

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 8 November 2016

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

#### Decision (including any steps ordered)

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1. The complainant submitted a request to the Foreign and Commonwealth Office (FCO) for copies of records relating to flights in and out of Diego Garcia in the British Indian Overseas Territory. The FCO refused to disclose the information relying on section 27(1)(a) (international relations) and section 26(1)(b) (defence) of FOIA. The Commissioner has concluded that the FCO is entitled to rely on section 27(1)(a) to withhold the requested information and that in all the circumstances of the case the public interest favours maintaining the exemption.

#### Request and response

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2. The complainant submitted the following requests to the FCO on 28 July 2015:

*'In July 2014, FCO ministers told the Commons that records relating to flights in/out of Diego Garcia had suffered water damage, but were being moved to a new location and digitalised, and were to be reviewed in order to assess their suitability for publication (I have included the Hansard links below for ease of reference).*

*With reference to those statements, I would like to ask:*

*(1) Whether digitalisation of those records has yet been completed? And if not, what stage has been reached, and what the estimated date of completion is?*

*(2) Whether an assessment of the records' suitability for publication has yet been undertaken? If so, what the conclusion of that assessment is? And if not, whether any discussions have yet been held between officials and/or ministers towards making that assessment?*

*AND*

*Further to your response, could I please make a FOI request for copies of the records relating to flights in/out of Diego Garcia which I understand have now been transferred to BIOT Administration offices in London? For the sake of clarity, the records concerned are those referred to by the FCO minister in this statement to parliament:  
[http://www.publications.parliament.uk/pa/cm201415/cmhansrd/cm140716/text/140716w0001.htm#140716w0001.htm\\_spnew31](http://www.publications.parliament.uk/pa/cm201415/cmhansrd/cm140716/text/140716w0001.htm#140716w0001.htm_spnew31)*

*And could I also please request copies of any internal documents containing information relating to (1) the digitisation process and (2) the process of assessing the documents for publication which may be held by the Government?'*

3. The FCO contacted the complainant and explained that it held information falling within the scope of these requests but it needed additional time to consider the balance of the public interest test.
4. The FCO issued a substantive response on 16 December 2015. The FCO explained that the flight records in question were exempt from disclosure on the basis of sections 27(1)(a) and 26(1)(b) of FOIA. The response also explained that the remainder of the requested information was considered to be exempt from disclosure on the basis of the exemptions contained at sections 35(1)(a), 36(2)(b), 40(2) and 43(2) of FOIA.
5. The complainant contacted the FCO on 22 January 2016 and asked it to conduct an internal review of its decision to rely on these various exemptions, with the exception of the names of junior staff on the basis of section 40(2) of FOIA.
6. The FCO responded on 18 March 2016 and confirmed that it was of the view that the various exemptions had been correctly relied upon. The only exception to this was the application of section 40(2), which in light of the complainant's willingness to accept the redaction of the names of junior members of staff, would no longer apply.

## Scope of the case

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7. The complainant contacted the Commissioner on 13 June 2016 to complain about the FCO's decision to withhold all of the information falling within the scope of his request, with the exception of the names of junior staff members. However, during the course of the Commissioner's investigation the complainant revised the scope of his complaint to simply contest the FCO's decision to withhold the flight records in question. Therefore, this decision notice simply considers whether these records are exempt from disclosure on the basis of sections 27(1)(a) and 26(1)(b) of FOIA.

## Reasons for decision

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### Section 27 – international relations

8. Section 27(1)(a) states that:

*'Information is exempt information if its disclosure would, or would be likely to, prejudice –*

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

9. In order for a prejudice based exemption, such as that cited by the FCO, to be engaged the Commissioner considers 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 – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be

a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority to discharge.

10. 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'*.<sup>1</sup>

#### The FCO's position

11. The FCO explained that its position for relying on section 27(1)(a) is the same as in the case FS50585471 in which the complainant in that case had requested a much smaller sample of flight records concerning Diego Garcia.<sup>2</sup> The FCO's submissions for supporting its reliance on the exemption are contained in paragraph 15 of the previous decision notice, but for ease the Commissioner has repeated them below.
12. The FCO explained to the Commissioner that it believed that disclosing this information *would* harm the UK's relationship with the US (ie the higher threshold of prejudice). In order to reach this view the FCO explained that, as noted in the internal review, it had discussed this request with officials in the US.<sup>3</sup> The US provided an unequivocal answer that disclosure would harm its national security and therefore requested that the FCO did not release the information. The FCO explained that having considered this response internally it reached the view that to disclose the withheld information – against the US' express wishes – would damage the UK's bilateral relationship with the US.

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<sup>1</sup> [Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence \(EA/2006/0040\)](#), paragraph 81.

<sup>2</sup> [https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1560328/fs\\_50585471.pdf](https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1560328/fs_50585471.pdf)

<sup>3</sup> The Commissioner was provided with copies of the FCO's exchanges with US officials in relation to this matter. The Commissioner was also provided with internal FCO emails discussing this request which comment on the US position.

### The complainant's position

13. The complainant disputed the FCO's position that disclosure of the withheld information would harm the UK relations with the US. Rather, the complainant argued that disclosure of the information would be unlikely to result in the prejudice envisaged by the FCO.
14. In order to support this position, the complainant noted that the FCO had relied on communications with the US government to bolster its claim that disclosure of the withheld information would harm UK-US relations. However, the complainant argued that similar claims had been made in the past in the context of litigation brought by Binyam Mohammed and Yunus Rahmatullah against the UK government concerning the disclosure of information during the course of these proceedings. However, the complainant argued that such claims had been shown to be exaggerated and the alleged consequences of disclosure had never occurred following the disclosure of the information in question. The complainant provided detailed information in support of these examples, which although not set out here, has been fully considered by the Commissioner.
15. Furthermore, the complainant argued that the position adopted by the FCO was at odds with recent US Government behaviour on the issue of the CIA rendition programme. The complainant noted that a significant portion of a major report by the US Senate Select Committee on Intelligence (SSCI) has already been put into the public domain, setting out in detail several examples of detention, rendition and torture of individuals. The complainant also emphasised that President Obama himself admitted that 'we tortured some folks'. Therefore the complaint argued that it was clear that the US has therefore already accepted its responsibility in carrying out renditions for the purpose of torture, and it is hard to see how disclosure of information potentially relating to such flights' transit through Diego Garcia would be of much concern to them.

### The Commissioner's position

16. With regard to the first criterion of the three limb test described above, the Commissioner accepts that potential prejudice to the UK's relations with the US clearly relates to the interests which the exemption contained at section 27(1)(a) is designed to protect.
17. With regard to the second criterion, given the US' indication that it did not wish the withheld information to be released, the Commissioner is satisfied that disclosure of it clearly has the potential to harm the UK's relations with the US. The Commissioner is therefore satisfied that there is a causal link between the potential disclosure of the withheld information and the interests which section 27(1)(a) is designed to

protect. Moreover, the Commissioner is satisfied that the resultant prejudice which the FCO believes would occur is one that 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 damage limitation exercise.

18. With regard to the third criterion, the Commissioner has carefully considered the submissions put forward by the complainant. However, in the Commissioner's opinion the FCO's exchanges with the US about the disclosure of flight records concerning Diego Garcia are unambiguous in setting out the US' position that it did not want this information to be disclosed. In light of this, the Commissioner is satisfied that the likelihood of harm if the withheld information was disclosed is clearly more than a hypothetical possibility, rather there would be a real and significant risk of prejudice occurring if the withheld information were to be disclosed. Moreover, the Commissioner is satisfied that this evidence is sufficient to demonstrate that the higher threshold of 'would prejudice' is met. The Commissioner has reached this conclusion essentially because the US has clearly asked the UK not to disclose the withheld information.

### **Public interest test**

19. Section 27 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

#### Public interest in disclosure of the information

20. The complainant argued that the UK government has refused to give a full and comprehensive account of what it knows about CIA rendition activities in Diego Garcia. The complainant noted that although in 2008 the government confirmed that the CIA flew two detainees through Diego Garcia in 2002 since that date it had refused to answer questions on this issue, including questions raised about the use of Diego Garcia in the rendition of Abdulhakim Belhaj from Thailand to Libya.<sup>4</sup> Furthermore, the complainant emphasised that the UK government's complicity in the 'CIA Torture Program' was a matter of great public interest and concern. As evidence of this the complainant directed the Commissioner to a significant amount of commentary, press reporting

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<sup>4</sup> <https://www.theguardian.com/world/2012/apr/08/special-report-britain-rendition-libya>

(from a range of newspapers), and Parliamentary questions and debates on this issue. Consequently, the complainant argued that there was a compelling public interest in the disclosure of the withheld information.

#### Public interest in favour of maintaining the exemption

21. The FCO argued that the effective conduct of international relations depends upon maintaining the trust and confidence between governments. It explained that if the UK does not maintain this trust and confidence its ability to protect and promote UK interests through international relations will be hampered. In the particular circumstances of this case the FCO explained that the UK's ability to protect and promote UK interests through its relationship with the US would be impaired, an outcome which would be firmly against the public interest.

#### Balance of the public interest

22. As she recognised in the earlier related decision notice, the Commissioner recognises the seriousness of the issues which are the focus of the complainant's request. Disclosure of the withheld information would significantly contribute to increasing transparency in relation to the alleged use of Diego Garcia for rendition flights given the withheld information spans a number of years. In the Commissioner's opinion the public interest in disclosing this information should in no way be underestimated, particularly in light of the attention this issue has received both in the press and Parliament.
23. However, the Commissioner accepts that there is a very significant public interest in ensuring that the UK enjoys a strong and effective relationship with the US. This is due, not least, to the significant ties between the two nations. In the particular circumstances of this case, the fact that disclosure of the information would prejudice these relations (rather than simply being likely to) adds, in the Commissioner's view, further weight to the public interest in maintaining the exemption.
24. Consequently, and as with her decision in the previous case, the Commissioner has concluded that the public interest favours maintaining the exemption. This is because in her view, whilst there is significant public interest in the disclosure of the withheld information, this is outweighed by the public interest in maintaining the exemption given the importance of the UK-US bilateral relationship. The Commissioner has also taken into account the fact that the US' basis for requesting that the information is not disclosed is based upon its concerns for its own national security. In the Commissioner's opinion in such circumstances it is hard not to envisage disclosure of this information

having a fundamental impact on the UK's ability to protect and promote its interests abroad through its relationship with the US.

25. In light of her decision in respect of the FCO's reliance on section 27(1)(a), the Commissioner has not considered the FCO's reliance on section 26(1)(b) of FOIA.



## Right of appeal

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26. 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: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

27. 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.
28. 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 .....**

**Jonathan Slee**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**