

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 January 2020

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

Decision (including any steps ordered)

1. The complainant submitted a request to the Foreign and Commonwealth Office (FCO) seeking valuation and value for money reports relating to the purchase of an apartment in New York. The FCO confirmed that it held information falling within the scope of this request but it considered this to be exempt from disclosure on the basis of section 43(2) (commercial interests) of FOIA. The Commissioner has concluded that the withheld information is exempt from disclosure on the basis of section 43(2) of FOIA and that in all the circumstances of the request the public interest favours maintaining the exemption.
2. The Commissioner does not require any steps to be taken.

Request and response

3. The complainant submitted the following request to the FCO on 27 March 2019:

'Under the FOI Act 2014, I am seeking the following:

-copies of any valuation reports relating to the recent purchase of a property by the FCO at the 38th floor of 50 United Nations Plaza, New York.

-copies of any value for money reports relating to the above purchase.

-copies of any submissions prepared for the Foreign Secretary recommending, advising, or discussing the purchase of the above property.

*I would prefer to receive this information electronically, ideally in its original electronic format.*¹

4. The FCO responded on 25 April 2019 and confirmed that it held information falling within the scope of the request but it considered this to be exempt from disclosure on the basis of section 43(2) (commercial interests) of FOIA. It noted however that it had secured the best possible deal on the property and that it paid significantly less than the latest market price.
5. The complainant contacted the FCO on 25 April 2019 and asked it to conduct an internal review of this refusal.
6. The FCO informed him of the outcome of the internal review on 24 May 2019. The review upheld the decision to withhold the information it held falling within the scope of the request on the basis of section 43(2) of FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 15 July 2019 to complain about the FCO's decision to withhold the information on the basis of section 43(2) of FOIA. He disputed whether this information was exempt from disclosure on the basis of this exemption and even it was, then he argued that the public interest favoured disclosure of it.

Reasons for decision

Section 43 – commercial interests

8. Section 43(2) states 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).'

9. In order for a prejudice based exemption, such as section 43(2), to be engaged the Commissioner considers that three criteria must be met:
-

¹ The FCO purchased the property in question for \$15,900,000 on 15 March 2019. The purchase price was already in the public domain at the point the request was submitted.

- 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.

The FCO's position

10. In its internal review response the FCO explained that although the basic details of the purchase were in the public domain, including the purchase price, the tailored valuations it commissioned to inform its wider New York representational accommodation strategy are not. The FCO argued that if it released these valuations into the public domain at the point the request was submitted it would give advance exposure to the market of its negotiating red lines and the analysis behind them. The FCO argued that this would seriously compromise its negotiating position on any future purchases and sales it might wish to make as it implements this strategy. Furthermore, the FCO argued that it needed to be mindful that the developer from whom it purchased the property still has unsold units in the building. The FCO argued that if its valuation was released it may also unfairly prejudice the developer's ability to sell the remaining units at a fair price.
11. In its submissions to the Commissioner the FCO explained that its wider New York strategy remained ongoing and that disclosure of the information in the scope of the request would not only reveal information about the valuation of the property at 50 United Nations Plaza, but also information about its plans for other purchases in New York. The FCO argued that disclosure of this information would skew the expectations of both vendors and potential purchasers of the assets which the FCO is seeking to buy and sell. The FCO explained that it was primarily concerned with the implications in respect of the New York

property market if this information was disclosed. However, it argued that it was important to ensure that third parties when purchasing or selling assets cannot use FOIA to obtain commercial leverage when negotiating with the FCO. The FCO explained that valuations are used to assist its surveyors in negotiating and it argued that the release of such valuation reports that could, over time, demonstrate the tolerances which the FCO would commit to a purchase or sale.

12. The FCO explained that it was therefore of the firm opinion that disclosure would be likely to a) severely prejudice its current negotiations for other properties in New York and also b) prejudice future negotiations with landlords, sellers and brokers worldwide if FOIA is routinely used to release commercially sensitive reports.
13. With regard to the interests of third parties, the FCO clarified that it was concerned about the impact on the commercial interests of potential purchasers of other properties within 50 United Nations Plaza. (In its response to the complainant the FCO had highlighted the possible prejudice to the developers of 50 United Nations Plaza if the withheld information was disclosed as opposed to the interests of potential purchasers). The FCO acknowledged that the commercial sensitivity of market prices and valuation reports typically diminishes over time. (However, it emphasised that the valuation report was only 9 months old and thus remained commercially sensitive. The FCO explained that therefore in its view releasing the report could influence the negotiating position of other parties seeking to purchase properties in the same development and be detrimental to the interests of these parties. The FCO noted that the light of the decision in *Derry Council v Information Commissioner* (EA/2006/0014) the Commissioner generally takes the position that if a public authority wants to withhold information on the basis that disclosure of it would or would be likely to prejudice the commercial interests of a third party, it must have evidence that this does in fact represent the concerns of that third party. However, the FCO explained that it was not sighted on who else was buying within the development and therefore could not provide this information. Nevertheless, the FCO explained in the view of its surveyors this did not mean that prejudicial influence would not exist in what is a very niche market were the valuation report to be published.

The complainant's position

14. The complainant argued that a valuation report for a property that had already been purchased could not possibly be commercially sensitive given that the expenditure had now taken place. He also suggested that material relating to future plans of the FCO could also be easily redacted.

The Commissioner's position

15. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the FCO relates to the interests which the exemption contained at section 43(2) is designed to protect.
16. With regard to the second criterion, the Commissioner is satisfied that disclosure of the withheld information has the potential to harm the FCO's commercial interests both in respect of its property strategy for New York and also, in theory, in relation to property negotiations worldwide. In reach in this finding the Commissioner accepts that the FCO had already purchased the property at 50 United Nations Plaza prior to the complainant submitting his request. However, she accepts that the FCO's line of argument that the information about that property contained in the valuation report could still potentially undermine its commercial interests in future purchases, or indeed sales, eg by providing an insight in the FCO's negotiating red lines and analysis behind, is a plausible one. Moreover, the Commissioner is satisfied that there is a link between disclosure of information about the FCO's wider New York property strategy both in terms of its plans for selling current assets and potential purchases of new ones, and an impact on the FCO's commercial interests in respect of such potential transactions. This is on the basis that the withheld information would provide interested third parties with a detailed insight into the FCO's likely intentions in the New York property market in the short to medium term. Finally, having had the benefit of examining the withheld information relating to the valuation of property purchased by the FCO at 50 United Nations Plaza, the Commissioner accepts that its disclosure has the potential to harm the commercial interests of third parties who may also be seeking to purchase properties in the development. The Commissioner cannot elaborate on this finding without revealing details of the withheld information itself.
17. With regard to the third criterion, the Commissioner is satisfied that in relation to the information concerning the valuation about the property at 50 United Nations Plaza there is more than a hypothetical possibility that disclosure of this would be likely to harm the FCO's commercial interests. Whilst this particular purchase has taken place, in the Commissioner opinion the FCO's approach to this purchase cannot be seen in isolation and the information contained in the valuation report for this specific property would provide an insight into how the FCO would be likely to conduct similar transactions to the future. The Commissioner is satisfied that such an outcome would place the FCO at a material disadvantage in any such negotiations. The Commissioner is also satisfied that there is a more than a hypothetical possibility that disclosure of the parts of the withheld information about the FCO's broader New York strategy would be likely to be detrimental to its

commercial interests given the level of detail included in the information and taking to account the fact that the strategy was still being implemented at the time of the request. Finally, in terms of the FCO's argument that disclosure of the withheld information would be likely to prejudice the commercial interests of other potential purchasers of the properties in 50 United Nations Plaza, the Commissioner also accepts that there is more than a hypothetical possibility of this occurring given the very niche nature of the market and the insight the disclosure of the valuation report would provide.

18. Section 43(2) of FOIA is therefore engaged.

Public interest test

19. Section 43 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 disclosing the withheld information

20. The complainant argued that it was in the public interest to disclose information relating to the valuation report of 50 United Nations Plaza.

Public interest in maintaining the exemption

21. The FCO argued that the public interest favoured maintaining the exemption in order to ensure that it achieved the best use of taxpayers' money when undertaking its property transactions.

Balance of the public interest arguments

22. The Commissioner recognises that the FCO clearly spent a significant amount of public money on buying the property in question. In light of this she accepts that there is a considerable public interest in the disclosure of information which would inform the public about the analysis that the FCO undertook before spending such sums, including the valuation report in the FCO's possession regarding this property. Indeed, such a disclosure could re-assure the public that the FCO's analysis and consideration of its options for property in New York, including the purchase of this particular property at this price, were detailed and considered.

23. However, the Commissioner is conscious that the FCO has already provided some information about the purchase of this property to the complainant in response to this request. Namely confirmation that it paid significantly less than the latest market price and that it expects the majority of the capital cost to be made back through the sale of the current Consul General residence which is no longer fit for purpose and

on the market for US\$9,995,000. The Commissioner also notes that the FCO explained to the complainant that the purchase was considered alongside other options and followed the normal governance process with sign off from the Infrastructure, Investment and Operations Committee and the FCO's Management Board. Therefore, whilst the disclosure of the information would add further details about the FCO decision making process in respect of this purchase, and its wider property strategy, there is some, albeit limited, information already in the public domain on this topic.

24. Furthermore, in the Commissioner's opinion there is clear public interest in ensuring that the FCO achieves value for money in its property transactions. In the circumstances of this case the Commissioner considers this argument to attract significant weight given that disclosure of the information presents a real risk of harming the FCO's commercial interests during its ongoing negotiations regarding its New York property portfolio, and moreover, potentially risks undermining its property transactions more broadly. In the Commissioner's opinion there is also a considerable public interest in ensuring that the commercial interests of third parties are not harmed by the disclosure of information under FOIA.
25. In light of the above the Commissioner has therefore concluded that the public interest favours maintaining the exemption contained at section 43(2) of FOIA.

Right of appeal

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@justice.gov.uk
Website: 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