

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 14 April 2011

Public Authority: The Foreign and Commonwealth Office
Address: King Charles Street
London
SW1A 2AH

Summary

The complainant submitted a request to the Government Hospitality Advisory Committee for the Purchase of Wine (GHACPW) for the database which detailed what wine was held in the government wine cellar. The GHACPW refused to provide the database on the basis that it was exempt from disclosure by virtue of section 43(2) of the Act. Following this refusal, and in response to an earlier decision notice issued by the Commissioner relating to a separate request by a different complainant, the GHACPW disclosed some parts of the database. By the time that this notice has been issued the complainant has therefore been able to access some of the information that he requested. (Furthermore, at the point at which this notice is being issued the GHACPW no longer exists with its functions and roles having been subsumed into the Foreign and Commonwealth Office (FCO). This notice is therefore being served on the FCO.) In respect of the remaining information that has not been disclosed, the Commissioner has concluded that some of this is exempt from disclosure on the basis of section 43(2); namely the original order number, cost per bottle, agency price and date each wine was ordered. However, the Commissioner has also concluded that the market price and stock held of each wine is not exempt from disclosure on the basis of section 43(2) and the FCO must therefore disclose this information.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. The public authority to which the complainant originally submitted his request, The Government Hospitality Advisory Committee for the Purchase of Wine (GHACPW), was a non-departmental public body sponsored by the Foreign and Commonwealth Office (FCO). The GHACPW was responsible for providing advice on the maintenance of appropriate standards of wines for use at government functions. This entailed providing advice, after tasting, on the purchase of wine, the exchange of wine if necessary, and the stocking of the Government Hospitality (GH) Cellar at Lancaster House. GH is a department within the FCO.
3. However, following an announcement by the government in October 2010 regarding changes to public bodies, by the time that this notice is being issued the GHACPW has ceased to exist with its responsibilities effectively being taken over by the FCO. The Commissioner therefore considers it appropriate to serve this notice on the FCO.
4. Furthermore when investigating this complaint the Commissioner actually exchanged correspondence directly with the FCO rather than the GHACPW. Therefore the Chronology section and remainder of the Notice refer to the 'FCO's submissions' rather than the 'GHACPW's submissions'. Such submissions however clearly reflected the opinions and position of the GHACPW (and were sent on its behalf).
5. Moreover, given that the role of the GHACPW, was as its name suggested, simply to 'advise' the FCO on the use and purchase of wines, rather than to buy them in its own right, the Commissioner understands that it is accurate to consider any prejudice that may occur following disclosure of the requested information to be to the FCO's, rather than to what would have been the GHACPW's, commercial interests.

6. On 18 October 2010 the Commissioner served a decision notice, FS50277632, which considered an earlier request to the GHACPW for very similar information to that requested in this case.¹ This earlier notice ordered the GHACPW to disclose certain information on the database detailing the stock contained in the government wine cellar. The GHACPW complied with the requirements of this Notice in December 2010 and the disclosed information can be viewed on the FCO's disclosure log.²

The Request

7. On 10 June 2010 the complainant submitted the following request to the Foreign and Commonwealth Office (FCO):
 - 'a) the complete database of what wine is currently held in the Government Wine Cellar.
 - b) If the list is not complete,...the partial list of what wine is currently held in the Government Wine Cellar'.
8. The FCO responded on 28 June 2010 and confirmed that it held the information requested but explained that it considered it to be exempt from disclosure on the basis of section 43(2) of the Act. The FCO did however provide the complainant with an illustrative list of some of the wines held in the cellar.
9. The complainant contacted the FCO on 2 July 2010 and asked for an internal review of this decision to be carried out.
10. The FCO informed the complainant of the outcome of the review on 9 November 2010; the review upheld the decision to withhold the requested information on the basis of section 43(2).
11. Following the intervention of the Commissioner, which is discussed below, the FCO contacted the complainant in January 2011 and informed him that it had published some parts of the database on its disclosure log in response to the Commissioner's earlier decision

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http://www.ico.gov.uk/tools_and_resources/decision_notices/~media/documents/decisionnotices/2010/fs_50277632.ashx

² <http://www.fco.gov.uk/content/en/23092127/0573-09-1> and <http://www.fco.gov.uk/content/en/23092127/0573-09-2>

notice. The FCO provided the complainant with a link to the information that had been disclosed.

The Investigation

Scope of the case

12. The complainant initially contacted the Commissioner on 1 September 2010 in order to complain about the FCO's delay in completing the internal review. The complainant also disputed the FCO's reliance on section 43(2). Following the issuing of the internal review the complainant confirmed to the Commissioner that he still wished him to consider the FCO's reliance on section 43(2). The complainant submitted a number of arguments in support of his position that this exemption had been incorrectly relied upon. The Commissioner has not detailed these arguments here but made reference to them, where relevant, in the Analysis section below.
13. As noted above, during the course of the Commissioner's investigation the FCO provided the complainant with some of the information which fell within the scope of this request. The Commissioner has therefore considered this aspect of the complaint to be informally resolved. For the purposes of this Notice the Commissioner has therefore only considered whether the remaining information contained on the database, not previously disclosed by the FCO in response to the decision notice on case FS50277632, is exempt from disclosure on the basis of section 43(2).

Chronology

14. The Commissioner contacted the FCO on 20 December 2010 and suggested that as it had now disclosed certain parts of the database in response to his decision notice FS50277632 it should contact the complainant in this case and provide him with the same information. The Commissioner noted that if such information was disclosed he would consider this aspect of the complaint to be informally resolved. With regard to the information contained on the database which the earlier notice did not order the FCO to disclose, and for the information contained on the database which did not fall within the scope of the previous request, the Commissioner asked the FCO to provide further submissions to support the application of section 43(2) to withhold such information.
15. The FCO responded on 10 February 2011 and confirmed that it had now provided the complainant with a link to the information the Commissioner's previous notice had required it to disclose. The FCO

reiterated its position that the remaining information was exempt from disclosure on the basis of section 43(2) of the Act.

Findings of fact

16. The stock list includes the name of each wine held in the cellar and also includes the following fields of information:
 - (a) Supplier and delivery date;
 - (b) Grade;
 - (c) Original order;
 - (d) Cost per bottle;
 - (e) Agency price;
 - (f) Market price;
 - (g) Present stock;
 - (h) Usage instructions; and
 - (i) Tasting notes.
17. Not all fields are populated for all wines; for example not all wines have tasting notes.
18. The Commissioner's previous notice required the FCO to disclose the following information:
 - The name of each of the wines along with their vintage;
 - The names of the suppliers but unallied to the names of the wines they supplied;
 - The information contained in fields (b), (h) and (i) allied to the actual wines. There were a very small number of exceptions to these disclosures, e.g. where the tasting note made reference to the supplier or price.
19. The previous notice also concluded that the information contained in fields (c) to (e), along with the date of delivery, was exempt from disclosure on the basis of section 43(2).
20. The previous notice did not reach a determination on the information contained in fields (f) to (g) as these fell outside the scope of the earlier request.

Analysis

Exemptions

Section 43(2) – commercial interests

21. The FCO has argued that the information which it has still not disclosed to the complainant is exempt from disclosure on the basis of section 43(2). Such information consists of the information described at points (c) to (g) and the delivery date.

The information contained at points (c) to (e)

22. In the earlier decision notice already referenced, the Commissioner concluded that the information contained at points (c) to (e), along with the delivery date, was exempt from disclosure on the basis of section 43(2) of the Act and that in all the circumstances of the case the public interest favoured maintaining the exemption. The Commissioner does not see any reason to vary his decision in respect of the same information in this case. Furthermore in light of the detailed analysis set out in the previous notice (see paragraphs 32 to 51 and 65 to 69 of that notice) the Commissioner does not intend to set out in detail why he has reached the same conclusion in this notice. Rather he would simply summarise his reasons for reaching this conclusion as follows:

- The Commissioner accepts that disclosure of the prices and quantities at which particular suppliers sold particular wines to the FCO would be likely to prejudice those suppliers' commercial interests because of pressure on them to provide other purchasers with similar discounts;
- The Commissioner also accepts that the FCO's commercial interests would be likely to be harmed because its suppliers would review the discounting arrangements offered to the FCO in light of the harm to their commercial interests discussed in the preceding paragraph;
- Furthermore – and independent of the effect described in the previous paragraph - the Commissioner accepts that the purchasing arrangements between the FCO and its suppliers are considered to be confidential in nature and thus if such information was disclosed this could also trigger the suppliers reviewing the discount arrangements they offered to the FCO; and
- Although there was a strong and legitimate public interest in understanding how public funds were spent, in the Commissioner's opinion this was outweighed by the public interest in the FCO being

able to achieve best value for money and thus not undermining the discounting arrangements it had in place with its wine suppliers. The debate as to whether or not the government should in fact be maintaining such a cellar was not relevant to the public interest test in this case.

23. In maintaining his previous conclusion in respect of this information the Commissioner has taken into account two particular submissions made the complainant:
24. Firstly, in response to the FCO's argument that releasing information would hurt its suppliers' commercial interests who would thus end discounting arrangements with the FCO, the complainant argued that the wine market was transparent. Prices on retail, wholesale and at auction are available in an instant and as a result the market is highly competitive. Certainly, some discounts may be given for larger orders. However it was wrong, in the complainant's view, to suggest that the FCO's discounts might be curtailed and in any case for the more expensive wines, which presumably make up the bulk of the department's investment, the statements regarding discounting would not be applicable. Additionally, the overall size of the government cellar is rather small and would have no impact on the wine markets as a whole.
25. Secondly, although the FCO had consulted with its suppliers in order to reach its position that section 43(2) was engaged, these suppliers clearly had an inherent interest in protecting information about their own activities and thus their opinions could not be described as impartial.
26. In response to the first point the Commissioner would simply note that whilst the wine market is to a large degree transparent in the manner in which the complainant suggests, he does not accept that such transparency extends to the information about discounts on individual wholesale or retail orders, such as those placed by the FCO, being in the public domain. Furthermore having examined the withheld information the Commissioner is satisfied that contrary to the complainant's assumption, the FCO did in fact achieve discounts on more expensive wines.
27. With regard to the second point, the Commissioner accepts that the FCO's suppliers obviously have some inherent interest in protecting their own position. However, as noted in paragraphs 50 and 51 of the earlier notice, public authorities' consultation with relevant third parties, including those whose interests may be harmed, is in line with the approach advocated by the Information Tribunal in *Derry Council v Information Commissioner (EA/2006/0014)*. Furthermore, the

Commissioner notes that the FCO's views on the likelihood of prejudice occurring to its suppliers are also informed by the knowledge and comments of the four Masters of Wine who comprise the GHACPW.

The information contained at points (f) and (g)

28. In its submissions to the Commissioner in relation to this case the FCO argued that disclosure of the information contained at points (f) and (g) would prejudice both its and its suppliers' commercial interests. These submissions mirrored those set out in relation to the information withheld at points (c) to (e) and discussed at length in the previous notice. That is to say disclosure of this information could lead to pressure on the FCO's suppliers from other purchasers to offer similar discounts previously provided to the FCO. This would impact on the FCO's relationship with its suppliers leading to the end of the discounting arrangements, the details of which were considered to be confidential.
29. In order for a prejudice based exemption, such as section 43(2), to be engaged the Commissioner believes that the following 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; 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. If the likelihood of prejudice occurring is one that is only hypothetical or remote the exemption will not be engaged.
30. The Commissioner accepts that the prejudicial effects envisaged by the FCO following disclosure of the information contained at points (f) and (g) are clearly ones that relate to the interests that section 43(2) is designed to protect. The first criterion is therefore met.
31. In respect of the second criterion and the prejudice to the FCO's suppliers' commercial interests, the Commissioner does not believe that the FCO has demonstrated that there is causal link between

disclosure of the market price for each wine and prejudice to the suppliers' interests. The Commissioner notes that the list of wines held by the FCO has now been placed in the public domain and the market price for each wine could be established by any interested party, particularly those involved in the wine trade. Consequently given the relative ease with which such information could be accessed it is difficult to see how its disclosure could be prejudicial to the FCO's suppliers' commercial interests. Given that the harm to the FCO's own commercial interests will only occur if the suppliers re-consider their discounting arrangements in response to their own interests being harmed, the Commissioner also believes that there is no causal link between the disclosure of the market price for each wine and the FCO's commercial interests. In reaching this finding the Commissioner does not believe that the confidential nature of the pricing arrangements between the FCO and its suppliers extend to the cover market price for each wine.

32. With regard to the stock levels held by the FCO, the Commissioner understands that the FCO believes that given the volatile nature of the wine market, disclosure of this information, along with the price paid by the FCO would be picked up by other wine purchasers and lead to pressure on its suppliers. The Commissioner does not dispute the specialist nature of the wine market and accepts that interest may well be taken in the level of stock held by the FCO. Furthermore, as his conclusion in respect of the information (c) to (e) makes clear the Commissioner does not dispute the prejudicial effects of disclosing the price paid for particular wines by the FCO. However, in the Commissioner's opinion the FCO has failed to evidence a clear causal link between disclosure simply of the stock level of each wine - without it being linked to the purchase price or particular supplier – and prejudice to either its suppliers' or its own commercial interests.
33. The Commissioner has therefore concluded that section 43(2) does not provide a basis to withhold either the market price or stock level of each wine. The exemption is not engaged, so it is not necessary to consider the public interest test.

Procedural Requirements

34. Section 1(1) of the Act provides a general right of access to information and states that, subject to the application of an exemption,:

'Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.'

35. Section 10(1) of the Act requires that a public authority complies with the requirements of section 1(1) promptly and in any event within 20 working days.
36. In the circumstances of this case, as the Commissioner has concluded that the information contained in the market price and present stock fields of the stock list are not exempt from disclosure, the GHACPW should have disclosed this to the complainant within 20 working days of his request. The GHACPW's failure to do this constitutes a breach of section 1(1)(b) and 10(1) of the Act.

The Decision

37. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- The information contained in the following fields of the database is exempt from disclosure on the basis of section 43(2) of the Act: the original order number; cost per bottle; agency price and date ordered. The Commissioner is satisfied that in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

38. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- The information contained in the following fields of the database is not exempt from disclosure on the basis of section 43(2) of the Act: the present stock and market price.
- By failing to provide the complainant with this information the GHACPW breached sections 1(1)(b) and 10(1) of the Act.

Steps Required

39. The Commissioner requires the FCO to take the following steps to ensure compliance with the Act:
 - To provide the complainant with the present stock and market price for each of the wines listed on the GH database.
40. The FCO must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

41. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

42. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

43. 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.
44. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 14th day of April 2011

Signed

**Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

General Right of Access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

(c) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(d) if that is the case, to have that information communicated to him."

Section 2(3) provides that –

"For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

(a) section 21

(b) section 23

(c) section 32

(d) section 34

(e) section 36 so far as relating to information held by the House of Commons or the House of Lords

(f) in section 40 –

(i) subsection (1), and

(ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,

(iii) section 41, and

(iv) section 44"

Time for Compliance

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Refusal of Request

Section 17(1) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

Commercial interests

Section 43(2) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”