

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 June 2016

Public Authority: Department for Business Innovation and Skills
Address: 1 Victoria Street
London
SW1H 0ET

Decision (including any steps ordered)

1. The complainants have requested all papers held by the Department for Business Innovation and Skills (BIS) relating to a criminal prosecution. BIS refused the request relying on the exemptions detailed in sections 30(1), 40(2), 21, 41 and 42.
2. The Commissioner's decision is that BIS is entitled to rely on section 30(1)(a)(i) to withhold the requested information. He does not require BIS to take any further steps.

Request and response

3. The complainants have been subject of a criminal prosecution which resulted in their conviction and subsequent appeals. At the time of concluding his investigation, the Commissioner notes that there are ongoing enforcement proceedings outstanding and that in relation to one element of the conviction, the case has been referred by the Criminal Cases Review Commission to the Court of Appeal.
4. On 7 July 2015, the complainants wrote to BIS and requested information in the following terms:

"For the avoidance of doubt we are asking for all the files and information BIS is holding regarding [names of the complainants]."

In particular we are requesting the entire files held by BIS as the Insolvency Service and BIS involved in the criminal case. I believe you have all the details.

We are not specifying under which act our request is being made. This will involve all contacts, notes, letters, references, details of telephone conversations and any references with all/any third parties in association with both the civil and criminal matters. We are thus requesting the entire files."

5. On 30 July 2015 BIS responded. It refused to provide the requested information. It cited the following exemptions under FOIA as its basis for doing so: section 30, section 21, section 40, section 41 and section 42.
6. The complainants requested an internal review on 3 August 2015. BIS sent the outcome of its internal review on 1 September 2015. The internal review specifically considered the FOIA exemption at section 30 and in that respect BIS upheld its original position and set out that the public interest lay in maintaining that exemption. BIS went on to state that if the exemptions under section 21, section 40, section 41 and section 42 were engaged, in addition to section 30, then the reviewer concurred with the conclusions in the original response.

Scope of the case

7. The complainants contacted the Commissioner by letter, received on 20 November 2015, to complain about the way the request for information had been handled. The complainants asked that the Commissioner reconsider the public interest and release the requested files.
8. The Commissioner considers the scope of the investigation is to determine whether BIS was correct to refuse the request in reliance on sections 30, 21, 40, 41 and 42 and to consider any inherent public interest test.

Reasons for decision

Section 40(5)

9. The Commissioner had set out his preliminary conclusion in a letter to the complainants but in completing this decision notice he has also considered section 40(5)(a). This section of the FOIA provides that the duty to confirm or deny does not arise in relation to information that falls, or would fall if it were held, within the scope of section 40(1) of the FOIA. Section 40(1) provides that information which is the personal data of the applicant is exempt from disclosure under the FOIA. This is because individuals may request their personal data under a separate legislative access regime, namely the right of subject access under

section 7 of the Data Protection Act 1998 (the DPA). In cases where section 40(5) is the relevant exemption and where information, if held, falls to be considered under the DPA, the Commissioner will address this outside of the FOIA decision notice framework.

10. BIS did not seek to rely on section 40(5) of the FOIA as it considered initially that the requested information was exempt under the sections cited. In its internal review response BIS set out its position that the entirety of the information requested was exempt under section 30(1)(a)(i) and (b). In this case the complainants have made it clear that the request will, at least in part, relate to their personal data. In these circumstances, this element of the request would fall to be considered under section 40(1) as explained above.
11. In considering such matters, the Commissioner is mindful that whilst individuals may be aware that information does or does not exist because of their involvement in a particular set of events, it does not follow that the general public shares that awareness in respect of the existence of information. Therefore in cases such as this the Commissioner would expect a public authority to refuse to confirm or deny that it holds information relevant to the complainants' request which would, if held, constitute the complainants' personal information.
12. The Commissioner notes that BIS did address the issue of the complainants' personal data, as it was required to do under the provisions of the DPA. Nonetheless the Commissioner is satisfied that, under the provisions of the FOIA, BIS was not required to confirm or deny, by virtue of section 40(5), whether it holds information which, if held, would be the personal data of the complainants.

Sections 30(1) (a)(i) and (b)

13. Section 30(1) states:

'(1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of—

(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained—

- (i) whether a person should be charged with an offence, or
- (ii) whether a person charged with an offence is guilty of it,

(b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or

- (c) any criminal proceedings which the authority has power to conduct.'
14. The information falling within the scope of the request was withheld by the public authority specifically in reliance on sections 30(1)(a)(i) and 30(1)(b).
 15. It is important to set out that section 30 is a class based exemption. This means that information simply has to fit the description in section 30 in order for the exemption to be engaged. There is no requirement to establish any likelihood of harm should the information be disclosed.
 16. However, a public authority must be able to show that it has a duty to investigate offences and institute criminal proceedings in order to engage section 30(1)(a)(i). In relation to section 30(1)(b), the public authority must show that it has the power to investigate offences and institute criminal proceedings. Whilst a duty is something that the public authority is obliged to do, a power simply allows the public authority to do something, giving it discretion over whether it exercises its powers.
 17. The Commissioner first considered whether the requested information was correctly withheld in reliance on section 30(1)(a)(i). In considering the application of the exemption, the Commissioner has only considered information within the scope of the request which does not constitute the personal data of the complainants, if this is held.
 18. The public authority explained that its Criminal Enforcement teams act on behalf of the Secretary of State, to conduct criminal investigations and, where appropriate in accordance with the Code for Crown Prosecutors, to institute criminal proceedings.
 19. The Secretary of State, as a Minister of the Crown, has an inherent responsibility for the enforcement of the law, particularly in relation to company and insolvency law for which he is responsible. Investigators working for the Criminal Enforcement teams can approach witnesses to provide statements, and have limited powers under the Police and Criminal Evidence Act 1984 (PACE) to obtain evidence via court order and invite suspects for interview. The results of their investigations are provided to in house lawyers who assess the evidence in accordance with the Code for Crown Prosecutors, and where appropriate, institute and conduct criminal proceedings.
 20. In its submission to the Commissioner, BIS set out that the requested information relates to an investigation it had conducted following a report of a potential breach of section 216 of the Insolvency Act 1986 whereby a director of a limited company which has entered insolvent liquidation is prohibited from acting as a director or in the management

of a company using that name for five years, subject to the application of a number of exceptions.

21. BIS has set out that all the documents held in its files relate to that investigation and prosecution. The investigation/prosecution was complete at the time of the request. BIS has made it clear that were it not for the investigation/prosecution it would not hold any information falling within the scope of the request.
22. The Commissioner is satisfied that all of the requested information was held by the public authority for the purpose of investigating the potential breach of section 216 of the Insolvency Act 1986.
23. In view of the above, he finds that the exemption at section 30(1)(a)(i) was correctly engaged by the public authority in respect of the requested information.

Public interest test

24. The exemption at section 30 is qualified by a public interest test and the Commissioner must determine whether the public interest lies in maintaining this exemption or whether it favours disclosure.
25. The complainants have not put forward any reasons why they believe the public interest favours disclosure in this case but it is this aspect they have asked to be considered by the Commissioner.
26. BIS has set out that the evidence relied upon at trial in the criminal case, and any unused investigative material, was served as required by law and as directed by the court. It has also set out that at the heart of the exemption lies the importance of public confidence in the investigations and litigation to which it refers.
27. In its submission BIS acknowledges that public confidence can be served by increasing the transparency of the processes in question but that it also requires that the processes themselves should be effective for the delivery of justice. BIS considers that information relating to the investigation of suspected crime and details of the prosecution of offenders must normally not be disclosed to the suspect or to others. It has set out that disclosure of evidential material collected during the course of an investigation or prosecution, such as names and addresses of witnesses and reports to prosecutors, could, if disclosed other than as required by law, and the courts, jeopardise law enforcement or the prevention or prosecution of crime. BIS drew the Commissioner's attention to the Criminal Procedures and Investigation Act 1996 (CPIA). BIS has submitted that knowledge that such information may be

disclosed to the world at large may deter individuals from assisting in the processes associated with the delivery of justice.

28. BIS has further submitted that the process of gathering information during a criminal investigation is greatly facilitated by the cooperation of those involved, especially third parties. Where cooperation is voluntary and provision of information is achieved through the knowledge that the investigation process is confidential and that the evidence obtained will be used solely for the purposes of that investigation and any subsequent prosecution.
29. It is BIS' position that the possibility of disclosure of information (especially to the world at large via the FOIA) provided by witnesses is likely to severely inhibit witnesses from providing either the factual information itself or their assessment of it, either at all or to the full and frank extent required for proper reliance to be placed upon it. Therefore, disclosure of the requested information would significantly hamper investigative and prosecution authorities in their role in determining whether criminal offences have been committed and if so, by whom. The absence of witness information would affect the completion of investigations which would make it more difficult to clear innocent individuals of wrongdoing and bring offenders to justice.
30. In its submission BIS has explained that material provided to an investigator by a witness is not automatically used as a part of the prosecution case in open court or disclosed as unused material to the defendants. It is the CPIA which sets out the regime for the disclosure of this material. This ensures consistency in the disclosure of witness material. The CPIA and Common Law together regulate the disclosure of other material generated during the course of an investigation or prosecution. It is therefore key to the integrity of the prosecution process that material relating to investigations and prosecutions be kept confidential beyond that disclosed under the regime set out by the CPIA. Disclosure under any other regime would undermine the processes laid down for the investigation and prosecution of criminal offences.
31. In considering the public interest test as it applies to the exemption in this particular case, BIS has also considered the impact of the passage of time but remains of the view that the balance of the public interest lies in maintaining the exemption. There remain outstanding enforcement and appellate issues in this case despite the initial referral being over 8 years ago.
32. The Commissioner is satisfied that BIS has put forward strong arguments to support its position that the balance of the public interest favours maintaining the exemption at section 30(1)(a)(i). He has considered these arguments carefully and acknowledges that there will

always be a public interest in transparency of a public authority's processes and procedures. However the Commissioner has concluded that the public interest in maintaining the exemption is considerable and clearly outweighs the public interest in disclosure of the requested information in this case.

33. In view of his decision that BIS was entitled to rely on section 30(1)(a) to refuse the request, the Commissioner has not gone on to consider the other exemptions cited.

Right of appeal

34. 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: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

35. 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.
36. 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

Sarah O’Cathain
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