

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 October 2021

Public Authority: Foreign, Commonwealth & Development 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) (now the Foreign, Commonwealth & Development Office, FCDO) seeking minutes of a meeting between the then Foreign Secretary, Dominic Raab, and members of the Hungarian government in autumn 2019. The FCO explained that it did not hold minutes of the meeting but did hold an internal note of the meeting. It provided the complainant with some of the information contained in the note but sought to withhold the remainder on the basis of sections 27(1)(a) (international relations), 35(1)(a) (formulation and development of government policy) and 40(2) (personal data) of FOIA.
2. The Commissioner has concluded that the withheld information is exempt from disclosure on the basis of sections 27(1)(a) and 40(2) of FOIA. However, she has also concluded that the FCO committed breaches of section 10(1) of FOIA by failing to respond to the request within 20 working days and by failing to disclose the information it was prepared to disclose within the same time period.
3. No steps are required.

Request and response

4. The complainant submitted the following request to the FCO¹ on 10 July 2020:

'Please send me, before 17 July, full and unredacted minutes and list of attendees of the meeting between Dominic Raab and members of the Hungarian government in autumn 2019.'

5. The FCO responded on 13 August 2020 and explained that it did not hold the specific information requested. However, the FCO explained that it did hold information relevant to the request in the form of an internally distributed overview of the meeting. The FCO provided the complainant with a redacted version of this document. It explained that the redacted information was considered to be exempt from disclosure on the basis of sections 27(1)(a) (international relations), 35(1)(a) (formulation and development of government policy) and 40(2) (personal data) of FOIA.
6. The complainant contacted the FCO on the same day and asked it to conduct an internal review of this refusal.
7. The FCDO informed him of the outcome of the internal review on 15 October 2020. The FCDO provided him with a further extract from the overview document which confirmed the names of the Hungarian delegation who accompanied the Foreign Minister. However, the FCDO explained that it was satisfied that the remaining information was exempt from disclosure on the basis of the exemptions cited in the refusal notice.

Scope of the case

8. The complainant contacted the Commissioner on 15 October 2020 in order to complain about the FCDO's decision to withhold information falling within the scope of his request. He was also dissatisfied with the time it took the FCDO to respond to the request and the time taken to complete the internal review.

¹ The FCO merged with the Department for International Development on 2 September 2020 to form the FCDO. This decision notice is therefore served on the FCDO but refers to the FCO where it was the body that took certain actions in relation to the request.

Reasons for decision

Section 27 – international relations

9. The FCDO argued that all of the withheld information, with the exception of the name and contact details of junior civil servants, was exempt from disclosure on the basis of section 27(1)(a) of FOIA.

10. This states 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'

The FCDO's position

11. The FCDO emphasised that this exemption recognises that the effective conduct of international relations depends upon maintaining relations between states. It argued that the UK's ability to influence and persuade is based largely on mutual trust and confidence with its foreign interlocutors. Without that mutual trust and confidence, its influence and ability is severely compromised.

12. In the context of this case the FCDO explained that the UK enjoys a close, friendly and trusting relations with Hungary and that the two share a positive trade partnership, people to people links and a strong defence and security relationship. The FCDO explained that the withheld information details an initial meeting with the Hungarian Foreign Minister. The FCDO explained that the meeting covered a range of subjects and was conducted in an atmosphere of trust and confidence which enabled there to be a free and frank discussion. In light of this the FCDO argued that it was satisfied that disclosing the redacted material, which covered sensitive information, would be likely to prejudice the UK's relations with Hungary.

The Commissioner's position

13. In order for a prejudice based exemption, such as section 27(1), 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. The anticipated prejudice must be more likely than not.
14. 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*'.²
15. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the FCDO clearly relates to the interests which the exemption contained at section 27(1)(a) is designed to protect. With regard to the second criterion, having considered the content of the withheld information and taken into account the FCDO's submissions, the Commissioner is satisfied that there is a causal link between disclosure of this information and prejudice potentially occurring to the UK's relations with Hungary. Furthermore, she is satisfied that the resultant prejudice would be real and of substance and that there is a more than a hypothetical risk of prejudice occurring. The Commissioner has reached this conclusion in light of the fact that the meeting in question was conducted in an atmosphere of trust and confidence and the redacted material covers a number of sensitive issues. The third criterion is therefore met and section 27(1)(a) is engaged.

Public interest test

16. Section 27(1) is a qualified exemption and therefore subject to the public interest test set out in section 2(2)(b) of FOIA. The Commissioner has therefore considered whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

² [Campaign against Arms Trade v the Information Commissioner and Ministry of Defence EA/2007/0040 \(26 August 2008\)](#)

17. The FCDO acknowledged that releasing the withheld information would increase public knowledge of, and transparency on, the UK's relationship with Hungary.
18. However, the FCDO argued if the UK does not maintain effective relations with other states its ability to protect and promote UK interests through international relations could be undermined, an outcome which would be not be in the public interest. In the context of this case the FCDO argued that it would clearly be against the public interest to harm the UK's relations with Hungary, noting that the withheld information related to ongoing bilateral matters.
19. In the Commissioner's view there is a clear public interest in understanding how the UK conducts its relations with other states. In the context of this case disclosure of the withheld information would provide an insight into the UK's relations with Hungary on a number of issues. Consequently, there is a public interest in the disclosure of this information. However, the Commissioner accepts that there is a very strong public interest in ensuring that the UK's relationship with other states is not harmed in order to ensure the UK can protect and promote its interests abroad. In the circumstances of this case she notes that the withheld information is relatively recent (dating from approximately nine months prior to the request) and that it relates to a number of ongoing bilateral matters. In light of this, in the Commissioner's view, the public interest tips in favour of maintaining the exemption.

Section 40 - personal information

20. The FCDO also argued that the names and contact details of its junior staff contained in the withheld information were exempt on the basis of section 40(2) of FOIA. This provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
21. In this case the relevant condition is contained in section 40(3A)(a)³. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
22. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection

³ As amended by Schedule 19 Paragraph 58(3) DPA.

Act 2018 ('DPA'). If it is not personal data then section 40 of FOIA cannot apply.

23. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

24. Section 3(2) of the DPA defines personal data as:

'any information relating to an identified or identifiable living individual'.

25. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
26. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
27. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
28. In the circumstances of this case, the Commissioner is satisfied that the names of the officials and their contact details both relate to and identify the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
29. As noted above, the fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
30. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

31. Article 5(1)(a) of the GDPR, which contains principle (a), states that:

'Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject'.

32. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

33. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

34. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

'processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child'⁴.

35. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:-

- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

36. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

⁴ Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

37. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. Interests may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
38. In the circumstances of this case, for the reasons discussed above, the Commissioner accepts that there is a legitimate interest in the disclosure of information about this subject. However, she is not persuaded that there is a particularly strong or compelling interest in the disclosure of the names of junior officials named in the withheld information in order to inform the public about the discussions which took place at the meeting.

Is disclosure necessary?

39. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so a measure would not be necessary if the legitimate aim could be achieved by something less. Disclosure under FOIA must therefore be the least restrictive means of achieving the legitimate aim in question.
40. In the Commissioner's view it is not sustainable to argue that disclosure of the names of the junior officials or their contacts details is necessary; disclosure of such information would not add to the public's understanding of this subject matter.
41. Given this finding the Commissioner has concluded that disclosure of the names would not be lawful and therefore article 6(1)(f) of the GDPR is not met. Disclosure of the names and contact details would therefore breach the first data protection principle and thus such information is exempt from disclosure on the basis of section 40(2) of FOIA.

Time to respond to the request

42. Section 10(1) of FOIA requires a public authority to respond to a request promptly, and in any event, within 20 working days.
43. In this case the complainant submitted his request on 10 July 2020 and the FCO responded 24 working days later on 13 August 2020. The Commissioner has therefore concluded that the FCO breached section 10(1) in its handling of this request. However, in reaching this finding,

the Commissioner acknowledges that the request was processed during the relatively early months of the Covid-19 pandemic during which time public authorities were having to manage their response to the crisis as well as adjust their ways for working to meet their information rights obligations.

44. The Commissioner notes that the FCDO only disclosed some of the information falling within the scope of the request at the internal review stage, outside of the 20 working day period. This late disclosure of information also represents a breach of section 10(1) of FOIA.

Other matters

45. The FOIA does not impose a statutory time within which internal reviews must be completed, albeit that the section 45 Code of Practice⁵ explains that such reviews should be completed within a reasonable timeframe. The Commissioner expects that most internal reviews should be completed within 20 working days, and even for more complicated requests, reviews should be completed within a total of 40 working days.⁶
46. In this case the FCO took 45 calendar days to complete the internal review. However, the Commissioner notes that this only marginally exceeds the upper time period in her guidance and again notes that this internal review was processed during the course of the pandemic.

⁵ <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

⁶ <https://ico.org.uk/for-organisations/request-handling-freedom-of-information/#internal>

Right of appeal

47. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

48. 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.
49. 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