

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 22 July 2014

**Public Authority:** Department for Work & Pensions  
**Address:** Caxton House  
Tothill Street  
London  
SW1H 9NA

#### Decision (including any steps ordered)

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1. The complainant submitted a request to the Department for Work and Pensions (DWP) seeking a copy of a letter the UK government sent to the European Commission regarding particular infringement proceedings. The DWP withheld this letter on the basis of the exemptions contained at section 35(1)(a) (government policy) and section 27(1)(b) (international relations) of FOIA. The Commissioner has concluded that the requested information is exempt from disclosure of the basis of section 27(1)(b) and that in all the circumstances of the case the public interest favours maintaining the exemption.

#### Request and response

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2. This request relates to the following Parliamentary Question:  
*'To ask the Secretary of State for Work and Pensions, if he will publish his response to the European Commission's letter requesting clarification of the UK Government's position on the cumulative conditions that apply for waiving the past presence test in cross-border cases'.*
3. Mark Hoban, the then Minister of State for Employment, responded to this request on 2 September 2013 stating that:  
*'This matter is currently under discussion with the European Commission. Correspondence between the Commission and the*

*member states on such cases is generally regarded by both parties as confidential between them. This approach recognises that preserving the space for the conduct of frank and effective discussions and negotiation best ensures that Community law is implemented and upheld.<sup>1</sup>*

4. The complainant submitted a request to the DWP on 9 September 2013 for a copy of the same letter which the Parliamentary Question had sought.
5. The DWP responded to this request on 27 September 2013 and explained that it considered the requested information to be exempt from disclosure on the basis of sections 27 and 35 of FOIA.
6. The complainant contacted the DWP on 20 November 2013 and asked for an internal review of this decision.
7. The DWP informed him of the outcome of the internal review on 31 January 2014; the review upheld the application of both exemptions.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 10 February 2014 to complain about the DWP's decision to withhold the information he had requested.

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<sup>1</sup> PQ/13/166585;  
[http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm130902/text/130902w0010.htm#130902w0010.htm\\_wqn53](http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm130902/text/130902w0010.htm#130902w0010.htm_wqn53)

## Reasons for decision

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### Section 27 – international relations

#### The DWP's position

9. The DWP argued that disclosure of the withheld information was exempt from disclosure on the basis of section 27(1)(b) of FOIA. This section provides that information is exempt if its disclosure would, or would be likely to, prejudice the relations between the UK and any international organisation or intentional court.
10. For the purposes of this request, the DWP explained that the international organisation in question was the European Union (EU) and more specifically the European Commission (the Commission) as the executive arm of the EU.
11. The DWP provided the following submissions to the Commissioner to support its reliance on this exemption:
12. It explained that the withheld information in question related to the UK's position regarding entitlement to social security benefits under the EU social security coordination rules. More specifically, it concerned the UK's policy regarding the application of the 'past presence test' (PPT) for access to certain benefits.
13. The DWP explained the Commission had served formal infringement proceedings against the UK in October 2009 because of concerns it had (and still has) about the UK's policy in these types of cases. As part of the Commission's ongoing investigations, it wrote to the UK Government in June 2013 to seek its views on the Commission's concerns in relation to the PPT. The UK Government responded in August 2013 and it is that letter which falls within the scope of this request.
14. In this context, the DWP explained that requested letter forms part of an on-going discussion process with the Commission in relation to formal infringement proceedings initiated by the Commission against the UK. The DWP explained that correspondence between a member state and the Commission in contentious matters is generally considered to be regarded as confidential. The DWP noted that this was reflected by comments of the Court of Justice of the European Union (CJEU) in previous cases to the effect that the parties to proceedings are entitled

to assume that their submissions should not be disclosed whilst the case is on-going.<sup>2</sup>

15. Furthermore, the DWP emphasised that the Commission had previously refused to disclose correspondence under similar circumstances in on-going discussions with the UK which may lead to proceedings being brought before CJEU on the basis that early disclosure would be harmful to the on-going process as well as for the judicial phase of infringement proceedings.
16. The DWP referenced an analogous case heard by the UK High Court in which the claimant sought disclosure of correspondence between the UK and Commission. In declining the claimants' application the court noted that there were various grounds for refusing, in particular and as far as they were relevant to this complaint:
  - The claimants were, in effect, seeking pre-action disclosure from the Secretary of State; and
  - The Commission did not consent to disclosure because to do so would undermine the principles of 'genuine cooperation and mutual trust' required in infringement investigations and the need to preserve confidentiality of documents relating to the Commission's infringement investigations.
17. Therefore, the DWP argued that disclosure **would** (as opposed to simply being likely to) harm the UK's relations with the Commission by breaching the accepted convention of confidentiality that applies to such correspondence and may affect the Commission's willingness to enter into proper negotiations with the UK on future cases.

#### The Commissioner's position

18. In order for a prejudice based exemption, such as section 27(1)(b), to be engaged the Commissioner believes 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

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<sup>2</sup> The DWP cited *API v Commission* cases C-514/07P and C-532/07P.

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. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.
19. Furthermore, the Commissioner has been guided by the comments of the Information Tribunal which suggested that, in the context of section 27(1), prejudice can be real and of substance *'if it makes relations more difficult or calls for a particular damage limitation response to contain or limit damage which would not have otherwise have been necessary'*.<sup>3</sup>
  20. With regard to the first criterion of the three limb test described above, the Commissioner accepts that potential prejudice to the UK's relations with the Commission clearly relates to the interests which the exemption contained at section 27(1)(b) is designed to protect.
  21. With regard to the second criterion, given the accepted convention of confidentiality as described above, the Commissioner is satisfied that disclosure of this information clearly has the potential to harm the UK's relations with the Commission. The Commissioner is therefore satisfied that there is a causal link between the potential disclosure of the withheld information and the interests which section 27(1)(b) is designed to protect. Moreover, the Commissioner is satisfied that the resultant prejudice which the DWP believes would occur is one that can be correctly categorised, in light of the Tribunal's comments above, as real and of substance. In other words, subject to meeting the likelihood test at the third criterion, disclosure could result in making relations more difficult and/or demand a particular diplomatic response.

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<sup>3</sup> [Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence \(EA/2006/0040\)](#), paragraph 81.

22. In relation to the third criterion, the Commissioner accepts that in the circumstances of this case the higher threshold of likelihood is met and he agrees with the DWP that disclosure of this information would prejudice the UK's relations with the Commission. Again the Commissioner has reached this conclusion in light of the accepted convention of confidentiality surrounding such correspondence. Against this background the Commissioner agrees that the disclosure of the requested information whilst the UK's discussions with the Commission in relation to this matter remained ongoing would be more likely than not to prejudice these relations between the two parties. Furthermore, in the Commissioner's view the likelihood of prejudice occurring is increased given that the impact on the UK's relationship with the Commission would not necessarily be limited to discussions regarding this matter, but could conceivably impact on the UK's relationship with the Commission more broadly.

### **Public interest test**

23. Section 27 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

### **Public interest in favour of maintaining the exemption**

24. The DWP argued that disclosure was not in the public interest as it could inhibit the frankness and openness of UK officials in discussions with the Commission in relation to this matter and in future discussions. It argued that by limiting the scope for free and effective exchanges of written views between the UK and the Commission, both in this and other matters, it may become more difficult for the parties to achieve early resolution. The DWP emphasised that it was relevant to note that a significant majority of infringement cases are settled without having to submit the case to the CJEU. Therefore, by undermining the confidentiality of correspondence in the negotiation stages risks reducing the number of cases that are settled amicably and this would consequently lead to increased litigation and slow down the proper implementation of EU law.

### **Public interest in favour of disclosing the information**

25. The complainant argued that the UK government was seeking to withhold this information as part of its attempts to avoid a determination by the Commission regarding this particular issue.

## **Balance of the public interest**

26. The Commissioner acknowledges that disclosing the withheld information would provide the public with a greater understanding of the UK's position on this matter in light of the Commission's infringement proceedings. Such transparency is arguably of most interest to those individuals affected by the UK's position on the cumulative conditions that apply for waiving the PPT in cross-border cases. Nevertheless, in the Commissioner's view disclosure would also be in the wider public interest as it would inform the public about how the UK liaises with the Commission in cases where the latter has instigated infringement proceedings against a member state and thus potentially lead to a greater understanding of EU such proceedings.
27. However, the Commissioner believes that there is very strong inherent public interest in ensuring that the UK can enjoy effective relationships with the institutions of the EU. It would, in the Commissioner's opinion, be firmly against the public interest if the UK's relations with the Commission were compromised by disclosure of information considered to be confidential. The disclosure of this information, at the time of the request, noting the stage the process had reached would undermine the ability of the UK and Commission to reach an early settlement to this particular matter, it also risks having a broader impact on the nature of the UK's discussions with the Commission in other matters. Both scenarios are ones that are firmly counter to the public interest.
28. Therefore, although there is some public interest in the disclosure of the requested information in order to inform the public about the subject matter in question, in the Commissioner's opinion this is outweighed by the public interest in maintaining the exemption given the broader prejudicial consequences of disclosing the information.
29. In light of his findings in relation to section 27(1)(b), the Commissioner has not considered the DWP's application of section 35(1)(a).

## Right of appeal

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30. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

31. 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.
32. 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** .....

**Steve Wood**  
**Head of Policy Delivery**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**