

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 April 2012

Public Authority: The National Archives
Address: Kew
Richmond
Surrey
TW9 4DU

Decision

1. The complainant made a freedom of information request to the National Archives for copies of a closed extract within a Foreign Office file. In response the National Archives disclosed most of the requested information by opening up the closed extract. However, three small passages were redacted under the exemptions in section 27(1) (International relations) of FOIA.
2. The Commissioner's decision is that the redacted information was exempt under section 27(1)(a) and 27(1)(d) of FOIA and that the public interest in maintaining each exemption outweighed the public interest in disclosure. The Commissioner requires no steps to be taken.

Request and response

3. On 23 July 2010 the complainant wrote to The National Archives to request sight of closed extracts within a Foreign Office file "FO 371/167783, Antarctica: Argentine claims to Falkland Islands, 1963".
4. The National Archives acknowledged the request and informed the complainant that because it needed to consult a number of other departments it needed to extend the deadline for responding to the request by a further 10 working days in accordance with the *Freedom of Information (Time for Compliance) Regulations 2004*. The National Archives said that it would respond to the request by 6 September 2010.
5. On 6 September 2010 the National Archives contacted the complainant to say that the requested information was covered by the exemption in

section 27(1) and 27(2) of FOIA and it needed further time to consider the public interest test.

6. The National Archives issued a substantive response on 1 October 2010 when it informed the complainant that none of the information in the closed extract could be disclosed because the information was exempt under section 27(1) of FOIA and the public interest favoured maintaining the exemption. It also clarified that whilst it had earlier referred to section 27(2) it was relying on section 27(1) only. The National Archives also explained that under section 66 of FOIA it had had to consult with the Foreign and Commonwealth Office as the transferring department and that it was the FCO who had undertaken the public interest assessment in accordance with section 15 of FOIA.
7. On 11 November 2010 the complainant asked the National Archives to carry out an internal review of its handling of the request. He asked the National Archives to reconsider its application of section 27(1) and the public interest test. In particular the complainant said that some of the withheld information was already in the public domain.
8. The National Archives presented the findings of its internal review on 12 January 2011. It now said that having reconsidered the request it had decided that much of the information contained within the closed extract, which had previously been withheld, could now be released. This information was made available to the complainant. However, some small portions of the closed extract continued to be withheld under section 27(1)(a) and (d) of FOIA. The National Archives further explained how it had reached its public interest determination on the information it continued to withhold.
9. There then followed an exchange of further correspondence during which the National Archives confirmed to the complainant that the information which was withheld amounted to 3 short passages from the file he had requested to see.

Scope of the case

10. On 5 August 2011 the complainant contacted the Commissioner to complain about the way his request for information was handled. The complainant asked the Commissioner to consider the National Archives' decision to refuse to disclose some of the information he requested under the exemption in section 27(1) of FOIA.

Reasons for decision

11. The National Archives has withheld three passages from the file requested by the complainant and has confirmed that it is relying on the section 27(1) exemption which provides that:

(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 other 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.*

12. In its responses to the complainant the National Archives said that the specific sub-sections it was relying on were 27(1)(a) and 27(1)(d). During the course of the Commissioner's investigation it also said that on review it would additionally seek to rely on section 27(1)(c). The Commissioner's understands that all three exemptions have been applied to each redacted piece of information which all relate to the UK's legal claim to the Falkland Islands.

Section 27(1) – Prejudice to international relations

13. Dealing first with the application of section 27(1)(a), the Commissioner's view is that this specific exemption will apply where disclosure makes relations more difficult between the UK and another state or calls for a particular damage limitation exercise. The nature of prejudice under section 27(1) was considered by the Information Tribunal in *Campaign Against the Arms Trade v The Information Commissioner* where it stated that they:

"...do not consider that prejudice necessarily requires demonstration of actual harm to the relevant interests in terms of quantifiable loss or damage. For example, in our view there would or could be prejudice to the interests of the UK abroad or the promotion of those interests if the consequence of disclosure was to expose those interests to the risk of an adverse reaction...or to make them vulnerable to such a reaction,

notwithstanding that the precise reaction...would not be predictable either as a matter of probability or certainty".¹

14. In this case the National Archives has argued that disclosure would prejudice relations between the UK and Argentina because the issues addressed within the withheld information are still a matter of current sensitivity. It pointed to recent protests in Argentina in March 2010, where Argentine veterans threatened to invade the Falkland Islands if the UK did not give up its sovereignty, as evidence of the current tension between the two countries. It also referred to comments made by the Argentine President, Cristina Fernandez de Kirchner which it said demonstrate the extent to which Argentina believes UK claims to the Falkland Islands to be without substance.
15. The Commissioner must be careful not to release the substance of the withheld information in this Decision Notice and therefore he is limited as to what he can say about why exactly the exemption is engaged. Therefore, he would simply say here that he is satisfied that disclosure would increase tensions between the UK and Argentina which would make relations between the two countries more difficult. Consequently section 27(1)(a) is engaged. The Commissioner has described in more detail exactly why disclosure would prejudice the relations between the two countries in a confidential annex to be provided to the National Archives only.
16. The National Archives has also argued that section 27(1)(a) is additionally engaged because disclosure would put the UK at a disadvantage in any future negotiations regarding the British Antarctic Territory (BAT). The Commissioner considers that these arguments are best suited to the exemption under section 27(1)(d) since they are more directly concerned with the ability of the UK to promote and protect its interests rather its relationship with Argentina. The Commissioner has considered these arguments below.

Section 27(1)(c) – Interests of the United Kingdom abroad

Section 27(1)(d) – Promotion or protection of interests abroad

¹ Campaign Against the Arms Trade v Information Commissioner and Ministry of Defence, [EA/2006/0040], para. 81.

17. Whilst technically separate exemptions the National Archives offered the same reasons for engaging section 27(1)(c) as for 27(1)(d). Therefore the Commissioner has followed this approach and considered the exemptions together. The Commissioner also notes that the arguments advanced by the National Archives actually originate from the Foreign & Commonwealth Office as they are the parent department for the requested information. However, as the National Archives is the public authority in this case the decision notice refers to the arguments as if they are the National Archives own.
18. First of all the Commissioner has considered the National Archives' argument referred to above regarding the BAT. The exact reasons why the exemption has been claimed are discussed in the confidential annex. However, the Commissioner would say here that in his view the National Archives has not adequately demonstrated the likelihood of this particular prejudice occurring and therefore he has found that section 27(1)(c) and 27(1)(d) are not engaged on this basis.
19. The National Archives had put forward a potential scenario where disclosure may put the UK at a disadvantage in any future negotiations regarding the issue of Antarctica. However, the National Archives has itself acknowledged that the scenario it describes is a "remote possibility" and in the Commissioner's view the likelihood of this prejudice occurring is not sufficient to meet the threshold required by the test of prejudice. This test is well understood and has been considered by the Information Tribunal in a number of cases including *John Connor Press Associates Limited v The Information Commissioner* where the Tribunal confirmed that in order for an exemption to be engaged on a 'would be likely to prejudice' basis:

*"the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk."*² (para 15)

20. This interpretation follows the judgement of Mr Justice Munby in *R (on the application of Lord) v Secretary of State for the Home Office* [2003]. In that case, the view was expressed that,

"Likely connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there 'may very well' be prejudice to

² *John Connor Press Associates Limited v The Information Commissioner* [EA/2005/0005], para. 15.

*those interests, even if the risk falls short of being more probable than not.*³

21. It follows that where a public authority argues that an exemption is engaged on a "would prejudice" basis there is an even greater evidential burden on the public authority and that the chance of prejudice occurring should at least be more probable than not.
22. However, the Commissioner did find that disclosure would or would be likely to prejudice the promotion or protection of the UK's interests with regard to the Falkland Islands and that for this reason section 27(1)(d), but not 27(1)(c), is engaged.
23. The Commissioner has decided that the withheld information is exempt under section 27(1)(d) and again he has had to consider these arguments further in the closed annex.

The public interest test

24. Section 27 is a qualified exemption which means that information may only be withheld where the public interest in maintaining the exemption outweighs the public interest in disclosure. Therefore the Commissioner has now gone on to carry out a public interest test for the information.
25. Whilst each limb of section 27 is technically a separate exemption the Commissioner has carried out a joint public interest test because the arguments for maintaining section 27(1)(a) and section 27(1)(d) are closely related.

Arguments for disclosure

26. The complainant has advanced the following arguments in favour of disclosing the requested information.
 - The cost of maintaining sovereignty over the Falkland Islands.
 - The complainant raised the question as to whether there was any real benefit to the UK itself of the Falkland Islands remaining British and therefore the British public and Falkland islanders ought to know more about the UK claim to the islands in order that they might make a decision about their future.

³ *R (on the application of Lord) v Secretary of State for the Home Office* [2003] EWHC 2073 (Admin)

- As regards the UK international relations with Argentina, the complainant argued that the main reason for any poor relationship was the British determination to maintain sovereignty over the islands. The complainant suggested that if the British were to concede sovereignty, which he recommended, then the relationship would be very much improved.

27. For its part, the National Archives acknowledged that the following factors favoured the release of the information:

- The information is historical; over 47 years old at the time of the request.
- The redacted information would allow the public to be better informed about an international dispute over territory and to a degree the factual and historical background relevant to the lead up to the Falklands War
- The release of the information would go towards meeting the objectives set out under the freedom of information legislation of greater transparency and openness.

Arguments in favour of maintaining the exemption

28. In its responses to the complainant, the National Archives' argument for maintaining the exemption was essentially that it was not in the public interest to prejudice international relations with Argentina and that it was important to promote and protect British interests in the Falkland Islands. It argued that any understanding that might flow from disclosure of the redacted information is not as great as the likely damage to the UK's national interests and international relations and for this reason it had decided that the balance of the public interest lies in withholding the information.

29. In its submissions to the Commissioner the National Archives also raised the issue of oil exploration in the Falklands and the potential for oil finds from which both Her Majesty's Government and the islanders would "benefit greatly". Most important was, it said, "the moral principle that the UK would not abandon sovereignty against the wishes of the islanders". It explained that no government would agree to go against the wishes of the islanders and public opinion in the UK would not support it.

Balance of the public interest arguments

30. The Commissioner accepts that there is a certain public interest in disclosure of the information as this would allow the public to better understand the basis for UK sovereignty over the Falkland Islands.

31. However, the Commissioner also considers that the public interest in avoiding the prejudice identified by the National Archives is very strong. It is apparent that there remains a very deep strength of feeling in Argentina regarding the sovereignty of the Falkland Islands and that tensions in Argentina's relations with the UK have increased in recent years. Disclosure in this context would be particularly damaging to relations between the two countries. The complainant had suggested that were the UK to concede sovereignty over the islands this would repair relations between the two countries. However the Commissioner considers this to be a separate issue and does not accept that this is an argument that supports the case for disclosure, given the determination of successive UK governments to maintain sovereignty so long as the Falkland Islanders wish to remain British. In any event, the Commissioner does not accept that disclosure of this information would impact upon the UK's stance on giving up its sovereignty over the Falkland Islands.
32. As regards the public interest in the UK being able to promote and protect its sovereignty over the Falkland Islands, the Commissioner again finds that this is a strong argument in favour of maintaining the exemption.
33. The complainant's arguments focus on his belief that it is not in the interest of the UK to maintain sovereignty over the Falklands Islands and that the UK should enter into negotiations with a view to transferring sovereignty to Argentina. The Commissioner has already explained that he has given these arguments only limited weight because he is not satisfied that disclosure would lead to the scenario envisaged by the complainant. However, even if this were the case the Commissioner would only give these factors limited weight. For instance, the complainant had suggested that the Falklands Islands were a financial burden for the UK and that this was not in the public interest. However, the National Archives has explained that the Islands do not get grant in aid from the HM Government and that any financial burden is not all that great. Whilst the UK does pay for the defence of the islands, the National Archives explained that they are "an excellent free training ground for the three services and much appreciated as such". Moreover, the Commissioner finds that there are strong public interest reasons for maintaining the UK's position in the Islands not least due to possibility of oil strikes in the area and the benefits this would bring to the UK.
34. The Commissioner recognises that the information is historical given that it is almost 50 years old. However, the information is clearly still relevant to the issue of sovereignty over the Falkland Islands and in the

Commissioner's view it is highly unlikely that the Argentine government would dismiss the information as irrelevant to the continuing dispute. Therefore the Commissioner does not think the age of the information carries any real weight in balancing the public interest either way in this case. Had the information been more recent, however, it would probably have made the arguments for maintaining the exemptions even stronger.

35. The Commissioner has decided that for section 27(1)(a) and 27(1)(d) the public interest in maintaining each exemption outweighs the public interest in disclosure. In reaching his decision the Commissioner is mindful that the likelihood of the prejudice occurring is very real indeed considering the history of tension on this issue. Having taken all the circumstances into account the Commissioner has decided that the redacted information should continue to be withheld.

Right of appeal

36. 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,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

37. 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.
38. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Signed

Graham Smith
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