

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 September 2013

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 a 2002 Olympic Bid report from the Department for Culture, Media and Sport ("DCMS"). DCMS cited the exemption at section 35(1)(a) (Formulation/Development of Government Policy) as its basis for withholding the information. It failed to provide an internal review. During the Commissioner's investigation, it disclosed some of the requested information but withheld the remainder reiterating reliance on section 35.
2. The Commissioner's decision is that DCMS is not entitled to rely on section 35 as a basis for withholding the majority of the requested information that remains withheld. However, he does agree that some of the information is exempt under section 40 (unfair disclosure of personal data). Also, the DCMS failed to provide a refusal notice within the time required by the Act. In failing to do so, it contravened the requirements of section 10(1) of the Act.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the remainder of the withheld information apart from the names of junior officials below SCS. These are exempt from disclosure under section 40(2) of the Act.
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 pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 1 September 2012, the complainant requested information of the following description:

"Subject: Re: CMS 191644 FoI Olympic Bid Report 2002

As the Olympics are now ended and the Paralympics are half way through I would like to resubmit this request as I believe the condition applied by the DCMS and the Information Commissioner now no longer prevents this document's release. Even if it is held that the Paralympics have not yet ended by the time this request is processed they will have done so."

6. He had (on 14 November 2011) made a request for information of the following description.

[In reference to a report that 'was prepared by the Department of Culture, Media and Sport in 2002 as to whether Britain/London should bid for the Olympic Games', he said:]

"The document I am looking for is referred to in the book on London 2012 by Mike Lee which I understand was an internal review."

7. It was to this request that he was referring in his request of 1 September 2012. The request of 1 September 2012 is the subject of this Notice.
8. In his request of 1 September 2012, the complainant is referring to the Commissioner's decision notice which was issued in March 2009.
9. On 11 September 2012, DCMS acknowledged receipt of the request and said it would take 20 working days from the date of receipt to do so. It gave the date of receipt as being 3 September 2012.
10. The complainant chased a response from DCMS on 9 October 2012 and again on 13 October 2012. On 16 October 2012, DCMS explained that it was seeking an extension of the time to respond in order to consider the balance of public interest in relation to section 36. It gave a target date for response of 29 October 2012. On that date, it wrote to the complainant again to say it needed more time and gave a revised target date for response of 16 November 2012. On 6 November 2012, it made a further revision to 30 November 2012.
11. On 30 November 2012, DCMS provided a refusal notice. It refused to provide the requested information. It cited section 35(1)(a) (Formulation/development of government policy) as its basis for doing so.

12. The complainant requested an internal review on 17 December 2012. He reiterated his request for review on 14 January 2013 having not received any acknowledgement. He sent a further reminder on 24 January 2013. He complained to the Commissioner on 4 February 2013.
13. The Commissioner wrote to the DCMS on 4 March 2013 asking it to respond to the complainant's request for review.

Scope of the case

14. The complainant contacted the Commissioner on 5 April 2013 to advise that he had still not received a response from DCMS. By virtue of section 50(2)(a), the Commissioner deemed the complaint eligible in that the complainant had exhausted the DCMS' internal review procedure. The complainant had applied to it but the DCMS had failed to undertake the review.
15. In response to the Commissioner's enquiries, the DCMS agreed to make a disclosure to the complainant but argued that the remainder was exempt from disclosure under section 35(1)(a).
16. The Commissioner has considered whether the DCMS is entitled to rely on section 35(1)(a) in respect of the remainder of the withheld information.

Reasons for decision

Background

17. The London Olympics opened on 27 July 2012 and closed on 12 August 2012. The London Paralympics opened on 29 August 2012 and closed on 9 September 2012.
18. The report in question had been the subject of a previous decision of the Commissioner of March 2009. It was issued 3 years before the start of the London Olympics and Paralympics (Ref FS50182402¹). While this request was made before the London Paralympics ended, the time for compliance with the request (20 working days after the date of the request), post-dated the closure of the London Paralympics.

¹ http://www.ico.org.uk/upload/documents/decisionnotices/2009/fs_50182402.pdf

Section 35

19. Section 35 is a class-based exemption. This means that if, as a matter of fact, information falls within any of the categories listed in that section, it is exempt. Section 35(1)(a) states that information held by a government department is exempt if it relates to the formulation or development of government policy.
20. In the Commissioner's view, although 'policy' is not a precise term, it can be about the development of options and priorities for ministers, who determine which options should be translated into political action and when. He also considers that the term 'relates to' can be interpreted broadly. The Commissioner's approach to defining government policy is set out in recently updated guidance². It clearly indicates that policy can be developed in many ways and in a wide range of circumstances.
21. Having viewed that information the Commissioner is satisfied that it falls within the category of 'formulation or development of government policy'. He accepts that the information relates to government policy on bidding for the Olympics.

Public interest test

22. Having found that the exemption is engaged, the next step is to consider the balance of the public interest.

Public interest arguments in favour of disclosing the requested information

23. The DCMS recognised public interest arguments favouring disclosure. It acknowledged that greater transparency made government more accountable to the electorate and increased public trust. It said that the public's contribution to the policy making process could become more effective and broadly-based where knowledge of how government works is increased. It also noted that "The greater the impact on the country or on public spending the greater the public interest may be in the decision-making process being transparent".

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http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/government-policy-foi-section-35-guidance.ashx

Public interest arguments in favour of maintaining the exemption

24. The complainant argued that any previous obstacles to disclosure had related to the timing of the request. In effect he argued that little weight should be given the arguments in favour of maintaining the exemption. When he made this second request for this information, the Olympic Games had concluded and the Paralympic Games were close to conclusion. He did not agree that the information should be withheld once the Games were over. He said that the DCMS' arguments as to:

"civil servant impartiality, broad based advice, external experts and stakeholders and the continuing Legacy project are so broad as to be a catch all for every kind of document. Surely only a very limited range of documents can fall into these categories if any sensible public debate is to occur and any exemption has to be specific and relevant to the document being refused. The DCMS has not provided any clear evidence to show how this document is required for this new phase of the Olympic programme."

25. As noted above, the DCMS eventually made considerable disclosure of the report to the requester but it withheld sections of the report because it believed the public interest favoured doing so.
26. Most of its arguments focussed on the public interest in protecting a safe space for discussing live issues of policy development candidly and in conducting rigorous risk assessments of different proposals. It argued that it was clearly in the public interest to avoid jeopardising a process that sought to maximise the economic and social legacy of the Olympic Games as well as the investment made by the nation in the Games. It also asserted it was currently in a crucial period for achieving this. It argued that the withheld information fed into this policy development.

Balance of the public interest

27. When balancing the opposing public interests in a case, the Commissioner is deciding whether it serves the public interest better to disclose the requested information or to withhold it because of the interests served by maintaining the relevant exemption. If the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information in question must be disclosed.

28. In considering the public interest the Commissioner has followed the approach set out in his published guidance on section 35.³ In forming a conclusion about the balance of the public interest in this case, the Commissioner has taken into account the general public interest in favour of transparency and openness as well as those factors that apply in relation to the specific information in question, including arguments advanced by the DCMS and by the complainant.
29. In the Commissioner's view, the weight given to arguments in favour of disclosure will depend largely on the need for greater transparency in relation to the subject matter and the extent to which disclosure of the information in question will meet that need.
30. In this case, the Commissioner, having regard to the subject matter of the information at issue, acknowledges that there is clearly a significant and weighty public interest in transparency, openness and accountability in relation to the process of the Government's decision to bid for the Olympic Games and its relevance to debates about future bids for major sporting events. There is also a relevant public debate about the legacy from the Olympics. The Commissioner recognises the public interest in the public being informed on this issue to enable them to engage in debate and discussion. The amount of public money involved⁴ and the significance of the environmental impact of hosting the games are also relevant factors.
31. The age of the information in this case is a significant factor. The games were also effectively over by the date of the request. The information also relates to a policy decision by the previous Government, a different circumstance to the 2009 decision of the Commissioner (referenced above). The information was over 10 years old by the time of the request, which would suggest a declining need to protect the information for policy purposes. However, the Commissioner accepts that this is not a straight line in every case and the specific circumstances of the policy formulation and development must be considered.
32. The Commissioner recognises that the policy of developing a positive legacy of the Olympic and Paralympic Games was live at the time of the

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http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/government-policy-foi-section-35-guidance.ashx in particular pages 46-53.

⁴ Recently revised to £8.7bn <http://www.bbc.co.uk/sport/0/olympics/20041426>

request. The Commissioner agrees that there is a public interest in providing a certain amount of protection to the safe space in which policy is discussed and developed. However, he does not agree that the DCMS has provided a clear explanation which shows that the withheld information is significantly linked to that live policy process and how disclosing this information, related the decision to bid (a very early stage in the overall process), would impact on the safe space needed for current policy development on legacy. He does not agree that disclosure of the withheld information would be likely to impact on the safe space for discussing the best way to maximise a positive legacy from the Olympics. The safe space arguments are therefore only accorded limited weight.

33. Whilst he has been dismissive of any impact on specific policy development the Commissioner recognises there is a limited general public interest in protecting information related to the policy decision. The Commissioner also recognises that the advice contained in the information is candid and frank, on a major policy decision. He has considered the general chilling effect from disclosure, on the frankness and candour of future advice related to any policy on the Olympics or other policy development more generally across Government. He has concluded that it would not be reasonable to assume a severe chilling effect given the passage of time, including a change of government and the successful completion of the Olympics.

Section 35 – Conclusion

34. In light of the above, the Commissioner is not satisfied that the information was correctly withheld by the DCMS under section 35, in all the circumstances of the case the public interest in maintaining the exemption does not outweigh the public interest in disclosure. The Commissioner finds that at the time of the request the public interest in disclosure was strong, despite the passage of time, but the arguments in favour of maintaining the exemption carry less weight, due to the passage of time and the lack of clarity in terms of the link to current policy formulation and development on legacy.

Section 40 – Unfair disclosure of personal data

35. The requested information includes the names of officials at DCMS. Their names have been redacted under Section 40(2). Section 40(2) of FOIA states that personal data (which is not the personal data of the

requester) is exempt if its disclosure would breach any of the data protection principles contained within the Data Protection Act ("DPA"). The term "personal data" is defined specifically in the DPA.⁵

Is this information personal data?

36. In determining whether information is personal data, the Commissioner has referred to his own guidance and considered the information in question.⁶ He has looked at whether the information relates to living individuals who can be identified from that information and whether that information is biographically significant about them.
37. He is satisfied that the names of individuals in the requested information are those individuals' personal data. It is information relating to each of them from which each can be identified. It shows not only their place of employment but also that they were involved in particular projects at that place of employment. The Commissioner is satisfied that information which shows where a person is employed is biographically significant about that person.
38. The next question for the Commissioner to consider is whether disclosure of that information under FOIA would contravene any of the data protection principles of the DPA.
39. The data protection principle that is normally considered in relation to section 40 is the first data protection principle which states that:

'Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

at least one of the conditions in Schedule 2 is met, and

in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.'
40. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:

⁵ <http://www.legislation.gov.uk/ukpga/1998/29/contents>

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http://www.ico.org.uk/for_organisations/data_protection/the_guide/~media/documents/library/Data_Protection/Detailed_specialist_guides/PERSONAL_DATA_FLOWCHART_V1_WITH_PREFACE001.ashx

- The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
 - what the public authority may have told them about what would happen to their personal data;
 - their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights;
 - the nature or content of the information itself;
 - the circumstances in which the personal data was obtained;
 - particular circumstances of the case, e.g. established custom or practice within the public authority; and
 - whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.
 - The consequences of disclosing the information, i.e. what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor, the Commissioner may take into account:
 - whether information of the nature requested is already in the public domain;
 - if so, the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?
41. Furthermore, notwithstanding the individual in question's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure.
42. In considering 'legitimate interests', in order to establish if there is such a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests. In balancing these legitimate interests with the rights of the individual in question, it is also important to consider a proportionate approach, i.e. it may still be possible to meet the legitimate interest by only disclosing some of the requested information rather than viewing the disclosure as an all or nothing matter.
43. The DCMS has argued that the names and contact details that had been redacted were those of junior civil servants who did not have outward facing roles.
44. The Commissioner notes that one name has been disclosed and this is the name of an individual who was at "SCS" (or Senior Civil Servant) grade or above. This person has a reasonable expectation that their name would be disclosed given their seniority.

45. The Commissioner has considered the question of fairness in this case by looking at whether it would be fair to the individuals concerned to put their personal data into the public domain in this context.
46. The Commissioner notes that while some of the individuals named in the withheld information may, on occasion, deal with members of the public, their roles are relatively junior and that they are not outward facing roles. He agrees that it is outside their expectations that their names would be published and that such expectations are reasonable in this context.
47. Further, he considers that disclosure of this personal data outside the reasonable expectations of the individuals concerned is not necessary in order to satisfy the legitimate interests of the public. There is a legitimate interest in improving transparency by public authorities. However, the Commissioner does not think that transparency would be further enhanced by the disclosure of junior officials' names in this case.
48. In light of the above, the Commissioner has therefore concluded that disclosure of the names of individuals found in the withheld information would be unfair and in contravention of the first data protection principle of the DPA. Consequently, he considers that the names that have been redacted from disclosure are exempt under section 40(2) of the FOIA.

Section 10 (1) – Time for compliance

49. Section 10(1) of the FOIA requires that a public authority complies with section 1(1) promptly and in any event not later than 20 working days following the date that a request was received. If public authority is seeking to rely on an exemption to refuse to comply with a request then, in line with section 17(1), it must provide the requestor with a refusal notice, within 20 working days, stating which exemption(s) is being relied upon. It can extend the deadline for response where it is considering the balance of public interest test but it must first tell the complainant within 20 working days which exemption it is seeking to rely on.
50. DCMS failed to provide a substantive response until 27 working days after the request was received. It said it needed further time to consider the public interest in applying section 36 (an exemption it ultimately did not seek to rely on). It did not issue a refusal notice until 65 working days after the receipt of the request. DCMS told the Commissioner that the department had been relocated during the period and that there had been staff turnover. The Commissioner recognises that such matters may impact on a public authority's capacity to respond in a timely manner. However, he considers that the delays that arose in the handling of this request were excessive.

51. In failing to comply with section 1(1) within 20 working days of the request, the DCMS contravened the requirements of section 10(1) of the FOIA.
52. Further comment about the delays which arose at internal review is set out below in Other Matters.

Other matters

Internal Review

53. Whilst there is no explicit timescale laid down by the Act for completion of internal reviews, the Commissioner considers that they should be completed as promptly as possible. The Commissioner thinks 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.
54. The Commissioner is concerned that in this case, no internal review was conducted despite repeated requests by the complainant and despite the Commissioner's direct and specific recommendation. This put the complainant at a disadvantage when seeking to exercise his right under section 50 to lodge a complaint with the Commissioner on the substantive question of access to the requested information. The DCMS' final position remained unclear to him.
55. The DCMS explained that this delay arose as the result of an administrative oversight. This oversight apparently resulted in a failure to record the request for review itself or the Commissioner's subsequent prompting that it should be undertaken.
56. While accepting that administrative oversights may arise, the Commissioner is concerned that separate attempts by two separate parties (himself and the complainant) to obtain progress on a request for internal review appear to have been overlooked. Whilst the Commissioner acknowledges that the DCMS may have been very busy at the time of the request, as the policy department responsible for the Olympics, this was still not a justification for the very significant delay and the failure to update the complainant about the internal review or complete it. He therefore wishes to register his view that the DCMS fell short of the standards of good practice by failing to complete its internal review within a reasonable timescale. He would like to take this opportunity to remind the DCMS of the expected standards in this regard and recommends that it aims to complete its future reviews within the Commissioner's standard timescale of 20 working days.

Right of appeal

57. 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

58. 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.
59. 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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