

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 March 2013

Public Authority: Cabinet Office
Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant requested correspondence between a named special adviser (or his office) and outside interests concerning the proposed register of lobbyists from June 2010 until December 2011.
2. The Commissioner's decision is that sections 41 and 43 claimed by the public authority are not engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information.
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 the Act and may be dealt with as a contempt of court.

Request and response

5. On 12 December 2011 the complainant wrote to the Cabinet Office (the CO) and requested information in the following terms:

'1) Correspondence (emails and letters) between [a named individual] and/or his office and outside interests concerning the proposed register of lobbyists from June 2010 to the present.

Please include in particular correspondence with employees of the following companies: Open Road; Tetra Strategy; Bell Pottinger; Lansons Communications; and Cicero Consulting.

2) Details of meetings between [a named individual] and outside interests concerning the proposed register of lobbyists from June 2010 to the present.'

6. The CO responded on 16 January 2012. It stated that it considered that the balance of interest fell in favour of disclosing the information and disclosed information to the complainant.
7. On 19 January 2012 the complainant requested an internal review. He also submitted a slightly amended request as follows:

'Correspondence between [a named individual] and/or his office and employees of the following companies: Open Road; Tetra Strategy; Bell Pottinger; Lansons Communications (with whom [a named individual] has held meetings) and Cicero Consulting from June 2010 to the present. Please ensure that you include correspondence regarding government business via private email accounts, and text messages as laid out in recent ICO guidance'.
8. Following an internal review the CO wrote to the complainant on 10 April 2012. The CO explained that it had handled the original request of 12 December 2011 correctly. In relation to the complainant's amended request, it disclosed a string of emails with some information redacted although it did not state which exemption it was relying upon. The CO also explained that it was withholding some other information under sections 41(1) and 43(2).

Background

9. The Regional Growth Fund (RGF) is a £2.4 billion fund operating across England from 2011 to 2015. It supports projects and programmes with significant potential for economic growth that can create additional, sustainable private sector employment. It aims particularly to help those areas and communities which were dependent on the public sector to make the transition to sustainable private sector-led growth and prosperity.
10. On 1 November 2011 the Mulberry Group plc (Mulberry) confirmed it was awarded £2.5 million from the RGF to build a factory in Bridgewater, Somerset. It also confirmed that in addition it was investing £5 million of its own money. It explained that this would provide 256 jobs in the area and that it would be producing approximately 140,000 handbags per annum, mainly for export.

Scope of the case

11. On 24 April 2012 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He complained that the CO had not provided any evidence to show that disclosure would constitute an actionable breach of confidence with regard to its application of section 41(1). He also complained that the CO had not explained how disclosure would damage the commercial interests of the companies involved with regard to its application of section 43(2).
12. The complainant confirmed to the Commissioner that he was complaining about the way in which the CO handled his amended request of 19 January.
13. The Commissioner will therefore consider whether the CO applied the section 41(1) and 43(2) exemptions appropriately to the withheld information in relation to the slightly amended request of 19 January.

Reasons for decision

14. Section 41(1) of FOIA provides that:

Information is exempt information if-

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.'

(a) Was the withheld information obtained by the CO from another person?

15. The information was given to the CO by Mulberry's advisers, therefore the Commissioner is satisfied that the information was given to the CO by a third party.

(b) Would disclosure of the withheld information constitute an actionable breach of confidence?

16. In order to determine whether disclosure would constitute an actionable breach of confidence the Commissioner considered the following questions.

(i) Does the withheld information possess the necessary quality of confidence?

(ii) Was the withheld information imparted in circumstances importing an obligation of confidence?

(iii) Would unauthorised disclosure cause a detriment to the party providing the information or to another party?

(iv) If parts (i)-(iii) are satisfied, would the public authority nevertheless have a defence to a claim for breach of confidence based on the public interest in the disclosure of the withheld information?

(i) Does the withheld information possess the necessary quality of confidence?

17. In the Commissioner's view information will have the necessary quality of confidence if it is not otherwise accessible and is more than trivial.
18. Having reviewed the withheld information, the Commissioner is satisfied that it is clearly more than trivial in nature as it concerns information in connection with the bid to the RGF.
19. With regard to whether the information is otherwise accessible, the Commissioner notes that some of the withheld information was in the public domain, before the complainant's request. This information was provided by Mulberry, in which it confirmed how much it had been awarded by the RGF, how much of its own money it was putting up for the building of the factory, approximately how many staff will be employed and approximately how many bags it will produce. The Commissioner considers that because this information has already been put into the public domain by Mulberry, it cannot be considered confidential.
20. However, whilst it is accepted that sections of the information are in the public domain there is some information provided to the CO which is not.

(ii) Was the withheld information imparted in circumstances importing an obligation of confidence?

21. The CO has explained that the information was provided to it in confidence. It acknowledged that although assurances of confidentiality were not explicitly given, applicants for funding are promised

confidentiality about the details. The CO also explained that the information in question was produced by Mulberry's advisers and Mulberry itself, to brief the Deputy Prime Minister's Office about a forthcoming bid they both had an interest in. There was a standard statement of confidentiality in the email.

22. The CO explained that although it was a standard statement of confidentiality, it indicated the assumptions which underpinned the information. It pointed out that there was nothing in the email in question or the submission attached which suggests that the statement of confidentiality is waived or is inappropriate.
23. The CO argued that the information in question was of the type that would usually import an obligation of confidence and that the Department for Business, Innovation and Skills gives an assurance of confidentiality for the information included in RGF applications. It also argued that Mulberry and its advisers would reasonably have assumed that the CO provided a similar assurance.
24. The nature of the information which was withheld in this instance, leads the Commissioner to agree that the information which was not already in the public domain, was intended to be held under a duty of confidence.

(iii) Would unauthorised disclosure cause a detriment to any party?

25. The CO argued that the disclosure of the information would mean that Mulberry and its advisers would suffer detriment. It argued that commercially sensitive information would be made public. The CO explained that Mulberry's advisers had disclosed the information to the CO with Mulberry's agreement. However, wider disclosure would embarrass the advisers with an important corporate client and would damage its prospects of obtaining future business both from Mulberry and from other potential clients.
26. The CO also argued that disclosure would make both Mulberry and its advisers distrustful of Ministerial offices; disclosure would also be damaging because it is in companies' interests to be able to communicate their perception of the economic conditions fully and frankly.
27. Furthermore, the CO explained that Mulberry's advisers had disclosed the information to it with Mulberry's agreement, but wider disclosure would embarrass the advisers with an important client. It argued that this would also damage the advisers prospects of obtaining future business from both Mulberry and other potential clients.

28. The CO confirmed that it had consulted both Mulberry and its advisers. They had confirmed that they regarded the information as confidential, of continuing commercial sensitivity and neither would waive the obligation of confidentiality. The CO argued that disclosure would constitute an actionable breach of confidence as it could not depend on a public interest defence. It explained that the Courts have maintained that there has to be a very strong general public interest in protecting confidences and this could only be superseded by an overriding public interest in disclosure. The CO explained that in this case, it did not consider this to be the case.
29. The Commissioner notes there was information in the public domain before the complainant submitted his request, as explained in paragraph 10. He also notes that this information was provided by Mulberry, even though it was maintaining that all of the withheld information was confidential/commercially sensitive. Further, with regard to its advisers, the Commissioner notes that the information they provided to the CO was given to them by Mulberry and that these advisers had approached the Deputy Prime Minister's office on behalf of Mulberry.
30. The Commissioner notes that Mulberry's advisers were helping it to obtain public money in the form of a grant from the RGF. The Commissioner considers that advisers/lobbyists dealing with public authorities are aware that they are subject to the FOIA and information may be disclosed.
31. The Commissioner considers that Mulberry waived confidentiality with regard to some of the withheld information, as it has already disclosed it as explained in paragraph 10. He also considers that with regard to the remainder of the withheld information, the CO has not provided evidence to demonstrate that there would be an actionable breach of confidence if it disclosed the information. Therefore, the Commissioner considers that section 41 is not engaged. The Commissioner will now consider whether section 43 applies.

Section 43(2)

32. Section 43(2) of FOIA 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).'

33. Section 43(2) of the FOIA provides an exemption from disclosure of information which would or would be likely to prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption and is therefore subject to the public interest test.

34. The term 'commercial interests' is not defined in the FOIA, however the Commissioner has considered his awareness guidance on the application of section 43. This comments that:

'...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services.

*The underlying motive for these transactions is likely to be profit, but this is not necessarily the case, for instance where a charge for goods or the provision of a service is made simply to cover costs.'*¹

35. The first issue the Commissioner must consider is whether disclosure could result in the prejudice that section 43(2) protects against. Therefore the Commissioner will consider the following:

- what are the applicable interests within the exemption?
- what is the nature of the prejudice being claimed and how will it arise?
- what is the likelihood of the prejudice occurring?

The applicable interests

36. The CO stated that it was not necessary for it to explain which level of prejudice would occur if the information were to be disclosed. The CO argued that disclosure would, or would be likely to, prejudice both Mulberry's and its advisers' commercial interests.

The nature of the prejudice and how it will arise

37. The CO explained that it had approached both Mulberry and its advisers and that they both believed that disclosure would prejudice their commercial interests as it would be helpful to Mulberry's competitors. The Commissioner cannot comment on the withheld information itself as to do so would reveal its content.

The likelihood of the prejudice occurring

¹http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.ashx

38. For section 43(2) to apply there must be prejudice which is not trivial but real, actual or of substance to the commercial interests of a relevant body. There must also be a causal link between the potential disclosure and the prejudice.
39. The Commissioner notes that the CO did not specify which information it was applying section 43 to. He also notes that any advisers/lobbyists dealing with a public authority must by now understand that it is subject to FOIA legislation and should therefore be aware of the likelihood of disclosure.
40. In cases where a public authority has failed to explain the nature of an implied prejudice and failed to demonstrate the causal link between any such prejudice and the disclosure of the information, the Commissioner is not obliged to generate relevant arguments on the public authority's behalf.
41. In this case, the Commissioner considers that the CO has failed to explain the nature of the prejudice which would be likely to occur from disclosure of the withheld information and link this back to the exemption claimed. The Commissioner therefore considers that the CO has failed to demonstrate that the exemption is engaged. As the Commissioner does not consider section 43 to be engaged, he did not go on to consider the public interest.

Other matters

42. The Commissioner notes that the CO stated that it did not have to consider whether, with regard to section 43(2), disclosure would, or would be likely to, prejudice anybody's commercial interests.
43. The Commissioner expects public authorities to be clear regarding which level of prejudice it considers would occur if withheld information were to be disclosed. If a public authority does not do this, the Commissioner will consider whether the disclosure of information would be likely to prejudice a particular matter.
44. The Commissioner also notes that the internal review took longer than 20 working days to complete. 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 Commissioner considers that internal reviews should be completed as promptly as possible.
45. While no explicit timescale is laid down by FOIA, the Commissioner has decided that a reasonable time for completing an internal review is 20

working days from the date of the request. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, an internal review was requested on 19 January 2012 but was not issued until 10 April 2012.

Right of appeal

46. 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: 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

47. 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.
48. 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

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