

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 September 2022

Public Authority: Department for Environment, Food and Rural Affairs

Address: Nobel House
17 Smith Square
London
SW1P 3JR

Decision (including any steps ordered)

1. The complainant has requested information relating to specific meetings of the Animal Welfare Committee. By the date of this notice, the Department for Environment, Food and Rural Affairs ("DEFRA") had disclosed all the information it held apart from a small quantity that it wished to rely on section 27 of FOIA (international relations) to withhold.
2. The Commissioner's decision is that DEFRA has correctly relied upon section 27(1)(a) of FOIA and that the balance of the public interest favours maintaining the exemption. DEFRA breached section 10 of FOIA as it failed to identify all the information that it held within the scope of the request within 20 working days.
3. The Commissioner does not require further steps.

Request and response

4. On 21 January 2021, the complainant, referring to the Animal Welfare Committee (AWC) requested information of the following description:
"I am requesting...further information regarding the following items recorded in the summary reports of the two 2020 meetings:

“The Rt Hon the Lord Goldsmith of Richmond Park joined the meeting and invited members to identify their 2-3 top animal welfare issues to inform policy planning

“There was a discussion around how the UK’s animal welfare standards compare to others on the global stage

“There was a discussion around animal sentience and how government might recognise animals as sentient in their policy making”

“I would also be very grateful if you were able to provide further information regarding the frequency of AWC meetings, the AWC budget, and the reasoning behind the AWC remit including wild animals kept by humans rather than wild animals per se?”

5. On 18 February 2021, DEFRA responded. It refused to provide the requested information. It relied on section 35 (development of government policy) and section 40(2) of FOIA (third party personal data) as its basis for doing so.
6. The complainant requested an internal review on 14 April 2021. DEFRA sent the outcome of its internal review on 9 June 2021. It revised its position slightly in that it now additionally relied on section 27 of FOIA (international relations) to withhold information.

Scope of the case

7. The complainant contacted the Commissioner on 8 September 2021 to complain about the way their request for information had been handled.
8. On 12 August 2022, DEFRA responded to the Commissioner’s investigation. It had identified some further information that fell within the scope of the request. It had now identified a total six documents within the scope of the request – of which it was happy to disclose five with only minor redactions to remove the names of junior staff members (but not the names of the Committee members themselves). It was also prepared to disclose the majority of the sixth document, but wished to withhold three short sections. It was relying on section 35 to withhold one of these sections and section 27 to withhold the other two.
9. On 18 August, the Commissioner wrote to DEFRA to set out his preliminary view of the complaint. He explained that, in his view, both exemptions were engaged in relation to two out of the three sections and that, at the point he was required to consider the balance of the

public interest, the balance of the public interest would have favoured withholding those sections.

10. However, the Commissioner also explained to DEFRA that whilst, as per the decision of the Upper Tribunal in *Montague v Information Commissioner & Department for International Trade* [2022] UKUT 104 (AAC) ("Montague"), he was required to consider the balance of the public interest as it stood when DEFRA issued its initial refusal notice, in this case there had been significant developments since the refusal notice was issued which, in his view, had tilted the balance of the public interest towards disclosure. He noted that, were he required to issue a decision notice, he would have to make clear that he was only upholding the exemptions on the basis of the circumstances as they stood at that time. Rather than precipitate a further request from the complainant (or another interested party), keen to re-test where the balance of the public interest currently lay, he suggested that a more pragmatic approach would be for DEFRA to simply disclose the remaining information.
11. Having re-considered the matter, DEFRA appeared to largely agree with the Commissioner's view. It disclosed the five documents previously identified and a partially-redacted version of the sixth document on 2 September 2022. DEFRA disclosed two of the three previously-withheld sections in full and disclosed a large part of the third. However it maintained that section 27 of FOIA would still apply to the small amount of information it wished to withhold, even if it were to respond to the same request now.
12. Once DEFRA had disclosed the majority of the information, the Commissioner invited the complainant to withdraw their complaint. He noted that the complainant had now received the vast majority of the information that they originally sought and explained that, in his view, DEFRA would have been entitled to withhold the small amount that it still wished to withhold. The complainant was unwilling to withdraw their complaint and asked for a decision notice.
13. The Commissioner considers that the scope of his investigation is to determine whether DEFRA would have been entitled to rely on section 27 of FOIA to withhold the remaining information at the point that it originally refused the request.

Reasons for decision

14. Section 27(1) of FOIA states that:

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

- (a) relations between the United Kingdom and any other State,
- (b) relations between the United Kingdom and any international organisation or international court"

15. Like with any prejudice-based exemption, the Commissioner follows the three step test set out in *Hogan and Oxford City Council v Information Commissioner* (EA/2005/0026 and 0030). First, the public authority must identify an applicable interest, then it must demonstrate a causal link between disclosure and a harm to that interest that is "real, actual and of substance", finally, it must decide on the likelihood of that harm occurring.

16. The information being withheld is a single reference to two trade deals which were, both at the time the information was created and at the point DEFRA responded to the request, currently being negotiated. In broad terms, the information describes how the Government was (at the point the information was created) attempting to recognise animal welfare standards in the overall trade deals it was seeking to agree.

17. The complainant argued that the information could not possibly engage section 27 because:

"a redaction of some 12 or so words could not prejudice future trade agreements"

18. DEFRA explained to the Commissioner that:

"The disclosure of this information signals a contentious trade stance which could impact our ability to open up international trade with any future partners or could be used against us as leverage to make early concessions. At the very least it would show our hand before we are able to purposefully explain over time what the policy position is in full, how it would work and most importantly take away our ability to leverage the strategic release of information in order to extract concessions at the right time."

19. DEFRA explained that, at the time it responded to the request, the UK was progressing trade agreements with numerous countries as well as some international organisations. Disclosing the information would have

had a harmful effect on the UK's ability to secure the best possible terms in the particular deals referred to as well as in any future deals it may negotiate.

The Commissioner's view

20. The Commissioner considers that DEFRA has demonstrated that section 27(1)(a) of FOIA is engaged.
21. The Upper Tribunal's decision in *Montague* (which is legally binding) states that, when determining a complaint under section 50 of FOIA about the application of a qualified exemption, the Commissioner must consider the balance of the public interest as it stood at the point at which the public authority issued its original refusal notice. Whilst the Upper Tribunal's decision only extended to the public interest test, the Commissioner considers it would be illogical to assess the likelihood of prejudice on one date and the balance of the public interest on a different date – especially when the former will partially determine the latter. Therefore he has assessed the probability that prejudice would have resulted from disclosure on the day that DEFRA issued its refusal notice: 18 February 2021.
22. On 18 February 2021, the UK was in the process of negotiating the two trade deals referred to in the withheld information – as well as a number of other deals.
23. It is not clear whether the withheld information refers to a stance that the UK had already taken in those trade negotiations or whether it was a stand the UK was intending to take. If it was a stance the UK was preparing to take, disclosing the withheld information would be highly likely to be detrimental to the UK's negotiating position in those specific negotiations because it would allow the other nations to refine their own stances to the detriment of the UK – which wouldn't have access to the equivalent information.
24. More broadly, disclosure would allow any other nation either in negotiations with, or considering negotiations with, the UK to find out in advance what the UK was likely to demand. This foreknowledge could cause other nations to either decline to enter into negotiations or to demand concessions from the UK as the "price" of agreeing to the UK's terms.
25. The Commissioner is therefore satisfied that it is more likely than not that the UK's ability to negotiate trade deals (and thereby retain good relationships) with other nations would be harmed by disclosure of this information. Section 27(1)(a) of FOIA is thus engaged.

Public interest test

26. Even where the disclosure of information would be likely to cause prejudice, the public authority must still disclose that information unless it can demonstrate that the public interest favours maintaining the exemption.
27. Given that the Commissioner has accepted the possibility that disclosure might cause prejudice, there will always be an inherent public interest in preventing that from occurring. However, the weight that should be attached to that public interest will be determined by the severity of the prejudice and the likelihood of it occurring.
28. The Commissioner has accepted as reasonable that the higher bar of prejudice is engaged. This means that that the chance of prejudice occurring is more likely than not. Whilst it is harder to demonstrate that the higher bar of likelihood is met, the weight to be attached to that prejudice is also correspondingly higher.
29. Whilst the Commissioner is aware that the UK has concluded several trade deals in the last 18 months, as has previously been noted, he is required to assess where the balance of the public interest lay at the point DEFRA issued its refusal notice.
30. At the point the refusal notice was issued, the Commissioner notes that the UK was in the process of agreeing trade deals with numerous other countries and international organisations. He considers that there is a very strong public interest in ensuring that the UK is able to strike deals on the most favourable terms possible – including the maintaining of high standards of animal welfare.
31. The Commissioner recognises that, across the world, standards for protecting animal welfare differ significantly and that, where the UK attempts to strike a deal with a country with differing standards (whether higher or lower), both countries must find some mechanism of reconciling the different standards within that deal. The Commissioner considers that there is a strong public interest in ensuring that the terms the UK agrees are, at worst, consistent with the standards it already sets.
32. However, in the Commissioner's view, this public interest can be met by the existing process of scrutiny that is available for all trade deals. Parliament is entitled to intervene if it considers that a particular trade deal lacks appropriate protections for animal welfare. This does not require early disclosure of the UK's negotiating stance.
33. The Commissioner is therefore satisfied that disclosing this information would be unlikely to improve animal welfare standards whilst

simultaneously harming the UK's ability to negotiate favourable terms. He is therefore satisfied that the balance of the public interest in this case favours maintaining the exemption.

Procedural Matters

34. Section 10 of FOIA requires a public authority to comply with its duties under section 1(1) of the Act (to identify relevant information and communicate non-exempt information) within 20 working days.
35. In this case, the Commissioner notes that DEFRA did not locate several documents that fell within the scope of the request until part way through his investigation (and therefore outside the 20 working day timeframe). Whilst these documents (with the exception of the information the Commissioner has agreed should be withheld) have now been provided to the complainant, the Commissioner is obliged to record a breach of section 10 of FOIA.

Right of appeal

36. 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

37. 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.
38. 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

Roger Cawthorne
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