption at section 36(2)(c) in respect of the disputed information did outweigh the public interest in disclosure.

³ According to the public authority the Commission issued a reasoned opinion on 20 November 2009

41. In light of the above decision, the Commissioner did not exercise his discretion to determine whether or not to accept the late reliance on the exemption at section 27(1)(c).

The Decision

42. 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:
43. The public authority correctly withheld the disputed information on the basis of the exemption at section 36(2)(c) of the Act.
44. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
45. The exemption at section 27(1)(b) was incorrectly engaged in respect of the disputed information.
46. The public breached section 17(1) for failing to rely on the exemption at section 36(2)(c) within 20 working days of the request.

Steps Required

47. The Commissioner requires no steps to be taken.

Other matters

48. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

Part VI of the section 45 Code of Practice (the "section 45 code") makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of

the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it took over 40 working days for an internal review to be completed, despite the publication of his guidance on the matter.

Right of Appeal

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

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals
PO Box 9300
Arnhem House
31 Waterloo Way
Leicester
LE1 8DJ

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 sent.

Dated the 19th day of August 2010

Signed

**Gerrard Tracey
Principal Policy Adviser**

**Information Commissioner's Office
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Wilmslow
Cheshire
SK9 5AF**

Legal Annex

International Relations

Refusal of Request

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 17(2) states –

"Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and

- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached."

Section 17(3) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of

section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

(a) that, in all the circumstances of the case , the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

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

Section 17(4) provides that -

"A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

Section 17(5) provides that –

"A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact."

Section 17(6) provides that –

"Subsection (5) does not apply where –

- (a) the public authority is relying on a claim that section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request."

Section 17(7) provides that –

"A notice under section (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50."

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."

Section 27(4) provides that –

"The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a)-

- (a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1), or
- (b) would involve the disclosure of any information (whether or not already recorded) which is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court."

Section 27(5) provides that –

"In this section-

"international court" means any international court which is not an international organisation and which is established-

- (a) by a resolution of an international organisation of which the United Kingdom is a member, or
- (b) by an international agreement to which the United Kingdom is a party;

"international organisation" means any international organisation whose members include any two or more States, or any organ of such an organisation;

"State" includes the government of any State and any organ of its government, and references to a State other than the United Kingdom include references to any territory outside the United Kingdom."

Prejudice to effective conduct of public affairs.

Section 36(1) provides that –

"This section applies to-

- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

Section 36(2) provides that –

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

- (a) would, or would be likely to, prejudice-
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
 - (iii) the work of the executive committee of the National Assembly for Wales,
- (b) would, or would be likely to, inhibit-
 - (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.

Section 36(3) provides that –

"The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public

authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2)."

Section 36(4) provides that –

"In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words "in the reasonable opinion of a qualified person".

Section 36(5) provides that –

"In subsections (2) and (3) "qualified person"-

- (a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown,
- (b) in relation to information held by a Northern Ireland department, means the Northern Ireland Minister in charge of the department,
- (c) in relation to information held by any other government department, means the commissioners or other person in charge of that department,
- (d) in relation to information held by the House of Commons, means the Speaker of that House,
- (e) in relation to information held by the House of Lords, means the Clerk of the Parliaments,
- (f) in relation to information held by the Northern Ireland Assembly, means the Presiding Officer,
- (g) in relation to information held by the National Assembly for Wales, means the Assembly First Secretary,
- (h) in relation to information held by any Welsh public authority other than the Auditor General for Wales, means-
 - (i) the public authority, or
 - (ii) any officer or employee of the authority authorised by the Assembly First Secretary,
- (i) in relation to information held by the National Audit Office, means the Comptroller and Auditor General,
- (j) in relation to information held by the Northern Ireland Audit Office, means the Comptroller and Auditor General for Northern Ireland,
- (k) in relation to information held by the Auditor General for Wales, means the Auditor General for Wales,
- (l) in relation to information held by any Northern Ireland public authority other than the Northern Ireland Audit Office, means-
 - (i) the public authority, or
 - (ii) any officer or employee of the authority authorised by the First Minister and deputy First Minister in Northern Ireland acting jointly,

- (m) in relation to information held by the Greater London Authority, means the Mayor of London,
- (n) in relation to information held by a functional body within the meaning of the Greater London Authority Act 1999, means the chairman of that functional body, and
- (o) in relation to information held by any public authority not falling within any of paragraphs (a) to (n), means-
 - (i) a Minister of the Crown,
 - (ii) the public authority, if authorised for the purposes of this section by a Minister of the Crown, or
 - (iii) any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown."

Section 36(6) provides that –

"Any authorisation for the purposes of this section-

- (a) may relate to a specified person or to persons falling within a specified class,
- (b) may be general or limited to particular classes of case, and
- (c) may be granted subject to conditions."

Section 36(7) provides that –

A certificate signed by the qualified person referred to in subsection (5)(d) or (e) above certifying that in his reasonable opinion-

- (a) disclosure of information held by either House of Parliament, or
- (b) compliance with section 1(1)(a) by either House, would, or would be likely to, have any of the effects mentioned in subsection (2) shall be conclusive evidence of that fact.