

Dr Chris Pounder  


Via email: [chris.pounder@amberhawk.com](mailto:chris.pounder@amberhawk.com)

Our ref: FOI 92366

13 October 2014

Dear Dr Pounder

SUBJECT: Freedom of Information Request (FOI 92366)

I am writing to you in response to your application under the Freedom of Information Act 2000 (FOIA) requesting receipt of the exchange of letters and associated correspondence between the European Commission and the UK in respect of prospective infringement proceedings against the UK Government on the grounds of alleged deficiencies in the UK transposition of the EU Directive 95/46EC (the Data Protection Directive).

I apologise for the length of time it has taken to respond to your request. The delay was caused by the need for a thorough and considered assessment of this latest request. We also needed to consult with the European Commission as one of the concerned parties to the requested information as part of the UK's statutory obligations under Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents.

You have previously submitted requests under FOIA on the 12 May 2011 and the 6 September 2013 asking for the same information. The latter request was refused on the 1 November 2013 and that decision was then upheld following your request for an FOI Internal Review (Ref: 86697) on the 11 March 2014.

This request has been considered afresh and has been handled under the Freedom of Information Act 2000 (FOIA). The original request and the same grounds for this request, are for:

- (i) A list of which Article(s) in Directive 95/46/EC (the Data Protection Directive) the European Commission have alleged have not been implemented properly by the UK Government.
- (ii) In relation to each Article, summary information as to why the

European Commission has made this claim.

(iii) You also requested "the full information the ICO considered in relation to Parts (i) and (ii) of the original request."

Having reviewed your request we still consider that s27(1)(b) and 27(2) exemptions under the FOIA 2000 are engaged in relation to your request and further that the public interest continues to favour withholding the information under the Act. I will turn to each of the exemptions in turn before addressing the public interest in withholding the information:

**27(1)(b) – disclosure would or would be likely to prejudice relations between the UK and an international organisation.**

Section 27(1)(b) exempts information if its disclosure would, or would be likely to prejudice relations between the UK and any international organisation including the European Commission. The Tribunal's deliberations in 2013 concluded that at the time the request was submitted the evidence showed that most of the issues had been resolved and there was very little if any negotiations taking place in relation to the infringement proceedings. They also noted the emphasis had shifted toward negotiations on a new data protection framework and that it could be reasonably assumed that any outstanding issues in relation to the infringement could be dealt with under the new Regulations. In summary, the Tribunal opined that the likelihood of infringement proceedings being taken in this case did not seem to be real, unless there was a failure to introduce the Regulations.

The key aspect in the Tribunal's deliberations on this point appear to be the absence of evidence to demonstrate that the infringement proceedings are an ongoing concern, and that to all extent and purposes the Commission is no longer pursuing infringement proceedings against the UK. On the basis of these findings, the Ministry of Justice has sought to clarify with the Commission its intention in relation to the infringement, and critically, whether they still consider it to be a live issue. Officials from the department contacted the Commission and had an exchange of correspondence in February and March 2013 (following the Tribunal hearing), again in January 2014 and then, more recently, at the end of September/beginning of October 2014 seeking their views following this latest FOI request. On each occasion, the Commission confirmed that the proceedings remain live, that the particular information remains under consideration and therefore should not be released at this time. In their most recent communication, the Commission reiterated the position that the requested documents concern an ongoing infringement procedure against the United Kingdom, and that the correspondence requested are part of the investigation and inspection procedure performed by the Commission, and essential documents upon which the Commission will base its final decision on how to proceed.

As a Government department we have a responsibility to take full account of the views and opinions of other international organisations affected by any decision to disclose information and whether acting contrary to their views would have a detrimental impact on ongoing relations with the UK. Given the unequivocal response from the European Commission in this recent communication, it is abundantly clear that disclosure would undermine our good relationship with the

Commission, which is important in resolving any infraction proceedings. Therefore, we consider that 27(1)(b) is engaged.

**27(2) – Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.**

The requested information is confidential information provided by the EU as an international organisation. The documents are not in the public domain and the Commission has reiterated its stance as recently as October 2014 that they consider the information confidential and that respect for this principle is important in creating an atmosphere of mutual trust between the Commission and Member States with a view to resolution of a dispute.

Again, it is unquestionable from the evidence provided by the Commission that they view the requested information as confidential and therefore, we consider that 27(2) is engaged.

**Public interest arguments in favour of disclosure under s27(1)(b) and 27(2)**

Disclosure could result in greater transparency around infraction proceedings. In particular, it would aid the public in understanding the European Commission's concerns about how the UK has implemented the Data Protection Directive. It would also assist the public in understanding the Commission's role in the process and how the UK responds to concerns raised.

As noted by the Tribunal, disclosure of the information would encourage informed debate in relation to the proposed Data Protection Regulation. Knowledge of how the Commission considers that the UK has failed to implement the existing Directive would assist the general public in assessing the proposed Regulation and inform public debate in relation to implementation of any new legislation.

**Public interest arguments in against disclosure under s27(1)(b) and 27(2)**

In assessing the public interest arguments of whether to disclose or withhold the information we have taken full account of the observations of the Tribunal judgment from the 13 July 2013, including whether the public interest favours disclosure. In setting out the public interest arguments against disclosure, it is important to address and respond to the arguments in favour outlined above. The UK Government is a strong advocate of transparency in relation to the functions and workings of Government and promoting informed debate in respect of policy development. However, transparency has to be balanced against the importance of confidentiality in certain circumstances, where the latter principle unquestionably improves the prospect of resolving disputes amicably.

The Commission has been clear in each of its separate responses (in February 2013, January 2014 and October 2014) to the Ministry of Justice that infraction proceedings in relation to the UK remains a live issue, and subject to ongoing review and consideration. The Commission has indicated that a decision is going to be taken in relation to the infraction proceedings which will in part be based on the information that you have requested. The proceedings therefore are actively under consideration

by the Commission. They have further reiterated the view that confidentiality is key to creating an atmosphere of mutual trust in support of resolution of such disputes and on that basis do not agree with disclosure of the information requested.

There is a strong public interest in maintaining good relations with the Commission – not only in relation to settling the infraction proceedings but also in terms of maintaining the mutual trust and respect that exists in the UK's on-going working relationship with the Commission.

Against this backdrop and the Commission confirmation that the infraction proceedings against the UK remain live, we consider the public interest continues to favour withholding the information to enable an amicable resolution to the matter.

You have the right to appeal our decision if you think it is incorrect. Details can be found in the 'How to Appeal' section at the end of this letter.

Yours sincerely

  
EU and International Data Protection Policy Team