ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS5050840

Dated: **22nd July 2014**

Appeal No. EA/2014/0197

Appellant:	**Sir Roger Gale MP ("RG")**
First Respondent:	**The Information Commissioner ("the ICO")**
Second Respondent:	**The Department for Work and Pensions ("the DWP")**

Before

David Farrer Q.C.

Judge

And

Pieter De Waal

And

John Randall

Tribunal Members

Date of Decision: 21st December 2014

Representation: **Sir Roger Gale appeared in person.**
Heather Emmerson appeared for the ICO.
Andrew Sharland appeared for the DWP.

Subject matter:

(i) Whether the requested information was exempt from disclosure by virtue of **s.27 (1)(b) of FOIA** because its disclosure would or would be likely to Prejudice relations between the United Kingdom and an international organization, namely the Commission of the European Union and

(ii) Whether, if the answer to (i) was "yes", the public interest was shown to favour withholding it.

(iii) Whether the requested information was exempt by virtue of **s.35 (1) (a)** because it related to the formulation or development of government policy and

(iv) Whether, if it did, the public interest was shown to favour withholding it.

Authorities:

R (McCarthy and Others) v Secretary of State for the Home Department [2012] EWHC 3368 (Admin.)
Hogan v ICO and Oxford City Council EA/2005/0030
R (on the application of Lord) v Secretary of State for the Home Office [2003] EWHC 2073 (Admin.)
Chief Constable for Devon and Cornwall v ICO [2012] UKUT 34)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal concludes that neither of the exemptions relied on is engaged. It therefore allows the appeal.

The Tribunal requires the Department of Work and Pensions to provide the requested information, namely the cited letter of August, 2013, to the Appellant, Sir Roger Gale MP, within twenty - eight days of the publication of this decision.

Dated this 21st. day of December, 2014

David Farrer Q.C.
Judge
[Signed on original]

REASONS FOR DECISION

The Background

1. Some years ago, the European Commission ("the EC") introduced rules to co - ordinate entitlement to social security benefits among member states. The UK government did not share the EC view as to the interpretation of certain provisions, in particular as to the "past presence test" (the "PPT") which governed access to certain benefits.
2. In October 2009 the EC served formal notice of infringement proceedings on the UK because of concerns as to UK policy on this issue. It regarded PTT as an additional residence requirement which contravened EU social security legislation. The evident differences of view were not resolved. In 2011 the decision of the European Court of Justice ("the ECJ") in *Stewart v Secretary of State for Pensions: Case C-503/09* required a revision of UK policy. On 20th June 2013, the EC served a further formal notice of infringement on the UK.

3. In August 2013 the UK (for practical purposes, the DWP) replied with a detailed exposition of the UK's interpretation of the relevant law of the community in the light of the Stewart decision. This letter ("the August letter") is the subject of RG's request to the DWP and of this appeal.

4. The infringement proceedings continue; the EC has neither brought the matter to the ECJ nor discontinued them.

5. RG is a Member of Parliament with a particular interest in the entitlement of expatriate UK citizens to social security benefits when resident in other member states and a deep concern for the plight of those who are unable to claim benefits, for whatever reason. This explains his keen interest in the August letter. The Tribunal emphasises, however, that neither his status nor his laudable motives for seeking disclosure have any relevance to its decision.

The Request

6. Shortly after the dispatch of the August letter RG put down a Parliamentary Question to the Secretary of State for Work and Pensions, asking if he would publish the August letter, which RG described as a response to an EC letter requesting clarification of the UK Government's position on the cumulative conditions that apply for waiving the PPT in cross - border cases. The ministerial reply was to the effect that both parties to such correspondence generally regarded it as confidential so that frank and effective discussions could ensure the implementation and enforcement of Community law.

7. On 9th. September 2013 RG, faced with that reply, made a similar request to the DWP, expressed to be pursuant to FOIA, for publication of the letter,

8. The DWP responded, refusing the request and citing the qualified exemptions under sections 27(1) (b) and 35(1). That stance was upheld on review. RG complained to the ICO on 10th. February 2014.

The Decision Notice ("the DN")

9. The ICO upheld the reliance of the DWP on s.27 (1) (b) and did not consider the further exemption cited, s.35 (1) (a).

10. The DWP, in exchanges with him, made clear that it relied on the proposition that disclosure would, rather than would be likely to cause prejudice.

11. The DN contains various references to a general consideration that communications between the EC and a member state remained confidential. It quotes a reference by the DWP to two ECJ cases in which the court said that parties to proceedings were entitled to assume that their submissions would not be disclosed in the course of the proceedings. It further cited observations of Haddon - Cave J in *R (McCarthy and Others v Secretary of State for the Home Department [2012] EWHC 3368 (Admin.)* at 35 - 7 to the effect that disclosure of the EC's Reasoned Opinion and the UK's reply would undermine the principles of "genuine cooperation and mutual trust" required in infringement investigations and the need to preserve confidentiality of documents relating to the EC's infringement investigations. The Tribunal examines those points in the context of this appeal at paragraph. 21

12. Having concluded that prejudice to relations with the EC would result; the ICO judged that there was no sufficient public interest in disclosure to outweigh the interest in maintaining confidentiality. He rejected the complaint. RG appealed.

The evidence

13. Robert Specterman ("RS"), Deputy Director of EU and international affairs within the DWP, gave evidence for the DWP. He had held that position for the past year. He related the history leading to RG's request. He referred to a convention of confidentiality applying to correspondence between the EC and member states when negotiating as to possible infringements. The convention applied to all government correspondence with

the EC on matters relating to possible infringements. He referred to EC contacts in Brussels who expect confidentiality for such correspondence and respect for the convention. Disclosure of the letter would seriously undermine the relationship between the UK and the EC and other member states and make early resolution of this and future disagreements more difficult. He further argued that disclosure could compromise the UK's presentation of its case before the ECJ, if the matter proceeded to litigation, by limiting the range of argument that the UK could advance.

14. RS gave further evidence as to the exemption under s.35 (1) (a). He emphasised that, at the date of RG's request, UK policy on PPT was still a matter of internal discussion, partly due to the *Stewart* decision, and that the letter was a response to EC concerns expressed in June, 2013. He referred to the familiar need for a safe space for the formulation and development of government policy. If the exemption was engaged, the public interest clearly favoured maintaining confidentiality.

RG's case

15. RG explained his concerns over the position of expatriates and his belief that disclosure of the letter would assist his campaign to promote their interests and remove disadvantages which they currently suffer. He dismissed the claim that disclosure would damage relations with the EC. As to s.35(1)(a), he pointed out that the investigation into a possible infringement by the UK had been running for four years by the time of his request, yet was described as being "in the early stages". He questioned whether the letter, which he had, of course, not seen, reflected the formulation of policy. He argued that the public interest, whichever exemption was under consideration, strongly favoured publication.

The Respondents' cases

16. The ICO largely adopted the arguments in the DN to which we have already referred. The DWP developed the points highlighted in the evidence of RS and the references to authority contained in the DN. Mr. Sharland reminded the Tribunal of the observations of Haddon - Cave J. in *McCarthy* as to the confidential status of EC documents, of the approaches to assessment of prejudice adopted in *Hogan v ICO and Oxford City Council EA/2005/0030* and by Munby J in *R (on the application of Lord) v Secretary of State for*

the Home Office [2003] EWHC 2073 (Admin.) and the requirement for aggregation of public interests in favour of withholding information, if both exemptions are engaged (see now *Chief Constable for Devon and Cornwall v ICO [2012] UKUT 34*).We consider that the preceding paragraphs fairly summaries the case presented.

Our reasons

17. The issues are those set out in the introduction to this decision.

18. So far as material to this appeal, s.27(1) reads -

> *"(1) Information is exempt information if its disclosure under this Act would, or Would be likely to, prejudice -*
>
> . . . .
>
> *(b) Relations between the United Kingdom and any international organization. . . . . .*

The EU is such an organization. The EC is its executive arm.

19. This is a qualified exemption so that, if it is engaged, the DWP must show that the public interest, judged on a balance of probabilities, favours withholding the information.

20. The tribunal accepts the tests for prejudice proposed in *Hogan,* as cited by the DWP. The DWP asserts that the feature of the relationship that would suffer prejudice is the trust that exists between the UK government and the EC as to the confidentiality of correspondence pending the resolution of disagreements as to a possible infringement of EU law. Clearly whether prejudice would or would be likely to result is to be assessed on the footing that the letter will be available to everybody, not simply RG for limited purposes. As to the degree of likelihood, we adopt the approach of Munby J. in *Lord*, namely that there must be a very significant chance of prejudice but not necessarily a probability exceeding fifty percent.

21. We do not consider that the question of prejudice can be decided on the basis of the general classification of a document, for example as correspondence generated as a result of an investigation into a possible infringement. We bear well in mind the observations of Haddon - Cave J. in McCarthy at paragraph 37 as to the need to preserve mutual trust in infringement investigations and the EC's expectations of confidentiality in respect of documents relating to its investigation. However, there were a number of clear distinguishing features in that case.

    - The documents sought in that case were not correspondence from an earlier stage of the exchanges but, in effect pleadings forming part of proceedings, namely the EC's Reasoned Opinion and the UK government's response.

    - There was evidently direct evidence from the EC in that case to the effect that it was averse to disclosure and did not consent to it.

    - Such aversion is not the same thing as treating disclosure as a breach of trust by the UK government. In this case, the Tribunal's decision means that disclosure is the discharge of a statutory obligation by a public body.

    - There were in *McCarthy* other equally if not more cogent reasons for refusing disclosure.

22. It is important to examine the nature of the letter, which can be done in an open decision in this appeal without prejudice to confidentiality of the content, since the DWP accurately summarized its effect and purpose in its open submissions.

23. The letter is simply a closely - woven forensic argument, setting out the UK's current stance on the issue of law on which the EC and the UK apparently disagreed. It makes no reference to discussions between the parties or how the EC had formulated its complaint. With very minor amendments as to whose opinion is being advanced, it could be an academic article or an advice from leading counsel.

24. The evidence as to prejudice came from RS. He cited the convention of confidentiality referred to above. In oral evidence he described what he deemed to be the likely reactions

to disclosure of EC officials with whom he was in contact. There was no evidence from the EC as to the damage that disclosure of this letter, or indeed correspondence more generally, would cause to relations with the UK.

25. Given the need for evidence of a very significant risk that disclosure of the letter may prejudice the relations between the UK government and the EC, the Tribunal does not regard the evidence adduced by the DWP as sufficient to engage the exemption. It is far from obvious that publication of this letter would disrupt relations with the EC, having regard to its character. There is nothing apparently confidential in the submissions that it contains and the letter itself bears no confidentiality marking. The EC would be the opponent of the UK in any infringement litigation, not a potential co-defendant, whose case is being revealed to the world, including the prosecutor regulator. It is hard to believe that the EC would take serious offence at disclosure by a member state to its own public of its forensic stance on a very important social issue, after four years of an infringement investigation which shows no sign of reaching a conclusion. An effective prohibition on any useful answer to a citizen's question - why is our government still disputing this issue with the EC in 2013? - might be seen as a surprising erosion of the right to impart and receive information conferred by Article 10 of ECHR.

26. Given the nature of the letter it is reasonable to consider the following question. Suppose that the relevant minister, in answer to a Parliamentary Question from RG - *"What legal case is HMG presenting to the EC on the issue of PPT?"* - had disclosed to the House of Commons in 2013 (without reference to the letter) precisely the case which is set out in the letter. Would he have prejudiced UK relations with the EC? If not, why should the disclosure of the fact that this case was made out in a letter to the EC make a critical difference? Everybody would assume from the answer to the PQ that this case was being communicated to the EC. The additional information as to the date and means of communication seems a rather insubstantial source of damage to relations with the EC.

27. Moreover, the EC might be expected to respect the decision of the DWP to disclose such information, where FOIA required it. What is involved is not a capricious decision to

disclose but a considered response to a statutory requirement resulting from a lawful request.

28. Quite apart from these considerations, the Tribunal does not accept that, as a result of disclosure of this information, the EC would be more disinclined to negotiate with the UK to resolve differences over alleged infringements without litigation. It will always be in the common interest of the member state and the EC to seek a compromise where that can properly be achieved. Trust may be undermined where sensitive discussions are revealed without warning or good reason. That is plainly not this case.

29. The argument as to the weakening of the UK's position if the matter comes before the ECJ has no bearing whatever on relations with the EC, which would not, presumably, view a weakening of its opponent's case as a cause for regret or recrimination. In any case, in so far as such a point might be relevant to the public interest, the letter discloses the case to the potential opponent. The Tribunal does not accept that its further disclosure to the public could affect its strength.

30. The Tribunal therefore finds that the exemption provided by s.27 (1) (b) is not engaged. Had it concluded that any degree of prejudice was likely to result, it would have found that such prejudice was slight, for the reasons already given. Having regard to the lapse of time, even allowing for revisions consequent on the *Stewart* decision, the uncertainty as to when the issue is likely to be resolved and the point made at paragraph 26, it would have accepted that the public interest favoured disclosure.

31. Section 35(1) (a) provides that information held by the government is exempt information if it relates to -

"*(a) the formulation or development of government policy*"

32. This exemption is normally applicable to internal communications within a government department, between one department and another or between a department and 10

Downing Street. It may well extend to correspondence or records of exchanges with outside bodies consulted when future departmental policy is under discussion. It is unusual for it to be relied on where the party receiving the communication is an external regulator to which the UK government wishes to state its case. Government policy is not generally formulated or developed, the Tribunal supposes, in consultation with an external entity which opposes the stance which the UK has adopted. The purpose of such a communication is to persuade that external entity to modify its opposition and to accept the UK case or policy, wholly or at least partly, not to seek its assistance in deciding what that case or policy should be.

33. As indicated above, the letter is a statement of the UK's position on a complex forensic issue. Its arguments, indeed its position, might change in the future but that does not alter the character of the letter.

34. The fact that policy or a case at law may change following further deliberation does not mean that a statement of the present position relates to policy formulation or development. That involves confusion between the stage that policy - making or forensic reasoning has reached and the nature of the communication under scrutiny. The DWP oral submissions came close to asserting that any statement on policy related to the formulation of policy if made when policy was still subject to modification. That extends the reach of s.35 (1) (a) much too far.

35. The Tribunal does not regard the letter as related to policy formulation or development. It is simply a detailed snap - shot of the UK's position on PPT in 2013. Hence the Tribunal does not accept that the s.35 (1)(a) exemption is engaged.

36. Had it taken a different view, it would have been strongly influenced by the passage of time, when considering the balance of public interests. This issue surfaced in 2009. There is no indication that it will be resolved in the foreseeable future. The DWP case amounts to a denial of information on the UK position on policy and in law, for an indefinite period. It would have answered the question posed in paragraph 26 by telling RG that,

regardless of the sensibilities of the EC, he could not have the information requested because government policy remained fluid and would remain so for an immeasurable period during which a safe space was required for its formulation and/or development. That is an untenable and unacceptable claim, in the Tribunal's view.

37. For these reasons we allow this appeal

38. Our decision is unanimous.

David Farrer Q.C.

Tribunal Judge

21st. December, 2014