

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 20 December 2010

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

Summary

The complainant requested information from the Department for Culture, Media and Sport comprising of correspondence in connection with requests made by the BBC and Channel 4 for exemption from certain duties under the Equality Act 2010. This request was refused under section 35(1)(a) (formulation and development of government policy) of the Act. In respect of the information which continues to be withheld the Commissioner is satisfied that the exemption is engaged and, in all the circumstances of this case, the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner orders no steps to be taken.

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. The Equality Act 2010 is new legislation which protects the rights of individuals and advances equality of opportunity for all. It provides a framework of discrimination law which protects individuals from unfair treatment and promotes a fair and more equal society. The primary purpose of the Act is to consolidate the numerous Acts and Regulations which make up the UK's anti-discrimination law.
3. Ninety per cent of the Equality Act 2010 came into force on 1 October 2010. A section of the Act which is not yet in force is that relating to the general and specific duties of public bodies under the Act. The

government is still in consultation with those bodies regarding their proposed duties under the Act.

The Request

4. On 1 May 2009 the complainant made the following request for information to the Department for Culture, Media and Sport (DCMS) in accordance with section 1 of the Act:

"I understand that the DCMS has received requests from the BBC and Channel 4 to be exempted from certain duties in the new Equality Bill. Please could you send me copies of correspondence in connection with these requests?" ("the requested information").
5. The DCMS replied to the complainant on 2 June 2009, stating that the DCMS' preliminary view was that the requested information was exempt from disclosure under sections 35 and 42 of the Act, however it required time to consider the public interest test in relation to those exemptions. Section 41 of the Act was not cited at that time.
6. On 7 August 2009 the DCMS issued a refusal notice to the complainant in respect of all of the requested information, citing sections 35(1)(a) and 41 of the Act as a basis for refusing to disclose that information.
7. On 18 August 2009 the complainant submitted a refined request to the DCMS, which read as follows:

"Please could you let me know whether the DCMS would be prepared to just release the originating communications from the BBC and Channel 4, and not including any subsequent correspondence?" ("the refined request").
8. On 4 September 2009 the DCMS wrote to the complainant stating that section 35(1)(a) of the Act applied to the refined request for the same reasons as the original request.

The Investigation

Scope of the case

9. On 28 August 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:

- DCMS' application of the exemptions under sections 35(1)(a) and 41 of the Act to the withheld information.
 - DCMS' failure to carry out an internal review of his original request.
10. The Commissioner notes that there was some confusion regarding whether the complainant's request of 18 August 2009 was a refined request or a request for internal review. The complainant viewed the request as a request for internal review, whereas the DCMS treated it as a refined request and responded on 4 September 2009. The response was as outlined in paragraph 8 above. The Commissioner and the DCMS have had discussions and the DCMS has addressed the confusion by carrying out an internal review of the complainant's original request. Therefore, the Commissioner considers that that matter was resolved informally and has not addressed it in this Notice.

Chronology

11. On 4 September 2009 the Commissioner wrote to the complainant acknowledging safe receipt of his complaint. He informed the DCMS of the complaint on 23 September 2009. The Commissioner asked the DCMS to carry out an internal review of its response to the complainant's original request.
12. After several months of correspondence between the complainant and the DCMS, involving the Commissioner on some occasions, the DCMS on 10 May 2010 provided the complainant with the result of its internal review. That result was that some of the requested information was disclosed to the complainant, however the remainder was still withheld under sections 35(1)(a) and 41 of the Act ("the withheld information").
13. On 10 September 2010 the Commissioner explored the possibility of informal resolution of the matter by asking the DCMS whether it would be prepared to release some further information on 1 October 2010 since the majority of the Equality Act 2010 would then be in force. However, since nothing has been forthcoming from the DCMS, the Commissioner has proceeded to make his decision in this matter based on his findings up until that date.

Findings of fact

14. The requested information consists of correspondence between the DCMS and the BBC and Channel 4 regarding certain duties of those public bodies as set out in the Equality Bill, which, on 1 October 2010, came into force as the Equality Act 2010. However, the sections of the

Act setting out the duties of those public bodies are not yet in force and are still subject to consultation with those and other public bodies.

15. The complainant was provided with some of the requested information by way of informal resolution. The withheld information consists of certain extracts from the correspondence in respect of which the DCMS still maintains its position that the exemption under section 35(1)(a) of the Act is engaged.

Analysis

Section 35(1)(a) – the formulation or development of government policy

16. Section 35(1)(a) provides that information that relates to the formulation or development of government policy is exempt information. The task in determining whether this exemption is engaged is to consider whether the information in question can be accurately characterised as relating to the formulation or development of government policy.
17. The Commissioner's view is that the term 'relates to' as it is used in the wording of this exemption can safely be interpreted broadly. At paragraph 58 of *DfES v the Commissioner & Evening Standard*¹, the Information Tribunal suggested that whether an item of information can be accurately characterised as relating to government policy should be considered on the basis of the overall purpose and nature of that information, rather than on a line by line dissection.
18. The DCMS applied the exemption at section 35(1)(a) to all of the withheld information. Therefore the Commissioner has looked at section 35(1)(a) first, and will move on to consider section 41(1) if any information has not been correctly withheld under section 35(1)(a).
19. The Commissioner notes that the withheld information in this case consists of extracts of correspondence between the government and certain parties regarding their duties under the Equality Bill, which, at the time of the request, was still being developed and was not in force as an Act of Parliament. Discussions between the DCMS and certain public bodies regarding their duties under the Bill were still very much ongoing, meaning that the policy surrounding this was fluid and subject

¹ EA/2006/0006; 19/02/07

to change at the time of the request. Indeed, the section of the Bill, now the Equality Act 2010, to which the complainant's request relates, was still not in force at the time of issuing this Notice, and discussions about its implementation were ongoing. The Commissioner accepts that, whilst government policy is in the process of being turned into legislation and discussions are still taking place prior to – and for the purposes of – finalising the implementation of the legislation, the formulation and development of the policy is still ongoing. Therefore the Commissioner is satisfied that the withheld information relates to the development of government policy and falls within the class of information specified in the section 35(1)(a) exemption.

Public interest test

20. Section 2(2)(b) of the Act states that a public authority may refuse to disclose information requested which is subject to a qualified exemption if in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
21. Section 35(1)(a) is a qualified exemption and is therefore subject to a public interest test. This requires the Commissioner to determine whether the public interest is best served by maintaining the exemption or by releasing the information sought.
22. In *DFES* the Tribunal set out 11 guiding principles for considering the public interest in relation to section 35(1)(a) of the Act. The Commissioner has been mindful of these principles when considering the public interest in this case.

Public interest arguments in favour of disclosing the withheld information

23. The Commissioner has considered the content and nature of the withheld information, which comprises correspondence between the DCMS and the BBC and Channel 4 in relation to the proposed duties of the respective broadcasters under the Equality Bill. That correspondence expresses certain views and concerns of the BBC and Channel 4 in relation to certain duties which it is proposed are to be set down as part of the Equality Act 2010.
24. The Commissioner considers that there is a legitimate public interest in the disclosure of the withheld information in order that the public might have a better understanding of the process by which government policy is formulated with regard to the duties of public bodies under anti-discrimination legislation. The Commissioner acknowledges that the promotion of equality, diversity and non-discrimination by way of such legislation are topics which are of great public interest and have

been the subject of significant public debate. The Commissioner accepts that disclosure of correspondence between the DCMS and broadcasters would inform the public as to the way the DCMS explored policy options.

25. There is also a general public interest in the transparency of public authorities and a specific public interest in being able to assess the quality of advice given to government ministers and the subsequent decision-making which may be based on that advice. The DCMS accepts that these are all valid public interest arguments in favour of disclosing the information.

Public interest arguments in favour of maintaining the exemption

26. The Commissioner recognises that it may be argued that it is in the public interest for government to have a private, “safe space” in which to formulate policy, and that such arguments carry particular weight where policy formulation was ongoing at the time of the request.
27. It is arguable that government, with input from others, should be given sufficient space away from public scrutiny to carry out the policy making process effectively. This includes protecting the government’s ability to gather free and frank input from others to inform its decisions. There is a public interest in ensuring that options are fully debated and that people are not deterred from providing full and frank suggestions and input to ensure that the best options are put forward.
28. The DCMS argued that, at the time of the request, the government was working with a number of third parties/stakeholders in order to ensure that the development of policy in relation to the Bill was based on the best possible advice. The public interest may not be served by premature disclosure of material before full and thorough consultations and discussions have taken place and satisfactory conclusions reached. The views being expressed related to ongoing policy development and therefore it would be damaging (in respect of the formulation of the policy issues in question) to disclose the discussions before decisions had been taken and policy agreed. In respect of this process, organisations making their representations need to be able to give their opinions in a free and frank manner.
29. More generally – and in relation to future contributions to the policy making process - the premature release of the information requested may mean that external experts or stakeholders may not feel that they can be as open; essentially, there would be a “chilling effect” on such expressions of opinion, resulting in the risk of damage or inhibition to the ongoing consultations with a view to final policy formulation in this case.

30. The DCMS maintained that Ministers and officials need to be able to conduct rigorous and candid risk assessments of their policies and programmes such as Bills in the process of becoming law, including considerations of the pros and cons, without there being premature disclosure which might affect full and objective consideration of all options. Any premature publication could hinder the frank discussions and rigorous consideration of expert advice required.

Balance of the public interest arguments

31. The Commissioner accepts that there is a general public interest in transparency in government and that there is a further, more specific public interest in being able to assess whether government ministers have received the best quality advice possible in order to enable them to make the best possible decisions based on that advice. The Commissioner therefore considers that there are valid public interest arguments both for and against disclosure of the withheld information and has gone on to balance both sets of arguments in order to ascertain whether one set of arguments outweighs the other in all the circumstances of the case.
32. The Commissioner accepts that policy matters regarding equality and discrimination are of significant public interest, as is the manner in which legislation regarding these topics is discussed and drafted. The issue of the duties of public bodies under that legislation would also be a matter of public interest. It is arguable that disclosure of the withheld information would better inform public debate on these potentially contentious "hot" topics. The Commissioner accepts that this argument carries some weight.
33. However, the withheld information itself specifically relates to one part of the Equality Act 2010, i.e. the duties of public bodies under that Act. That matter, as stated, was one which was subject to consultation between the government and certain public bodies at the time of the request and is still subject to ongoing consultation. Furthermore the complainant has been provided with some of the information he requested, which is now in the public domain. That information outlines the current obligations of the BBC and Channel 4 in relation to the promotion of equality and non-discrimination and certain concerns they have voiced in relation to their proposed duties under the Equality Act 2010. The Commissioner believes that this information is useful in order to inform public debate about that issue.
34. Specifically regarding the content of the information which continues to be withheld the Commissioner is of the view that, if disclosed, it would to some extent further serve the public's understanding of the policy making process in this case, especially with regard to representations

made to government on the issue. In doing so it would also further serve the public interest in transparency and accountability, both in relation to this issue and more generally. The Commissioner holds these views as a result of his analysis of the withheld information which he considers to be much more sensitive – due to the nature of its free and frank content - than that which was disclosed to the complainant. However the Commissioner is conscious that the nature of this information will also mean that the public interest arguments in favour of the maintenance of the exemption – i.e. those which identify harm to the public interest as a consequence of disclosure - are likely to carry much more weight.

35. In considering the balance of the public interest arguments the Commissioner has taken into account the underlying principles involved in balancing the public interest test under section 35(1)(a) which were set out by the Tribunal in the *DFES* case. The Commissioner has focused on two of these principles in particular, the first being the timing of the request:

“The timing of a request is of paramount importance...Whilst policy is in the process of formulation it is highly unlikely that the public interest would favour disclosure unless for example it would expose wrongdoing in government. Both ministers and officials are entitled to hammer out policy without the...threat of lurid headlines depicting that which has been merely broached as agreed policy.”

36. The second principle relates to the content of the information itself, on which the Tribunal commented:

“The central question in every case is the content of the particular information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case.”

37. In relation to the question of timing, the DCMS has argued that premature disclosure of the withheld information could have a “chilling effect” on future expressions of opinion by third parties, leading to the risk of inhibition of or damage to future decision-making. The Commissioner accepts that there is a risk in this instance of such a “chilling effect”, as equality and discrimination are topics of significant public interest and which can be extremely contentious. Premature disclosure of the views expressed by third parties in relation to the developing Equality Bill would be very likely to prejudice the quality and candour of future views and advice and in turn damage or inhibit future decision-making, policy formulation and development. The Commissioner agrees that this would not be in the public interest

as the public relies upon government to make decisions and develop legislative and other policy based on the very best quality advice possible.

38. The Commissioner accepts that there is a risk of the “chilling effect,” however he has considered how much weight should be attached to that argument in this instance. The BBC and Channel 4 are public bodies whose interests lie very much in being able to engage with the DCMS in relation to their proposed duties under the Equality Act 2010. If they refused to engage in discussion and consultation with the DCMS out of fear that their views might be disclosed, the policy would be developed and the legislation finalised without taking into account the views, opinions and concerns of those who would be directly affected by it. It is unlikely, therefore, that the two particular third parties in this case would allow fear of disclosure to curtail the expression of their views as the case for putting forward their views is much more compelling. Therefore, the Commissioner has attached only limited weight to the “chilling effect” argument in this case.
39. In relation to the question of timing, the complainant submitted his request whilst the policy formulation and development was still ongoing, i.e. before the Equality Bill came into force as an Act of Parliament. Taking the content of the information into account in the context of the timing, the Commissioner finds that disclosure of the withheld information at that stage would have impacted on the safe space required within government for the formulation and development of that policy. He is of the view that government ministers and officials are entitled to that safe space in order to debate issues with a view to formulating policy without the risk of premature disclosure of the issues under discussion, which could lead to, amongst other considerations, media headlines erroneously stating that the policy had been agreed when in fact it is still very much subject to discussion and consultation.
40. It would not be in the public interest for lurid or sensationalist headlines to give the public the impression that tentative views constituted agreed and finalised policy or legislation, as this could jeopardise the public’s faith in good government. This is particularly important in this case when such contentious issues are under discussion. Therefore the Commissioner is inclined to attach significant weight to this particular argument in favour of the maintenance of the exemption.
41. The Commissioner has considered all public interest arguments and concludes, on balance, that, in all the circumstances of the case, the public interest in disclosing the withheld information is outweighed by

the public interest in maintaining the exemption under section 35(1)(a).

Section 41 – Information provided in confidence

42. The DCMS relied upon the exemption under section 41 of the Act as a basis for non-disclosure of some of the withheld information. However, the Commissioner believes that the entirety of the withheld information is covered by section 35(1)(a) and has therefore not considered any arguments in relation to section 41.

Procedural Requirements

Section 17 – Refusal of request

43. The Commissioner considers that the DCMS' letter to the complainant of 2 June 2009 constitutes a refusal notice under section 17(1) of the Act as it states that it is refusing to disclose the information requested by the complainant under sections 35(1)(a) and 42 of the Act.
44. Since that refusal notice does not state that the DCMS is relying on the exemption under section 41 of the Act as a basis for non-disclosure of the requested information, an exemption upon which it later relied, the Commissioner considers that this is a breach of section 17(1)(b) as the DCMS has not specified all of the exemptions in question.
45. The Commissioner considers the DCMS' letter to the complainant of 7 August 2010 to constitute a "separate notice" under section 17(3) as it outlined the DCMS' public interest arguments in the case.

The Decision

46. 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 withheld information was correctly withheld under section 35(1)(a) of the Act.
47. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- The DCMS failed to meet the requirements of section 17(1)(b) in that it failed to notify the complainant within twenty working days of the request that it was also seeking to rely upon section 41 to withhold some of the requested information.

Steps Required

48. The Commissioner requires no steps to be taken.

Right of Appeal

49. 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,
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

50. 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.

51. 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 20th day of December 2010

Signed

**Alexander Ganotis
Group Manager – Complaints Resolution
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Cheshire
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Legal Annex

Freedom of Information Act 2000

Public interest test

(2) 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—

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

Formulation of government policy

35(1) Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to—

(a) the formulation or development of government policy,

Information provided in confidence

41(1) Information is exempt information if-

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

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

Refusal of request

17(1) 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.

(2) 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.

(3) 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.