

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 February 2014

Public Authority: Department of Health
Address: 78 Whitehall
London, SW1A 2NS

Decision (including any steps ordered)

1. The complainant has requested information relating to correspondence with the Australian government about plain packaging for cigarettes.
2. The Commissioner's decision is that the Department of Health (DoH) has correctly applied section 27(1)(a) of the FOIA to the withheld information.
3. The Commissioner does not require any steps to be taken as a result of this decision notice.

Request and response

4. On 13 May 2013, the complainant wrote to DoH and requested information in the following terms:

"Please send me all correspondence, including e-mails and attachments, relating to plain packaging for cigarettes since 29th October 2012 to 13th May 2013. Please include a full copy of the e-mail sent by the Department of Health to the Australian Government Department of Health and Ageing (this e-mail was released to the cigarette manufacturer Japan Tobacco International which then used it in as part of an advertising campaign which ran in several national newspapers on Monday 8th April, I believe it could be reference number 748969 - Correspondence with Australia on plain packaging of tobacco products) and any reply and subsequent correspondence related to this."

5. The DoH responded on 6 June 2013. It confirmed that it held information within the scope of the request but that it would exceed the cost limit to provide it.
6. On 10 June 2013 the complainant refined her request to:
"Please send me all correspondence to and from the Australian Government and the Department of Health, including e-mails and attachments, relating to plain packaging for cigarettes since 29th October 2012 to 13th May 2013. Please include a full copy of the e-mail sent by the Department of Health to the Australian Government Department of Health and Ageing (this e-mail was released to the cigarette manufacturer Japan Tobacco International which then used it in as part of an advertising campaign which ran in several national newspapers on Monday 8th April, I believe it could be reference number 748969 - Correspondence with Australia on plain packaging of tobacco products) and any reply and subsequent correspondence related to this."
7. On 8 July 2013 the DoH responded. It stated that it did hold information relevant to the request. There were three elements to its response. First, some of the information relating to the period up to 13 March 2013 had already been released in response to an earlier FOIA request (Ref DE768033) and had been published on the DoH website; a link to that information was provided (<https://www.gov.uk/government/publications/correspondence-about-tobaccocontrol-and-plain-packaging-de768033>). Secondly, some of the information was withheld under the exemption provided by section 27 FOIA. Thirdly, a further link was provided under section 21 of the FOIA to the specific e-mail used by Japan Tobacco International (JTI) in their advertisements which had also been published on the DoH website.
8. Following an internal review the DoH wrote to the complainant on 16 August 2013. It upheld its original position. However, it further noted that in the request for internal review a query had been raised about information disclosed in an earlier FOI request. The complainant stated:
"It is not clear if the link you included in your response includes any reply and subsequent correspondence related to the letter."
9. DoH confirmed that some of the information published in reply to request DE768033 was relevant to the current request and that information for the later period 14 March 2013 to 13 May 2013 was being withheld.

Scope of the case

10. The complainant contacted the Commissioner on 8 October 2013 to complain about the way her request for information had been handled.
11. During the course of the Commissioner's investigation DoH confirmed it wished to maintain its position with regard to sections 27(1)(a), 27(2) and 27(3). In addition it also wished to apply section 35(1)(a). The Commissioner considers the scope of this case to be to determine if the DoH has correctly applied the exemptions it has cited to the withheld information.

Reasons for decision

The DoH's view on the current position relating to the retail packaging of tobacco and the tobacco control policy.

12. The DoH explained that the considerations that are relevant to this case primarily relate to (a) the need to be able to have the trust of Australia so it can seek their views and experience to assist with its policy development, (b) to not inadvertently create a litigation risk for the Australian Government in releasing information that they consider to be sensitive and confidential (c) to not compromise the current working relationship that the UK and Australian Government enjoy, which is built on trust and cooperation and the fact that policy on tobacco plain packaging remains one still in development. The UK also has treaty obligations as a party to the World Health Organization's Framework Convention on Tobacco Control (FCTC), which are relevant to this case.
13. On 28 November 2013 Health Ministers commissioned Sir Cyril Chantler to carry out an independent review of the evidence on whether the introduction of standardised tobacco packaging is likely to have an effect on public health, in particular for young people. The review will report by March 2014. <https://www.gov.uk/government/news/independent-review-of-standardised-packaging-for-tobacco>.
14. The Government has introduced amendments to the Children and Families Bill to provide ministers with powers to introduce regulations to standardise packaging of tobacco products, should the Government decide to do so. The Bill is reaching the final stages of consideration in Parliament.
15. Following the independent review the Government will consider Sir Cyril's report and the wider issues raised by this policy, and will introduce standardised packaging regulations if it is satisfied that there are sufficient grounds to proceed, including the public health benefit.

16. Australia has had plain packaging of tobacco legislation in place since 1 December 2012. The Australian Commonwealth's Tobacco Plain Packaging Act 2011 requires all tobacco products sold in Australia to be in plain packaging. A key consideration in the case is the fact that the Australian Government is currently defending their tobacco packaging legislation against a number of legal challenges, including cases that involve the World Trade Organisation and foreign governments. In light of this litigation, the DoH considered it must defer to the judgement of Australian Government officials to determine what information is, in their view, sensitive and confidential.
17. DoH explained that there is a natural tension between tobacco control policies designed to reduce the prevalence of smoking tobacco and the commercial interests of the tobacco industry. The World Health Organization says that one of the six main forms of tobacco industry interference in public health is the intimidation of governments with litigation or the threat of litigation¹.
18. As a Party to the World Health Organisation's Framework Convention on Tobacco Control (FCTC), the UK Government has two obligations in particular that are relevant to this case. First, is the obligation to protect tobacco control policy development and implementation from the vested interests of the tobacco industry. Second is the obligation for international cooperation between Parties, "in the scientific, technical and legal fields and provision of related expertise". The UK needs to be able to meet these obligations in a way that cultivates rather than compromises the working relationship it has with other countries.
19. The question of the robustness of the evidence supporting policy on standardised (or "plain") tobacco packaging is a subject of the highest sensitivity and of fundamental importance in the Australian litigation. The question of evidence is of equal importance to DoH and the UK Government because, if it is decided to introduce standardised tobacco packaging in England (or the UK), it is inevitable that the legislation will be subject to legal challenge by the tobacco manufacturers. Information that is released at this point could jeopardise the Australian defence of legal challenges and interferes with its effective decision making.

¹ World Health Organisation (2012). *Technical Resource for Country Implementation of WHO Framework Convention on Tobacco Control Article 5.3 on the protection of public health policies with respect to tobacco control from commercial and other vested interests of the tobacco industry*. WHO, Geneva.

20. The withheld information in this case is 16 emails, two messages and a note of a telephone call between DoH and Australia between 20 February 2013 and 23 April 2013.
21. The Australian Government has reviewed the documents referred to and considers that all of the documents should be withheld in their entirety for the following reasons:
 - the information provided by Australia in the documents is confidential and was provided on an in-confidence basis to the UK with the strong expectation that the UK would keep it confidential, particularly having regard to the fact that Australia is a party to ongoing litigation in relation to tobacco plain packaging; and
 - the likely prejudicial effect that disclosure would have on the relations between Australia and the UK.
22. The Commissioner has therefore firstly considered the application of section 27 FOIA.

Section 27

23. In the Commissioner's view, section 27 contains two closely related provisions: an exemption for information whose disclosure would or would be likely to prejudice UK interests or relations with another State, international organisation or court 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) and (3). The Commissioner has firstly considered the application of section 27(1) (a) which has been applied to all the withheld information.
24. In order for a prejudice based exemption, such as section 27(1), to be engaged the Commissioner considers that 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 – ie, 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.

25. In explaining how the harm it alleges relates to the applicable interests – in this case relations between the UK and Australia – DoH told the complainant:

"..we must also take account of the strong public interest in maintaining good international relations and allowing the UK to conduct cooperative relationships with the government of Australia. We believe the release of the information in question would be likely to affect the willingness and confidence of this and other countries to share information with us."

26. The Commissioner is satisfied that the withheld information comprises information regarding engagement between the UK and Australia about 'plain packaging'. He is also satisfied that there is a causal relationship between the potential disclosure of the withheld information and the interests which section 27(1)(a) is designed to protect. The Commissioner is therefore satisfied that the exemption at 27(1)(a) is engaged. He has next gone on to consider the public interest test.

Public interest test

27. Section 27 is a qualified exemption and therefore subject to the public interest test.

Public interest arguments in favour of disclosure

28. DoH recognised that there is a clear public interest in disclosure in order to further the understanding and participation in the public debate of this current and high profile area of policy.
29. The complainant argued that disclosure was in the public interest to promote accountability and transparency by public authorities for decisions taken by them and to bring to light information affecting public health.

Public interest arguments in favour of maintaining the exemption

30. DoH acknowledged that the appropriateness and relevance of applying exemptions may change over time. In this instance because disclosure would prejudice the relations between the UK and Australia and/or because the withheld information is confidential information obtained from a state other than the UK which relates to an ongoing issue, it concluded that it remains appropriate to continue to withhold the information requested in this case.

31. DoH considers that any early release of the information would create the risk of a significant deterioration in the current good working relationships between the UK and the Australian governments, and further may well have an impact on relations beyond the topic of tobacco plain packaging policy. It argues that the relationship that the UK has with Australia has been shaped through trust and close working over many years.
32. DoH also believes that if the information were placed in the public domain at this stage, it may have a detrimental effect on the ability of the Australian government to secure a successful outcome on the on-going litigation actions against the tobacco industry. The impact of deterioration in the relationship that the UK has with Australia as a result of this disclosure taking place would have consequences across public health priorities generally.
33. If this relationship is damaged the DoH has a very real concern that Australia will no longer wish to cooperate, which means that the UK would not be able to draw on the Australian experience or unpublished evidence that might be made available by the Australian Government in relation to tobacco packaging. This would have significant ramifications for the development of public health policy in the UK, as well as the UK's ability to defend any legal challenges that it might face. DoH also pointed out that it has already shown a willingness to release some communications between the UK and Australia that would not jeopardise Australia's legal situation.
34. Of grave concern to the UK Government is the impact that the release of this information would have on its relationship to continue to cooperate with the Australian Government. In particular, it reflected the following position that has been set out by the Australian Government: *"If Australia does not have confidence that its discussions with the UK on sensitive matters are able to be discussed in confidence, it would be likely in future limit the types of matters it would be prepared to discuss with the UK. As a result, the UK's ability to manage future discussions of this nature and its international relations with Australia is likely to be compromised."*
35. In summary the DoH believes that release of the information in question would be likely to affect the willingness and confidence of the Australian Government to share information about tobacco control and other policies. It could also have an adverse impact on the effective defence of their tobacco control legislation in their on-going litigation. Such a precedent also has the potential to undermine constructive relationships with other states, particularly those facing legal challenges or themselves considering legislating on tobacco packaging.

Balance of the public interest

36. The Commissioner considers there is a strong public interest in transparency in the workings of government and particularly where he accepts the information requested has attracted considerable media and public interest. He also accepts that there is a strong public interest in regard to the government's relationship with other countries to further public understanding of decisions it takes when these stem in full or in part from international relationships.
37. However the Commissioner considers there is also a significant public interest in avoiding causing damage to relations between the UK and Australia in this case. He considers that due to the confidential nature of the information provided to the UK government and the fact that this relates to issues which are very much alive, the weight attributed to this public interest argument is substantial.
38. He accepts that disclosure of the withheld information could therefore undermine the UK's relations with Australia and with a range of States in the international community.
39. For this reason the Commissioner has concluded that in the circumstances of this case the public interest favours maintaining the exemption.
40. As the DoH indicated that all the information was withheld by virtue of section 27(1)(a) the Commissioner has not gone on to consider the application of other parts of section 27 or section 35.

Right of appeal

41. 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: GRC@hmcts.gsi.gov.uk

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

42. 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.
43. 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

Pamela Clements
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