

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 16 June 2011

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

Summary

The complainant requested information relating to the ownership and legal title of property in Algiers. The FCO refused to disclose the requested information under sections 27(1)(c), 27(1)(d), 42(1) and 43(2) of the Act. The Commissioner has investigated and has found that the exemption at section 27 of the Act has been correctly applied and that the information should not be disclosed. However, the Commissioner identified a series of procedural shortcomings on the part of the public authority. He requires no steps to be taken.

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. On 28 December 2009, the complainant wrote to the FCO with the following request:

"In March 1998, the British Ambassador in Algiers, acting, we understand, on instructions from the FCO, convened a meeting of four British residents of Algiers for the purpose of persuading them to agree to the "transfer of ownership" to HMG of property in Algiers which belonged to Holy Trinity Anglican Church, Algiers (...)

*We are already in possession of the minutes which record the two meetings which the ambassador chaired on 10 and 11 March 1998 and of the Agreement which was signed on 15 March 1998. I am now (...) requesting access to other papers and documents for the period October 1997 to October 1998 which record the arguments put forward by the various parties involved in the FCO to justify this "purchase" of church property. We are not interested in seeing papers which relate exclusively to security issues, or security assessments which FCO Security Department may have carried out. We **do** wish to see **all** the papers which record opinions about, and evidence (or lack of evidence) of, the legal ownership of all property on the church compound and how the "purchase" might be effected. These papers include the minutes of FCO interdepartmental meetings on this subject (...)*

The FCO departments involved would have been – apart from Security Department – Near East and North Africa Department (renamed North Africa and Middle East Directorate), Overseas Estates Department (possibly also renamed) and Legal Advisers. I am advised that papers would most probably have been filed with Overseas Estates Department (or its successor department if it has been renamed) and with North Africa and Near East Department/Middle East Directorate. There should be no difficulty identifying these papers.

We also wish to see papers which contain any reference – in the context of the FCO proposals to take over the church property – to my predecessor, [named individual], and to [named individual] neither of whom was consulted beforehand or informed afterwards of the FCO's intentions".

3. The complainant made a further request on 12 January 2010, as follows:

"We are requesting, in addition to the documents already requested, access to documents covering the period January 1996 to September 1997. We wish to see all documents which record FCO internal

deliberations, and correspondence with the British Embassy in Algiers, about the possibility of buying or arranging "the transfer of ownership" of diocesan, or British Community Association, property in Algiers on the site of Holy Trinity Church, Algiers including minutes of FCO interdepartmental meetings and advice from FCO Legal Advisers. In particular, we wish to see papers commenting on legal title. We also wish to see papers which mention the then Bishop of this diocese, [named individual], and/or the chaplain to Holy Trinity Church (...)

The FCO departments involved would have been Overseas Estates Department (or its successor), Near East and North African Department (or its successor) and Legal Advisers Department. We have studied the published information about access to documents under the Freedom of Information Act and it does not appear to us that the information we have requested would fall into any of the exempted categories. Nor do we believe that it could be argued that disclosure of these documents could be prejudicial, in any way, to British national security, HMG's relations with any other state, to British interests or to the government's policy making process. There should be no difficulty identifying the papers".

4. From the information that was provided to the Commissioner, it appeared that the FCO provided an initial response to the requests on 5 February 2010, but the public authority was unable to provide the Commissioner with a copy of this response.
5. The FCO provided a response to both information requests within the same letter on 22 February 2010. The FCO stated that, owing to the fact that the FCO was in ongoing discussions with the complainant regarding the ownership of the property in question, all of the requested information was exempt from disclosure by virtue of section 43(2) of the Act. The FCO also stated that, as disclosure of the information would be likely to prejudice the interests of the United Kingdom and the promotion or protection of its interests abroad, the exemptions under sections 27(1)(c) and (d) were engaged in respect of all of the requested information and that section 42 was engaged in respect of some of the requested information.
6. The complainant wrote to the FCO on 4 March 2010 to request an internal review of its refusal to release the requested information.
7. The FCO provided the outcome of its internal review on 24 April 2010, upholding its decision to withhold the requested information. The FCO confirmed its reliance on section 43(2) of the Act in withholding the requested information. No reference was made to its application of sections 27(1)(c), 27(1)(d) or 42.

The Investigation

Scope of the case

8. On 4 May 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the FCO was correctly withholding the requested information. The Commissioner notes that two separate requests for information were made by the complainant, on 28 December 2009 and 12 January 2010. The FCO dealt with the two requests together, so the Commissioner has considered both of the information requests within this Notice.

Chronology

9. On 25 August 2010 the Commissioner wrote to the FCO to request copies of the withheld information, to request further arguments to support the FCO's application of the exemption under section 43(2) of the Act, and to request further arguments in respect of the FCO's application of any other exemptions. The Commissioner also asked the FCO to clarify which exemptions were being applied to which pieces of withheld information.
10. As he had received no response to his letter of 25 August 2010, the Commissioner contacted the FCO on 11 October 2010, 20 October 2010 and 22 October 2010 to ask when its response would be forthcoming. On 22 October 2010 the Commissioner agreed to an extension to 5 November 2010 for the provision of the FCO's response. The Commissioner notified the FCO that he would consider serving an Information Notice in line with the provisions of section 51 of the Act if its full response was not received by 5 November 2010.
11. The FCO responded to the Commissioner on 5 November 2010. The FCO provided copies of the withheld information, and confirmed its reliance on sections 27(1)(c), 27(1)(d), 42(1) and 43(2) of the Act in withholding all of the information. Limited arguments were provided by the FCO in respect of each exemption, and each exemption was applied to the withheld information in its entirety. The Commissioner did not consider that the FCO had fully answered his questions regarding the specific application of exemptions.
12. On 17 November 2010 the Commissioner wrote to the FCO to ask again for detailed arguments in support of its application of exemptions. The questions in the Commissioner's letter of 25 August 2010 were repeated, and further specific questions were asked in respect of the FCO's application of sections 27(1)(c), 27(1)(d) and 42(1) to the

withheld information. Owing to the length of time it had taken the FCO to respond to the Commissioner's queries and the delays this had caused in progressing his investigation, the Commissioner asked for the FCO's response by 6 December 2010.

13. A response was finally received from the FCO on 13 December 2010 providing some further limited arguments in support of its application of the exemptions under the Act to the withheld information.

Analysis

Substantive Procedural Matters

14. The FCO considered the complainant's request for information under the Act and withheld all the information by virtue of sections 27(1)(c), 27(1)(d), 42(1) and 43(2) of the Act.
15. Due to the nature of the withheld information, the Commissioner considered whether the information constituted environmental information and therefore whether the correct access regime under which the request should have been considered was the EIR.
16. For the reasons set out below, the Commissioner has determined that the requested information would not fall within the definition of environmental information set out at regulation 2(1)(c) of the EIR. Regulation 2(1)(c) provides that:

"'environmental information' has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material on –

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements".

17. The factors referred to in (a) and (b) include:
 - (a) *the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms and the interaction among these elements".*

(b) *Factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a)*

18. In this case, the withheld information consists of information relating to the legal ownership of property in Algiers. Whilst the Commissioner accepts that any piece of land has the potential to be redeveloped, and therefore to have an impact on the environment, for the information to be 'on' a measure affecting the environment there has to be a plan or realistic intention to develop the land in question. Having viewed the withheld information in question, the Commissioner considers the issue to be the ownership of the land in question, rather than a confirmed intention to develop that land. The Commissioner considers that the information is 'on' the ownership of the land, which is not a measure likely to affect the elements and factors referred to in (a) or (b) above.
19. The Commissioner also notes that some of the withheld information provided to him by the FCO relates to the maintenance and rental of the property in question. This part of the information includes descriptions of exterior structural work required. Whilst the Commissioner considers this information to be environmental, since it is 'on' a measure (the restructuring) that would be likely to affect elements referred to in (a) above (for example, land and landscape), he does not consider that this information falls within the scope of the complainant's request for information.

Exemptions

Section 27

20. Information is exempt under section 27(1) if its disclosure 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*

21. Therefore, to engage the section 27(1) exemption, it is necessary for the FCO to demonstrate that disclosure of the information would, or would be likely to, cause some relevant prejudice.
22. In this case, the FCO has confirmed that it is relying on subsections (c) and (d) in withholding all of the withheld information in question.

Applicable interests

23. In order for sections 27(1)(c) and (d) to be engaged, the FCO must show that the disclosure would, or would be likely to, prejudice the stated interest. Accordingly, the Commissioner has first considered as relevant those arguments about whether or not disclosure of the withheld information could be prejudicial to the interests of the United Kingdom abroad, or to the promotion or protection by the United Kingdom of its interests abroad.
24. The withheld information in question relates to a dispute between the FCO and the Church in Algiers, concerning the ownership of land in Algeria. The UK's legal interest in that land is therefore an interest of the United Kingdom abroad.

Nature of the prejudice

25. The FCO has argued that releasing the withheld information would be likely to prejudice the interests of the UK abroad and the promotion and protection by the UK of its interests abroad as the withheld information concerns the ownership of the land which the FCO asserts is its land.
26. The Information Tribunal in *Hogan* (EA/2005/0026 and EA/2005/0030) commented:

"An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and the prejudice is, as Lord Falconer of Thoroton has stated "real, actual or of substance" (Hansard HL (VOL. 162, April 20, 2000, col. 827))".

27. When making his assessment regarding the prejudice test, the Commissioner must consider not only whether the prejudice identified can be said to have a real, detrimental or prejudicial effect but also whether or not the nature of the prejudice can be adequately linked back to the disclosure of the information in question.
28. The information in this case demonstrates that there is an ongoing dispute between the two parties. Whilst the complainant maintains that he is not in "constructive" dialogue with the FCO, the matters have clearly not been settled. The Commissioner considers that there is a

clear likelihood that disclosure of the withheld information would prejudice the interests of the FCO, representing the interests of the UK abroad.

Likelihood of prejudice

29. With regard to the likelihood of prejudice, the FCO argued that release, in this case, “would be likely to prejudice” the interests of the UK abroad and the promotion or protection by the UK of its interests abroad.
30. Where the issue is that disclosure is only likely to give rise to the relevant prejudice then, in accordance with the Tribunal’s decision in the case of *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005), “*the chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk*”.
31. The Commissioner must consider whether disclosure of the information in question would be likely to prejudice the applicable interests identified above.
32. Although restricted in what he is able to say because of the nature of the withheld information, having duly considered the arguments put forward by the FCO, the Commissioner’s view is that the level of ‘likelihood’ has been demonstrated. It follows that he finds the exemption engaged and he has carried this ‘likelihood’ through to the public interest test.

Public interest test

33. Having established that the section 27(1) exemption is engaged, the Commissioner must go on to consider the public interest test as set out in section 2(2)(b) of the Act. This favours disclosure unless, “*in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information*”.

Public interest arguments in favour of disclosing the requested information

34. The FCO acknowledged the general public interest in promoting openness in government business transactions – particularly when the UK’s assets overseas are involved. The FCO also acknowledged the general public interest in the accountability of government, and in a reassurance that public money is being spent properly, and that the UK’s assets are being protected.

35. In correspondence with the FCO, the complainant put forward arguments in favour of disclosing the requested information, taken from the Commissioner's guidance. In the complainant's view, the following public interest arguments were relevant in this case:
- Promoting accountability and transparency by public authorities for decisions taken by them
 - Promoting accountability and transparency in the spending of public money
 - Allowing individuals, companies and other bodies to understand decisions affecting their lives
36. In his submissions to the FCO and to the Commissioner, the complainant has also made it clear that "*the diocese has a legitimate interest*" in the information in question.
37. The Commissioner is also mindful of the fact that there is a presumption running through the Act that openness is, in itself, to be regarded as something which is in the public interest.

Public interest arguments in favour of maintaining the exemption

38. The FCO argued that disclosure of the information in question would have a detrimental effect on the value of the land in question, and on the negotiations between the FCO and the complainant. The FCO's view was that this would not be in the interests of the UK government, the UK government abroad or the taxpayer.

Balance of the public interest arguments – the interests of the United Kingdom abroad

39. As the FCO is citing two limbs of the exemption, the Commissioner has considered separately, in the case of each limb, whether the public interest in maintaining the exemption outweighs the public interest in disclosure. In doing so, he notes that, in this case, the public interest arguments put forward by the FCO in relation to section 27(1)(c) are broadly similar to those cited in relation to section 27(1)(d).
40. The Commissioner has considered, firstly, the public interest arguments in respect of the interests of the United Kingdom abroad.
41. The Commissioner considers that, when applying the public interest test to information withheld under section 27(1), the content of the information is likely to have a significant bearing on the decision of whether to disclose. There must be some detriment to the public

interest arising from disclosure for the balance of the test to justify maintaining the exemption.

42. The Commissioner gives significant weight to the consideration that releasing the information would inform public debate and promote understanding of international affairs. However, he is also conscious that he has already accepted that the nature of the prejudice is “real, actual and of substance”.
43. The Commissioner has given consideration to the complainant’s specific argument, referred to in paragraph 37 above – that the “*diocese*” has a legitimate interest in the information in question. However, the Commissioner does not believe that in this case the content of the withheld information would affect a substantial number of people. He considers that the interest of the complainant and the diocese in question is more of a private interest, and therefore not a public interest in disclosure of the information as required under the Act.
44. The Commissioner accepts that it is strongly in the public interest that the UK’s interests abroad are protected. He considers this to be especially true given the issues involved in this case and the likely harm from disclosure in terms of the UK’s interests abroad or makes international relations more difficult.
45. The Commissioner considers that the nature of the ongoing dispute surrounding the content of the withheld information means that its disclosure could have the potential of making international relations more difficult as it involves the UK’s legal interest in property situated in a foreign country. The Commissioner is also persuaded by the FCO’s view, that disclosure of the information could have a negative impact on the value of the property in question, which would not be in the public interest.
46. In conclusion, the Commissioner recognises the strength of the arguments on both sides of the public interest test; however, he has concluded that in all the circumstances of this case the public interest favours maintaining the exemption.

Balance of the public interest arguments – the promotion or protection by the United Kingdom of its interests abroad

47. The FCO is citing section 27(1)(d) in relation to the same information for which it is citing section 27(1)(c). As he has found the section 27(1)(c) arguments in favour of maintaining the exemption persuasive, the Commissioner has not gone on to consider separately the public interest arguments in relation to section 27(1)(d).

48. However, in the Commissioner's opinion, the public interest in maintaining the exemption under section 27(1)(c) overlaps substantially with that in maintaining the exemption at section 27(1)(d). The public interest in the UK's interests abroad is inextricably linked to the public interest in the promotion or protection by the UK of those interests abroad.

Other exemptions

49. Since the Commissioner has found that the exemption at section 27(1) of the Act is engaged in respect of the withheld information, he has not gone on to consider the FCO's application of section 43(2) and 42 to the withheld information.

Procedural Requirements

50. Section 1(1) states 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."

51. Section 10(1) states 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."

52. The request for information was made on 28 December 2009. The FCO issued its refusal notice on 22 February 2010. The FCO therefore breached section 1(1)(a) by failing to respond to the complainant's initial information request within 20 working days.

The Decision

53. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- It correctly withheld information in accordance with section 27(1).

54. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- The FCO breached section 1(1)(a) by failing to respond to the request for information within 20 working days of receiving the request.

Steps Required

55. The Commissioner requires no steps to be taken.

Other matters

56. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.

Engagement with the ICO

57. During the course of his investigation, the Commissioner has met with resistance in his attempts to understand the FCO's reasons for handling the request as it did, and as a result the Commissioner's handling of the complaint was subject to several delays, as detailed in the Chronology section of this notice.
58. In total, the FCO had over 60 working days to consider its position and gather its arguments to provide the Commissioner with a full and detailed response. Limited arguments were received from the FCO, following long periods of delay to their response.
59. The Commissioner does not consider the FCO's approach to this case to be sufficiently co-operative or within the spirit of the Act. As such he would expect to see improvements in this regard in future.

Right of Appeal

60. 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

61. 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.

62. 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 16th day of June 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."

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."

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."

Legal Professional Privilege

Section 42(1) provides that –

"Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information."

Section 42(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.”

Commercial interests.

Section 43(1) provides that –

“Information is exempt information if it constitutes a trade secret.”

Section 43(2) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

Section 43(3) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).”