

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 3 March 2011

Public Authority: The Foreign and Commonwealth Office
Address: King Charles Street
London
SW1A 2AH

Summary

The complainant submitted a request to the FCO which sought correspondence sent or received from eight named individuals. The FCO provided some information but withheld the remainder of the information on the basis that it was irrelevant to the request or that it was relevant but exempt from disclosure on the basis of sections 27(1)(a), 27(2), 40(2) and 35(1)(a) of the Act. During the course of the Commissioner's investigation the FCO accepted that all of the information that it had identified did in fact fall within the scope of the request but considered all the withheld information to be exempt from disclosure on the basis of the exemptions previously cited. The Commissioner has concluded that the information not provided to the complainant by the FCO is in fact exempt from disclosure on the basis of section 27(1)(a) or 40(2).

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. The complainant submitted the following request to the Foreign and Commonwealth Office (FCO) on 10 July 2009:

'Following [name redacted] email of 18th June, I wish to modify my request to be the following.

(1) Under the provisions laid out in the Freedom of Information Act 2000 (the Act) I request all correspondence with the people listed below received or sent since 3rd November 2008 and held by the Foreign and Commonwealth Office (FCO) subject to the restrictions laid out in (3):

- (a) US Senator Jim Webb
- (b) Lisa Stark
- (c) Carolyn Walser
- (d) Lona Valmoro
- (e) Linda Dewan
- (f) William Edwards
- (g) Daniel Fogarty
- (h) Barbara Yoder

(2) I also request under the Act all documents held by the FCO produced since 3rd November making reference to any one of the people listed in (1) subject to the restrictions laid out in (3).

(3) I ask that your search for documents be restricted to the following:

- (a) all data bases which are accessible by any member of the FOI Team of the FCO
- (b) any data accessible to each of the following people or held in their email accounts:
 - (i) Robyn Naysmith
 - (ii) Stuart McLean
 - (iii) Sharon Wilson
 - (iv) John Rankin
 - (v) Mathew Gould
 - (vi) Yvonne Cherrie

(vii) Alistair Starling

(viii) Nigel Sheinwald

(ix) Gavin Crockard

(4) Some of these documents will fall under the request I made on 9th March 2009. In order to avoid making a repeat request, I do not ask for any document which is being considered for release under that request. Should it be in any way easier for you to reissue any document, however, please feel free to do so.'

3. The FCO contacted the complainant on 7 August 2009 and confirmed that it held information falling within the scope of his request but it considered it to be exempt from disclosure on the basis of sections 27, 28 and 35 of the Act and needed further time to consider the balance of the public interest test.
4. On 7 September 2009 the FCO contacted the complainant again and informed him that it needed further time to reach a conclusion on the balance of the public interest test.
5. The FCO contacted the complainant once again on 2 November 2009 and informed him that it had concluded its analysis of the public interest test. The FCO's response provided the complainant with 'documents found to contain information relevant to your request and that I am able to release to you'. However some of the information contained in these documents had been redacted on the basis of sections 27(1)(a), 27(2), 35(1)(a) and 40(2). Furthermore the FCO explained that some parts of the documents had information redacted on the basis that it was irrelevant to the request.
6. The complainant contacted the FCO on 8 November 2009 and asked for an internal review to be conducted. In asking for this review the complainant explained why he believed that the exemptions had been incorrectly relied upon. He also argued that the information excluded on the grounds of irrelevance did in fact fall within the scope of his request and thus should be disclosed unless an exemption applied.
7. The FCO informed the complainant of the outcome of the review on 29 January 2010. The review upheld the refusal of the request on the grounds set out in the letter dated 2 November 2009.

The Investigation

Scope of the case

8. On 15 March 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant's grounds of complaint mirrored those set out in his request for an internal review, namely that the exemptions had been incorrectly relied upon and the information excluded on the basis of irrelevance did in fact fall within the scope of his request.
9. As is clear from the Chronology section below, the FCO now accept that the information it initially considered to be irrelevant to the request is in fact in the scope of the request.
10. The complainant also raised other issues, namely the delays in conducting the public interest test and internal review that are not addressed in this Notice because they are not requirements of Part 1 of the Act. However, the Commissioner has commented on these delays in the Other Matters section.

Chronology

11. The Commissioner contacted the FCO on 5 November 2010 and asked to be provided with a copy of the information falling within the scope of the request along with submissions to support the application of the exemptions cited in the refusal notice. With regard to the complainant's second ground of complaint, the Commissioner explained that in submissions to him the complainant had emphasised the fact that his request clearly sought 'documents' containing references to Senator Jim Webb and others. Therefore in the complainant's opinion if a document contained a reference to any of the individuals listed in his request then that entire document would fall within the scope of his request; it would not simply be the information contained in the document about the individual that was within the scope. The Commissioner explained to the FCO that his preliminary view was that the complainant's, rather than the FCO's, interpretation of the request was the correct one. Therefore the Commissioner explained to the FCO that if considered any of the information that was edited out of the documents disclosed at the refusal review stage to be exempt from disclosure he needed to be provided with details of the exemptions upon which the FCO was relying to withhold this information and submissions to support their application.
12. The FCO contacted the Commissioner on 13 December 2010 and explained that it was not yet in a position to provide him with a response to his letter of 5 November 2010 and asked for an extension

to allow it more time to respond. The Commissioner agreed that an extension would be granted until 21 January 2011 but this extension would be formalised by the issuing of an Information Notice.

13. The Information Notice was issued on 14 December 2010 and required the FCO to respond to the points set out in the Commissioner's letter of 5 November 2010 by 21 January 2011.
14. The FCO provided the Commissioner with a response on 25 January 2011. In this response the FCO explained that it had enclosed the documents which contained the information which it considered to fall within the scope of the request. The FCO also explained the basis upon which it considered such information to be exempt. The response also indicated which parts of these documents the FCO considered to be outside the scope of the request. However, the response did not provide any explanation as to the exemptions the FCO would seek to rely on to withhold this category of information should the Commissioner formally conclude that this information did fall in the scope of the request.
15. The Commissioner contacted the FCO on 27 January 2011 and explained its failure to provide this latter submission meant that the FCO had failed to comply with all of the requirements of the Information Notice. This was because the Notice clearly stated that:

'In order that the Commissioner can consider this aspect of the complaint [i.e. the FCO's exclusion of information on the basis that it was irrelevant], if the FCO still considers any of the information that was edited out of the documents provided to the complainant at the refusal notice stage (on the basis that it was out of the scope of the requests) to be exempt from disclosure under the Act, please provide details of these exemptions and why the FCO considers them to apply.'
16. The Commissioner asked the FCO to ensure that this aspect of the Information Notice was complied with as soon as possible and in any event within a further ten working days.
17. The FCO responded on 18 February 2011 and explained that it was now of the view that the information it previously considered to be outside the scope of the request was in fact within the scope of the request. The FCO explained that it also considered this information to be exempt from disclosure on the basis of the exemptions contained at sections 27, 35 and 40 and referred the Commissioner to its earlier submissions on these exemptions.

Findings of fact

18. The FCO holds six documents falling within the scope of the complainant's request. Two of these documents have been withheld in their entirety and the complainant has been provided with extracts from the four remaining documents.

Analysis

Exemptions

Section 27 – international relations

19. The FCO argued that the majority of the withheld information was exempt from disclosure on the basis of section 27(1)(a).
20. This exemption states that information is exempt from disclosure if its disclosure would, or would be likely to prejudice, relations between the United Kingdom and any other State.
21. In order for a prejudice based exemption, such as section 27(1), to be engaged the Commissioner believes that three criteria must be met:
- Firstly, the actual harm which the public authority alleges would or would be likely to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e. disclosure would be likely to result in prejudice or disclosure would result in prejudice. If the likelihood of prejudice occurring is one that is only hypothetical or remote the exemption will not be engaged.
22. Furthermore, the Commissioner has been guided by the comments of the Information Tribunal which suggested that in the context of section 27(1), prejudice can be real and of substance 'if it makes relations more difficult or calls for a particular damage limitation response to

contain or limit damage which would not have otherwise have been necessary'.¹

The FCO's position

23. The FCO explained that the information withheld under this exemption consisted of reportage of conversations between Senator Webb and high-ranking UK officials covering key foreign policy issues. The information therefore covered policy discussions on a bilateral and confidential level. The way in which the UK's interests are protected and promoted, and international relations conducted, takes a variety of forms, including formal diplomatic exchanges and informal conversations, such as those reflected in the requested information.
24. The UK enjoys a close relationship with the US and this relationship is key to the UK's foreign and defence policy. The strength of the relationship flows in a large part from the trust built up over time as a result of close cooperation between individuals and organisations on the UK and US side. This allows the UK to discuss matters at a significant and unprecedented level of openness and frankness for an international relationship. Such openness and frankness is essential to allowing the UK to conduct business with the US and allows the UK to be integral to the (US) policy making process as opposed to simply seeking to influence the formation of US Administration policy from outside. To lose this level of access and openness would do serious damage to the UK's effectiveness with its most important ally.
25. The FCO argued that US interlocutors are highly sensitive to the risk that open and frank conversations the UK had with them may appear in the public domain. Any sense that this risk might materialise would lead these interlocutors to reduce the degree to which they are prepared to share with the UK the inner workings of the US Administration or discuss policy and other issues at a stage when they are being shaped. Senator Webb is an important high-ranking contact of the UK's Embassy in Washington; he has the UK's trust which was not easily won. He expects and would insist upon a level of confidence in discussions and beyond. It is not, nor should it be, taken for granted. The ideas, opinions and advice of Senator Webb, and others like him, provide vital insight into political manoeuvrings in the US and the way in which US policy may develop. These views are extremely valued for many reasons not least of which is that they help inform the Embassy and therefore by implication, the FCO and the UK government.

¹ *Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence* (EA/2006/0040), paragraph 81.

26. With regard to the likelihood of this prejudice occurring the FCO explained that given the varied nature of the withheld information, both levels were applied to different parts of the documents. However, the majority of the information was withheld on the basis that disclosure would, not just be likely to, prejudice relations between the UK and US. In support of this higher threshold of likelihood being met the FCO emphasised the contemporary nature of the topics under discussion and the fact that disclosure would not simply damage relations with Senator Webb but also, through precedent, relations with other contacts who would also be less willing to hold frank discussions on key issues.

The complainant's position

27. The complainant argued that the prejudice test had been incorrectly applied. In his opinion whilst there was a small risk that releasing the information may prejudice the international relations or the interests of the UK abroad it was not at such a level as to engage the exemption. In the complainant's opinion, the arguments applied by the FCO are pessimistic and suggest the possibility of prejudice is greater than is actually the case.

The Commissioner's position

28. The Commissioner accepts the FCO's argument that disclosure of the information could harm the UK's relations with the US is clearly an applicable interest falling within the scope of section 27(1)(a).
29. With regard to the second criterion, the Commissioner accepts that disclosure of information provided by interlocutors, such as Senator Webb, could clearly have the potential to affect how such individuals engage with representatives of the UK government in the future. This is because it is logical to assume that if an individual has provided frank views and opinions on the understanding that they would remain confidential then disclosure of the details of such conversations are likely to make the individuals more reticent to offer such candid views and opinions in the future. Furthermore, having considered the FCO's description of the importance of such conversations to the UK-US relationship, including the UK's ability to influence US policy, the Commissioner is satisfied that a disclosure of the withheld information has the potential to damage this relationship.
30. The Commissioner is therefore satisfied that there is a causal relationship between the potential disclosure of the withheld information and prejudice to the UK's relations with the US. Moreover, the Commissioner is satisfied that the resultant prejudice which the FCO believes could occur is one which can be correctly categorised, in

light of the Tribunal's comments above, as real and of substance. In other words, subject to meeting the likelihood test at the third criterion, disclosure could result in making relations more difficult and/or demand a particular diplomatic response.

31. In relation to the third criterion, the Commissioner has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Information Tribunal decisions. With regard to likely to prejudice, the Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (Tribunal at paragraph 15). With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026 & 0030) commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (Tribunal at paragraph 36).
32. The Commissioner notes the FCO's comments about the different levels of likelihood in relation to the range of withheld information. The Commissioner also notes that the FCO has not specifically identified which parts of the withheld information it considers the two different thresholds to apply to. Therefore the Commissioner has simply considered whether the lower threshold of prejudice is met. Having done so the Commissioner is satisfied that it clearly is. The Commissioner has reached this conclusion because of the content of withheld information itself, that is to say the candid nature of the reported conversations and associated comments, and the compelling and logical description provided by the FCO as to how a change in the Washington Embassy's interaction with interlocutors could impact on the UK's broader relations with the US. Furthermore, in concluding that disclosure of the requested information provides a real and significant risk of prejudice occurring the Commissioner accepts the FCO's argument that it is not simply its relationship with Senator Webb which could be harmed by disclosure but also the relationships with other interlocutors. The Commissioner therefore rejects the complainant's assertion that the FCO has exaggerated the risk of prejudice occurring although he notes that in reaching this conclusion he has had the benefit of viewing the withheld information.

Public interest arguments in favour of disclosing the requested information

33. The FCO did not identify any particular arguments in favour of disclosing the information although the complainant argued that disclosure would further the understanding and participation in the public debate of the issues of the day.

34. More specifically, the Commissioner would also note that disclosure could improve the public's understanding of how the UK's representatives engage with key political and governmental figures in the US on a range of foreign policy matters. Such transparency could improve the public's confidence in role played by British diplomats.

Public interest arguments in favour of maintaining the exemption

35. The FCO argued that it was clearly in the public interest that the UK's ability to conduct business with the US was not harmed given the importance of the UK's relations with this particular ally. The FCO noted that the strength of the UK's relationship with the US allowed Her Majesty's Government to effectively achieve a range of goals involving both foreign and defence policy.

Balance of the public interest arguments

36. With regard to attributing weight to the public interest arguments in favour of disclosure the Commissioner recognises that issues of accountability and transparency, along with furthering public debate are often cited when applying the public interest test. However, this does not diminish their relevance. Moreover the Commissioner would agree that there is a clear public interest in the public being informed as to how the UK manages its relations with its international partners. Disclosure of the withheld information in this case would provide a particular insight into how the UK manages its relations with a key contact in US politics and how this relationship, along with similar contacts, helps the UK achieve its foreign policy objectives.
37. With regard to attributing weight to the public interest factors in favour of maintaining the exemption, the Commissioner accepts that it is very strongly in the public interest that the UK enjoys strong relations with foreign States, especially a key ally such as the US. Furthermore given that Commissioner accepts that disclosure of the withheld information would be likely to undermine not just the UK's relationship with Senator Webb but also other individuals, discussions with whom cover a broad range of foreign policy issues, the Commissioner has concluded that in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
38. In light of this conclusion the Commissioner has not gone on to consider the application of sections 27(2) or 35(1)(a) to withhold the same information.

Section 40 – personal data

39. The FCO redacted a small amount of additional information on the basis that it was exempt from disclosure under section 40(2) of the Act. Such information consisted of the names of non-public facing members of staff, junior members of staff or individuals from third parties whose role placed their names, more or less incidentally, within the documents falling within the scope of the request.
40. The complainant argued that the names of individuals do not constitute personal data for the purposes of the Data Protection Act 1998 (DPA) and thus could not be exempt on the basis of section 40(2) of the Act.
41. Section 1 of the Data Protection Act 1998 (DPA) defines personal data as:

‘...data which relate to a living individual who can be identified

a) from those data, or

b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.’

42. The Commissioner is firmly of the opinion that the redacted names in this case are personal data, as defined by the DPA, because the individuals in question can clearly be identified from their names.
43. Section 40(2) of the Act provides an exemption for information which is the personal data of any third party where disclosure would breach any of the data protection principles contained in the DPA.
44. The FCO argued that disclosure of the individuals’ names that had been redacted would breach the first data protection principle which states that:

‘Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.’

45. The FCO argued that the individuals whose names had been redacted would not have had the expectation that their names would be placed into the public domain and therefore to do so would be unfair.
46. The Commissioner is conscious of the Tribunal's findings in *Creekside Forum v Information Commissioner and Department for Culture Media and Sport* (EA/2008/0065) which considered the redaction of junior civil servants' names from the requested information. The Tribunal found that the more junior an official in an organisation the less necessity there is to disclose their name and the more unwarranted the intrusion. The Tribunal accepted that the role of junior civil servants is largely administrative, without significant responsibility, or a public profile or personal responsibility for policies and therefore they should not be exposed to public censure.²
47. In light of the Tribunal's comments the Commissioner accepts that in this case disclosure of the names of junior officials in the withheld information would represent an unwarranted infringement of their privacy and would constitute a breach of the first data protection principle. Such information is therefore exempt from disclosure on the basis of section 40(2). The Commissioner also believes that non-public facing civil servants would have a similar expectation that their names would not be disclosed in response to a request given the nature of their role. Disclosure of such names would therefore also constitute a breach of the first data protection principle and thus they are exempt from disclosure on the basis of section 40(2).
48. The Commissioner also accepts that the individuals whose names constitute those of the third parties would have had a similarly strong expectation that their names – in the context of what were considered to be confidential discussions – would not be made public. Therefore the Commissioner accepts that such names are also exempt from disclosure on the basis of section 40(2).
49. The outcome in this case is, therefore, that the Commissioner accepts that all the personal information withheld by the FCO on the grounds that disclosure would breach the data protection principles was properly withheld.

The Decision

50. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

² EA/2008/0065 – paragraphs 64-67 and 75-80.

Steps Required

51. The Commissioner requires no steps to be taken.

Other matters

52. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
53. The Act does not define what a 'reasonable' time period is for a public authority complete its consideration of the public interest test. However in his guidance note, *'Good Practice Guidance No 4'*, which was published in February 2007, the Commissioner has made it clear that in his opinion all public authorities should aim to respond to requests within 20 working days. In cases where the public interest considerations are exceptionally complex it may be reasonable to take longer but in the Commissioner's opinion in no case should the total time taken exceed 40 working days. In this case the FCO took over 80 working days to complete its consideration of the public interest test.
54. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, also published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. Again while no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. In this case the FCO took over 50 working days to conduct its internal review.
55. In the future when completing its consideration of the public interest test and completing internal reviews the Commissioner expects the FCO to adhere to the timescales identified in the guidance documents referenced above.

Right of Appeal

56. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

57. 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.
58. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 3rd day of March 2011

Signed

**Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

General Right of Access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him."

Section 2(3) provides that –

"For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

- (a) section 21
- (b) section 23
- (c) section 32
- (d) section 34
- (e) section 36 so far as relating to information held by the House of Commons or the House of Lords
- (f) in section 40 –
 - subsection (1), and
 - subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
 - section 41, and
 - section 44"

Time for Compliance

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Refusal of Request

Section 17(1) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

International Relations

Section 27(1) provides that –

“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.”

Section 27(2) provides that –

“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.”

Relations with the United Kingdom

Section 28(1) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice relations between any administration in the United Kingdom and any other such administration.”

Section 28(2) provides that –

“In subsection (1) “administration in the United Kingdom” means-

- (a) the government of the United Kingdom,
- (b) the Scottish Administration,
- (c) the Executive Committee of the Northern Ireland Assembly, or
- (d) the National Assembly for Wales.”

Formulation of Government Policy

Section 35(1) provides that –

“Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (a) the formulation or development of government policy,
- (b) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request or the provision of such advice, or
- (d) the operation of any Ministerial private office.”