

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 December 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 and Development Office, FCDO) seeking the number of times the UK had sought waivers of diplomatic immunity from foreign states, for what reasons and with what results. For cases where a waiver was refused the request also sought details as to whether the UK had asked for the withdrawal of the individual or their family. The FCO initially withheld all of the information falling within the scope of the request on basis of sections 27(1)(a) and (c) (international relations) and section 40(2) (personal data) of FOIA. At the internal review stage the FCDO disclosed the cumulative figures for the categories of information falling within the scope of the request but refused to disclose any further information it held on the basis of the exemptions already cited. It also argued that some of the information was exempt from disclosure on the basis of section 41(1) (information provided in confidence) of FOIA.
2. The Commissioner has concluded that the remaining withheld information is exempt from disclosure on the basis of sections 27(1)(a) and (c) of FOIA and that the public interest favours maintaining the exemptions. However, the Commissioner has concluded that the FCDO breached section 10(1) of FOIA by failing to disclose the information it decided was not exempt within 20 working days.
3. No steps are required.

Request and response

4. The complainant submitted the following request to the FCO¹ on 6 February 2020:

'Under the Freedom of Information Act please tell me for the years 2017/18 to 2019/20 inclusive, how many times has HMG sought waivers of diplomatic immunity from foreign states in the period specified, for what reason(s) and with what results?

I would also like to know for the same period the amount of times, when the Head of Mission concerned does not agree to a waiver, the FCO has asked for the withdrawal of the individual and their family or to declare them personae non-gratae.

Please also tell me how such actions are recorded - i.e. is this held on a computer database and when did the current filing system begin?'

5. The FCO responded to the request on 2 April 2020. It noted that information about alleged serious offences at foreign missions and international organisations in the UK is published in the annual Written Material Statement available online.² However, the FCO explained that information relating to the requesting and refusing of diplomatic waivers, reasons for them, as well as refusals to waive, was exempt from disclosure on the basis of section 27(1)(a) (international relations) and section 40(2) (personal data) of FOIA. With regard to the last question, the FCO explained that information is recorded on a database that was developed in 2012 as a replacement for the previous Access database that was used to record information about foreign diplomats and their dependants in the UK.
6. The complainant contacted the FCO on 25 April 2020 and asked it to undertake an internal review of this decision. He challenged the

¹ The FCO merged with the Department for International Development on 2 September 2020 to form the Foreign, Commonwealth and Development Office (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.

² The link the FCO provided to the complainant was to the generic Parliament website, ie <https://www.parliament.uk/>

An example of such a statement can be found here: <https://questions-statements.parliament.uk/written-statements/detail/2020-02-25/HCWS119>. The Commissioner would have expected the FCO to provide the complainant with a link to the most recent statement rather than a link to simply the main Parliament website.

application of both exemptions. He also explained that now he knew that the FCO's database went back to 2012 he asked that all information going back to 2012/13 was provided.

7. The FCO acknowledged receipt of the internal review request on 28 April 2020.
8. The complainant chased the progress of the internal review on 26 May 2020. The FCO responded on 28 May 2020 and explained that it was working on the review and this would be issued as soon as possible. The complainant chased the progress of the internal review again on 27 June 2020 and the FCO responded on 1 July 2020 and explained that it was aiming to issue the internal review response within the next 10 working days. The complainant contacted the FCO on 18 July and again on 22 July 2020 to chase the progress of the internal review. The FCO responded on 22 July 2020 and explained that the internal review was delayed due to the complexity of the case and the necessity to change working practices due to the COVID-19 pandemic and that it would aim to complete the internal review as soon as practicable.
9. However, the FCDO did not inform the complainant of the outcome of the internal review until 10 August 2021 (after the complainant had lodged a complaint with the Commissioner and after the Commissioner had contacted the FCDO in July 2021 in order to begin his investigation of this complaint). In the internal review the FCDO explained that it was content to release the cumulative figures and some additional information sought by the request as this did not identify any specific cases or individuals. The part of the internal review disclosing this information was as follows:

'The waiver records on our database start at the end of 2013. Between January 2014 and March 2020, HMG sought 225 waivers of immunity from foreign states. 139 of these were requests for witness statements, which in some cases included requests for access to CCTV footage. 40 further requests were specifically for access to CCTV footage. Both the requests for witness statements and access to CCTV footage relate to alleged crimes committed in the vicinity of, but not connected to, the diplomatic mission, and requests where the mission or diplomats were victims of crime. If police wish to investigate a case, a waiver of a diplomat's immunity by their sending State is required in order for them to provide a statement and for that statement to be used in any court proceedings. Similarly, as the police require a statement from the person providing CCTV footage to verify its authenticity, origin and content, and, if necessary, for the person to give supporting evidence in court, a waiver of the individual's immunity by their sending State is also required for those purposes.

In 92 cases waivers were granted. In 5 cases the requests for waivers were subsequently cancelled. In 64 cases the waivers were denied, and in 64 cases there have been no responses to the requests. You will note from the breakdown of type of request provided above that 179 of the total waivers requested were for witness statements or access to CCTV.

There were 15 instances in this period where the FCDO asked for the withdrawal of individuals / declared them personae non grata following refusals from sending States to waive immunity. It is the UK government's policy to seek the immediate withdrawal of a diplomat and their dependants (to declare them persona non grata) if the request for a waiver in cases of offences is denied.'

10. The FCDO explained that it remained of the view that the additional information it held relating to the reasons for seeking a waiver, and outcomes of doing so in relation to each of the individual cases, was exempt from disclosure on the basis of sections 27(1)(a) and (c) and 40(2) of FOIA.

Scope of the case

11. The complainant contacted the Commissioner on 31 October 2020. He was dissatisfied with the FCDO's failure to complete the internal review and its refusal to disclose any of the information falling within the scope of his request.
12. In light of the information disclosed at the internal review stage, this decision notice simply considers whether the remaining, withheld information is exempt from disclosure under FOIA. (For the avoidance of doubt, this information dates from 2013 onwards, ie the broader date range specified in the complainant's request for an internal review rather than the narrower range set out in his original request.) In addition to sections 27(1)(a) and (c) and 40(2), in its submissions to the Commissioner the FCDO argued that section 41(1) applied to the information detailing the reasons for requesting waivers of immunity as this information had been shared with it by the Metropolitan Police Service.
13. In relation to the delays in conducting the internal review, FOIA does not contain a statutory requirement for the reviews to be completed within a certain time period. However, the Commissioner has commented on the internal review delays in the Other Matters section at the end of this notice.

Reasons for decision

Section 27 – international relations

14. Sections 27(1)(a) and (c) of FOIA state 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...

...(c) the interests of the United Kingdom abroad.'

The FCDO's position

15. The FCDO argued that disclosure of information which would identify specific cases and, potentially, individuals, would be likely to prejudice the relations between the UK and those countries concerned, by inhibiting communications on diplomatic matters between the UK and those countries. The FCDO argued that disclosing the remaining withheld information, as opposed to the cumulative figures disclosed at the internal review stage, would be likely to have a damaging effect on the UK's reputation as a trustworthy and dependable international partner. As a direct consequence this would reduce missions' confidence in the UK's willingness and ability to protect sensitive bilateral communications. The FCDO noted that it had consulted the Metropolitan Police Service, which shared the FCDO's view that release of some of the data requested could be harmful.

The complainant's position

16. In his request for an internal review, the complainant questioned the FCDO's reliance on section 27 to withhold all of the information falling within the scope of his request and disputed that disclosure of it would lead to the prejudice envisaged. In support of his position the complainant disputed the FCDO's view that disclosure would lead to individuals being identified. The complainant also argued that the nature of prejudice envisaged was very highly unlikely to occur if one looked at events in world history. The complainant suggested that over the years far more damaging information has been leaked by way of diplomatic cables through Wikileaks and other such leaks. He argued that none of these internationally known incidents have had any significant impact on the diplomatic system which continues to operate. Moreover, the complainant argued that the importance of having foreign embassies and diplomats in other countries is so great that it would not be impacted by release of the requested information and that history showed that international relations are very resilient. In comparison to

such events, the complainant argued that release of the requested information would be insignificant.

17. Following the completion of the internal review, the complainant provided the Commissioner with the following submissions in respect of section 27:
18. The complainant maintained that releasing anonymised details of waivers of immunity from foreign states sought by the FCDO, or of instances where the FCDO asked for the withdrawal of individuals / declared them *personae non gratae* following refusals from sending states to waive immunity, would not lead to a breakdown of the diplomatic system and damage international relations. In support of this position the complainant cited the array of serious allegations levelled by the British government at foreign states in recent years, including allegations of state sanctioned murder made against Russia and Saudi Arabia and more recently spying on individuals based in the UK levelled at the United Arab Emirates. The complainant argued that these are some of the most serious allegations possible against a foreign state that have been made public and none of these have led to the breakdown of the diplomatic system or international relations generally or specifically in connection with these example countries. Rather, the diplomatic system has continued and so have relations with these and other countries with their embassies operating within the UK. Moreover, the complainant had argued that historically the British government had made very serious allegations about other countries, such as war crimes and state sponsored assassinations, and, despite this it continued to maintain diplomatic and international relations with them.
19. The complainant argued that in order to rely on sections 27(1)(a) and (c) the FCDO needed to advance at least some evidence of how the release of the anonymised details of these cases would lead to a breakdown of the diplomatic system and damage international relations, rather than just an assumption that it is likely to be the result. In his view the FCDO had not given any evidence at all of how this would be the result, other than mere speculation, and he suggested that it appears to be just an attempt to withhold the details by using the exemptions in a blanket fashion to do this. The complainant suggested that it was unlikely that the withheld information would contain any more damaging accusations than those already highlighted by him, such as murder, war crimes and spying, which have previously been made public by the British government in relation to specific countries and which have not, as he argued above, led to the breakdown of the diplomatic system or seriously damaged international relations.
20. In light of the above, the complainant argued that the Commissioner should find that the details of which countries these requests and actions related to, with details (not containing personal information),

that outline why the requests were made or the action was taken and the circumstances that led to it, is not exempt on the basis of section 27.

21. The complainant emphasised that he had made it clear that he was content for individuals not to be identified and that the internal review did not fully address this point.

22. The complainant noted that the internal review stated that:

'Between January 2014 and March 2020, HMG sought 225 waivers of immunity from foreign states. 139 of these were requests for witness statements, which in some cases included requests for access to CCTV footage. 40 further requests were specifically for access to CCTV footage.'

23. The complainant suggested that this left 46 times when the waivers were sought that were still relevant to his request, and it was these instances which he wanted the FCDO to provide anonymised details as outlined in his submissions above.

24. The complainant also noted that the internal review stated that:

'In 92 cases waivers were granted. In 5 cases the requests for waivers were subsequently cancelled. In 64 cases the waivers were denied, and in 64 cases there have been no responses to the requests.'

25. The complainant argued that the FCDO should explain how the 46 cases of interest fit into these responses - i.e. of the 46 cases of interest, which and how many were granted (and any subsequently cancelled), denied or not responded to.

26. The complainant also noted that the internal review stated that:

'There were 15 instances in this period where the FCDO asked for the withdrawal of individuals / declared them personae non grata following refusals from sending States to waive immunity. It is the UK government's policy to seek the immediate withdrawal of a diplomat and their dependents (to declare them persona non grata) if the request for a waiver in cases of offences is denied.'

27. The complainant argued that he also wished the FCDO to provide anonymised details, as outlined above, to explain why the requests were made or the action was taken and the circumstances that led to it.

The Commissioner's position

28. In order for a prejudice based exemption, such as section 27, to be engaged the Commissioner believes 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.
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e., disclosure would be likely to result in prejudice or disclosure would result in prejudice. If the likelihood of prejudice occurring is one that is only hypothetical or remote the exemption will not be engaged.
29. 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'*.³

The Commissioner's position

30. With regard to the first criterion of the test set out above, the Commissioner accepts that the type of harm that the FCDO believes would be likely to occur if the information was disclosed is applicable to the interests protected by sections 27(1)(a) and (c) of FOIA.
31. With regard to the second criterion the Commissioner accepts the rationale of the FCDO's argument that if it disclosed information which allowed the specific waiver cases, and details of them, to be identified then this could harm the UK's relations with the states to which the individual cases relate to. This is on the basis that such states would expect communications about such matters to be treated in an appropriately confidential manner and the disclosure of such information could, as the FCDO suggests, erode the trust that other states have in the FCDO. The Commissioner therefore accepts that there is a causal relationship between the disclosure of the withheld information and prejudice occurring.

³ Campaign against Arms Trade v the Information Commissioner and Ministry of Defence EA/2007/0040 (26 August 2008)

32. Furthermore, in relation to the third criterion, the Commissioner is satisfied that the risk of prejudice occurring is one that is more than a hypothetical risk. He has reached this conclusion because in his view disclosure of the withheld information does pose a genuine risk of specific cases being identified and because the nature of the information held, especially in some cases, is particularly sensitive. This remains the case even if the information relating to identifiable individuals was not disclosed. Furthermore, the Commissioner is conscious that the withheld information relates to over 200 separate cases and as a result concerns a number of different states. In the Commissioner's view this increases the risk of prejudice occurring to the UK's relations with other states, and in turn increases the risk of prejudice occurring to the UK's ability to protect its interests abroad in relation to the states in question.
33. In reaching this finding the Commissioner has carefully considered the nature of the information contained in the annual Written Material Statement to which the FCDO referred (albeit indirectly) the complainant. Such statements specify the annual number of serious and significant offences allegedly committed by people entitled to diplomatic or international organisation-related immunity in the UK which the FCDO is aware of. This number is broken down by country and type of offence eg driving without insurance; country x two instances. The annual statements also explain that:
- 'We take all allegations of illegal activity seriously. When instances of alleged criminal conduct are brought to our attention by the police, we ask the relevant foreign government to waive diplomatic immunity where appropriate. For the most serious offences, and when a relevant waiver has not been granted, we seek the immediate withdrawal of the diplomat.'* (emphasis added)
34. The Commissioner therefore accepts that the FCDO proactively discloses information about the nature of serious and significant offences committed by diplomats. However, in his view such information is different in nature to the remaining information which seeks details about each actual case, including the specific actions taken by the FCDO and the actual outcome. For the reasons set out above, in the Commissioner's opinion disclosure of this additional, more detailed information, would be likely to prejudice the UK's relations with other states.
35. Furthermore, in reaching the conclusion that sections 27(1)(a) and (c) are engaged, the Commissioner appreciates the complainant's line of argument that information potentially far more damaging than the withheld information in this case has been released into the public domain and the system of international diplomacy continues to function. However, when assessing the prejudicial consequences of the availability of such information, the Commissioner considers it important to draw a

distinction between information being leaked into the public domain and information which a UK public authority has released under FOIA. In the former scenario the public authority in question is not liable for the decision to disclose information in question, whereas this is clearly not true in the latter scenario. Furthermore, the Commissioner acknowledges that it could be argued that more sensitive diplomatic material may have been disclosed - albeit leaked - over the years without the public being aware of any harmful consequences. Moreover, the Commissioner accepts the complainant's point that there are examples, both recently and historically, of the British government making statements or taking actions which have arguably made diplomatic relations more challenging. However, the Commissioner appreciates that it could be argued that such actions conform to diplomatic norms and are presumably taken in the national interest, even if they do cause challenges, and are aligned to government policy. This could not be said to be the case of the disputed withheld information was disclosed under FOIA.

36. However, in the context of section 27 of FOIA, and following the lead of the Tribunal quoted above, prejudice can be real and of substance if disclosure *'makes relations more difficult or calls for a particular damage limitation'*. As discussed above, the Commissioner is satisfied that this threshold is met in the context of this case.
37. Therefore, for the reasons discussed above, the Commissioner is satisfied that the withheld information is exempt from disclosure on the basis of sections 27(1)(a) and (c) of FOIA.

Public interest test

38. Section 27 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemptions contained at section 27(1) outweighs the public interest in disclosing the information.
39. The complainant argued that disclosure of the withheld information would provide the public with an insight into international relations, and more specifically, would inform the public interest about which states ignore the requests for waivers and do not cooperate with the British government.
40. The FCDO acknowledged that releasing information on this issue would increase public knowledge about the UK's international relations and the actions of foreign missions within the UK.
41. However, it also argued that section 27(1) recognises that the effective conduct of international relations depends on maintaining trust and confidence between governments. The disclosure of information detailing the UK's relationship with foreign governments would

potentially damage the UK's bilateral relationships. For this reason, the FCDO concluded that the public interest in maintaining the exemption outweighs the public interest in disclosure.

42. The Commissioner agrees that there is a public interest in the disclosure of information which would increase the public's understanding of the UK's relations with foreign missions within the UK, particular in relation to circumstances in which diplomats from those missions are suspected to have broken the law. Disclosure of the withheld information would go some way to meeting this public interest beyond what is already published.
43. However, the Commissioner also accepts that there is a significant public interest in the UK being able to maintain effective relations with other states, particularly so in the context of the UK's relations with diplomatic staff in missions in the UK. Furthermore, in considering the balance of the public interest the Commissioner is conscious that disclosure of the withheld information risks causing prejudice not simply to the UK's relations with one state, but numerous states. In light of this, and on balance, the Commissioner considers that the public interest favours maintaining the exemptions contained at sections 27(1)(a) and (c) of FOIA.
44. In light of this conclusion the Commissioner has not considered the FCDO's reliance on sections 40(2) and 41(1) of FOIA.

Section 10 – time taken to disclose information

45. Section 1(1) of FOIA provides the right of access to information under FOIA.
46. Section 10(1) of FOIA requires a public authority to comply with section 1(1) promptly, and in any event no later than 20 working days following the date it receives the request.
47. In the circumstances of this case the FCO did respond to the request within 20 working days, ie its response of 2 April 2020 in which it sought to withhold all of the requested information. However, there was a significant delay in the complainant being provided with the information which the FCDO subsequently determined could be disclosed at the internal review stage. This late disclosure of information constitutes a breach of section 10(1) of FOIA.

Other matters

48. FOIA does not impose a statutory time limit within which internal reviews must be completed, albeit that the section 45 Code of Practice⁴ 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.⁵
49. As is noted in the chronology of the request above, the complainant submitted his request for an internal review on 25 April 2020 but the FCDO did not inform him of the outcome of the internal review until 10 August 2021, some 328 working days later.
50. As part of his initial investigation letter to the FCDO the Commissioner asked it to explain why (at that point) the internal review had not been completed. In response the FCDO explained that work had started on the internal review in April 2020, but the examination of the data and compilation of figures took time to prepare. The FCDO noted that internal review had now been completed.
51. The Commissioner accepts that this could be classed as a complicated case, and may therefore merit the FCDO taking 40 working days to complete the internal review. He also accepts that in the early stages of the COVID-19 pandemic public authorities were having to manage their responses to the crisis, as well as adjust their ways of working to meet their information rights obligations.
52. However, neither of these factors can justify the FCDO taking the grossly excessive amount of time it did to complete the internal review in this case. The Commissioner has logged the delays in this case as part of his practice of recording the performance of public authorities and wishes to make it clear that he does not expect such a lengthy delay to be repeated.

⁴ <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

⁵ <https://ico.org.uk/for-organisations/request-handling-freedom-of-information/#internal>

Right of appeal

53. 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

54. 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.
55. 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

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