

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 November 2011

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

Decision (including any steps ordered)

1. The complainant requested various information from the Department for Culture, Media and Sport (DCMS) concerning HTTP cookies and spyware and organisations that may produce this type of software. DCMS stated that some of the information requested was not held, and refused other requests on various grounds.
2. The Commissioner's decision is that DCMS was correct to state that some of the information was not held and withheld other information correctly. However, the Commissioner has also found that DCMS cited section 12 (cost limit) of the FOIA incorrectly and that it applied the exemption provided by section 40(2) (personal information) incorrectly in relation to information about senior officials.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - In relation to requests (ii) and (v), disclose to the complainant the relevant information relating to senior officials.
 - In relation to request (iv), contact the complainant to seek clarification as to what information is sought, and provide advice and assistance as to how this request may be refined to bring it within the cost limit. If the complainant chooses to respond with a refined request, DCMS should respond to this in accordance with the FOIA by either disclosing the requested information, or giving valid reasons under the Act for why this information will not be disclosed.

4. The public authority must take these steps within 35 calendar days of the date of this Decision Notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the FOIA and may be dealt with as a contempt of court.

Request and response

5. The requests made by the complainant to DCMS all related to the complainant's concerns about spyware and HTTP cookies, and the dates of these were as follows.

(i) 20/05/11

"...details and evidence that DCMS did carry out a due diligence on IAB complaint process..."

"...the report DCMS produced to give the assurance IAB were fit to self regulate BTW"

(ii) 23/05/11

"whether anyone at DCMS including Mr Vaizey are on the board of any of the vendors or companies who might benefit from this invasion of privacy...[whether] any senior or policy staff at DCMS has shares within these co's or if partners or relatives have shares or financial interests in this area"

(iii) 23/05/11

"...any dinners, lunches, drinks or gifts that DCMS staff or Mr Vaizey may have received or benefitted from again relating to IAB, who you seem to have a close relationship [with] or any business likely to benefit from DCMS staff championing..spywear"

(iv) 24/05/11

"All relevant [to the complainant's concerns about spyware] reports proposals, consultations, recommendations, objections and feedback data from DCMS and DCMS external consultants and third parties..."

(v) 24/05/11

"...biographies or CVs of staff"

6. The responses from DCMS to these requests were as follows.

(i) 15/06/11

No information held.

(ii) 27/05/11

Refused under the exemptions provided by sections 21 (information accessible by other means) and 40(2) (personal information of third parties) of the FOIA.

(iii) 15/06/11

Refused under the exemptions provided by sections 21 and 22 (information intended for future publication) of the FOIA.

(iv) 15/06/11

Refused on the grounds of cost under section 12(1) of the FOIA.

(v) 15/06/11

Refused under the exemption provided by section 40(2) of the FOIA.

7. Following an internal review DCMS wrote to the complainant on 27 June 2011. It stated that the earlier handling of the requests was upheld.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way her request for information had been handled on 28 June 2011. The complainant had exchanged a number of items of correspondence with DCMS, which had contained many questions. It was agreed with the complainant at the outset of this case that this case would cover only those requests set out above.
9. During the correspondence between DCMS and the complainant various alternative grounds for refusing the requests to those set out above were mentioned by DCMS. In particular, section 14(1) (vexatious requests) was mentioned at several points. During correspondence with the Commissioner's office DCMS confirmed that its substantive grounds for refusing the requests were those set out above. This notice therefore considers whether the grounds for refusal set out above were applied correctly.

Reasons for decision

Request (i)

10. DCMS has stated that it holds no information falling within the scope of this request. The task for the Commissioner here is to consider whether, on the balance of probabilities, DCMS is correct to state that it does not hold information falling within the scope of this request. In reaching a conclusion on this issue, the Commissioner has considered the explanation provided by DCMS of the searches carried out for this information, as well as having formed a view based upon the wording of the request of the likelihood of relevant information being held.
11. DCMS has described the searches carried out for this information, stating that electronic searches were carried out within the DCMS electronic filing system using appropriate search terms. Electronic searches were also carried out of information transferred to DCMS from the Department for Business, Innovation and Skills (BIS) following a transfer in responsibility between these two departments. An electronic search of information held by BIS was also carried out in acknowledgement that information of relevance to the request may have continued to have been held by BIS. These electronic searches did not locate any information of relevance to the request.
12. DCMS has also stated that officials working in the relevant policy area were asked to check their own electronic records for information of relevance to the request. Again, these searches did not locate any relevant information.
13. As to what the wording of the request suggests about the likelihood that information of relevance to this would be held, DCMS provided an explanation to the complainant as to why it did not hold information falling within the scope of this request. This explanation stated that *"DCMS has not undertaken 'a due diligence on IAB complaint process' and has no intention of doing so"* and *"DCMS has not produced a report 'to give the assurance IAB were fit to self regulate'"*.
14. The view of the Commissioner is that DCMS has carried out an appropriately thorough search for relevant information. He is also unaware of any grounds upon which to dispute the explanations given as to why it does not hold relevant information. The conclusion of the Commissioner is, therefore, that on the balance of probabilities DCMS was correct to state that it did not hold information falling within the scope of this request.

Request (ii)

15. In relation to information about Ed Vaizey, an MP and Government Minister, DCMS cited section 21 and stated that this information was available on the Parliament website, providing the appropriate address to the complainant. Section 21 provides an exemption for information that is available by other means. The Commissioner has verified that information about the financial interests of MPs is available on the Parliament website and so accepts that section 21 is engaged in relation to this information.
16. In relation to the remainder of the information, that relating to officials and their partners or relatives, DCMS cited section 40(2). This provides an exemption for information that is the personal data of any individual aside from the requester and where the disclosure of that personal data would be in breach of any of the data protection principles. Consideration of this exemption is a two-stage process. First, the information in question must constitute the personal data of an individual aside from the requester. Secondly, the disclosure of this personal data must be in breach of at least one of the data protection principles.
17. Covering first whether this information constitutes the personal data of any individual, the definition of personal data given in section 1 of the Data Protection Act 1998 (DPA) states that for information to constitute personal data it must relate to an individual and that individual must be identifiable from this information. Clearly any information held that fell within the scope of the request would relate to the individual whose financial interests were recorded within. The Commissioner also considers it highly likely that these individuals would be named in any such information. On this point, therefore, the conclusion of the Commissioner is that this information would constitute the personal data of individuals aside from the complainant.
18. As to whether disclosure of this personal data would be in breach of any of the data protection principles, the Commissioner has focussed here on the first data protection principle, which requires that personal data be processed fairly and lawfully, and specifically on the question of whether disclosure of this information would be, in general, fair. The focus of this analysis is on whether disclosure of this information would be in general fair to the individuals to which it relates. In forming a conclusion on this issue, the Commissioner has considered the consequences of disclosure upon these individuals, their reasonable expectations as to whether this information would be disclosed, and the legitimate interests of the public in this information.

19. In relation to partners or relatives of officials within the public authority, the Commissioner considers that the reasonable expectations of these individuals are the crucial factor here. He believes it to clearly be the case that these individuals would hold no expectation that DCMS would disclose any information it holds about their financial interests. He has therefore concluded that it would clearly be unfair to these individuals for DCMS to do so. Therefore, in relation to any relevant information that DCMS holds about the partners or relatives of DCMS officials, the Commissioner finds that disclosure would be in breach of the first data protection principle and so the exemption provided by section 40(2) is engaged.
20. The Commissioner has reached differing conclusions in relation to junior and senior officials and he would note at this point that he would expect that DCMS can employ reasonable and established criteria for differentiating which level of staff are considered junior or senior. In relation to junior officials the Commissioner has again considered the reasonable expectations of these individuals about disclosure. For similar reasons as recorded above, the Commissioner believes that junior staff would have a reasonable expectation that information held about them by their employer would be kept confidential, owing to the general expectation of confidence that an employer will not disclose employee personal data without good reason. The Commissioner also does not believe that there would be any legitimate public interest in the disclosure of information about junior officials. Therefore, in relation to information about junior officials, the Commissioner believes that disclosure would be unfair and in breach of the first data protection principle. This means that the exemption provided by section 40(2) is engaged in relation to that information.
21. Turning to senior officials, these officials may prefer this information not to be disclosed. However, the Commissioner would not regard such a preference as producing a reasonable expectation of confidence, given the senior status of these officials. The view of the Commissioner is also that any negative consequence upon these individuals would be outweighed by the legitimate public interest in disclosure. This public interest would be on the basis of improving public awareness of the financial interests of senior officials who are paid through public funds. In relation to senior officials, the view of the Commissioner is, therefore, that disclosure would be fair and in accordance with the first data protection principle and so the exemption provided by section 40(2) is not engaged. At paragraph 3 above, DCMS is required to disclose this information.

Request (iii)

22. In response to this request DCMS cited section 21 in relation to information made available online. The Commissioner has verified that DCMS does make information about hospitality received by Ministers and senior officials available online and accepts that this exemption does apply in relation to information published on that website.
23. DCMS also cited section 22 in relation to information that was not yet published online. It stated that information was published quarterly so relevant information may not have been published at the time of the request pending the next quarterly update. Section 22 specifies three conditions for this exemption to be engaged.
 - The information is held with a view to publication at some future date, whether or not determined.
 - This information was intended for publication at the time that the request was made.
 - It is reasonable in the circumstances for the information to be withheld until the intended date of publication.
24. This exemption is also qualified by the public interest. This means that the information should be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.
25. The Commissioner accepts that at the time of the request the information falling within the scope of the request that was not yet published was intended for publication in the next quarterly update. This covers the first two criteria set out above. The Commissioner believes that it was reasonable for the information that was not yet published to be withheld until the next publication date given that this was at the most three months following the date of the request and that this was an established means by which DCMS made information about hospitality available. Having found that these three criteria are met, the conclusion of the Commissioner is that the exemption provided by section 22 is engaged.
26. The next step is to consider the balance of the public interest. The key question here is whether there would have been a public interest in disclosure at the time of the request that would not have been served, or at least would not have been served to the same extent, by delaying publication until the next quarterly update.
27. The view of the Commissioner is that there is a significant and legitimate public interest in details of hospitality received by government Ministers

and by senior civil service officials. However, he also believes that this public interest is well served by the regular publication of this information by DCMS. It is more likely to be the case that the public interest in section 22 will not outweigh that in immediate disclosure in a case where the date of publication is far in the future following the date of the request, or where this date has yet to be determined. In this case the information was to be published at a defined date only shortly following the date of the request.

28. The Commissioner has identified no grounds on which to conclude that the public interest would have been better served through the immediate disclosure of the requested information rather than the planned date of publication shortly following the date of the request. This is on the basis that he believes that quarterly publication of this information would serve the public interest in the disclosure of this information equally as well. The conclusion of the Commissioner is, therefore, that the public interest in the maintenance of the exemption provided by section 22 outweighs the public interest in disclosure and so DCMS withheld information under this exemption correctly.

Request (iv)

29. DCMS cited section 12(1) of the FOIA in response to this request. This provides that a public authority is not obliged to comply with a request if to do so would exceed the cost limit, which is £600 for central government departments and £450 for all other public authorities. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the fees regulations) provide that the cost of compliance with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) effectively provides a time limit of 24 hours. The fees regulations also specify the tasks that can be taken into account when forming a cost estimate as follows.
- Determining whether requested information is held.
 - Locating the information.
 - Retrieving the information.
 - Extracting the information.
30. The task for the Commissioner here is to consider whether the estimate made by DCMS of the cost of dealing with request (iv) was reasonable. DCMS has provided little detail in support of the citing of this section. It has not, for example, given its estimate of the cost / time of dealing with this request, or specified the tasks that it believes would be necessary to undertake in order to comply with this request. Instead, the reasoning given by DCMS for citing this section was that this request

was ill-defined and could cover a potentially very large volume of information.

31. Section 16(1) of the Act requires that a public authority should offer appropriate advice and assistance to a person making a request. Where section 12 is cited, this should include advising the requester how the request could be refined in order that it may be possible to comply with it without exceeding the cost limit. In this case it also appears that it would have been appropriate for DCMS to seek clarification as to what information the complainant was requesting.
32. The lack of detail provided by DCMS about its cost estimate means that it is not possible for the Commissioner to conclude that the cost limit would have been exceeded through this request. His conclusion is, therefore, that section 12 does not apply. It appears that, instead of refusing this request on cost grounds, it would have been more appropriate and in line with section 16 for DCMS to have responded to this request by seeking clarification from the complainant as to what information was requested.
33. At paragraph 3 above DCMS is required to respond to the requester and seek clarification as to what information is sought in this request. The Commissioner would stress at this point that this does not preclude DCMS from refusing a clarified version of this request under section 12, or under any other provision of the FOIA, if it is appropriate to do so. Rather it is a recognition that it is appropriate for a public authority to obtain a proper understanding of a request prior to giving reasons for refusing it.

Request (v)

34. DCMS refused this request under section 40(2). As covered under request (ii), this section provides an exemption for information that is the personal data of an individual aside from the requester and where the disclosure of that personal data would be in breach of any of the data protection principles.
35. It is clear that biographies and CVs of staff would constitute the personal data of those individuals. The next step is to consider whether disclosure of this information would be in breach of any of the data protection principles. The Commissioner has again focussed on the first data protection principle here, which requires that personal data be processed fairly and lawfully. The conclusion as to whether disclosure would be in general fair is based on what the consequences of disclosure would be to the subjects, their reasonable expectations as to whether this

information would remain confidential and whether there is legitimate public interest in the disclosure of this information.

36. On the issue of consequences of disclosure on the subjects, it is clear that the complainant is seeking professional histories, rather than anything more personal or intrusive. The contents of a professional biography or CV would generally be chosen by the subject with the intention of presenting themselves in a positive light. The Commissioner does not therefore believe it likely that disclosure would result in any significant negative consequence to the subjects.
37. As to the reasonable expectations of the data subjects, the view of the Commissioner is that this would vary dependant on level of seniority. A junior official may expect that this information would not be disclosed by their employer, not due to any strong objection that they may have to disclosure, but due to a general expectation that personal information about staff at their level would not be disclosed by their employer. The Commissioner does not believe that any similar expectation could reasonably be held by a senior employee, however. It is well-established practice for an organisation to make available a professional history of its senior employees, meaning that there would reasonably be at least some expectation on the part of a senior employee that information about their professional history could be disclosed.
38. Finally, on the issue of whether there would be any legitimate public interest in this information, again the view of the Commissioner varies according to the professional seniority of the data subject. In relation to senior employees, the Commissioner believes that there is a legitimate public interest in disclosure on the basis of understanding more about the qualifications and experience of individuals who are paid senior level salaries through public funds. The Commissioner does not believe there to be any corresponding public interest relating to individuals in more junior positions.
39. The conclusion of the Commissioner is, for the reasons set out above, that disclosure of the information requested in relation to senior employees would not be unfair or in breach of the first data protection principle. This means that the exemption provided by section 40(2) is not engaged in relation to information about senior officials. In relation to information about junior officials, the Commissioner believes that disclosure would be unfair and so the exemption provided by section 40(2) is engaged. The public authority should again note the comments at paragraph 20 above as to how it should differentiate between junior and senior staff.

Right of appeal

40. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

41. 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.
42. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Jon Manners
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF