



**First-tier Tribunal  
(General Regulatory Chamber)  
Information Rights  
Decision notice 50812647**

**Appeal Reference: EA/2020/0165V**

**Heard on CVP 31 March 2021**

**Before**

**JUDGE CHRIS HUGHES**

**TRIBUNAL MEMBERS**

**ALISON LOWTON & ROSALIND TATAM**

**Between**

**DR CHRIS POUNDER**

Appellant

**and**

**INFORMATION COMMISSIONER**

First Respondent

**DEPARTMENT FOR DIGITAL, CULTURE, MEDIA & SPORT**

Second Respondent

**Appearances:-**

**Appellant: In person (assisted by Maurice Frankel)**

**First Respondent: did not appear**

**Second Respondent: Mr Peter Mant**

**DECISION**

The appeal is dismissed

## REASONS

### Background

1. This request for information arises from events commencing a quarter of a century ago. In 1995 the European Union adopted Directive 95/46/EC on data protection and the UK passed the Data Protection Act 1998 to implement it. On 9 July 2004 the EU issued an infraction notice arising out of that implementation of the Directive. Dr Pounder made requests to the Department for Constitutional Affairs on 22 December 2004 and 2 January 2005 under the Freedom of Information Act (FOIA) seeking release of information. The Information Commissioner (IC) upheld the Department's position that the information was exempt from disclosure.
2. Dr Pounder again sought information on 1 October 2009, 12 May 2011 and 6 September 2013. The Tribunal has considered his appeals on two previous occasions (EA/2011/0116, in which proceedings he unsuccessfully sought leave to appeal from the Upper Tribunal) and (EA/2012/0110). At about the same time Dr Pounder secured a release of some information from the European Commission following the intervention of the European Ombudsman.
3. On 27 July 2014 Dr Pounder made a further request for the information, the responsible department was now the Department for Culture Media and Sport (DCMS) which refused his request. That refusal was upheld by the IC in a decision of 22 March 2016 (FS5077377). Dr Pounder did not appeal.
4. The General Data Protection Regulation (2016/679) came into force on 25 May 2018 and the Data Protection Act 2018 came into force the same day.
5. On 29 May 2018 Dr Pounder renewed his request under FOIA to the DCMS (now Department for Digital, Culture, Media and Sport):-

*A list of Article(s) in Directive 95/46/EC (the repealed Data Protection Directive), which the European Commission alleged were not implemented properly by the UK Government via the provisions in the Data Protection Act 1998 (now fully repealed) and identification of the sections in the 1998 Act to which each allegation relates.*

*In relation to each Article in the above list, information, preferably from the Commission, which explains why the European Commission made this claim.*

*In relation to each Article in the above list, information which explains the UK stance as to why the Commission were wrong to allege improper implementation of a provision in the Directive.*

*In relation to each Article in the above list, information which explains any agreement between the UK Government and the Commission concerning the resolution of the alleged infringement'*

6. DCMS refused to provide the information on 22 June and maintained that position on 13 November 2018. In its internal review DCMS relied upon FOIA exemptions contained in s27 and s42(1) legal professional privilege. Dr Pounder complained to the IC who on 5 February 2020 upheld the DCMS position relying on s27(1)(b) and agreeing with DCMS that the balance of public interest lay in withholding the information. Dr Pounder has appealed to this tribunal. S27 (International Relations) provides, so far as is relevant:-

*(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice –*

*(a) relations between the United Kingdom and any other State,*

*(b) relations between the United Kingdom and any international organisation or international court,*

*(c) the interests of the United Kingdom abroad, or*

*(d) the promotion or protection by the United Kingdom of its interests abroad.*

*(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.*

*(3) For the purposes of this section, any information obtained from a State, organisation or court is confidential at any time while the terms on which it 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.*

7. Dr Pounder was simultaneously seeking the information from the European Commission, which refused to provide it claiming a presumption against the disclosure of these pre-litigation documents arguing that such disclosure would undermine the protection of the purposes of the investigation. He sought the assistance of the European Ombudsman on 18 September 2018. By a proposal to the European Commission dated 9 November 2018 the Ombudsman recognised that there was a general presumption that such documents would not be disclosed and that presumption could be rebutted. She noted that the infringement proceedings 2004/2099 had not been suspended, however work on them had slowed from 2011 due to work on GDPR and that between 2016 and 2018 the Commission and the UK were working on the GDPR transition *"the aim of this cooperation was to foster a common understanding of the new data protection rules, including any remaining issues in the ongoing infringement proceedings"*. The Commission had confirmed that of ten points originally considered as a result of dialogue nine points had been resolved but the procedure had not been closed *"because one very specific issue remains unresolved... that can be clearly isolated from the resolved issues."* She proposed that the Commission reassess the *"request for public access based on an*

*individual assessment of the relevant documents and respond to him by 21 December 2018 at the latest. "*

8. The Commission did not comply arguing that disclosure, even partial, would undermine engagement with the UK authorities for which a climate of mutual trust was necessary. The Commission was monitoring compliance of member states with GDPR and as new issues of UK compliance may arise and may be connected with the issues in the infraction proceedings "*a climate of mutual trust must be preserved*". The Ombudsman considered the Commission's stance as formalistic and unhelpful and made a finding of maladministration against the Commission on 1 July 2019.

### The appeal

9. In his appeal Dr Pounder argued that harm to international relations was unlikely to occur and that since work on GDPR had begun the infraction proceedings were unlikely to come to anything, especially since almost all the issues had been resolved and the GDPR was now in force. He ventured that information on past data protection issues is important so that the next generation of practitioners can learn from them. He argued that the material was not confidential, pointing to a discussion of one of the issues in Rosemary Jay's magisterial *Data Protection Law and Practice* (4<sup>th</sup> edition). He argued that far greater harm was caused to international relations by the comments of the individual who was Foreign Secretary at the time he had made his 2018 request. Dr Pounder illustrated it with 3 news clippings where a comparison was allegedly made by politicians between the EU and the Nazi regime; one from during the Referendum campaign when Mr Jonson was on the backbenches, one from his period as Foreign Secretary and the third also from the later period which drew attention to a comment in his book "*The Churchill Factor*" published in 2014.
10. The IC and DCMS resisted the appeal. DCMS emphasised that the issue was whether, at the time of the request, disclosure was likely to cause harm to relations between the UK and EU and if so, where the balance of public interest lay. DCMS argued that the Commission had confirmed that infraction proceedings were open, that it viewed them as confidential, that it had refused to release the information despite the promptings of the European Ombudsman. Disclosure would undermine goodwill, trust and confidence between the EU and UK in highly sensitive and important negotiations over withdrawal from the EU including the adequacy of UK data arrangements which were being negotiated and the resolution of the infraction proceedings. Although adequacy discussions were expected from Referendum result onwards (Mr Gaskell was in his post from December 2017), they did not formally commence until after the UK actually left the EU in 2020.

11. Paul Gaskell gave a witness statement and oral evidence for DCMS. He spent 2 years working for a member of the European Parliament, 17 years in the Diplomatic Service specialising in EU and then data policy and from December 2017 he was Deputy Director of the DCMS Data Adequacy Team. In this role he had led the preparations for securing agreement from the EU that the UK's data protection regime met the requirements of EU law to enable transfers of personal data from the EU to the UK. Agreement with the EU on this issue was identified by the then Prime Minister in March 2018 as one of the five fundamental requirements for the future trading relationship (and an adequacy ruling would be essential for national security data sharing). The DCMS EU Exit Data Adequacy Team was formally constituted in May 2018. Formal negotiations with the EU started after the departure from the EU on 1 February 2020 and by the end of the transition period on 31 December 2020 positive adequacy decisions had been secured (subject to ratification). Throughout the period he was in very frequent contact with his opposite numbers in the Justice Directorate of the Commission working through the issues. Those contacts were part of the same team responsible for the infraction proceedings. He noted that the UK had, in response to Dr Pounder's requests, repeatedly asked for the Commission's consent to disclosure and it had always been refused.
12. In his evidence he stressed the importance of personal trust in his relations with the Commission's team and acknowledged the difference between the working relations that he secured and the highly charged relations between politicians where there was clearly a semi-public lack of trust. Given the repeatedly expressed view of the Commission on disclosure he felt that any disclosure by DCMS would have been extremely likely to have had a prejudicial effect on personal relations within his negotiations rendering harder the confidential exchange of arguments and information which are essential to the process. He stated that to his knowledge there had never been a successful application to disclose infraction documents. It would have been seen as an example of breaking trust and would have had a very substantial wider impact with the Commission reacting strongly to it.
13. The Tribunal also received and considered an open bundle of 667 pages and a closed bundle of the withheld information.

### Consideration

14. The tribunal has considerable sympathy with Dr Pounder in seeking disclosure of this important information over a considerable period of time. It is clear that although some knowledge is in the public domain much is not. Dr Pounder acknowledged that while the European Ombudsman had disclosed 12 Articles of the 1995 Regulations as being within the infraction proceedings in 2010, in her more recent decision she had stated that 9 out of 10 matters had

been settled and he was not clear how these figures could be reconciled or which Article was unresolved.

15. The first issue to be resolved by the tribunal is whether disclosure would prejudice relations with the EU. That question is to be answered with respect to the time period from the date of request to the date of the internal review, between 29 May and 13 November 2018.
16. It is clear that relations between the EU and UK were at that time tense. It is certainly open to Dr Pounder to identify conduct by a Minister which may have exacerbated tensions, however that is of no great help to him in addressing the issue of the impact of the disclosure of this information and its potential for harming working relations of the UK and EU officials who were working to ensure that the UK's future data protection arrangements would be accepted by the EU.
17. During that period the Commission confirmed to DCMS that it was opposed to any disclosure, on 9 November it was prompted by the Ombudsman to disclose the material in the parallel request and persisted in its refusal so far as to incur a finding of maladministration a few months later. That is a very clear indication of the strength of feeling with which the Commission views confidentiality in infraction proceedings, despite clear indications from the ECJ that such a rule of confidentiality is not absolute.
18. Mr Gaskell has considerable experience in working as a diplomat with the EU especially in the field of data protection and during that May- November period was developing the UK's approach to securing the EU's agreement to the continued flow of data between EU and UK after the departure from the EU. The tribunal was satisfied that his judgement that disclosure would cause significant prejudice to relations and would have impacted on Brexit negotiations and particularly on the data adequacy discussions was robust.
19. The tribunal is satisfied that relations would have been prejudiced and the requirements of s27(1)(b) are met. The risk was significant and the prejudice greater than de minimis.
20. While Dr Pounder emphasised to the tribunal the importance of data protection law and that the infraction proceedings impacted on the question of whether the rights of 60 million UK citizens were properly protected; it seemed to the tribunal that the effect of the adoption of the GDPR and the coming into force of the Data Protection Act 2018 reduced the salience of that argument. Viewed dispassionately, while there were at the time of the request preparations for discussion of the adequacy of the UK's new legislative arrangements, and it has been suggested that these may raise some of the difficulties of the previous system, the simple fact that the old arrangements were no longer in force considerably lessened the public interest in knowing

the details of the infraction proceedings. The precise status of these proceedings at the time of the request was a secondary issue, more salient was the question of the impact of disclosure on EU relations as new data arrangements were examined.

21. The information was of largely historic interest, its disclosure would have a substantial adverse effect on relations. The balance of public interest is decisively against disclosure.
22. In the light of this finding the tribunal did not need to address arguments as to legally privileged material or the law officer exemption.
23. The tribunal is satisfied that the decision of the IC is correct, and the appeal fails.

**Signed C. Hughes**

**Judge of the First-tier Tribunal**

**Date of Decision: 05 May 2021**

**Date Promulgated: 06 May 2021**