

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 July 2023

Public Authority: Department for Culture, Media and Sport
Address: 100 Parliament Street
London
SW1A 2BQ

Decision (including any steps ordered)

1. The complainant has requested copies of information passed to Stonewall regarding Stonewall's Equality Index 2020, and the rating received from Stonewall. The then Department for Digital, Culture, Media and Sport (now the Department for Culture, Media and Sport or DCMS) refused the request under section 43(2) (prejudice to commercial interests), and section 41 (information provided in confidence) of FOIA.
2. The Commissioner's decision is that DCMS has failed to demonstrate that either exemption is engaged.
3. The Commissioner requires DCMS to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information to the complainant.
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 FOIA and may be dealt with as a contempt of court.

Background

5. Although not referred to by DCMS the Commissioner is mindful that he has considered complaints against other public authorities involving requests for similar information regarding Stonewall Workplace Equality Index (WEI) ratings.¹
6. The following background information is taken from decision notice IC-129040-Y4T2:
7. Stonewall first published its Workplace Equality Index (originally known as the Corporate Equality Index) in 2005. Participation in the scheme itself is voluntary and free. Each member employer receives a score from Stonewall based on how well the organisation's policies and general culture reflect Stonewall's criteria for judging what an organisation supportive of LGBTQ+² employees should offer. Stonewall publishes an annual list of the 100 employers who have received the highest ranking in that year's survey.
8. For those employers which sign up to the Diversity Champions Programme, Stonewall also provides detailed feedback on their applications, noting how the employer could better meet its criteria.

Request and response

9. On 17 January 2021 the complainant submitted the following request to DCMS:

Please could you supply me with copies of all the information which was passed to Stonewall for the purpose of rating the Department for Culture, Media and Sport on Stonewall's Workplace Equality Index [WEI] 2020?

¹ For example, <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4021157/ic-125081-g8j6.pdf>, <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022786/ic-127452-g8f5.pdf> and <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022502/ic-129040-y4t2.pdf>

² The Commissioner has used the abbreviation LGBTQ+ (which stands for Lesbian, Gay, Bisexual, Transsexual, Queer (or Questioning) and others (the "+") who do not consider themselves to fall within any of those categories, but do consider themselves part of this community) as this is the abbreviation used by Stonewall and is thus the definition most appropriate in this context. The Commissioner is aware that both longer and shorter abbreviations are used.

What WEI ratings did the DCMS receive back from Stonewall?

10. DCMS issued a refusal notice on 5 March 2021, refusing the request in reliance on the exemptions at sections 41 and 43(2) of FOIA.
11. The complainant requested an internal review on 13 March 2021 and DCMS communicated the outcome of that review on 23 November 2021. The internal review upheld the original refusal.

Scope of the case

12. The complainant contacted the Commissioner on 23 November 2021. He asked the Commissioner to look into the way DCMS handled their request, "with a view to proper disclosure".

Reasons for decision

Section 41: actionable breach of confidence

13. Section 41(1) of FOIA provides an exemption from disclosure for information that was obtained by the public authority from any other person (including another public authority), and where disclosure of the information would constitute an actionable breach of confidence.
14. DCMS indicated in its correspondence with the complainant that it considered the WEI rating received from Stonewall to be exempt by virtue of section 41 of FOIA. It was not clear whether DCMS also sought to rely on section 41 in respect of the information provided to Stonewall, and DCMS failed to provide clarification when requested by the Commissioner.
15. In any event the Commissioner observes that the exemption at section 41 is only available in respect of information received by the public authority from another person. Whilst the WEI rating meets this test (ie the second part of the request), information that was provided to Stonewall by DCMS (ie the first part of the request) would not. Accordingly the Commissioner finds that DCMS would not be entitled to rely on section 41 in respect of the information provided to Stonewall. He has gone on to consider DCMS's application of section 41 to the information received by DCMS, ie the WEI rating.
16. For section 41 to be engaged, disclosure of the withheld information must also constitute an actionable breach of confidence. In the Commissioner's view a breach will generally be actionable if:

1. The information has the necessary quality of confidence.
 2. The information was communicated in circumstances importing an obligation of confidence.
 3. Unauthorised disclosure would cause detriment to either the party which provided it or any other party.
17. The Commissioner has inspected the information in question, ie the WEI rating, and is satisfied that it has the necessary quality of confidence since it is not trivial and is not in the public domain. Consequently the Commissioner is satisfied that the first test is met.
18. In respect of the second test, DCMS advised the complainant that:
- "It is indicated in the submission process that any scoring or comments made on the submission is confidential between Stonewall and the applicant/organisation".
19. Accordingly, the Commissioner accepts that the information was imparted under an explicit obligation of confidence.
20. DCMS did not provide arguments explicitly relating to the third test. However, in the context of the section 43 exemption, DCMS set out that disclosure of the information in question could have a detrimental impact on Stonewall's commercial revenue. The Commissioner is therefore prepared to accept that the third test is met.
21. The exemption at section 41 is not subject to the public interest test at section 2(2) of FOIA. However the Commissioner is mindful that an action for breach of confidence will fail if there is a public interest defence to disclosure. Therefore the Commissioner has considered whether the public interest in disclosure is sufficient to override the public interest in maintaining the duty of confidence.
22. In its refusal notice DCMS advised the complainant that it had considered whether there was an overriding public interest in disclosure, and had concluded that there was not. It did not provide any details of this consideration, either to the complainant or to the Commissioner. The Commissioner is extremely disappointed at the brevity of the explanation provided by DCMS with regard to section 41.
23. In the absence of detailed arguments put forward by DCMS, the Commissioner has found it helpful to take account of the previous decision notices referred to at paragraph 5 above. In particular the Commissioner has been guided by his findings in decision notice IC-129040-Y4T2. The Commissioner is satisfied that the withheld information in this case is of the same description as that which was

considered within decision notice IC-129040-Y4T2. It should, however, be noted that in that case, the public authority had previously released some feedback received from Stonewall. DCMS has not, as far as the Commissioner is aware, ever disclosed or published the feedback it has received from Stonewall.

24. Whilst the Commissioner has given consideration to the specific circumstances of this case, he can find no additional information or compelling arguments contained within DCMS's correspondence to the complainant, or to his office, which would lead him to draw a different conclusion to that which he set out within paragraphs 15-50 of decision notice IC-129040-Y4T2. He is therefore not persuaded that the circumstances of this particular case are sufficiently different to that set out in decision notice IC-129040-Y4T2 to warrant a different outcome.
25. The Commissioner therefore finds that, for the same reasons set out within paragraphs 15-50 of decision notice IC-1290404-Y4T2, he is not satisfied that any action Stonewall brought for a breach of confidence would succeed. The Commissioner is therefore not satisfied, based on the information that has been presented by DCMS in this case, that a breach that resulted from disclosure of the requested information by DCMS would be an actionable breach, ie likely to succeed.
26. Since the Commissioner is not satisfied that an actionable breach would occur, he must find that section 41 of FOIA is not engaged.

Section 43(2): commercial interests

27. Section 43(2) of FOIA provides that information is exempt where disclosure "would, or would be likely, to prejudice the commercial interests of any person (including the public authority holding it)".
28. In order for a prejudice based exemption such as section 43(2) to be engaged, the Commissioner considers 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 were 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 prejudice which is alleged must be real, actual or of substance; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, i.e.

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 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.

29. The Commissioner's published guidance³ on section 43(2) expands on the level of detail required by the public authority:

"It is not sufficient for you to simply argue that because information is commercially sensitive, its disclosure would, or would be likely to, prejudice commercial interests. You must be able to demonstrate a causal relationship between the disclosure of the information in question and the prejudice you envisage."

30. DCMS relied on the exemption at section 43(2) on the basis that disclosure would prejudice the commercial interests of Stonewall. DCMS set out that the disclosure of its submission to Stonewall, and the feedback report, could have a detrimental impact on the commercial revenue of Stonewall, as other public bodies may be less willing to engage in its services if detailed information were to be shown to be subject to disclosure.
31. DCMS also set out that it could be possible to deduce the questions from disclosure of DCMS's submissions. This may affect Stonewall by disclosing sensitive information revealing its methodology and scoring systems, which would likely be used by competitors to gain a competitive advantage in their own work.
32. DCMS repeated the above arguments in its refusal notice and internal review. For the purposes of his investigation the Commissioner asked DCMS to explain how it had concluded that the likelihood of this prejudice occurring is more likely than not, ie to demonstrate the causal effect between disclosure and prejudice.
33. In response, DCMS merely reiterated the arguments set out in the refusal notice and internal review without expanding on them.
34. The Commissioner's published guidance further sets out that if a public authority proposes to withhold information because the disclosure

³ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-43-commercial-interests/>

would, or would be likely to, prejudice a third party's commercial interests, the authority must have evidence that this accurately reflects the third party's concerns. It is not sufficient for the authority to simply speculate about the prejudice which might be caused to the third party's commercial interests. The authority needs to consult the third party for their exact views in all but the most exceptional circumstances.

35. The Commissioner asked DCMS whether it had consulted Stonewall. DCMS clarified that it had not consulted Stonewall at the time it issued the refusal notice, or when it conducted the internal review. However it confirmed that it had now consulted Stonewall, and provided the Commissioner with copies of the consultation.
36. The Commissioner observes that the communication from DCMS to Stonewall does not in fact ask for Stonewall's views on disclosure of the withheld information as such. Rather, it states that DCMS has sought to rely on the exemption at section 43 of FOIA, and invites Stonewall to let DCMS know if it had any questions or concerns.
37. However, in response, Stonewall advised DCMS that it concurred with DCMS's assessment and felt that section 43 was a valid reason for refusing the request.
38. The Commissioner has examined the information provided by DCMS but is not persuaded that disclosure of the specific withheld information would be more likely than not to have the prejudicial effect claimed. Despite claiming the higher threshold of prejudice, DCMS's arguments indicate that disclosure of the withheld information "could" prejudice Stonewall's commercial interests, which is insufficient in the context of section 43. DCMS has failed to demonstrate the causal link between the withheld information and the prejudice claimed. The Commissioner cannot accept such generic arguments, particularly in the context of the specific withheld information, since they clearly do not demonstrate that the public authority has considered all the circumstances of this case.
39. Similarly the Commissioner cannot attach any significant weight to DCMS's consultation with Stonewall. No consultation was carried out when the decision was made to refuse the request, and the subsequent communication was extremely brief. Neither party made any attempt to provide information or arguments regarding anticipated prejudice.
40. In addition to Stonewall's commercial interests, DCMS argued that
"...were [DCMS] to release information that may impact the commercial interests of other parties, people and organisations would be concerned about sharing any future commercial information with us, for fear that we would not treat the information with the relevant sensitivity. This would greatly impact [DCMS]'s

work going forward. [DCMS] relies upon the exchange of commercial information to help it make decisions that have real world impact on both citizens and businesses.

41. It appears to the Commissioner that DCMS is arguing that the consequences following the disclosure of information relating to Stonewall may have a detrimental effect on the willingness of other third parties to share relevant information. However, again DCMS did not provide any further details of the causal effect between disclosure of the withheld information, and the prejudice anticipated. Therefore the Commissioner is not persuaded that DCMS has demonstrated how this argument is relevant to the circumstances of this particular case.
42. The Commissioner is mindful that it is for a public authority to satisfy him that it has handled a request in accordance with the requirements of FOIA. Accordingly the Commissioner expects authorities to ensure that they provide full details of their decision making and any information or arguments they wish the Commissioner to take into account. Authorities should bear in mind that the Commissioner cannot make assumptions in the authority's favour.
43. In light of the above the Commissioner cannot be satisfied that the exemption at section 43(2) is engaged. Consequently he is not required to consider the public interest.

Right of appeal

44. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

45. 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.
46. 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

Sarah O’Cathain
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