

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 November 2013

Public Authority: Department for Culture, Media and Sport¹

Address: 100 Parliament Street
London
SW1A 2BQ

Decision (including any steps ordered)

1. The complainant requested information in relation to the Government's *listening exercises* on Equal Civil Marriage – i.e. granting same sex couples marriage rights already enjoyed by heterosexuals.
2. The Commissioner's decision is that the public authority was entitled to withhold the requested information described as 'the disputed information' in this notice on the basis of the exemption at section 35(1)(a).
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. The complainant initially wrote to the Home Office on 27 July 2012 in the following terms:

'On 15th March 2012 Lynne Featherstone MP in a written statement to the House of Commons regarding consultation on equal civil marriage stated that a listening exercise had been conducted in 2010.'

¹ Although the Department for Culture, Media and Sport (DCMS) is named as the public authority, the Government Equalities Office (GEO), a unit within the DCMS specifically responsible for providing advice to the Government on equality matters dealt with the request and also responded to queries from the Commissioner during the investigation.

Please would you send details as follows:

- 1) The report on this listening exercise (alternatively if it is available via the Web).*
 - 2) Details of those consulted during the listening exercise.*
 - 3) The results and any conclusions resulting from this exercise.*
5. It would appear that he received a response from the Home Office on 8 August 2012 because his next email to the Home Office on 11 September 2012 was phrased as follows:

'.....on 27th, July, 2010 you received a request from myself.....seeking information regarding Equal Civil Marriage.

Your response dated 8th August did not address two of my questions, namely:

- 1) I requested the full report resulting from the listening exercise regarding Equal Civil Marriage held by the government in autumn 2010.*
- 2) In addition the full report on any conclusions resulting from this exercise.*

Since receiving your reply.....I have repeatedly contacted you regarding this issue but apart from an auto reply have had no response or acknowledgement of my request.

6. It would appear that his request was forwarded to GEO who responded on 21 September 2012.² GEO treated the email above of 11 September as a request for internal review. It informed the complainant that it did not hold any information in relation to items (1) and (2) of his request because the *'listening exercise was not a formal consultation and therefore there was no report published. The listening exercise contributed to the introduction of civil partnerships on religious premises....'*

² GEO was transferred back to the DCMS on 4 September 2012. Although part of the DCMS when it was created in 2007, it had been merged into the Home Office prior to 4 September 2012.

7. On 2 October 2012, the complainant sent another email³ in which he clarified his request in the following terms:

'...Thank you for your reply to my Freedom of Information request (27th July 2012).

I think that as worded my request has led to a misunderstanding as to the information I seek.

As I understand the situation, the listening exercise was instigated under the auspices of The Home Office and was carried out by them. Although no report was published the information I am requesting must be on file. During the consultation there must have been discussions, internal reports and e-mails. At the end of the listening exercise one would expect conclusions to have been recorded and used when coming to the decision to proceed with a public consultation.

It is the above mentioned details that are the subject of my request....'

8. The public authority responded on 27 November 2012. It treated the above clarification as a fresh request for information and confirmed that it held information within the scope of the request (i.e. of 2 October). The public authority however explained that it considered the information in scope exempt from disclosure on the basis of section 35(1)(a) FOIA.
9. Following an internal review (requested on 20 December 2012) the public authority wrote to the complainant on 6 February 2013. It upheld the original decision to withhold the information in scope on the basis of section 35(1)(a).

Scope of the case

10. The complainant contacted the Commissioner on 21 March 2013 to complain about the way his request for information had been handled. He challenged the application of section 35(1)(a) to the information within the scope of his request of 2 October 2012 (the disputed information) on a number of grounds. The reasons provided by the complainant for challenging the application of the exemptions are addressed further below.
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³ It is not exactly clear which Department this email was sent to. It was however the DCMS that responded.

11. During the course of the investigation, the public authority sought to rely on the exemptions at sections 36(2) (b) & (c) to all of the disputed information in the event that the Commissioner did not uphold the exemption at section 35(1)(a). The exemptions at sections 40(2), 41, 42 were also applied specifically to some of the disputed information.
12. The scope of the investigation therefore was first; to consider whether the public authority was entitled to withhold the disputed information on the basis of section 35(1)(a). Second, if necessary, to consider whether the public authority was alternatively entitled to withhold the disputed information on the basis of section 36(2) (b) & (c). Third, if necessary, to consider whether the public authority was entitled to withhold specified parts of the disputed information on the basis of sections 40(2), 41 and 42.⁴

Reasons for decision

The Disputed Information

13. The Commissioner carefully examined the disputed information. It broadly consists of internal discussions and minutes of listening exercises (between stakeholders and officials) in relation to the implementation of the Government's policy on *Equal Civil Marriage* i.e. granting same sex couples marriage rights enjoyed by heterosexuals.

Section 35(1)(a)

14. Information held by a government department is exempt from disclosure on the basis of section 35(1)(a) if it relates to the formulation or development of government policy.
15. The public authority explained that the disputed information relates to the future of civil partnerships and the Government's policy on marriages of same sex couples. In March 2012, the Government launched a consultation called *Equal Civil Marriage: a consultation* as a response to the messages coming from the listening exercise. The consultation document made it clear that Ministers wanted to allow

⁴ There would be no need to consider the remaining exemptions if the Commissioner upholds the application of section 35(1)(a) to all of the disputed information. Likewise, there would be no need to consider the exemptions at sections 40(2), 41, and 42 if the Commissioner upholds the alternative exemptions at sections 36(2) (b) & (c) to all of the disputed information.

same sex couples to get married. The purpose of the consultation was to establish how this would happen. Formulation and development of the Government's policy on marriages of same sex couples continued throughout 2012 culminating in the introduction of the Marriage (Same Sex Couples) Bill in January 2013. The Marriage (Same Sex Couples) Act 2013⁵ was consequently passed by Parliament on 17 July 2013.

16. The Commissioner accepts that at the time of the request, Equal Civil Marriage was *government policy* within the meaning envisaged in section 35(1)(a). He also accepts that the disputed information relates to the formulation of the Government's policy on the implementation of Equal Civil Marriage. The discussions are primarily on the codification and implementation of the Government's policy on marriages of same sex couples. Section 35(1)(a) is a class based exemption which means that there is no need to show any harm in order to engage the exemption.⁶ The information simply has to fall within the class described, in the case of section 35(1)(a), information relating to the formulation or development of government policy.
17. The Commissioner therefore finds that the exemption at section 35(1)(a) was correctly engaged.

Public Interest Test

18. The exemption at section 35(1)(a) is however subject to a public interest test. Therefore, the Commissioner must also consider whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the disputed information.

Complainant's arguments

19. After the listening exercise, the decision to proceed with the Bill for Equal Civil Marriage was made and neither Parliament nor the electorate had any input. The electorate is entitled to know how this decision was made in order to understand the reasoning behind the Government's position. Disclosure would be in line with the government's stated commitment to openness and transparency.

⁵ The 'Marriage Act'

⁶ Possible prejudice in disclosure is considered as part of the public interest test.

20. Most of the organisations consulted during the listening exercise will have made their representations public. Therefore, arguments regarding pre-emptive or partisan scrutiny inhibiting ongoing discussions are now historic.

Public authority's arguments

21. The public authority acknowledged the general public interest in openness and transparency, and more specifically in the development of policies regarding Equal Civil Marriage. Transparency would increase public trust and confidence in decisions made by the Government in relation to Equal Civil Marriage. Disclosure could also potentially lead to greater involvement in political discussions, as the public would develop a better understanding of the specific issues involved.
22. The public authority however argued that disclosing the disputed information would undermine the strong public interest in freedom to express opinions and have unrestrained discussions required by Ministers in order to fully consider all aspects of any new policy. Officials must be allowed to discuss potentially controversial options without being subject to pre-emptive or partisan scrutiny that might serve to inhibit the scope of extent of ongoing discussions.
23. The release of any discussion surrounding a new or updated policy is likely to prejudice the eventual outcome. Good government requires good decision making and this needs to be based on the best advice available and a full consideration of all the options without fear of premature disclosure. However, arguments become considerably less pressing once the final decision has been made.
24. Furthermore, those who participated and contributed to the listening exercises did so *'in confidence and on the basis that it was conducted in a private space...'* to allow for an informed debate on some of the key and sensitive issues. Participants were assured by a Government Minister at the time that the *'.....discussions are intended to be private and we do not intend to issue any statements regarding their occurrence or the content.'* If information relating to the listening exercises was disclosed, it would risk damaging the public authority's relationships with stakeholders and discourage them from engaging fully with the public authority in future. The loss of such frankness and candour would damage the quality of advice and deliberation which would in turn lead to poorer decision making.
25. Despite the passage of the Marriage Act in July 2013, there are several strands of policy development that are still to be finalised that arose during the passage which are likely to require consultation with affected groups.

26. The range of stakeholders that participated in the listening exercise will be crucial to the effective implementation of the Marriage Act and the review of the operation and future of the Civil Partnership Act 2004. The disclosure of information referencing these stakeholders, despite assurances from the Minister that the discussions were private, could damage the relationship with these stakeholders and inhibit free and frank discussion that will improve the formulation of government policy in the areas highlighted above.
27. The public authority also responded to the arguments submitted by the complainant in support of disclosing the disputed information.
28. In response to the first point, the public authority explained that the Coalition Government was clear about its policy on marriages of same sex couples. The Conservative Party, alongside their 2010 General Election Manifesto, published *The Contract for Equalities*, which set out clearly that they would consider the case for changing the law to allow civil partnerships to be called and classified as marriage. The Liberal Democrats party conference in 2010 also passed a motion to open marriage to both same sex and opposite sex couples. Representations made in the listening exercise, by both secular and faith organisations, did indicate a demand for marriage of same sex couples. The Ministerial foreword to the equal marriage consultation states '*During a listening exercise conducted in 2010 on allowing civil partnerships to take place on religious premises, we heard representations from many who sought equal access to marriage for same-sex couples.*' This is reflected the statements made, and supported both parties' positions.
29. On the second point made by the complainant, the public authority explained that while many organisations involved in the listening exercise have made their views publicly known, it was still important to ensure free and frank discussions between public officials. The public authority also pointed out its undertaking to participants that the content of discussions would not be shared in public.

Balance of the public interest

30. The Commissioner accepts that there is a public interest in the Government being open and transparent about discussions relating to the listening exercise and the decision to introduce the Marriage (Same Sex Couples) Bill before Parliament. Equal Civil Marriage retains significant sensitivities amongst different groups, not least, faith groups. There is a public interest in knowing the various options considered by Ministers and officials during the discussions as well as the contributions of stakeholders involved in the listening exercises. The public would be better informed and therefore increase their understanding of some of the key issues to do with the codification and implementation of same

sex marriage. The disputed information would enhance the public's understanding of the specific issues considered by Ministers and officials and the contributors to the listening exercise.

31. The Commissioner disagrees with the view that the policy was not subject to any public or parliamentary scrutiny. As the public authority mentioned, in March 2012, the Government launched a public consultation on Equal Civil Marriage in England and Wales following the listening exercise. The Marriage (Same Sex Couples) Bill was also debated in Parliament before the Marriage Act was passed.
32. The timing of the request is crucial in this case. At the time of the request in October 2012, the Marriage Act had yet to be passed. Therefore, the *formulation* of the Government's policy in relation to marriage of same sex couples was incomplete at the time of request. For that reason, the Commissioner accepts that there was a strong public interest in not undermining ongoing discussions between Ministers and officials on how to enshrine the Government's commitment to grant equal status to marriages between same sex couples into law. He accepts that there was a strong public interest in ensuring that Ministers and officials had the necessary private thinking space to consider all options in relation to a sensitive subject matter without the fear of pre-emptive or premature criticisms which might inhibit the scope of their considerations. He is satisfied that the disputed information (internal discussions) deserved protection for that reason. The Commissioner also notes that the public authority considers the development phase of the Marriage Act is ongoing. However, he has not addressed this aspect of the public authority's submissions because the request was made before the Marriage Act was passed. The development phase of the Marriage Act cannot be taken into consideration because it had not begun at the time of the request.
33. The Commissioner accepts that the substantive views of most (if not all) of the stakeholders in terms of granting same sex couples equal marriage rights as heterosexual couples is likely to have been publicly known at the time of the request. However, the frankness in which the stakeholders could express their views during the listening exercises was crucial to ensuring that they could fully engage with the public authority in future discussions on the issue. The Commissioner is satisfied that the disputed information (contributions of the stakeholders) deserved protection for that reason. If their contributions to the listening exercises were disclosed, it is likely that stakeholders would not have felt confident that future contributions would not be revealed prematurely – i.e. during ongoing discussions relating to the Marriage Bill. Furthermore, given the sensitivity of the subject matter, disclosing their representations whilst discussions were ongoing and during the period of policy formulation would have likely increased the pressure on

stakeholders to act one way or another. It was therefore in the public interest to ensure that stakeholders were not unduly exposed in that manner otherwise they could have become less frank in future discussions. This would have negatively affected the quality of their contributions as well as the quality of consequent decisions taken in view of those contributions.

34. The Commissioner does not accept that the assurance given by the Minister to the stakeholders that their contributions would not be revealed circumvents the right of access to information under the FOIA. Since the passage of the FOIA, Ministers and officials are aware that there can be no absolute guarantee of official discussions not being made public. Nevertheless, he is satisfied for the reason explained above that the opinions of the stakeholders should not have been disclosed in response to the request.
35. The Commissioner therefore finds that, in all the circumstances of the case, the public interest in favour of maintaining the exemption at section 35(1) outweighs the public interest in disclosing the disputed information.
36. In view of his decision that the disputed information was correctly withheld on the basis of section 35(1)(a), the Commissioner did not consider the exemptions at sections 36(2) (b) & (c), 40(2) and 41 and 42.

Right of appeal

37. 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: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

38. 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.
39. 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

Alexander Ganotis
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