

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 February 2018

Public Authority: Medicines and Healthcare Products Regulatory Agency

Address: 151 Buckingham Palace Road
London
SW1W 9SZ

Decision (including any steps ordered)

1. The complainant has requested correspondence between a named individual and the Medicines and Healthcare Products Regulatory Agency (MHRA) along with any records of meetings between the parties. The MHRA identified 27 emails containing information relevant to the request but considered that information in them was exempt on the basis of section 43(2).
2. The Commissioner's decision is that the MHRA has correctly applied the provisions of section 43(2) to withhold information within the emails. However, she finds there is information that the MHRA itself has identified which does not engage the exemption and this should be disclosed.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose redacted copies of the emails providing the information which does not engage the section 43(2) exemption and is not personal data.
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 23 January 2017, the complainant wrote to the MHRA and requested information in the following terms:

- *“Any and all correspondence between the agency and Dr Will Cavendish*
- *Any and all MHRA correspondence that mentions Dr Cavendish*
- *A record of any and all meetings that involved Dr Cavendish and MHRA staff*
- *A copy of minutes taken at those meetings*

I am interested only in information between Feb 1 2016 and the date on which this request is acknowledged.”

6. The MHRA responded on 7 February 2017. It stated that it held information within the scope of the request but considered it exempt on the basis of section 12 of the FOIA. The MHRA suggested narrowing the request by shortening the timeframe or identifying specific topics of interest.
7. The complainant wrote back to the MHRA on 7 February and asked if the request could be refined to just material relating to the Alphabet companies, DeepMind and Verily.
8. The MHRA responded to this refined request on 17 March 2017 confirming that information was held and disclosing some of this. The MHRA withheld some information under section 40(2) and 43(2) as it related to an ongoing commercial proposal and was considered to be market-sensitive. The MHRA later confirmed this information was contained in 27 emails.
9. The complainant responded on 29 March 2017 asking the MHRA to redact the commercially sensitive information from the emails and send them to him. He also stated the release of the emails was in the public interest and the public interest test should be reconsidered.
10. The MHRA considered this a request for an internal review and conducted a review, responding to the complainant on 27 April 2017. The MHRA upheld its decision to withhold information under section 43(2) and confirmed that the only correspondence withheld was with Dr Cavendish acting on behalf of Google and not in a personal capacity and the information would therefore prejudice Google's interests. The MHRA did consider redacting the emails but concluded no meaningful

information could be disclosed. It also sought to withhold personal information on the basis of section 40(2).

Scope of the case

11. The complainant contacted the Commissioner on 12 July 2017 to complain about the way his request for information had been handled.
12. The Commissioner considers the scope of her investigation to be to determine if the MHRA has correctly applied the exemption at section 43(2) of the FOIA and, if so, where the balance of the public interest lies. The Commissioner is not considering the use of section 40(2) by the MHRA as this was not raised as a point of complaint.

Reasons for decision

Section 43(2) – prejudice to commercial interests

13. 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.
14. 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."*¹
15. The withheld information is contained in emails between the MHRA and Dr Cavendish regarding a commercial proposal. Details of this are included in a confidential annex provided only to the MHRA. Verily's correspondence with the MHRA relates to this ongoing commercial proposal and is therefore commercial in nature.

¹ See here:

http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.aspx

16. However, the MHRA had previously sought to withhold the emails in full as although some of the information did not engage the exemption it considered the remaining parts of the emails would not be meaningful. However, in the circumstances the Commissioner is of the view that providing this information, which is not subject to any exemptions, is required to show transparency in its communications with Google.
17. Having concluded that the remaining information in the emails information falls within the scope of the exemption the Commissioner has gone onto consider the prejudice which disclosure would or would be likely to cause and the relevant party or parties that would be affected.

The nature and likelihood of the prejudice occurring

18. The MHRA has explained that it considers disclosing the emails would be likely to prejudice the commercial interests of Google (Verily) as well as the MHRA. Details of these arguments are provided in the confidential annex.
19. The MHRA has explained it did not contact Google about the alleged prejudice and instead based its arguments on its knowledge of the situation and its fervent belief that Google would not consent to the release of the information in the emails.
20. On this basis the Commissioner is not able to accept the arguments relating to Google's commercial interests. Arguments needs to be more than just speculative and the Commissioner would expect any third party to be consulted unless it can be demonstrated that a public authority has prior knowledge of a third party's concerns. In this case, the MHRA has stated it is certain Google would not consent to the disclosure of the disputed information. Whilst the Commissioner does not dispute this is likely to be the case and the MHRA can probably state with some certainty that Google would not consent, this is not the same as being able to demonstrate that there would be likely to be prejudice to Google's commercial interests. Without Google's input on this the Commissioner does not accept it has been shown that disclosing the requested information would be prejudicial to Google's commercial interests.
21. That being said, The Commissioner is of the view that when an issue is ongoing there is a likely to be a greater argument that disclosing information not otherwise publicly known about the process, such as the fact a commercial issue or proposal has been made or any technical or procedural discussions around this, will be likely to impact on the MHRA's processes. The Commissioner considers that section 43(2) FOIA was therefore correctly applied and she has gone on to consider the public interest test in this case.

Public interest arguments in favour of disclosure

22. The complainant states that Dr Cavendish joined Google DeepMind from the Department of Health and agreed that he would not lobby the government on behalf of DeepMind for two years. This information can be verified on the pages for the government's Advisory Committee on Business Appointments². The complainant therefore argues that any emails from Dr Cavendish should be disclosed to show if any lobbying has taken place.
23. The MHRA recognises there is a public interest in transparency and scrutiny, as well as in knowledge of interactions between Government bodies and companies such as DeepMind and Verily.

Public interest arguments in favour of maintaining the exemption

24. The MHRA considers the greater public interest is served by maintaining its ability to carry out its public health role. This would be likely to be prejudiced if this sort of information were released as it would have a chilling effect, discouraging third parties from having free and frank discussions with the MHRA, submitting concepts on research ideas or making applications.
25. Some further details of the public interest arguments advanced by the MHRA are included in the confidential annex.

Balance of the public interest arguments

26. The Commissioner recognises that there is a public interest in disclosing information which increases transparency in the communications between private companies who operate on large scales and public authorities. The Commissioner also acknowledges the complainant's point that if the information related to lobbying the government by an individual prevented from doing so, this would enhance the public interest in disclosure.
27. That being said, the Commissioner does consider that the information which engages the section 43(2) exemption can be withheld as, on balance, the public interest favours maintaining the exemption. The reasons for this are described in the confidential annex provided to the MHRA.

² <https://www.gov.uk/government/publications/cavendish-will-dg-for-innovation-growth-and-technology-department-of-health-acoba-recommendation/summary-of-business-appointments-applications-dr-will-cavendish>

Reference: FS50690676

Right of appeal

28. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

29. 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.
30. 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

Jill Hulley
Senior Case Officer
Information Commissioner's Office
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