

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 April 2012

Public Authority: Cabinet Office
Address: Admiralty Arch
North Entrance
The Mall
London
SW1A 2WH

Decision (including any steps ordered)

1. The complainant asked the public authority to provide information about communications sent or received by a specified individual and their line manager and direct or indirect reports, in relation to the company Phorm. The Cabinet Office withheld all the information it held relevant to the request (four pieces of correspondence) claiming that all of it constituted the personal data of the specified individual. In addition, it applied the exemption for international relations (section 27) to two of the four documents.
2. The complainant indicated to the Information Commissioner that he was content for any 'personal data' to be redacted from the withheld information. Therefore, where applied, the Information Commissioner will not consider further the exemption for personal information (section 40(2)). In respect of the exemption at section 27, the Information Commissioner has decided that the public authority properly applied this exemption and that the public interest in maintaining the exemption outweighs the public interest in disclosure.
3. The Information Commissioner therefore requires the public authority to take the following steps to ensure compliance with the legislation.
 - He orders that the content of the two emails previously withheld under the exemption for personal information should now be disclosed to the complainant, with the names of the parties redacted.
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 Information 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.

Background

5. Phorm is a company that developed a system where, with the cooperation of an individual's internet service provider (ISP), it can profile the addresses and certain content of websites visited by users and then use that information to match that user against predefined broad advertising categories.
6. This request was the subject of an earlier decision notice (*reference FS50318526*) issued on 17 March 2011. The Cabinet Office had previously applied the exemption at section 40(5)(b)(i), neither confirming nor denying whether any information was held because it claimed that to do so would contravene the Data Protection Act 1998. The Information Commissioner disagreed with the Cabinet Office's decision and issued the notice requiring it to either provide the requested information or to apply an appropriate exemption.
7. The detail in the '*Request and Response*' section below relates to actions taken by both parties following the issue of the decision notice.

Request and response

8. On 20 October 2009, the complainant wrote to the Cabinet Office via the website *WhatDoTheyKnow.com* and requested information in the following terms:

"Please release the first communication received electronically by the cabinet office in relation to the company "Phorm" by [named employee] of the office (the email address will be her name plus cabinet-office.x.gsi.gov.uk).

Also, release all communication (sent or received) by [the named employee], or her line manager, or her direct or indirect reports, associated with the subject of Phorm and the meeting held at 1 Victoria Street, 10:30am 5th Aug 2008.

If any emails cannot be released due to exclusion under the FOI Act, please redact the contents, leaving the recipients' and senders' department names and dates and times of the communications that took place visible."

9. Following the Information Commissioner's decision notice referred to above, the Cabinet Office provided its response to the complainant on

20 April 2011. It stated that the requested information was exempt by virtue of the exemption for international relations, concluding that the public interest test favoured withholding the information. It also applied the exemption for personal information to the information.

10. The complainant requested an internal review of the decision on 23 April 2011. In the absence of any response from the Cabinet Office, the complainant contacted the Information Commissioner on 5 July 2011 to complain about the outstanding internal review. The Information Commissioner then wrote to the public authority asking it to provide the result of its internal review by 19 July 2011.
11. Despite further contact from the Information Commissioner, the Cabinet Office did not write to the complainant with its internal review outcome until 2 August 2011. This upheld the original decision to apply the exemptions for international relations and personal information to the requested information.

Scope of the case

12. The complainant contacted the Information Commissioner to complain about the way his request for information had been handled. He asked the Information Commissioner to consider whether the exemptions could be correctly used *"in a blanket fashion"* and restated that he would be satisfied with the release of any emails with redactions.
13. He was particularly concerned with the Cabinet Office's use of the exemption for personal information to withhold the requested information.
14. The Information Commissioner has considered whether the Cabinet Office properly applied the exemptions for international relations and for personal information to the withheld information. The Cabinet Office applied sections 27(1)(b) and 27(2) to two of the four pieces of correspondence in this case.

Reasons for decision

Exemption for personal information (section 40(2))

15. Section 40(2) of FOIA states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure under the Act would breach any of the data protection principles.
16. Although the complainant originally sought details of any personnel involved, as shown above, during the course of the Information

Commissioner's investigation he indicated he would accept redacted information in order to forego any breach of the DPA.

Is the requested information personal data?

17. Section 1 of the DPA defines personal data as data which relates to a living individual, who can be identified:

- from that data, or
- from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.

Would disclosure breach one of the Data Protection principles?

18. The Cabinet Office has argued that all the withheld information is exempt under section 40(2) because disclosure would breach the first data protection principle.

19. The first data protection principle has two components:

- personal data shall be processed fairly and lawfully; and
- personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met.

20. With the names of any personnel redacted from the information, the Information Commissioner considers that the remaining content cannot be used to identify any party involved. Whilst he accepts that the request itself does make reference to a member of staff by name, with all the parties redacted it would not be possible to accurately ascertain that party's involvement. He therefore concludes that, after redaction, section 40(2) does not apply to any of the information.

Exemption for international relations (section 27)

21. The exemption for international relations contains two closely related provisions; an exemption for information whose disclosure would or would be likely to harm United Kingdom interests, dealt with in section 27(1), and an exemption for information obtained in confidence from another state or international organisation or court, dealt with in section 27(2).

22. The Cabinet Office applied section 27(1)(b) to the two documents described above. This exemption provides that information is exempt if its disclosure would or would be likely to prejudice relations between the UK and any international organisation or international court. In other words, it focuses on the effect of disclosure rather than the nature of the information itself.

23. In the Information Commissioner's view, prejudice under this exemption can be real and of substance if it makes relations with the international organisation in question more difficult or calls for a particular diplomatic damage limitation exercise. The Cabinet Office has confirmed that its role in relation to the subject matter of the two documents in question is administrative, and that the named individual has a procedural rather than a substantive role in relation to those matters.

24. It confirmed that they were still *"in process"* and said that:

"...disclosure of this information, and the breaching of the confidentiality which that would entail, would prejudice our relations with the [relevant international organisation] and the likely outcome of our case".

25. It also explained that the subject matter of the documents was *"regarded as confidential at every stage of the proceedings"*, and that the prejudice to its relations with the international organisation flowed directly from the failure to respect the confidentiality which governs such matters. In considering the matter of prejudice in respect of section 27(1), the Information Commissioner has followed the three-stage process as set out in his guidance.

Public interest arguments in favour of disclosing the requested information

26. The Cabinet Office recognised that disclosure would be in the interests of transparency:

"...openness in government increases public trust in and engagement with the government and that this has a beneficial effect on the overall quality of government; we also acknowledge the generic public interest in openness and that transparency may promote public understanding of the policy making process".

27. The Cabinet Office also recognised that the subject matter:

"...remains a matter of considerable public interest and that there is a public interest in the public having access to good quality information about the issues to ensure debate is well-informed. The outcome of [this case] may have an effect on our citizens..."

Public interest arguments in favour of maintaining the exemption

28. Arguing in favour of maintaining the exemption, the Cabinet Office said that it had weighed the importance to the UK of its relationship with

the international organisation, advising that anything which damages the UK's ability to engage with it and represent UK interests would not be in the public interest.

29. The Cabinet Office explained that the prejudice to relations that disclosure would cause would undermine the UK's credibility and make it much more difficult to argue its case in the future. It added that this damage to the UK's ability to defend and pursue its interests would have a material effect on UK citizens. The Cabinet Office argued that it would weaken the UK's ability to reach its wider policy objectives, make it more difficult for it to secure wider support for the UK's policy initiatives, and make it less able to promote and protect the interests of British businesses.

30. In addition, the Cabinet Office said that disclosure of this information:

"...would damage our relations with an important collective institution of which [sic] we have a long term commitment and which plays a central part in our economic life".

Balance of the public interest arguments

31. When balancing the opposing public interests in this case, the Information Commissioner is deciding whether it serves the public interest better to disclose the requested information or withhold it because of the interests served by maintaining the relevant exemption.

32. In reaching his decision in this case, the Information Commissioner accepts that there is clearly a public interest in the accountability and transparency of the Cabinet Office for the decisions it takes, such as its involvement in providing a response in the matters at issue. However, the Information Commissioner also considers it is strongly in the public interest that the UK maintains good relations with international organisations. Expectations of confidentiality in respect of discussions with such organisations should be respected.

33. In this case, he considers that the effective conduct of the UK's international relations and international engagement in the sensitive issues around the UK's handling of the issue would be compromised if the requested information were to be made known. He therefore finds the public interest in maintaining the exemption outweighs the public interest in disclosure.

34. Having reached this decision, the Information Commissioner does not need to make a decision on the application of section 27(2) to the withheld information. However, he accepts that the subject matter is by its very nature confidential, and that this confidentiality applies at every stage of the proceedings. Therefore the withheld information

would almost certainly also be exempt from disclosure under section 27(2).

Conclusion

35. The Information Commissioner finds that the Cabinet Office properly applied the exemption for international relations to the letter (first electronic piece of communication) and the email summarising the communication and does not require this information to be disclosed.

Other matters

36. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, the Information Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Information Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Information Commissioner is concerned that in this case, it took over 68 working days for an internal review to be completed, despite the publication of his guidance on the matter.

Right of appeal

37. 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: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

38. 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.
39. 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

Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
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Wilmslow
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SK9 5AF