



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

Appeal No: EA/2016/0276

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50631017

Dated: 19th October 2016

Appellant: David Goldberg

Respondent: The Information Commissioner

2nd Respondent: The Foreign and Commonwealth Office

Heard on the papers

Date of Hearing: 5 September 2017

Before

Chris Hughes

Judge

and

Jean Nelson & Paul Taylor

Tribunal Members

Date of Decision: 27 October 2017

Subject matter:

Freedom of Information Act 2000

Cases:

Magyar Helsinki Bizottsag v Hungary (18030/11)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal is satisfied that the decision notice is correct in law and upholds in part the decision notice dated 19 October 2016.

It directs the disclosure of those documents identified as not engaging s27 and s35 and listed in paragraph 45 of the witness statement of Mr Paul Williams (documents 8,10,11,12,21,28,30,31,45,48,55,56,77,82) with 35 days of the date of this decision and to that extent allows the appeal.

REASONS FOR DECISION

Introduction

1. The Organisation for Security and Cooperation in Europe (OSCE) has 57 states as members and works by consensus across a range of issues affecting those states and their citizens. One of the human rights institutions of the OSCE is the Representative on Freedom of the Media (RFoM) which is held by an individual for a period of three years. In 2015 the process of making a new appointment was underway and Dr Goldberg contacted the UK delegation to the OSCE to explore how the appointment was made and to register his interest in becoming the RFoM. Following this contact, when it became apparent that the UK would not be nominating a UK citizen to the post Dr Goldberg made an information request of the Foreign and Commonwealth Office (FCO):-

“Please supply me with all the documents – by email- pertaining to the decision not to nominate any UK citizen for the position of OSCE Representative for Freedom of the Media.

The topic will have been discussed and the matter decided during the Autumn of 2015.”

2. The FCO refused the request relying on exemptions from the duty to disclose contained in three sections of FOIA, s27(1)(a) and (b), s35(1)(a) and s40(2). These provide:-

*“27 **International relations.***

(1)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,...

(2) 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.

(3) For the purposes of this section, any information obtained from a State, organisation or court is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.

35 Formulation of government policy, etc.

(1) Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to—

(a) the formulation or development of government policy,...

40 Personal information.

(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

(2) Any information to which a request for information relates is also exempt information if—

(a) it constitutes personal data which do not fall within subsection (1), and

(b) either the first or the second condition below is satisfied....

3. The exemptions contained in s27 and s35 are qualified exemptions; if the exemption is engaged then the decision-maker considering the disclosure of the information has to weigh the public interest in disclosure of the information against the harm caused by disclosure to the interest which the exemption is intended to protect. Where the information falls within s40 then consideration of disclosure and non-disclosure is in accordance with the Data Protection Act 1998 and in particular the data protection principles.

4. On review the FCO maintained its refusal and Dr Goldberg complained to the Information Commissioner (the ICO). The ICO investigated and during the course of the investigation the FCO also relied on s27(2).
5. The FCO set out its position in a letter to the ICO of 27 July 2016. This explained the FCO's position that while the information might be of considerable interest to Dr Goldberg the request did not serve any public purpose. Disclosure would damage the public interest in maintaining relations with both OSCE and with other states. Non-disclosure continued to be necessary to protect a safe space for policy formulation and decision-making:-

“The OSCE’s RFoM selection procedure forms only part of the UK’s broader policy towards the OSCE and is an interconnected part of our relationship to both the institution itself and the Participating States.

Further, the selection process for the RfoM is still a live and ongoing issue... As this is a complex issue our views and hence advice may evolve to match changing circumstances and the minister needs to be assured that this advice and all that underpins it is given in confidence.

In this instance, therefore, we do not believe that releasing information that concerns the formulation and development of government policy is in the public interest, balanced against the low public interest in disclosure.

Section 40

Dr Goldberg has subsequently submitted a Subject Access Request. In response to this we released a digest of material relevant to Dr Goldberg only.

Dr Goldberg was not the only person to approach us about being considered for this role; and there was extensive discussion of other potential candidates...So we still need to protect data relating to these individuals pursuant to Section 40 as they would not expect information about them to be disclosed in this manner”.

6. Dr Goldberg argued that in considering the impact on international relations the FCO had not focussed on the actual information but had a class-based approach. He hypothesised a range of reasons relating to the decision-making not to nominate which, in his view, meant that disclosure would not cause prejudice. The role of RFoM in protecting freedom of expression was important.

7. Dr Goldberg acknowledged that if the potential candidates' names were not in the public domain at the time of the request then they could be legitimately withheld.

The Information Commissioner's decision notice

8. In her decision notice the ICO considered that prejudice would arise in respect of relations between the UK and OSCE and its members and that effective conduct of international relations depends on maintaining trust and confidence. The disputed material contained detailed and candid assessment of the process and related issues, the harm envisaged by disclosure was the harm which the exemption under s27 was intended to prevent, the nature of this information was relevant to the harm envisaged by s27 and harm was likely to result from disclosure by weakening trust in our relations with other members of OSCE. There would be substantial actual prejudice. There was an inherently strong public interest in effective international relations which outweighed the benefit of disclosure.
9. The material covered the UK approach to the selection process and OSCE more generally, the decision not to nominate was taken by a Minister as part of the general approach to OSCE. The issue was live at the time of the request as the selection process was still continuing. Policy formulation and deliberation remained live. She concluded that *"the disclosure of parts of the information which contain free and frank comments about the possible approaches to the RFoM nomination process could plausibly have a chilling effect on future contributions to any discussions about this process or potentially the UK's relationship with the OSCE."* She concluded that public interest favoured maintaining the exemption in s35(1)(a).
10. She was satisfied that personal data about potential candidates was exempt from disclosure, they had a legitimate expectation that it would not be disclosed, at the time of the request their names were not in the public domain and it would, in the circumstances, be unfair to breach it.

The appeal to the tribunal

11. In his appeal Dr Goldberg noted his difficulties since he had no sight of the withheld information. He argued that it was a decision "not to act" and therefore the FCO was being melodramatic, at the date of the request the issue was not "live" and so was less

sensitive. Prejudice was not sufficiently likely or substantial. The FCO had adopted a blanket approach.

12. In considering the information Dr Goldberg invited the tribunal to consider the strict relevance of each piece of information to the request since he felt that the FCO had interpreted the request too widely, thus increasing the risk of prejudice. There was a public interest in understanding how appointments to positions such as this are made and disclosure would give insight into the working of the FCO.
13. The request related to a single discrete decision, not a policy, Ministerial involvement did not constitute policy and this individual decision was not an inextricable element of policy formulation.
14. Dr Goldberg argued that given the probable seniority of candidates for such a role there was a reasonable expectation that they would expect their names to be disclosed. A full list of candidates for the analogous UN position had been published, consequently disclosure of the names would be fair. He relied on the ECHR case of *Magyar Helsinki Bizottsag v Hungary* (18030/11).
15. The ICO resisted the appeal. With respect to s27 (harm to international relations) the ICO recognised the expertise of the FCO in discerning whether the exemption was engaged and the risk of harm through disclosure. The material presented a frank assessment of other countries diplomacy and “*prejudice could arise if it gives a state an opportunity to extract some advantage by pretending to be offended or to drive a wedge between the UK and its allies.*” Furthermore some of the information was clearly confidential information from other states or OSCE officials so falling within s27(2). With respect to breach of the confidence in communications from another State she noted that there was an inherent public interest in not breaching that State’s confidence and disclosure would prejudice the ability to obtain such information in future. The public interest in avoiding damage outweighed the only substantive argument advanced by Dr Goldberg of enabling the public to learn more about the FCO procedure and tactics in deciding whether to nominate for one specific role.
16. With respect to s35 (policy formulation and development) she noted the importance of timing and the exercise of judgement in concluding that the exemption was engaged. The decision not to nominate could not be separated from wider considerations and

therefore the chilling effect was clearly relevant. The issues continued to be live as the situation continues to unfold. The balance in public interest was clear.

17. The third party personal data included positive and negative comments, sometimes about individuals who had not at that stage expressed an interest in appointment. The author of one assessment explicitly asked for it to be kept confidential. It would be unfair to disclose the material and there was no necessity for the disclosure.
18. The FCO in opposing the appeal and supporting the ICO's decision notice, supplied a statement from Mr. Paul Williams, the Director for Multilateral Policy in the FCO. In his statement Mr Williams explained the role of the OSCE, the approach of the UK to the nomination of RFoM and how the FCO had considered the request. The disputed information was contained in 99 email chains between August and December 2015. The witness statement categorised each email chain according to the relevant exemption (some email chains being categorised with more than one exemption) and clearly indicated how prejudice arose in each case.

The questions for the Tribunal

19. The issue for the tribunal is whether the ICO's decision notice is correct in law and whether any exercise of discretion by the Commissioner ought to have been exercised differently. The starting point is consideration of the request:- "*Please supply me with all the documents – by email- pertaining to the decision not to nominate any UK citizen for the position of OSCE Representative for Freedom of the Media*". Although Dr Goldberg has attempted to shift his position during the course of the appeal it is a request for **all documents pertaining to the decision**. It is therefore wide in scope and for documents.
20. The evidence of Mr Williams provides a useful structure for approaching the material and it is very clear that the withheld material is clear-eyed and frank in its assessment of the many aspects "*pertaining to the decision.*" An examination of the material shows that it includes objective appraisals of the stances and attitudes to issues of the UK's partners in OSCE and of the OSCE itself. It contains confidential communications from other states and confidential personal information about individuals. There is a very clear potential for repercussions from international partners, whether in the form of real offence or tactically assumed offence or in a loss of trust in the reliability and discretion of the UK diplomats. The conduct of wide

ranging and searching consideration of policy choices would be impeded.

Information about individuals who might, or might not, be seeking this post and searching criticisms of them if disclosed would infringe their rights.

21. The tribunal shares the view of the ICO that the public benefit of disclosure is very limited. The ECHR jurisprudence to which Dr Goldberg referred the tribunal is of little assistance to his cause. While it states that in very limited circumstances Article 10 of the European Convention on Human Rights may give rise to a positive right to information held by a public body, those circumstances do not apply. Dr Goldberg wishes to see the information about why the UK Government made a specific decision not to nominate to an OSCE post. This is of great interest to him, however there is no evidence of a wider interest or any journalistic interest in the issue which would justify the prejudice likely to be caused. In the witness statement the witness for the FCO made a small concession indicating that a few of the documents in the disputed material did not engage s27 or s35. In the light of this concession the FCO will release the documents for which it no longer claims exemptions.
22. The tribunal is satisfied that beyond the concession the appeal has no merit and it is in substance dismissed.
23. Our decision is unanimous.

Judge Hughes

[Signed on original]

Date: 27 October 2017

Promulgated: 27 October 2017