

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 May 2012

Public Authority: Ministry of Justice
Address: 102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant requested the full information the Information Commissioner had considered in an earlier decision where he ordered a summary of that full information to be disclosed. The full information, agreed between the parties, are the two letters of formal notice in which the European Commission alleged that the UK Government had not properly implemented Directive 95/46/EC. The MOJ relied on sections 27(1) (b), 27(1) (c), 27(1) (d) 27(2) and 35(1) (a) to withhold the requested information.
2. The Commissioner finds that the exemptions afforded by sections 27(1) (b), 27(1) (c), 27(1) (d) 27(2) and 35(1) (a) are not engaged.
3. The Commissioner's decision is that the Ministry of Justice is in breach of section 1 for having not communicated to the complainant the information he had requested.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation –
 - Provide the complainant with the information within the two letters of formal notice in which the European Commission alleged that the UK Government had not implemented the Directive 95/46/EC properly.
5. 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 pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

6. European Union Directive 95/46/EC ("the directive") stated aim is the protection of individuals as regards the processing of personal data and on the free movement of such data. The European Commission alleged that the United Kingdom had not properly implemented the directive.
7. The complainant made, amongst others, the following information requests on 1 October 2009:
 - "(i) A list of which Article(s) in Directive 95/46/EC (the Data Protection Directive) the European Commission have alleged have not been implemented properly by the UK Government.*
 - "(ii) In relation to each Article, summary information as to why the European Commission has made this claim.*
8. The MOJ refused the request, citing the exemptions provided by sections 27(1)(c) (prejudice to the interests of the UK abroad) and 27(2) (confidential information obtained from a state other than the UK, or from an international organisation or international court). This refusal was the subject of a complaint to the Commissioner by the complainant. The Commissioner adjudicated upon that complaint in issued decision notice FS50290504¹.
9. In FS50290504 the Commissioner said, that-
 - "(15.) When supplying to the Commissioner's office the information falling within the scope of the requests, the public authority provided the complete information, rather than a list and summaries. Consideration was given as to whether the analysis in this Notice should have been based upon the list and summary specified by the complainant and so whether the public authority should be required to collate the information into those forms.*
 - (16.) The conclusion on this point was that whilst section 11(1)(c) provides that a public authority should give effect to the preference of a requester as to the means by which they wish the information to be communicated, it does not mean that*

¹ http://www.ico.gov.uk/~media/documents/decisionnotices/2011/fs_50290504.ashx

exemptions cited should relate to anything other than the recorded information held by the public authority. In this case, therefore, the exemptions cited by the public authority relate to the recorded information from which the list and summary would be collated, rather than to information collated into the form requested by the complainant.

10. The Commissioner found that neither exemption, cited by the MOJ was engaged in relation to request (i). In relation to (ii) the exemptions were engaged however, the public interest in the maintenance of these exemptions did not outweigh the public interest in disclosure. The Commissioner therefore ordered the disclosure of, as requested, the list and the summation.
11. On appeal, the Information Tribunal in EA/2011/0116² endorsed the above quotation albeit in passing and not as part of its substantive decision (an obiter comment).

Request and response

12. On 12 May 2011, the complainant wrote to the MOJ and requested the full information that the Information Commissioner's Office (ICO) considered in relation to parts (i) and (ii) of his previous FOI request made on 1 October 2009 asking for information relating to Directive 95/46/EC (the Data Protection Directive).
13. There was then an exchange of correspondence between the parties. They agreed that the request was for the two letters of formal notice in which the European Commission alleged that the UK Government had not implemented the Directive 95/46/EC properly.
14. The MOJ told the complainant, on 7 July 2011, that it refused his request under the following exemptions under the FOIA:
 - Section 27(1)(b) (disclosure would prejudice relations between the United Kingdom and any other international organisation or court)

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<http://www.informationtribunal.gov.uk/DBFiles/Decision/i593/20111209%20Decision%20%20PTA%20Ruling%20EA20110116.pdf>

- Section 27(1)(c) (disclosure would prejudice the interests of the United Kingdom abroad)
 - Section 27(1)(d) (disclosure would prejudice the promotion or protection by the United Kingdom of its interests abroad)
 - Section 27(2) (confidential information provided by the EC as an international organisation)
 - Section 35(1)(a) (formulation of Government policy)
15. Following an internal review the MOJ wrote to the complainant on 12 August 2011. It stated that the review's outcome was the upholding of its original decision.

Scope of the case

16. The complainant, on 17 August 2011, contacted the Commissioner to complain about the MOJ's handling of his request for information. The complaint confirmed that by agreement with the MOJ the requested information was the two letters of formal notice in which the European Commission alleged that the UK Government had not implemented the Directive 95/46/EC properly.
17. The Commissioner asked the MOJ its views on the implications of the Commissioner's previous decision FS50290504. In that, the exemptions considered in FS50290504 were in relation to the held information (i.e. the two letters of formal notice) from which the summary would be collated rather than what would be contained in the requested summary itself.
18. The MOJ replied on the 23 December 2011 saying, amongst other things, that the complainant's

"... request dated 12 May 2011 was for the "full information" that the Commissioner considered in relation to limbs i and ii of the original request. It was clarified with... (the complainant)... that this referred to the two formal letters of notice from the Commission.

The information which is the subject of the current matter is of an entirely different nature to that which was released as a result of the previous decision. It does not therefore follow that a decision on the application of exemptions or an assessment of

where the public interest lies on limbs i and ii would have any bearing on the current matter. For example, in terms of application of the exemptions, a bare list of Articles in a Directive that are subject to infraction proceedings is a very different piece of information to the full letters of formal notice of infraction proceedings from the Commission, which are highly sensitive core infraction documents in live infraction proceedings.

While the Commissioner decided previously that the two exemptions were not engaged regarding the bare list and that the public interest did not favour disclosure regarding the summary grounds, he did not reach a view, and nor would we have expected him to, in respect of the two formal letters of notice, either regarding those two exemptions, the public interest test or indeed in relation to the additional exemptions relied on in the present matter".

19. The Commissioner rejects the above assertion of the MOJ. The Commissioner's view (as expressed in FS50290504) was that though a summary of information was requested what was to be determined was whether the exemptions affixed to the whole information which would give rise to the requested summary. As explained above the Information Tribunal said that this rationale of the Commissioner was correct.
20. Notwithstanding that the Commissioner's view is that his decision in FS50290504 applies to the information from which the summary was to derive he notes that the MOJ now seeks to rely on further exemptions not considered in that decision. The exemptions put forward by the MOJ and considered in FS50290504 were those provided by sections 27(1)(c) and 27(2). In addition to those, previously considered exemptions, the MOJ also relies on the exemptions provided by sections 27(1)(b) and 35(1)(a). These are new exemptions applied to withhold the requested information and the Commissioner must determine their application.

Reasons for decision

21. As stated above the Commissioner will consider the application of the exemptions provided by sections 27(1)(b), 27(1)(d) and 35(1)(a) of FOIA in detail.
22. The Commissioner appreciates that, pursuant to FS50290504, the MOJ has disclosed a summary of the requested information. The

Commissioner notes that a summary contains “the chief points of the matter; dispensing with unnecessary detail”³. That is the chief or substantive points of the requested information are already in the public domain. By definition what is yet to be disclosed is, by the earlier release of the summary, inconsequential to the substantive issues within the letters.

Section 27(1) (b)

23. Section 27(1) (b) provides for information to be exempt if its disclosure would, or would be likely to prejudice relations between the United Kingdom and any other international organisation or international court.
24. Consideration of this exemption is a two-stage process. Firstly, a determination as to whether the exemption engages. Secondly, the exemption is qualified by the public interest, meaning that the information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.
25. The MOJ maintains that disclosure of the two formal letters of notice would adversely affect relations between the UK and the European Commission. The MOJ maintaining that there is an expectation by both sides (i.e. the UK and the European Commission), inherent in the nature of infraction proceedings, that correspondence relating to the infraction is kept confidential to enable the dispute to be resolved in such a way that is of benefit to both parties. The amicable resolution of differences, and candour, are essential elements of good relations between the UK and the EU.
26. The Commissioner takes into account that when the information request was made the public, via the earlier release of the summary and list, has a pre-existing knowledge of its substantive content. Any prejudices (between the UK and the EC) that would or would be likely to occur due to the substantive content of the requested information would have, given its release, already have occurred. This state of affairs provides the contextual background to the Commissioner’s decision in this matter.
27. The MOJ state that the European Commission confirmed, in a letter dated 16 June 2011, that disclosure of the requested information would not be granted if a request were made to the European Commission. The European Commission saying that

³ Shorter Oxford English Dictionary, Volume 2, Fifth Edition (2005)

'The Commission is governed by Regulation 1049/2001. Article 4(2), third indent of this Regulation provides as follows: The institutions shall refuse access to a document where disclosure would undermine the protection of:

– (...)

– (...)

the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure."

28. The Commissioner does not take issue as to whether the European Commission would itself release the requested information. However, the MOJ does not state that the European Commission view is that the recipient of the requested information (i.e. United Kingdom) should not release them.
29. The Commissioner is unpersuaded by the MOJ that releasing the withheld information would be likely to prejudice (or prejudice any further) the relations between the UK and EC given that the public already knows its substantive content. The Commissioner cannot foresee therefore how releasing the non-substantive content of the letters can bring about the prejudice section 27(1)(b) seeks to prevent.

Section 27(1)(d)

30. Section 27(1) (d) exempts information from disclosure where to do so would prejudice the promotion or protection by the United Kingdom of its interests abroad.
31. The MOJ's view is that disclosure of the two letters of formal notice would make it more difficult for the UK to negotiate flexibly with the European Commission, to the prejudice of the UK's interest abroad. It states that it is well established that negotiated settlements of disputes in the pre-litigation phase require a confidential space for full and frank discussion of the matters at issue between the parties in question. This becomes impossible if key documents are to be disclosed by one of the parties. The MOJ reiterating that the European Commission has confirmed that it would not itself release these documents if requested. Resolution of some or all of the outstanding issues in the infraction proceedings is strongly in the UK's interests abroad.
32. The comments made by the Commissioner regarding section 27(1) (b) are similarly applicable here. By releasing a summary of the withheld information, the MOJ has already publically disseminated the substantive issues between the UK and the European Commissioner regarding the UK's alleged non-conformity with the Data Protection Directive.

Releasing now (for the first time) the non-substantive and/or unnecessary information that, by definition, did not form part of the summary is unlikely to prejudice the promotion or protection by the United Kingdom of its interests abroad over and above that caused (if any) by the release of the summary itself. The Commission accordingly finds that the exemption not engaged.

33. As to the exemptions that the Commissioner considered in FS50290504 (i.e. sections 27(1)(c) and 27(2)) he finds that they are not engaged on the same basis as above. There has not been, as far as the Commissioner is aware, an intervening event between the issuing of FS50290504 and the complainant's request for information that is the subject matter of the decision notice that would convince the Commissioner that sections 27(1) (c) and 27(2) are engaged.

Section 35(1)(a)

34. Section 35(1)(a) information is exempt if it relates to the formulation or development of government policy.
35. The MOJ argued that the requested information relates to the formulation by government of policy in the area of data protection insofar as it relates to the transposition of the Data Protection Directive and the implementation of the Data Protection Act 1998 and thus section 35(1)(a) is engaged.
36. The MOJ case, certainly as put, is not persuasive. It is unclear how the letters the letters in question relate to the formulation and development of policy. Accordingly, the Commissioner finds that the exemption is not engaged.
37. The Commissioner considers that even if the exemption provided by 35(1)(a) were engaged that the public interest in maintaining the exemptions would not outweigh the public interest in releasing the information. The application of the public interest test was extensively considered in FS50290504 upon the Commissioner finding the exemption provided by section 27 (1) (c) engaged. There have not been events in the interim that would warrant the changing of his view. In fact, the only apparent intervening event is the public dissemination of the summary and list and this would significantly diminish the public interest factors for maintaining the exemption(s).

Right of appeal

38. 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

39. 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.
40. 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

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