

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 March 2023

Public Authority: Department for Science, Innovation & Technology

Address: 100 Parliament Street
London
SW1A 2BQ

Complainant: Carl Heaton

Address: carl.heaton@gmail.com

Decision (including any steps ordered)

1. The complainant submitted a request to Department for Digital, Culture, Media & Sport (DCMS)¹ seeking communications between DCMS and Nominet UK for a two week period in February/March 2022. DCMS disclosed some information but sought to withhold the remainder on the basis of sections 35(1)(a) (formulation or development of government policy), 40(2) (personal data) and 41(1) (information provided in confidence) of FOIA. During the course of the Commissioner's investigation DCMS disclosed further information to the complainant under FOIA. The only remaining disputed information has been withheld on the basis of section 41(1) of FOIA.

¹ Although this request was submitted to DCMS, in February 2023 as a result of machinery of government changes responsibility for the policy area to which this request relates was transferred to the newly formed Department for Science, Innovation & Technology (DSIT). This decision notice is therefore served on DSIT albeit that the decision notice refers to DCMS as it was the body that handled the request and with whom the Commissioner corresponded with about this complaint.

2. The Commissioner's decision is that section 41(1) does not apply the remaining disputed information. The Commissioner has also found that DCMS breached section 10(1) by failing to respond to the request within 20 working days.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Provide the complainant with a copy of the email chain which has been withheld on the basis of section 41(1) of FOIA. In doing so the names of individuals can be 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 Commissioner making written certification of this fact to the High Court pursuant to section 54 of FOIA and may be dealt with as a contempt of court.

Request and response

5. The complainant submitted the following request to DCMS on 10 March 2022:

'Please provide all communications between DCMS and Nominet UK (its board, executive or staff) in any format in which it is held for the two weeks period between 2022/02/28 and 2022/03/14.

If your systems are unable to handle this in a cost efficient way, you may limit the request to all communications containing the words "Russia" and/or "Ukraine" and/or "sanctions" and/or "suspensions".'
6. DCMS responded on 21 April 2022 and provided him with some of the information falling within the scope of the request, albeit it explained that parts of the information had been redacted on the basis of section 40(2) (personal data) of FOIA. DCMS also explained that it was withholding two further email chains on the basis of sections 35(1)(a) (formulation or development of government policy) and 41(1) (information provided in confidence) of FOIA.
7. The complainant contacted DCMS on the same day and challenged its reliance on sections 35(1)(a) and 41(1) and asked it to conduct an internal review.
8. DCMS informed him of the outcome of the internal review on 20 June 2022. It upheld the application of the exemptions cited in the refusal notice.

Scope of the case

9. The complainant initially contacted the Commissioner on 9 April 2022 to complain about DCMS' delays in providing him with a response to his request. Subsequent to DCMS' response to the request and completion of the internal review, the complainant explained to the Commissioner that he wished to challenge its reliance on sections 35(1)(a) and 41(1) to withhold information falling within the scope of his request. He did not seek to challenge the application of section 40(2) of FOIA.
10. The complainant was also dissatisfied with the length of time it took DCMS to complete the internal review.
11. The information falling within the scope of the request consists of three emails chains:
 - Chain 1 - DCMS originally provided the complainant with a copy of this on 21 April 2022 but redacted some information on the basis of section 40(2) and redacted two emails as it considered these to be out of scope as they fell outside the timescale of the request. The Commissioner informed DCMS that in his view one of the emails considered to be out of scope fell within the period covered by the request. DCMS disclosed this email, redacted on the basis of section 40(2), to the complainant on 1 December 2022.
 - Chain 2 – DCMS originally withheld this email chain in full on the basis of section 35(1)(a). It subsequently provided the complainant with a copy of this chain on 1 December 2022, redacted only on the basis of section 40(2).
 - Chain 3 – DCMS originally withheld this email chain in full on the basis of section 41(1) of FOIA. Its position remains that this chain is exempt from disclosure on the basis of this exemption.
12. In light of DCMS' further disclosures to the complainant, and taking into account the fact the complainant has not sought to contest the application of section 40(2), the only withheld information which falls to be considered by this notice is chain 3.

Reasons for decision

Section 41 – information provided in confidence

13. DCMS withheld the disputed information on the basis of section 41(1) of FOIA.

14. This states that:

'(1) 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.'

15. Therefore, for this exemption to be engaged two criteria have to be met; the public authority has to have obtained the information from a third party **and** the disclosure of that information has to constitute an actionable breach of confidence.

16. With regard to whether disclosure would constitute an actionable breach of confidence the Commissioner follows the test of confidence set out in *Coco v A N Clark (Engineering) Ltd* [1968] FSR 415. This judgment suggested that the following three limbed test should be considered in order to determine if information was confidential:

- whether the information had the necessary quality of confidence;
- whether the information was imparted in circumstances importing an obligation of confidence; and,
- whether an unauthorised use of the information would result in detriment to the confider.

17. However, further case law has argued that where the information is of a personal nature it is not necessary to establish whether the confider will suffer a detriment as a result of disclosure.

18. The Commissioner has assessed each of these criteria in turn.

Was the information obtained from another person?

19. DCMS explained that the withheld information in question was provided by Nominet. The Commissioner notes that only parts of the email chain to which this exemption has been applied were sent to DCMS by Nominet. The remainder of the chain consists of emails sent by DCMS to Nominet. However, the Commissioner is satisfied that such emails, although generated by DCMS, record information previously provided to DCMS by Nominet. The Commissioner is therefore satisfied that the information meets the requirements of 41(1)(a).

Does the information have the necessary quality of confidence?

20. In the Commissioner's view information will have the necessary quality of confidence if it is not otherwise accessible and, it is more than trivial.
21. The Commissioner is satisfied that the information is not trivial and that it is not otherwise available. Consequently, the Commissioner is satisfied that the information has the necessary quality of confidence.

Was the information imparted in circumstances importing an obligation of confidence?

22. DCMS explained that the information was provided to it on the understanding that it would be treated confidentially. In light of this the Commissioner accepts that this criterion is met.

Would disclosure be of detriment to the confider?

23. DCMS argued that disclosure of the information would be detrimental to Nominet because it contained detailed information about its operations and it was implicit that such information was commercially sensitive.
24. The complainant argued that as Nominet is a public benefit company, not for profit membership company and holds a government granted monopoly over all the domain .uk there was no commercial sensitivity to be applied.
25. The Commissioner appreciates that the withheld information includes details of Nominet's operations. However, it is not clear to the Commissioner how or why disclosure of this would directly affect Nominet's commercial interests, and thus be detrimental. DCMS has stated that this detriment was implied given the nature of the material. However, in the Commissioner's view such submissions are not sufficiently detailed enough for him to be persuaded that disclosure would be detrimental in this case. A public authority has to provide more compelling submissions than stating that the detrimental nature of the material is implied. For example, why would disclosure of the specific information that has been withheld be likely to harm the third party's commercial interests? In what way or ways would this harm occur? And to, the complainant's point, in the context of this case to what extent does Nominet have commercial interests? The Commissioner is therefore not persuaded that DCMS has provided sufficient evidence that disclosure of the disputed information would be detrimental for the reasons it suggests. This criterion is therefore not engaged, and as a result the Commissioner has concluded that the information is not exempt from disclosure on the basis of section 41(1).

Section 10

26. Section 1(1) of FOIA states that:

'Any person making a request for information to a public authority is entitled – (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and (b) if that is the case, to have that information communicated to him.'

27. Section 10(1) of FOIA states that a public authority must respond to a request promptly and 'not later than the twentieth working day following the date of receipt'.

28. In this case the complainant submitted his request on 10 March 2022. DCMS issued its response to the request on 21 April 2022, some 29 working days later. DCMS therefore breached section 10(1) of FOIA by failing to respond to the request within 20 working days.

Other matters

29. FOIA does not impose a statutory time within which internal reviews must be completed, albeit that the section 45 Code of Practice² explains that such reviews should be completed within a reasonable timeframe. The Commissioner expects that most internal reviews should be completed within 20 working days, and even for more complicated requests, reviews should be completed within a total of 40 working days.³

30. In this case the complainant requested an internal review of DCMS' response on 21 April 2022 and DCMS informed him of the outcome of the review on 20 June 2022, ie within 39 working days. Given the nature of the request the Commissioner is satisfied that it was not unreasonable for DCMS to take this length of time to consider the request.

² <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

³ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/request-handling-freedom-of-information/#internal>

Right of appeal

31. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

32. 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.
33. 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

Jonathan Slee
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