

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 February 2019

Public Authority: HM Treasury
Address: 1 Horse Guards Road
London
SW1A 2HQ

Decision (including any steps ordered)

1. The complainant requested information in relation to financial sanctions on individuals and entities from the Syrian Arab Republic. The public authority withheld the information held within the scope of the request relying on the exemption at section 44(1)(b) FOIA (prohibitions on disclosure).
2. The Commissioner's decision is that the public authority was entitled to rely on the exemption at section 44(1)(b) FOIA.
3. No steps are required.

Request and response

4. The complainant wrote to the Head of the Office of Financial Sanctions Implementation (OFSI), part of HM Treasury (the public authority) on 21 December 2017 with the following request for information:

"Certain Underwriters at Lloyds London et al v (1) Syrian Arab Republic (2) Syrian Air Force Intelligence and (3) General Muhammed AI Khulli, Chief, Syrian Air Force Intelligence

Case Number CL — 2015 000667

We act for the Claimants in the above mentioned Commercial Court proceedings which seek to enforce a judgment of the US District Court against the Syrian Arab Republic and its two Syrian co-defendants against assets of theirs held in the jurisdiction of England and Wales. A final hearing of the claim is listed for 5 February 2018.

To that end, we are writing to request information about individuals and entities from the Syrian regime that are on the latest Consolidated List of Financial Sanctions Targets in the UK (updated 27th September 2017) ("the Consolidated Targets List for Syria") with a view to a possible application under Part 72 of the Civil Procedure Rules for one or more third party debt orders or the pursuit of such other enforcement mechanisms as may be available.

Our request relates to the following individuals and entities on the Consolidated Targets List for Syria.

Individuals About Whom Information is Requested

In respect of the First Defendant:

Entry 39

Bashar AI-Assad, President of the Republic

Listed on 24 May 2011

Entry 29

General Amer AI-Aachi, Head of the Intelligence Branch of the Air Force Intelligence Service

Listed on 24 July 2012

In respect of the Third Defendant:

Entry 133

Major General Jamil Hassan, Head of Syrian Air Force Intelligence

Listed on 1 October 2016

Entities About Whom Information is Requested

In respect of the Second Defendant:

Entry 4

Air Force Intelligence Agency

Listed on 24 August 2011

We also seek the same information set out below in relation to the First Defendant the Syrian Arab Republic itself.

Information Requested in relation to each Individual and Entity

In respect of each individual and entity set out above, please provide details of:

1. Whether there is a bank account held in the name of that individual/entity or understood to hold funds beneficially owned by them;
2. Whether the bank account is in the sole name of that individual/entity and if not, details of the other names in which the account is held;
3. If so, the name and address of the bank and bank branch where that account is held;
4. The relevant account number;
5. The last known balance of funds in that account;
6. The date of that last known balance of funds;
7. Any information regarding the historic use of those funds; and
8. The source of the information set out above.

Basis of the Request

For the avoidance of doubt, this request is made, to the extent necessary under section 1(1) of the Freedom of Information Act 2000 ("FOIA") on behalf of the Claimants so as to require a response within 20 working days. It is however submitted that there should be no objection to provision of the information sought regardless of the entitlement under the FOIA. Please in any event use the address at the top of this letter for correspondence.

It seems to us that such a request is consistent with your obligations under Article 29 of EU Regulation 36/2012 as consolidated on 27th September 2017 ("the Consolidated EU Regulation") given that its purpose is to identify assets which may be released pursuant to Article 18(1)(b) of the Consolidated EU Regulation.

It seems to us that such a request is also consistent with your obligations under paragraph 6 of the Schedule to the Syria (European Union Financial Sanctions) Regulations 2012 ("the UK Regulations"), given its compatibility with the Data Protection Act 1998, Part 1 of the

Regulation of Investigatory Powers Act 2000 and the Freedom of Information Act 2000.”

5. The public authority provided its response on 22 January 2018. Relying on section 44(2) FOIA it neither confirmed nor denied holding the requested information. It provided the following explanation as the basis for its refusal to comply with the request:

“Section 44(1)(b) provides that information is exempt from disclosure if its disclosure would contravene any EU obligation. Section 44(2) removes the obligation to confirm whether or not information is held, if doing so would in itself contravene any obligation. We consider that confirmation as to whether or not such information is held would contravene our obligation under Article 29(2) of the Council Regulation (EU) No 36/2012 which obliges us only to use information for the purpose it was provided to us, i.e. to facilitate compliance with the Regulation.....

We note that you consider that complying with your request is, in any event, consistent with our obligations under other EU Regulations. We consider that there are no other provisions that would require us to confirm to you whether the requested information is held and, if held, to disclose it.”

6. The complainant wrote to the public authority on 13 March 2018 requesting an internal review of the response to her request. In that letter the complainant mentioned that on 1 March 2018, “the Commercial Court gave judgement in favour of our clients in the case of Certain Underwriters & Ors v Syrian Arab Republic & Ors [2018] EWHC 385 (Comm) for over \$US 50 million together with interest and costs...” The complainant asked the public authority to reconsider its decision in light of the Order made by the Commercial Court as well as other reasons to do with the application of Council Regulation (EU) No 36/2012.
7. The public authority wrote back to the complainant on 22 June 2018 with details of the outcome of the internal review. The review revised the original decision to rely on section 44(2) FOIA and confirmed that the public authority held some information within the scope of the request. However, the review further concluded that the information held was exempt from disclosure on the basis of the exemption at section 44(1)(b) FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 18 July 2018 to complain about the way her request for information had been handled. She specifically disagreed that the public authority was entitled to rely on the exemption at section 44(1)(b) FOIA to withhold the information held within the scope of the request.
9. She asked the Commissioner to additionally consider whether the public authority had complied with paragraphs 41-42 of the Code of Practice issued under section 45 FOIA, its own target date for dealing with complaints and, the ICO's guidance on section 45 FOIA.
10. Further, whether the public authority complied with section 17(1) FOIA "given the lack of specificity" in the refusal notice as to which of the different pieces of the requested information are held and not held and, why the exemption at section 44(1)(b) applies to the specific pieces of information which are held.
11. The Commissioner has referred to the complainant's submissions at the relevant parts of her analysis below.
12. For added clarity, the scope of the investigation was to consider;
 - whether the public authority was entitled to rely on the exemption at section 44(1)(b),
 - whether the public authority complied with the requirements in section 17(1) FOIA and,
 - whether the public authority complied with the ICO's guidance on section 45 further to paragraphs 41-42 of the Code of Practice issued by the Secretary of State under section 45.
13. With respect to the Commissioner's consideration of whether the public authority complied with the relevant paragraphs in the Code of Practice including the ICO guidance, it should be noted that the FOIA does not contain a statutory period within which internal reviews must be completed. Consequently, the Commissioner has considered that issue in the 'Other Matters' section at the end of this notice.

Reasons for decision

Was the public authority entitled to rely on section 44(1)(b) FOIA?

Section 44(1)(b)

14. The public authority withheld the information held within the scope of the request on the basis of the exemption at 44(1)(b).
15. Information is exempt under section 44(1)(b) if its disclosure by the public authority holding it is incompatible with any EU obligation.¹ The exemptions contained in section 44(1) FOIA are absolute, which means that they are not subject to the public interest test set out in section 2(2)(b) FOIA.

The public authority's position

16. The public authority's submissions are summarised below.
17. The public authority considers that disclosing the information that it holds would contravene its obligation under Article 29(2) of Council Regulation (EU) No 36/2012 (the EU Regulation)².
18. The information was collected to help facilitate compliance with the relevant financial sanctions legislation as part of the annual reporting of frozen assets to the OFSI. As such it was received under Article 29(1) of the EU Regulation, as implemented through Regulation 21 and paragraph 2 to the Schedule to the Syria (European Union Financial Sanctions) Regulations 2012, namely that "natural and legal persons, entities and bodies shall (a) supply immediately any information which would facilitate compliance with this Regulation, such as accounts and amounts frozen in accordance with Article 14, to the competent authority in the Member State where they are resident or located....; and (b) cooperate with that competent authority in any verification of this information."
19. Article 29(2) of the EU Regulation restricts the use of information received further to Article 29 to only the purpose it was provided to the

¹ For the full text of the exemption, see: <http://www.legislation.gov.uk/ukpga/2000/36/section/44>

² For the text of the EU Regulation, see: <https://eur-lex.europa.eu/eli/reg/2012/36/2018-05-30>

competent authority (in this case the public authority) namely, to facilitate compliance with the EU Regulation. However, disclosing the information it holds would not facilitate the asset freeze or prevent funds or economic resources being made available to or for the benefit of designated persons. As such, the public authority is exempt from providing the information it holds under section 44(1)(b).

20. In support of its position the public authority referred to the decision of the First-Tier Information Rights Tribunal (the Tribunal) in the case of RAID by its Executive Director Patricia Feeney v the Information Commissioner and HM Treasury EA/2015/0019³ (the RAID case). It pointed out that the Tribunal unanimously upheld the Commissioner's Decision Notice in case FS50532911 which concluded that HM Treasury was entitled to rely on the exemption at section 44(1)(b). In particular the Tribunal set out that Regulation 8(3) of Council Regulation (EC) No 314/2004 which the public authority considers is the same as Article 29(2) of the EU Regulation "should be given a purposive interpretation. The sanctions regime over-rides confidentiality, the role of Regulation 8(3) is to minimise the harm to that key principle [of confidentiality] by restricting the use of confidential information to what is necessary for sanctions administration. The word "use" has a broad meaning however the uses to which the information in this case may be put are strictly limited to the "purposes for which it was provided or received" – the administration of a sanctions regime; not for putting into the public domain under FOIA."
21. The public authority also explained that where it does not hold recorded information in relation to part of the request, Article 29(2) on its own would not prevent it from confirming that it does not hold that information. However, it considers that confirming which specific pieces of information it holds (or does not hold as the case may be) in relation to all of the relevant individuals and entities would have the effect of identifying the individuals and entities on which it holds information and the detail of that information which it is prohibited from revealing by virtue of Article 29(2). Confirming which specific pieces of information it holds would therefore breach the requirement in Article 29(2) for the public authority to only use the information provided further to that Article to facilitate compliance with the EU Regulation.

³ That decision can be found here:
<http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1707/038a%20120116%20DECISION.pdf>

The complainant's position

22. The complainant's submissions are reproduced below.

23. **"The Legal Framework**

Article 28 [Article 29] of Consolidated EU Regulation 39/2012 provides that:

"(1) Without prejudice to the applicable rules concerning reporting, confidentiality and professional secrecy, natural and legal persons, entities and bodies shall:

(a) supply immediately any information which would facilitate compliance with this Regulation, such as accounts and amounts frozen in accordance with Article 14, to the competent authority in the Member State where they are resident or located, as indicated on the websites listed in Annex III, and shall transmit such information, either directly or through the Member States, to the Commission; and

(b) co-operate with that competent authority in any verification of this information.

(2) Any information provided or received in accordance with this Article shall be used only for the purposes for which it was provided or received."

24. Article 14 of Consolidated EU Regulation 39/2012 provides that:

(1) All funds and economic resources belonging to, owned, held or controlled by the natural or legal persons, entities and bodies listed in Annex II and IIa shall be frozen.

(2) No funds or economic resources shall be made available, directly or indirectly, to or for the benefit of the natural or legal persons, entities or bodies listed in Annex II and IIa.

(3) The participation, knowingly and intentionally, in activities the object or effect of which is, directly or indirectly, to circumvent the measures referred to in paragraphs 1 and 2 shall be prohibited."

25. Article 18 of Consolidated EU Regulation 39/2012 provides that:

(1) By way of derogation from Article 14, the competent authorities in Member States, as indicated on the websites listed in Annex III, may authorise the release of certain frozen funds or economic resources, if the following conditions are met:

(a) the funds or economic resources are the subject of an arbitral decision rendered prior to the date on which the natural or legal person, entity or body referred to in Article 14 was listed in Annex II or IIa, or of a judicial or administrative decision rendered in the Union, or a judicial decision enforceable in the Member State concerned, prior to or after that date;

(b) the funds or economic resources will be used exclusively to satisfy claims secured by such a decision or recognised as valid in such a decision, within the limits set by the applicable laws and regulations governing the rights of persons having such claims;

(c) the decision is not for the benefit of a natural or legal person, entity or body listed in Annex II or IIa; and

(d) recognising the decision is not contrary to public policy in the Member State concerned.

(2) The relevant Member State shall inform the other Member States and the Commission.”

26. **The Implications of the Legal Framework for the Request**

The implications of these provisions for the request are as follows:

1. Article 29(1) of Consolidated EU Regulation 39/2012 provides that entities and bodies shall supply HM Treasury with information which would facilitate compliance with the Regulation, such as accounts and amounts frozen in accordance with Article 14.

2. Article 29(2) of Consolidated EU Regulation 39/2012 provides that any information provided or received in accordance with Article 29 shall be used only for the purposes for which it was provided or received.

3. Article 29(1) of Consolidated EU Regulation 39/2012 makes clear that the purpose for which that information is provided or received is to facilitate compliance with the Regulation.

4. Article 29(1) of Consolidated EU Regulation 39/2012 also makes clear that providing details of accounts and amounts frozen in accordance with Article 14 would facilitate compliance with the Regulation.

5. Since Article 18 of Consolidated EU Regulation 39/2012 provides for the release of funds frozen in accordance with Article 14 if certain conditions are met, it is clear that facilitating compliance with the regulation also includes providing details of accounts and amounts frozen in accordance with Article 14 to enable those funds to be released in accordance with Article 18.

6. The request seeks information that would enable the release of funds in circumstances that would satisfy the conditions in Article 18 in that:

(a) the funds are the subject of a judicial decision enforceable in the UK after the date on which the relevant persons, entities or bodies were listed in Annex II or IIa of the Regulation;

(b) the funds or economic resources would be used exclusively to satisfy claims secured by such a decision or recognised as valid in such a decision, within the limits set by the applicable laws and regulations governing the rights of persons having such claims;

(c) the decision is not for the benefit of a person, entity or body listed in Annex II or IIa of the Regulation; and

(d) recognising the decision is not contrary to public policy in the UK.

27. **The Concern**

In their response to the request for reconsideration of the original request, OFSI then construed the concept of facilitating compliance with the Regulation narrowly, to extend only to facilitating the asset freeze or preventing funds or economic resources being made available to or for the benefit of designated persons. In construing the concept of facilitating compliance with the Regulation, OFSI should have had regard to Article 18 of Consolidated EU Regulation 39/2012.

Had OFSI had regard to Article 18 of Consolidated EU Regulation 39/2012 in either their initial response or their reconsidered response, OFSI would and should have concluded that facilitating compliance with the Regulation is broader and extends to providing details of accounts and amounts frozen in accordance with Article 14 to enable those funds to be released in accordance with Article 18.

Accordingly, disclosing the requested information would not contravene Article 29(2) of Consolidated EU Regulation 39/2012 or any EU obligation and section 44(1)(b) of FOIA 2000 does not render the information exempt from disclosure."

Commissioner's considerations

28. The Commissioner shares the public authority's view that Article 29(2) of the EU Regulation should be given a purposive interpretation as set out by the Tribunal in the RAID case in relation to Regulation 8(3) of Council Regulation (EC) No 314/2004.

29. The Commissioner does not share the complainant's view that disclosing the withheld information under the FOIA would not contravene Article

29(2) if the conditions in Article 18 of the EU Regulation are met. Since disclosure under the FOIA places the withheld information in the public domain, there can be no guarantee that the withheld information would be used exclusively for the purpose set out in Article 18(1)(b).

30. Further, disclosure under the FOIA would not minimise the harm to the confidentiality of the withheld information by restricting its use to the administration of the EU Regulation. It leaves the information open to uses beyond the restrictive purposes in the EU Regulation and consequently extends the limited harm to confidentiality more broadly than was envisaged for the administration of the sanctions regime.
31. In view of the wording of the request the Commissioner shares the view that the public authority is also prohibited by Article 29(2) from confirming which specific pieces of information it holds or does not hold in relation to all of the relevant individuals and entities. She accepts that confirming which specific pieces of information it holds or does not hold would have the effect of identifying the individuals and entities on which it holds information and the detail of that information. She accepts that would be inconsistent with the requirement in Article 29(2) for the public authority to only use the information provided further to Article 29 to facilitate compliance with the EU Regulation.
32. The Commissioner therefore finds that the public authority was entitled to rely on the exemption at section 44(1)(b) by virtue of the prohibition from disclosure set out in Article 29(2) of the EU Regulation.

Has the public authority complied with the requirements in section 17(1)?

33. Section 17(1) states:

"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."

34. Section 17(4) however states:

"A public authority is not obliged to make a statement under subsection (1)(c) or (3)⁴ if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information."

35. The complainant has invited the Commissioner to find the public authority in breach of section 17(1) because in her view the public authority has not clearly stated in its response to the request which of the different pieces of information requested are held and not held; and of those which are held, which exemption applies and why.
36. The public authority has argued that section 17 does not require it to state which different pieces of information are held and not held. Furthermore, owing to the nature of the questions asked, it is unable to confirm which specific pieces of information it holds without answering the request for information which it considers is exempt from doing under s44(1)(b).
37. For example, if it confirms whether it holds a relevant account number for a specific individual or entity about whom information is sought, that in itself answers the question whether there is a bank account held in the name of those designated individuals or entities about whom information is sought. Therefore, it considers that to confirm which specific pieces of information are held and not held would in itself breach section 44(1)(b).
38. The Commissioner has already found that the public authority is also prohibited by Article 29(2) of the EU Regulation from confirming which specific pieces of information it holds or does not hold in relation to all of the relevant individuals and entities.
39. The Commissioner is satisfied that the explanation provided by the public authority on 22 June 2018 satisfies the requirement in section 17(1)(c). In the event that the Commissioner is wrong on this point, she finds that the public authority would have been entitled to rely on section 17(4) as the basis for not revealing exempt information in its response to the request.

⁴ Section 17(3) relates to the timeliness of conducting the public interest test. For the full text of section 17, visit: <http://www.legislation.gov.uk/ukpga/2000/36/section/17>

Other Matters

40. As mentioned, the FOIA does not contain a time limit within which public authorities have to complete internal reviews. However, the ICO guidance explains that in most cases an internal review should take no longer than 20 working days in most cases, or 40 working days in exceptional circumstances.
41. The internal review was requested on 13 March 2018 and completed on 22 June 2018, taking the public authority 70 working days in total.
42. The public authority explained that whilst the response time exceeded that which it would aim for, it was important that a proper review of the case was undertaken, that the issues were considered in full, and that it arrived at the correct conclusions. The response was issued as soon as the review had been concluded. The public authority assured the Commissioner that internal review requests were taken seriously and are responded to as promptly as possible.
43. The Commissioner accepts that in some cases it might take longer than 20 working days to complete internal reviews. In her view the majority of internal reviews should not take longer than 40 working days. It is therefore regrettable that it took the public authority 70 working days to complete the internal review in this case. Given the sensitivity of the case, the public authority was right to ensure that all the issues had been fully considered and that it had arrived at the correct conclusions.
44. However, the Commissioner does not consider it justifiable in the circumstances for the public authority to have taken a total of 70 working days to conclude its deliberations further to the internal review request. She expects the public authority to take steps to ensure that in future similar cases are dealt with more promptly.

Right of appeal

45. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

46. 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.
47. 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

Terna Waya
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