

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 September 2014

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

Decision (including any steps ordered)

1. The complainant requested correspondence between the Ministry of Justice (the 'MOJ') and the European Commission relating to European regulations for the Transforming Rehabilitation reforms. The MOJ refused to provide the information, relying on section 21 (information accessible to applicant by other means), sections 27(1) and (2) (international relations) and section 43(2) (commercial interests).
2. The Commissioner has concluded that the information requested by the complainant is exempt from disclosure on the basis of section 27(1)(b) and, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. As he finds this exemption was properly cited, he has not considered the MOJ's reliance on any other exemption. The MOJ is not required to take any steps as a result of this notice.

Background

3. The Commissioner understands that the Government's Transforming Rehabilitation reforms are aimed at driving down reoffending, particularly for those offenders sentenced to less than a year in prison where reoffending is highest. Currently, these offenders do not receive any supervision on release, and until these reforms there was no statutory requirement to provide them with rehabilitation services.

4. Under the reforms, probation services will also be provided by the private and voluntary sectors, in addition to the current public sector provision, by 2015. This has involved considerable restructuring and substantial engagement with Criminal Justice System partners and wider stakeholders.
5. The MOJ has explained that one of the key tasks being managed by the Transforming Rehabilitation Programme is the successful transition of staff into the new probation structures without any detriment to their pay and conditions in the short term.
6. This includes membership of the Local Government Pension Scheme ('LGPS'). In 2013 the Secretary of State for Justice proposed providing a guarantee to the single LGPS administering authority which would administer all probation service pensions. The guarantee would cover the pension contributions to be paid by the newly established Community Rehabilitation Companies ('CRCs') which provide probation services to the administering authority in the event of their default. The MOJ had entered an informal discussion with the European Commission to explore what their view might be of such a guarantee in relation to State Aid rules. It is these discussions which are the subject of the complainant's request.

Request and response

7. On 5 February 2014 the complainant wrote to the MOJ and requested information in the following terms:

"Please supply me with all correspondence, both hard copy and electronic, and any notes or minutes of meetings, between the Ministry of Justice and the European Commission in respect of European regulations concerning State Aid and the local government pension scheme proposals for the Transforming Rehabilitation reforms."

8. Having extended the time period in accordance with the FOIA to consider the public interest test, the MOJ responded on 7 March 2014. It stated that some of the information was exempt by virtue of section 21 of the FOIA (reasonably accessible by other means) and provided the web links to this material. It applied section 43(2), the exemption for commercial interests, and said that the balance of the public interest test favoured withholding the requested information. The MOJ also applied section 27(1) and 27(2), the exemption for international relations, and again concluded that the public interest test favoured withholding the information.

9. Following an internal review the MOJ wrote to the complainant on 22 April 2014 and maintained its original decision.

Scope of the case

10. The complainant contacted the Commissioner on 13 June 2014 to complain about the way his request for information had been handled.
11. At the outset of the investigation the complainant confirmed that he had no objections to the information exempted under section 21, so the Commissioner has not considered this exemption any further.
12. The Commissioner has determined whether the MOJ was entitled to rely on the other exemptions cited.

Reasons for decision

Section 27(1) and 27(2) – international relations

13. The Commissioner has examined the withheld information. He notes that, with the exception of the information exempted under section 21 (which has been disregarded for the purposes of this notice as outlined above), the MOJ has applied sections 27(1) or (2) and 43(2) to the remainder of the withheld information.
14. The MOJ explained that the communications in which it had participated were 'inter-governmental', being between the UK Government and the European Commission (the 'EC') (and so overseen by the Foreign and Commonwealth Office (the 'FCO')), although mainly handled by the MOJ.
15. The Commissioner asked the MOJ to specify which subsections of section 27(1) it wished to rely on. In reply, the MOJ said the information sent by the MOJ to the EC is considered to be exempt under section 27(1)(b) and (d), whereas the information received from the EC is exempt by virtue of section 27(1)(b) and (d) and section 27(2).
16. In investigating this case, the Commissioner has therefore first considered the MOJ's reliance on section 27(1) and (2) which state that:

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

(a) relations between the United Kingdom and any other State,

(b) relations between the United Kingdom and any international organisation or international court,

(c) the interests of the United Kingdom abroad, or

(d) the promotion or protection by the United Kingdom of its interests abroad.”

17. Section 27(2) of FOIA states that information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court. The MOJ said that some of the information had been withheld as it was obtained on a confidential basis from an international organisation and was thereby exempt under section 27(2) of FOIA. In addition, the MOJ said that in respect of past preliminary discussions of this sort, the EC has informed the UK that it considers these to be confidential and that they should not be disclosed.
18. The MOJ has cited section 27(1)(b) in respect of all the withheld information. Section 27(1)(b), as with the other sub-sections of section 27(1), is a prejudice based exemption. In order for a prejudice based exemption to be engaged the Commissioner believes that three criteria must be met.
 - Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption.
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance.
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, disclosure ‘would be likely’ to result in prejudice or disclosure ‘would’ result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner’s view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.

19. This means that information is exempt if its disclosure 'would, or would be likely to' result in the harm that the exemption is designed to protect. In relation to section 27(1), the MOJ said that it had initially considered the potential prejudice to international relations and the prejudice to the MOJ's (and the UK Government's) relationship with the EC in disclosure of the information. In addition, the MOJ said that in determining the prejudice of the exemptions, it had also consulted the Department for Business, Innovation and Skills ('DBIS') and the Foreign and Commonwealth Office ('FCO').
20. At the internal review stage, the complainant submitted the following as to why he believes that disclosure of the requested information would be in the public interest:

"Unless the UK Government is unsure of the pension solution and is still in the process of agreeing this with the EU Commission, whilst forging ahead with the procurement without express permission regarding State Aid (which would be extremely alarming) the claims that international relations would be damaged by disclosure are flimsy to say the least. It is not clear what matters relating to the local government pension scheme could be deemed to have passed in confidence between the EU Commission and the UK Government."

21. In reply, the MOJ explained that the EC had been clear that it considers preliminary discussions of this sort to be in confidence, and that they should not be disclosed. It explained that, as the information had been sent to the MOJ on a confidential basis from an international organisation, it is exempt under section 27(2) as well as section 27(1) of the FOIA. The MOJ said that if it does not maintain confidentiality where information was provided on that basis, it runs the risk of harming relations between the UK Government and the EC. The MOJ pointed out that it had only been a participant in the discussions and that they were formally between HM Government and the EC, and were conducted through the FCO with advice from DBIS, such that the effect of disclosure would impact widely across the Government as a whole.
22. The MOJ also advised the complainant that the process of providing an opinion on State Aid depends on a full and frank exchange of information between the UK Government and the EC. It said that both organisations must have a reliable mechanism by which they can conduct discussions, and that any requirement to release papers relating to those discussions could have the effect that those involved in the discussions could be less candid in offering their views. The MOJ said its view is that disclosure would prejudice and undermine the mutual relationship of trust that the Government enjoys with the EC.

23. The MOJ explained that preliminary discussions with the EC are those which take place before a formal approach has been made and are a "tentative steer" on how the formal approach should be made. It said such discussions are therefore sensitive as they outline a provisional position before a formal "on record" approach. The MOJ felt that making public such discussions, which could attribute an initial steer given by the EC, would significantly prejudice the MOJ and the wider UK Government's future ability to gain such insights before making a formal approach, as it would be likely that the EC would become reluctant to provide such advice in the event that these were routinely made public.
24. The MOJ assessed that this prejudice to the UK interests is significant and told the Commissioner this had been echoed by colleagues in DBIS and the FCO, from whom the MOJ had sought advice on disclosure. DBIS advised that disclosure could have implications for relations with the EC and the future conduct of cases, and for past preliminary discussions of this nature. The EC explicitly informed the UK Government that it considers these communications to be confidential in terms of 27(1) of FOIA. Taking all these views into consideration, the MOJ determined that the public interest in withholding such information is strong, given that the implications of such disclosures are much wider than the Transforming Rehabilitation programme and the MOJ, as they clearly have impact on the UK Government's future reputation and negotiating position. The MOJ confirmed that the FCO had concurred with this view.
25. In support of its application of section 27(1)(b), the MOJ argued that it is imperative that the UK Government is able to have a free and frank 'pre-discussion' in advance of setting out their formal position to the EC. It said that disclosure of the particular information against the wishes of the EC would serve to undermine the reputation and relationship between the UK and the EC in the sensitive area of State Aid negotiations, and that it considered the EC would be less likely to provide a candid and frank view in advance of a future formal approach to State Aid, if it thought that informal contacts were to be published in advance of formal discussions. The MOJ stated that this is evidenced by the EC's request to maintain the confidentiality of this information.
26. Without the ability to gain this steer, the MOJ stated that the UK Government is placed at a disadvantage in terms of securing a sound negotiating position which would, in turn affect the promotion and protection of UK interests (this it submitted in support of section 27(1)(d)).
27. The MOJ reiterated that the information in scope of the request is the first tentative approaches in advance of a more formalised "on record" approach to the EC. It highlighted that the negotiations were live at the time of the request and that the risk of damaging the MOJ's relationship

with the EC during this process could have risked progress in reaching a final decision.

28. With regard to the first criterion of the three-limb test described above, the Commissioner accepts that potential prejudice to the UK's relations with the EC clearly relates to the interests which the exemption contained at section 27(1)(b) is designed to protect.
29. With regard to the second criterion, given the accepted convention of confidentiality as described above, the Commissioner is satisfied that disclosure of this information clearly has the potential to harm the UK's relations with the EC. The Commissioner is therefore satisfied that there is a causal link between the potential disclosure of the withheld information and the interests which section 27(1)(b) is designed to protect.
30. With relation to the third criterion, the Commissioner accepts that in the circumstances of this case the higher threshold of likelihood is met and he agrees with the MOJ that disclosure of this information would prejudice the UK's relations with the EC. Again the Commissioner has reached this conclusion in light of the accepted convention of confidentiality surrounding such correspondence. Against this background the Commissioner agrees that the disclosure of the requested information whilst the UK's discussions with the EC in relation to this matter remained ongoing would be more likely than not to prejudice these relations between the two parties.

Public interest test

31. Section 27 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Arguments in favour of disclosing the information

32. The MOJ has advanced the following public interest arguments to the Commissioner in support of disclosing the information.
33. There is a general public interest in public authorities being accountable for, and transparent about, decisions taken by them. Moreover, there is an underlying public interest in disclosure of information which reveals how Government works. This can particularly be the case when information relates to the successful delivery of "*a relatively high profile programme such as Transforming Rehabilitation*".

34. There will be a large number of current Probation Trust employees transferring to the employment of the new Community Rehabilitation Companies ('CRCs') when the Transforming Rehabilitation reforms are completed. Disclosure of information that relates to a probation employee's terms and conditions in their future employment is an important element in maintaining the confidence of the employee to continue working in this vital criminal justice service.

Arguments in favour of withholding the information

30. The MOJ has advanced the following arguments in support of its position that the public interest favours withholding the requested information at the time the request was made.
31. There is a public interest in preserving trust and confidence between states and international organisations necessary for the effective conduct of international relations. This trust allows for the free and frank exchange of information on the understanding that it will be treated in confidence. If the UK does not respect such confidences, its ability to protect and promote UK interests through international relations will be hampered. The EC could be reluctant to share information with the UK and/or give an opinion on questions raised in the future, thus hampering the Government's ability to protect and promote the UK's interests overseas.
32. The information in scope of this request contains the preliminary views and recommendations of the EC on the MOJ's proposals in relation to its guarantee of certain pension liabilities in connection with the restructuring of probation services in England and Wales, and whether this constitutes State Aid. Therefore release of information that presents only a preliminary picture may create a distorted image of the MOJ's position before full negotiations take place.
33. These matters are the subject of ongoing engagement and negotiation, and disclosure of such documents now may engender reluctance from the EC to engage in free and frank terms both in the current and future negotiations. Disclosure would have implications for the UK Government's relations with the EC and the future conduct of cases. Furthermore, release of the information at this time may generate unhelpful comment or speculation at this early stage of incomplete negotiations.

Balance of public interest arguments

34. In conclusion, the Commissioner has decided that in the circumstances of this case the public interest in favour of maintaining the exemption

outweighs the public interest in disclosure. In reaching this decision, the Commissioner considers that disclosure under the FOIA will always be likely to increase public confidence in Government openness and willingness to be scrutinised. Disclosure may also add to the public's general understanding of the UK engaged with the EC.

36. However, the Commissioner believes that this is outweighed by the strong public interest in ensuring that the UK's relations with the EC are not prejudiced; in reaching this decision the Commissioner is conscious that whilst disclosure of this information may inform the public about the pensions guarantee, disclosure of the information may affect the UK's relations with the EC on both this and other unrelated issues, which given the importance of UK-EC relations in numerous other aspects of the UK Government's policy, is something which is clearly not in the public interest.
37. As the Commissioner has concluded that the information requested is exempt from disclosure on the basis of section 27(1)(b) he has not considered the other exemptions cited.

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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

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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