

BERRRef **01.04.05.3876c**

Your Ref

S. Hankin

Via e-mail [<mailto:request-3025-6870f84b@whatdotheyknow.com>]

15 January ~~2008~~ 2009

Dear Mr Hankin

Freedom of Information request 08/0621

I refer to your request of 18 December 2008 under the Freedom of Information Act 2000 for an internal review of the Department's decision to withhold some information you requested in your original letter of 17 September 2008 to which we replied on 16 October 2008.

Your request has been the subject of an internal review process. In carrying out the review, we have carefully looked again the material held by this Department and falling within the scope of your request. In particular we have considered and fully reviewed the material which was withheld on the basis of the exemptions in section 27 and 35 of the Freedom of Information Act 2000. As a result of that review process, the Department is satisfied that these exemptions were applied correctly, and that in each case the public interest in maintaining those exemptions outweighs that in disclosing the information to you.

The Department considers that disclosure of the letter sent by BERR to the Commission, regarding the use of Phorm and its legality would result in a detrimental effect on relations between the United Kingdom and the European Commission for the reasons explained in Patrick Baichin's reply of 16 October.

We consider that in the present case, premature and unilateral disclosure of correspondence by the UK could affect the free and frank exchange of views between the UK and the Commission and potentially hinder the ability of the United Kingdom to freely discuss and negotiate in this area in the future. The guidance provided by the Ministry of Justice makes this clear (see <http://www.justice.gov.uk/docs/foi-exemption-s27.pdf>, Annex A).

In your e-mail of 18 December, you challenged the use of sections 27 and 35 for exempting information as the FOI allows. As part of the internal review, I have paid particular attention to the application of Section 27 (1) (b)

As you are aware, Sections 27 and 35 are a qualified exemptions and that a public interest test must be applied before any decision is taken to release or withhold any information

There is a clear public interest in enabling the public to be aware of the working of government, BERR and of the European Commission'. Disclosure could enhance the public's knowledge of the powers held by these institutions to intervene on behalf of consumers and its willingness to use those powers. However there is also a clear interest to the public that any negotiations between member states and the Commission can be undertaken in the clear understanding that a free and frank discussion of the issues and exchange of views can be achieved.

Continuation 2

However, and as explained above, the Department is satisfied with the way in which the public interest test has been applied to your request, which resulted in the decision not to disclose.

The other questions that you submitted with your request were answered fully in the letter from Patrick Balchin of 16 October 2008. The Freedom of Information Act allows public authorities to regard questions that are not for recorded information to be dealt with as routine correspondence, and that is the case here. I am satisfied that the letter of 16 October 2008 answers your questions fully and appropriately. Further guidance on this matters is available in the publication "Freedom of Information and environmental Information Regulations – Hints for Practitioners handling FoI/EIR requests" produced by the Information Commissioner's Office.

What is an information request?

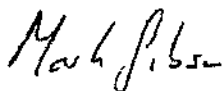
*It is very important to draw a distinction between requests and routine correspondence. Requests for information that can be provided without any question – such as recruitment brochures, leaflets, press releases and the text of public speeches – should be treated as business as usual. **Requests which are not for recorded information, but instead ask questions, such as "please explain your policy on x" or "please explain your decision to do y" are not requests for recorded information and therefore should be treated as routine correspondence.** Public authorities will need to decide for themselves if they wish to record these requests.*

http://www.ico.gov.uk/upload/documents/library/freedom_of_information/practical_application/foi_hints_for_practitioners_handling_foi_and_eir_requests_2008_final.pdf

If you are not content with the outcome of the internal review, you have the right to apply directly to the Information Commissioner for a decision. The Information Commissioner can be contacted at:

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Yours sincerely



Mark Gibson
Director General, Enterprise and Business Group



Ministry of
JUSTICE

Freedom of information guidance

Exemptions guidance

Section 27: International relations

14 May 2008

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Introduction

The exemption under section 27 exists to protect the United Kingdom's international relations, its interests abroad and the United Kingdom's ability to protect and promote those interests.

Section 27 consists of two different kinds of exemption:

- Section 27(1) focuses on the **effects** of disclosure rather than on the type of information. Information is exempt if its disclosure would or would be likely to prejudice any of the matters mentioned in section 27(1)(a) - (d):
 - a) relations between the UK and any other state
 - b) relations between the UK and any international organisation or international court
 - c) the interests of the UK abroad
 - d) the promotions or protection by the UK of its interests abroad
- Section 27(2) protects confidential information obtained from a foreign state, an international organisation, or an international court. Section 27(2) describes information by reference to its **origins** and the **circumstances** in which it was obtained.

The rationale for this is clear: the effective conduct of the United Kingdom's international relations, and its ability to protect and promote its interests abroad, would be compromised if certain information held within government were made known publicly.

This also applies if other states or international organisations became concerned that the confidence within which they consider their exchanges with the United Kingdom to take place might not be respected. This must be considered on a case by case basis.

The United Kingdom's interests abroad, and the subject matter of its international relations, cover a wide and changing range of matters, including for example trade, defence, environment, human rights and the fight against terrorism and international crime. The specific 'interests' that the United Kingdom pursues in its relations with other states will vary over time and so this guidance does not attempt to give a comprehensive definition.

The way in which the United Kingdom's interests are protected and promoted, and international relations conducted, also takes a wide variety of forms ranging from formal diplomatic exchanges to informal conversations.

When any part of this exemption is engaged, the **public interest test must be applied** before any decision is taken to release or withhold any information.

In some circumstances, section 27 may be used to neither confirm nor deny that information is held.

If in doubt as to whether a disclosure of information would prejudice any of the matters mentioned in section 27(1), or be confidential within the terms of section 27(2), consult the government department concerned, usually the Foreign and Commonwealth Office.

The advice of FCO officials should normally be sought before you consult foreign governments or international organisations about the disclosure of information.

It is important that you are clear about the definition of some of the key terms used in section 27 in order to understand what information is covered by the exemption. Some terms are defined in section 27(5) and are set out in Annex A.

What information may be covered by this exemption?

Information that **might** be covered by this exemption spans a broad spectrum and could include, for example:

- reports on, or exchanges with, foreign governments or international organisations such as the EU, NATO, the UN, Commonwealth, World Bank or International Monetary Fund
- information about the United Kingdom's activities relating to United Kingdom citizens or companies abroad, particularly their consular and commercial interests
- information about other states' views or intentions provided in the course of diplomatic and political exchanges of views
- details of inward and outward state visits and visits by ministers and officials

- information supplied by other states on diplomatic or other channels
- discussion within the United Kingdom government on approaches to particular states or issues
- information relevant to actual or potential cases before an international court
- details of the United Kingdom's positions in multilateral or bilateral negotiations

These examples are not exhaustive. They are provided to show the kinds of information where the potential disclosure might trigger use of the exemption. It is important to note that 27(1) applies to information only where the effect of disclosure is prejudice to the interests listed in 27(1) whereas 27(2) applies to information which has been obtained in confidence.

When releasing the information would prejudice the United Kingdom's international relations – section 27(1)

Section 27(1) is a prejudice-based exemption. Information that may be covered by this exemption includes, for example, details of inward and outward state visits; reports on or exchanges with foreign governments or international organisations and information supplied by other states on diplomatic or other channels.

The likely impact of disclosure will need to be assessed in each case. You should consider whether the information concerned is (and remains) sensitive and what kind of affect its disclosure would, or would be likely to have, on:

- the United Kingdom's international relations
- relations with third party states or organisations as well as those most immediately concerned
- the United Kingdom's interests abroad or its ability to protect and promote them

You should consider questions such as:

- What sort of reaction is disclosure likely to provoke in other states, international organisations and courts?
- If a negative reaction is anticipated, what will the implications of that reaction be?
- How is it likely to impact on the United Kingdom's ability to 'do business' in and with those states?

You must consider the likely implications not only for the state and subject matter most immediately concerned, but also for other aspects of the United Kingdom's relations with the state concerned and its relations with other states. Even where disclosure is unlikely to provoke a negative reaction in other states, would it nonetheless be likely to prejudice United Kingdom interests abroad or the United Kingdom's ability to protect and promote those interests (for example, by alerting others to United Kingdom intentions or negotiating positions)? In each case where likely prejudice to the United Kingdom's international relations is identified, the form that prejudice is likely to take will need to be identified.

For example, would disclosure of sensitive trade information provided by the state be likely to prejudice the United Kingdom's trade relations with that state? Would disclosure of sensitive trade information make that state reluctant to share sensitive environmental information with the United Kingdom or less likely to vote for the United Kingdom in an election to an international body?

Similarly, disclosure of information relating most immediately to one state might, if it became known to them, prejudice other states' willingness to provide information to the United Kingdom. For example, if details of discussions on defence matters with state A were disclosed, this might make state B less willing to hold similar discussions with the United Kingdom. This should all be considered before a decision is made as to whether prejudice might be caused by disclosure.

Other points to take into account include:

Security classification of the information

The fact that a document carries a security classification does not necessarily mean the exemption applies, though it may indicate that you should consider using the exemption. The protective marking may relate to matters other than international relations (for example national security or defence), or the sensitivity may have declined due to the passage of time or events.

Additionally, the security classification may not be relevant to the entire contents of the document and may simply reflect the highest classification of some of the information in the document at the time of its creation. You should consider each request on its merits and assess the specific information that has been requested and any prejudice associated with its disclosure to establish whether use of the exemption is appropriate.

The source of the information

This will be particularly relevant for confidential information obtained from another state or from an international organisation or international court.

Other information already in the public domain

Individual requests for information must be considered on their merits but you should take account of what is already in the public domain when assessing prejudice to international relations. The fact that similar or related information is already in the public domain may reduce or negate any potential prejudice. For example, where the state concerned has itself put the information in the public domain. Care needs to be taken where the information is put into the public domain by a non-official source in which case disclosure by the United Kingdom could provide confirmation of the

reliability of the information. In some circumstances it could give rise to prejudice that would not otherwise have existed (for example where reading the disclosed information alongside information already in the public domain allows deductions to be made that could themselves be prejudicial). In the latter case, it will be particularly important to identify the specific prejudice that disclosure of the information would, or would be likely to, cause.

The timing of a request

The sensitivity of information will often be dependent on the timing of a request and the age of the information. For example, while disclosing information about the United Kingdom's negotiating position at an international conference might be prejudicial before the conference is concluded, concern about disclosing some or all of the information may diminish or disappear with the passage of time. Similarly, potentially prejudicial comments about the policies of a foreign government may diminish in sensitivity after a change of government.

You should not focus exclusively on whether the information would be likely to prejudice the United Kingdom's relations with the state concerned **in the area related to the information**; you should also consider whether the information would be likely to prejudice relations with that state **in another aspect of those relations**.

For an example of the application of section 27(1) you may wish to consider the Decision Notice by the Information Tribunal (Appeal Number EA/2006/0065¹). The Tribunal found that on the facts of that particular Appeal, disclosure of the information would pose a significant risk of prejudice to international relations.

¹[http://www.informationtribunal.gov.uk/Documents/decisions/foreignandcommonwealthofficeinformationcommissionerandfriendsoftheearth\(29june2007\).pdf](http://www.informationtribunal.gov.uk/Documents/decisions/foreignandcommonwealthofficeinformationcommissionerandfriendsoftheearth(29june2007).pdf)

Confidential information obtained from another state, an international organisation or international court – section 27(2)

Confidential information received from another state, an international organisation or an international court is exempt under section 27(2). The exemption applies as long as the terms on which the information was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the state, organisation or court to expect that it will be so held. In assessing whether this part of the exemption applies, you should consider the following factors:

- On what terms was the information supplied? For example, was the information supplied under arrangements containing either a requirement to preserve its confidentiality or consent to its disclosure? In the absence of any express provision, should consent to disclosure or a requirement for confidentiality be implied? For example, an implied confidentiality requirement is likely to apply to the content of most diplomatic exchanges with other states and political discussions with Ministers and officials of other governments, much of which takes place under a relationship of assumed confidentiality.
- It is not necessary for the information to be contained in a document supplied directly by a foreign government for section 27(2) to apply.
- In some cases, it may be possible to form a reasonable judgement as to whether the information remains confidential without needing to consult the supplier. This may be because officials have (or can consult someone who has) recent knowledge of the topic and the supplier's likely reaction to disclosure, or because of an express condition of confidentiality or consent to disclosure attached to the supply of the information. In case of doubt, consult the supplier of the information.
- Is the information or a substantial part of it already in the public domain, in the United Kingdom or overseas? **How** it came to be in the public domain may be important, as relations with a foreign government might still be prejudiced by the United Kingdom officially disclosing information which has previously only been in the public domain as a result of, for example, an unattributable press story or speculation.

- Whether the state or organisation concerned has a culture of transparency in international relations. It is reasonable to take into account another state's general views on disclosure. For example, a state with a more liberal approach to freedom of information may be less likely to take offence at disclosure of some kinds of information and so the risk of prejudice to international relations may be lower. However, in this example, it may still be prudent to forewarn the state concerned of a proposed disclosure. With a state, or international organisation, that has a less liberal approach to disclosure than the United Kingdom, account will need to be taken of its higher threshold for disclosure. What might be acceptable to others might still prejudice relations with that state or organisation.
- Confidential information from another state is unlikely to be exempt under section 41 (information provided in confidence) of the Freedom of Information Act because it is unlikely to be actionable in the domestic courts.

Further guidance can be found in the Working Assumption on confidential information obtained from a foreign government or international organisation.

Public interest test

Before information may be withheld under the exemption, an assessment must be made of the public interest considerations both in favour of disclosure and in favour of protection of the information. When considering section 27(1) the fundamental question is whether the public interest in disclosure is outweighed by the damage or likely damage that would be caused to the United Kingdom's international relations, its interests abroad or its ability to protect and promote those interests.

Where the prejudice or likely prejudice would be relatively trivial, the public interest in favour of disclosure is likely to prevail. For example, where disclosure of information about the content of a discussion with a foreign official would be **unlikely** to provoke any significant negative reaction by that official or his/her government or to have any significant detrimental affect on third states' willingness to enter into similar discussions in future.

Where the prejudice or likely prejudice is potentially more serious, there would have to be a more specific and compelling public interest in disclosure to outweigh the public interest in withholding the information. For example, where disclosure of information about the United Kingdom's

attitude to an international issue of particular concern to a state would be likely to provoke a strong negative reaction that could, for example, make it less likely that British companies would be awarded government contracts by the state concerned.

Although each request must be considered on its merits, the public interest in maintaining the international relations exemption is likely to be strong when the disclosure of information would, for example:

- significantly weaken the United Kingdom's bargaining position in international negotiations
- inhibit other governments' willingness to share sensitive information with the United Kingdom
- inhibit frankness and openness in diplomatic reporting

When considering the balance of the public interest in respect of confidential information covered by section 27(2), the following are some examples of matters which might be taken into account:

- whether disclosure would be contrary to international law (for example where disclosure would be a breach of a treaty obligation)
- whether disclosure would undermine the United Kingdom's reputation for honouring its international commitments and obligations
- whether disclosure would be likely to undermine the willingness of the state, international organisation or court that supplied the information to supply other confidential information in future (or whether it would be likely to have such an affect on the willingness of states, international organisations or courts **in general**)
- whether disclosure would be likely to provoke a negative reaction from the state, international organisation or court that supplied the information that would damage the United Kingdom's relations with them and/or its ability to protect and promote United Kingdom interests
- whether disclosure would be likely to result in another state, international organisation or court disclosing confidential information supplied by the United Kingdom, contrary to the United Kingdom's interests
- whether the state, international organisation or court that supplied the confidential information has objected to its disclosure and good relations with them would be likely to suffer if the objection were ignored

While the specific circumstances of each case must be considered, where any of the above considerations are present there is likely to be a strong public interest in non-disclosure. Where the other country is opposed to disclosure, that will be a very important consideration. The impact on relations with the other country is likely to be so severe in those circumstances that the working assumption should be in favour of retention. Under these circumstances, it will only rarely be the case that the public interest in disclosure outweighs the case for retention.

Consultation with the Foreign and Commonwealth Office

The FCO is likely to receive the majority of requests for information which would or would be likely to prejudice international relations if disclosed, but other government departments and public authorities will also receive requests for such information that fall within the scope of the exemption. This includes documents supplied by the FCO and other governments, as well as information created by the department or public authority concerned.

It is good practice to consult FCO officials when considering whether to disclose information that may affect the United Kingdom's international relations as the FCO will, in most cases, be best placed to assess the likely impact of disclosure.

The advice of FCO officials should normally be sought before you consult foreign governments or international organisations about the disclosure of information, although on subjects where other public authorities have well-established international relationships it may be sufficient simply to keep FCO officials informed. Enough time should be left for consultation to be completed within the statutory time limits.

The courts, and the Information Tribunal, have consistently acknowledged the special expertise of the Executive in assessing what actions would protect or promote international relations: see for example *R v Secretary of State for the Home Department ex parte Launder* [1997] 1 WLR 839 per Lord Hope at 857, and *R v Secretary of State for Foreign and Commonwealth Affairs ex parte Ferhut Butt* 116 ILR 607 (1999).

Duration of the exemption

This exemption does not expire when the records in which the information is contained are 30 years old and become historical records. However the sensitivity of a subject, and therefore the need to apply an exemption, may diminish with the passage of time.

Neither confirm nor deny

The exemptions in section 27 can be used to justify why information is being withheld. Section 27 may also be used to neither confirm nor deny that information is held: if to confirm or deny would be likely to prejudice any of the matters in section 27(1) or would disclose information covered by section 27(2). If exclusion of the duty to confirm or deny whether information (under section 1(1)(a)) is held is claimed, it is not necessary to go on to claim exemption from the duty to provide the information itself (in section 1(1)(b)).

Relationship with other exemptions

You will often need to consider the international relations exemption alongside other exemptions. The exemptions which are the most likely to be relevant are:

- **Section 23 (information supplied by, or relating to, bodies dealing with security matters)**
For example in cases where that information concerns foreign governments or nationals.
- **Section 24 (national security)**
For example in cases where confidential information supplied by a foreign government needs to be protected for our own national security reasons.
- **Section 26 (defence)**
For example in cases of joint projects or operations where disclosure

would prejudice not only our own defence interests but those of our allies.

- **Section 28 (intra-United Kingdom relations)**
For example when information concerning international relations is held by Devolved Administrations.
- **Section 30 (investigations and proceedings conducted by public authorities)**
For example in relation to requests made to or received from overseas police, prosecutors and courts in respect of criminal investigations and prosecutions.
- **Section 31 (law enforcement)**
For the same reasons as section 30.
- **Sections 35 (formulation of government policy, etc.) and 36 (prejudice to effective conduct of public affairs)**
For example in relation to the development of foreign policy.
- **Section 37 (communications with Her Majesty etc.)**
For example in relation to Royal visits overseas or state visits to the United Kingdom.
- **Section 38 (health and safety)**
For example in relation to the safety of United Kingdom subjects overseas.
- **Section 39 (environmental information)**
If environmental information within the meaning of the Environmental Information Regulations is requested, it is exempt from the Freedom of Information Act and its disclosure must be considered in accordance with the Environmental Information Regulations. EIR regulation 12(5)(a) exempts material where disclosure would adversely affect international relations, defence, national security or public safety.
- **Section 41 (information provided in confidence)**
Where disclosure of that information would not only be an actionable breach of confidence but would also prejudice international relations.
- **Section 43 (commercial interests)**
For example where disclosure would prejudice the United Kingdom's commercial interests both domestically and abroad.

You should consult the separate guidance on each of these exemptions to establish which, if any, is also relevant to the request you are considering.

If you use more than one exemption you should cite them all in your reply to the applicant.

Annex A: Definitions

It is important that you are clear about the definition of some of the key terms used in section 27 in order to understand what information is covered by the exemption. Some terms are defined in section 27(5):

- **international court' means any international court which is not an international organisation and which is established –**
 - by a resolution of an international organisation of which the United Kingdom is a member, or
 - by an international agreement to which the United Kingdom is a party.

Examples include the International Court of Justice, the European Court of Justice, the International Criminal Court and the European Court of Human Rights.

- **'international organisation' means any international organisation whose members include any two or more states, or any organ of such an organisation.**
- Note that the United Kingdom does not have to be a member of the organisation concerned. Thus organisations such as Organisation of Petroleum Exporting Countries and the Organisation of American States are covered, as well e.g. the United Nations and the European Union. 'Organs' of international organisations would include for example the European Commission and the European Parliament.
- **'state' includes the government of any state and any organ of its government, and references to a state other than the United Kingdom include references to any territory outside the United Kingdom.**
- This latter will include, for example, the Crown Dependencies (Jersey, Guernsey and the Isle of Man) and British Overseas Territories (e.g. Gibraltar) and territorial entities not recognised as states. 'Organs' of government will include a state's legislature and executive.
- **'confidential information'** obtained from a state, international court or international organisation is defined in section 27(3). This definition allows for the possibility that confidentiality may be either expressly imposed under the terms on which it was obtained or inferred as a

matter of the reasonable expectation of the state, organisation or court from the circumstances in which it was obtained. In contrast to section 41, there is no requirement that disclosure be an actionable breach of confidence for this definition to apply. Confidential information from another state is unlikely to be exempt under section 41 (information provided in confidence) because it is unlikely to be actionable in the domestic courts.

- **'United Kingdom'** is defined in the Interpretation Act as: 'Great Britain and Northern Ireland'.

BERRRef **01.04.05.3880c**

Your Ref

C . Williams

Via e-mail [<mailto:chris.williams@sitpub.com>]

15 January 2009

Dear Mr Williams.

Freedom of Information request 08/0618

I refer to your request of 18 October 2008 under the Freedom of Information Act 2000 for an internal review of the Department's decision to withhold some information you requested in your original letter of 17 September 2008 to which we replied on 15 October 2008.

Your request has been the subject of an internal review process. In carrying out the review, we have carefully looked again the material held by this Department and falling within the scope of your request. In particular we have considered and fully reviewed the material which was withheld on the basis of the exemptions in section 27 and 35 of the Freedom of Information Act 2000. As a result of that review process, the Department is satisfied that these exemptions were applied correctly, and that in each case the public interest in maintaining those exemptions outweighs that in disclosing the information to you.

The Department considers that disclosure of the letter sent by BERR to the Commission, regarding the use of Phorm and its legality would result in a detrimental effect on relations between the United Kingdom and the European Commission for the reasons explained in Patrick Balchin's reply of 16 October.

We consider that in the present case, premature and unilateral disclosure of correspondence by the UK could affect the free and frank exchange of views between the UK and the Commission and potentially hinder the ability of the United Kingdom to freely discuss and negotiate in this area in the future. The guidance provided by the Ministry of Justice makes this clear (see <http://www.justice.gov.uk/docs/foi-exemption-s27.pdf>, Annex A).

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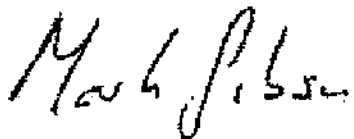
Continuation 2

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Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Yours sincerely

A handwritten signature in black ink that reads "Mark Gibson". The signature is written in a cursive style with a large initial 'M' and a long, sweeping underline.

Mark Gibson
Director General, Enterprise and Business Group