

G Webber

Our ref: **FOI1270R**

Date: 21 December 2018

Email: request-531752-f69a4867@whatdotheyknow.com

Dear G Webber

Freedom of Information Request FOI1270R - Review

Thank you for your email of 10 December in which you ask for a review of the Commission's response of 10 December to your FOI request of 11 November.

Request for Review:

Your request for a review related to the application of the public interest test to the s31 exemption which Ms Wong had set out in her response to your FOI request. Your email said:

"Surely you know that section 31 is a qualified exemption and can only be used to withhold information if a public interest test has been carried out? Public authorities are required to explain the outcome of this public interest test when issuing a section 31 refusal.

Please can you therefore refer this case to someone senior, who has received FOIA training, and have them review it."

Ms Wong then sent two annexes to you that should have been sent to you with her original letter, apologising for their omission. One was titled "Section 31(1)(g) Prejudice to Public Functions Test" and the other "Annex A – section 31(1)(g)". You responded:

"Thank you for sending this through. However, that document is headed "Prejudice to public function test" and is devoted to examining whether or not the section 31 exemption is engaged. That is all well and good, however after deciding that the exemption is engaged a public authority has to go on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

The EHRC has not done this in relation to my request, or at least it has not disclosed its reasoning. In fact, there is nothing to suggest that the EHRC considered both sides, or conducted any form of balancing exercise at all, whereas the Freedom of Information Act explicitly requires such a balancing exercise.

My request for a review therefore stands.”

Response

As a person not involved with the Commission’s original decision I have been asked to review the response. This means that I have looked again at your request and at all of the paperwork associated with our original decision and have considered the public interest test afresh.

Given the terms of your second email of 10 December it may be that you have not had sight of the second of the annexes that Ms Wong sent to you in response to your first email. Annex A sets out the detail of the balancing exercise that was undertaken in deciding whether the public interest in disclosing the information you had requested outweighed the public interest in withholding it. I attach that Annex again for ease. It is clear therefore that the necessary balancing exercise was carried out when your request for information was considered.

However, given your request for a review I have considered the public interest test of new.

There is of course a presumption of disclosure of information and I have begun my consideration from that presumption. I have also considered the general public interest in the promotion of better governance and regulation through transparency and accountability.

I have taken into account the timing of the request for this information. The consideration of whether any Commission enforcement action is appropriate is ongoing. There is therefore a stronger public interest in not releasing any information than there might be if that consideration was historic.

I have also considered how the Commission’s power to consider whether a body may have acted unlawfully would be affected by the release of such

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information. We need to be able to ascertain whether an organisation is complying with the law and whether the Commission should use its enforcement powers. We must be able to carry out enquiries into such issues in confidence so that there is no interference with the principles of natural justice and so that we can conclude our enquiries with appropriate confidentiality and fairness, without being prejudiced by disclosure of information.

My view is that, in this case, the public interest in the Commission being able to consider the use its statutory enforcement powers effectively and with the appropriate level of confidentiality outweighs any benefit in disclosing exempt information.

I have carefully assessed all of these opposing interests to determine whether the public interest is best served by disclosing information or maintaining the section 31(1) exemption. I believe that, on this occasion, the public interest is best served by non-disclosure of the information.

I hope that you are satisfied with the information provided in relation to your FOI request review.

However, if following my review you are not content with the outcome you may apply directly to the Information Commissioner's Office (ICO) at:

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

Yours sincerely



Lynn Welsh
Head of Legal

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