

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 26 October 2022

**Public Authority:** Department for Environment, Food and Rural Affairs

**Address:** Nobel House  
17 Smith Square  
London  
SW1P 3JR

#### **Decision (including any steps ordered)**

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1. The complainant has requested information about a potential sanitary and phytosanitary agreement with the European Union. The above public authority ("the public authority") relied on various limbs of section 27 (international relations) and, latterly, section 21 of FOIA (reasonably accessible) to withhold information.
2. The Commissioner's decision is that the public authority has correctly relied upon section 27 of FOIA and that the balance of the public interest favours maintaining the exemption. It has not correctly applied section 21 of FOIA. The public authority breached section 17 of FOIA as it failed to provide a refusal notice, citing all the exemptions upon which it wished to rely, within 20 working days. Finally, the public authority breached section 10(3) of FOIA as it failed to complete its public interest considerations within a reasonable timeframe.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Indicate, to the complainant, where the information that it has relied on section 21 of FOIA to withhold can be accessed.
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**

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5. On 22 July 2021, the complainant wrote to the public authority and requested information in the following terms:

"Please can you confirm whether the department holds any information produced since the beginning of 2021 which relates to the matter of a potential SPS agreement with the European Union covering, in particular, food products intended for human consumption.

"If any such information exists, please can you provide it to me.

"For the avoidance of doubt:

- By "information", I mean all written information, prioritised to remain within the cost limit as follows: 1) correspondence, 2) meeting-related documents (such as agendas, minutes, notes and transcripts), 3) other documents (such as reports and slide decks), including unfinished/unpublished versions of such, 4) other information. (That is, I would like you to search within as many of the aforementioned categories - starting from (1) - as possible, while remaining within the cost limit."

6. The public authority responded on 28 September 2021. It disclosed some information, but relied on section 35 (development of government policy) and various limbs of section 27 to withhold the remainder.
7. Following an internal review the public authority wrote to the complainant on 18 January 2022. It no longer relied on section 35, but maintained that section 27 applied.

## **Reasons for decision**

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### **Section 27 – international relations**

8. The public authority identified 17 documents that it was relying on one or more limbs of the exemption to withhold. It confirmed to the Commissioner that this information was drawn from all four categories set out in the original request.
9. Section 27(1)(b) of FOIA applies to information whose disclosure would harm the UK's relationships with international organisations. Section 27(1)(c) applies to information whose disclosure might prejudice the UK's interests abroad.
10. Whilst public authority attempted to separate out the withheld information between these two limbs of the exemption, its arguments

were the same and the Commissioner considers that either or both limbs would have applied to all the information under consideration. In practice there is no clear dividing line between protecting the UK's overseas interests and protecting its relationships with international organisations. It is clearly in the UK's interest to preserve friendly relations with an international organisation whose members are among our closest neighbours. The Commissioner considers that both section 27(1)(b) and (c) of FOIA are engaged for the following reasons.<sup>1</sup>

11. The public authority has explained (and the Commissioner accepts) that the documents in question cover granular details of the UK's attempt to strike a sanitary and phytosanitary agreement with the EU that would relieve much of the current friction over the position of Northern Ireland (ie. the only part of the United Kingdom which shares an unchecked land border with another EU state.)
12. The documents in question cover potential options for the UK's negotiating position with the EU, candid assessments of the strengths and weaknesses of the UK's position, as well as candid assessments of the stance that the EU was taking. The information also discusses various scenarios that might occur in the event that no deal was achieved.
13. The Commissioner agrees with the public authority that disclosing this information to the world at large, when talks remain ongoing, would undermine the UK's ability to promote its interests abroad by undermining its ability to strike a deal on the most beneficial terms available. It would also undermine the UK's relationship with the EU because the EU might be able to use the information to extract further concessions from the UK.
14. Given the sensitivity of negotiations, the Commissioner is satisfied that the higher bar of "would prejudice" has been met. The prejudice is both likely and weighty. The exemption is thus engaged.
15. In the circumstances of this case, the Commissioner is satisfied that the balance of the public interest favours maintaining the exemption.
16. Clearly an agreement (or a failure to reach an agreement) will affect a large number of people – particularly those who live in, or do business

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<sup>1</sup> The Commissioner also notes that sections 27(1)(a) – because of the specific implications for the Republic of Ireland – 27(1)(d) and even section 35 of FOIA (formulation of government policy) might equally have been applied to this information.

in, Northern Ireland. There is a strong public interest in understanding what new rules might be put in place.

17. However, the Commissioner considers that the strongest public interest lies in being able to scrutinise an agreement, once it has been reached. Any agreement would need to be ratified by both the UK and the EU – therefore there will be ample opportunity to scrutinise it, once it emerges. It is difficult to exercise meaningful scrutiny of something that does not yet exist.
18. The Commissioner considers that there is a very strong public interest in allowing the UK to maintain an element of secrecy around its negotiating position so that it can extract the best possible deal from the EU. Disclosure of this information would undermine the UK's negotiating position and this is not in the public interest.
19. The Commissioner is therefore satisfied that the balance of the public interest favours maintaining the exemption.

## **Section 21 – reasonably accessible**

20. The public authority identified one document that it had previously relied upon section 27 of FOIA to withhold, but which it now noted had been published by the European Commission. Because the document had now been published, the public authority argued it could rely on section 21 of FOIA to withhold the information.
21. The Commissioner has looked at the webpage where the document is currently hosted and notes that the metadata indicates that the document was published there on 9 June 2021 – prior to the request being made. It was therefore accessible to the complainant at the point the public authority responded to the request.
22. However, the Commissioner's guidance on this exception states that it is not sufficient for a public authority to merely assert that information is already in the public domain. It must either know that the requester has already found the information or must be able to provide precise directions to where the information can be found. As the public authority has failed to issue a refusal notice citing section 21, it follows that it has also failed to direct the complainant to where the information can be found.
23. The Commissioner is therefore satisfied that the information in question was not reasonably accessible and therefore the exemption is not engaged. However, in the circumstances, he considers that the proportionate remedial step is for the public authority to direct the complaint to where the information can be found, rather than requiring that it be disclosed.

## **Procedural matters**

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24. As the public authority did not begin relying on section 21 until late in the Commissioner's investigation, it failed to issue a correct refusal notice within 20 working days of the request. It therefore breached section 17 of FOIA.
25. The public authority also accepted, in its internal review, that it had taken an unreasonable amount of time to complete its considerations on the balance of the public interest. The Commissioner thus records a breach of section 10(3) of FOIA.

## **Other matters**

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26. The Commissioner notes that it took the public authority over three months to complete its internal review. The FOIA Code of Practice states that internal reviews should be completed within 40 working days.
27. Whilst the Commissioner notes that the internal review, when it was issued, was a thorough piece of work, it was late – despite the public authority having taken an unreasonable amount of time to issue its original response. He considers this to be poor practice.

## Right of appeal

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28. 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

29. 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.
30. 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 .....**

**Roger Cawthorne**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**