

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 September 2022

Public Authority: Ministry of Defence

Address: Whitehall
London
SW1A 2HB

Decision (including any steps ordered)

1. The complainant submitted a request to the Ministry of Defence (MOD) asking to know what options were being considered to repay the debt the International Military Services, a defunct arms sales arm of the UK MOD, owed to the Ministry of Defence of Iran in relation to an order of tanks which was cancelled in the 1970s. The MOD 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 sections 27(1)(a) and (c) (international relations) and 35(1)(a) (formulation or development government policy) of FOIA.
2. The Commissioner's decision is that the withheld information is exempt from disclosure on the basis of sections 27(1)(a) and (c) of FOIA and that in all the circumstances of the case the public interest favours maintaining the exemptions.
3. No steps are required.

Request and response

4. The complainant contacted the MOD on 24 November 2021 and asked it to respond to a request he had initially submitted to the Foreign, Commonwealth and Development Office. The request was as follows:

 'In your letter reference TO2021/28429 you stated that you continue to explore options to resolve the 40 year old IMS debt and will not commit further as discussions are ongoing. I ask what options remain on the table?.'¹
5. The MOD responded on 26 November 2021 and confirmed that it held some information falling within the scope of the request but it considered this to be exempt from disclosure on the basis of section 27 (international relations) of FOIA.
6. The complainant contacted the MOD on 28 November 2021 and asked it to conduct an internal review of this refusal.
7. The MOD informed him of the outcome of the internal review on 16 December 2021. The review concluded that the withheld information was exempt from disclosure on the basis of sections 27(1)(a) and (c) and section 35(1)(a) (formulation or development of government policy) of FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 17 December 2021 in order to complain about the MOD's decision to withhold the information falling within the scope of his request.

¹ This refers to a debt that International Military Services (IMS), a defunct arms sales arm of the UK Ministry of Defence, owed to the Ministry of Defence of Iran in relation to an order of tanks which was cancelled in the 1970s. The UK government acknowledged that the debt was due but arrangements in respect of how the debt could be settled were ongoing at the time of the request. In March 2022 the Foreign Secretary announced 'that we have found a way to make the payment in full compliance with UK and international sanctions and with global counter-terrorism financing and anti-money laundering regulations. A sum of £393.8 million has now been paid, which will be available only for humanitarian purposes. The terms remain confidential to both parties.' <https://hansard.parliament.uk/Commons/2022-03-16/debates/858B7797-9F75-439F-8268-A33D22421D6B/IranDetainees>

9. The Commissioner's role in assessing the application of any exemptions is limited to considering the circumstances at the point the public authority responded to the request, assuming such a response was issued inline with the statutory requirements of FOIA. In this case the Commissioner's assessment of the validity of the exemptions cited by the MOD therefore focuses on the date of the refusal notice, 26 November 2021.

Reasons for decision

Section 27 – international relations

10. 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 MOD's position

11. The MOD explained that at the time of the request the resolution of the IMS debt remained the subject of discussions between interested international parties. It argued that if details of those discussions were released this would (as opposed to only being 'likely to') prejudice the UK's relations with them. The MOD argued that the causal link between the information being released and the risk of the harm occurring to international relations was real and not imagined.
12. In support of this position the MOD explained that release of the withheld information would undermine the UK's relations with interested parties bearing in mind that effective international relations need to be based upon confidence and trust. The MOD noted that the withheld information consists of a variety of options which rely on the support and trust of international partners. The MOD argued that if this information was released at this early stage, the UK could lose the trust and support of those partners in this matter, and wider international relations. In turn, the MOD argued that disclosure would also prejudice the UK's protection of its interests abroad because the withheld information reveals aspects of the UK government's strategy and methodology when handling matters of complex diplomacy which would impact on the UK's interests abroad.

The complainant's position

13. The complainant disputed the MOD's position that disclosure of the withheld information would be prejudicial. He emphasised that he had not asked for any wider details about the options that remain on the table for settling the debt, rather he had simply asked what the options were that remained. The complainant noted that the UK government has accepted that the debt must be repaid so its overall policy is clear in this respect. The complainant explained that as far as he was aware, all the available options are in the public domain so revealing which ones are still under consideration cannot be controversial. Therefore, he did not accept that revealing them would prejudice relations between the UK and any other state.

The Commissioner's position

14. 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. The higher level 'would' means the possible harm caused by release is more probable than not. In other words, there is a more than 50% chance of the disclosure causing the prejudice, even though it is not absolutely certain that it would do so. Case law has determined that the lower level of prejudice 'would be likely to' means that the chance of harm being suffered is more than a hypothetical or remote possibility. That is to say, there must still be a real and significant risk even if it is less likely.

15. 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

16. With regard to the first criterion of the test set out above, the Commissioner accepts that the type of harm that the MOD 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.
17. With regard to the second criterion, the Commissioner notes the MOD's position that effective international relations depend on maintaining the trust and confidence of other states and international partners. In the circumstances of this case the Commissioner is conscious of the history of the IMS debt, the impact that this has had on UK-Iran relations, and the sensitive nature of issues associated with the UK's repayment of it. That is say, that the UK accepted that it needed to repay the debt but that it needed to determine a means of doing so that remained within UK and international sanctions. Taking into account this context, the Commissioner is satisfied that there is a causal link between disclosure of the withheld information and harm occurring to interests identified by the MOD.
18. Furthermore, in respect of the third criterion, the Commissioner is satisfied that that the risk of prejudice occurring is one that is clearly more than a hypothetical and therefore the third criterion is met. In reaching this conclusion, the Commissioner acknowledges the complainant's point that he has only sought the options which were being considered but no further details about them. However, in the Commissioner's view for the reasons set out above, he is satisfied that disclosure of even simply those options at the time of the request would have harmed the UK's relations with other states and international partners and in turn the interests of the UK abroad. Moreover, the Commissioner's understanding is that the list of all possible options for repayment of the debt was not in the public domain at the time of the request. In addition, the Commissioner accepts the MOD's position that disclosure of the withheld information risks not only directly impacting on the UK's international relations in respect of the IMS debt, but also risks having a wider impact on the UK's relations as it would undermine, on a broader basis, the trust and confidence international partners have in the UK.

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

19. Sections 27(1)(a) and (c) are therefore engaged and taking into account the above the Commissioner is satisfied that the higher threshold of 'would prejudice' is met.

Public interest test

20. 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 exemption contained at sections 27(1)(a) and (c) outweigh the public interest in disclosing the information.

Public interest in disclosing the information

21. The complainant argued that the public interest favoured disclosure of the withheld information for the following reasons:
22. Firstly, there was a general public interest in disclosure if it is advanced by the specific information in question, particularly if some options currently in the public domain can be ruled out.
23. Secondly, greater transparency makes government more accountable to the electorate and increases trust.
24. Thirdly, the public interest in being able to assess the quality of advice being given to ministers and subsequent decision making, particularly if some extreme options are still on the table.
25. Fourthly, the greater the impact on the country or on public spending the greater the public interest may be in the decision-making process being transparent.
26. Fifthly, the complainant argued that that the public interest in freeing Nazanin Zaghari-Ratcliffe was overwhelming given that around four million people have signed Richard Ratcliffe's petition to this effect.³ The complainant also noted that the Prime Minister and other ministers have been compelled to meet Mr Ratcliffe on several occasions and they have told him that the debt must be paid, but it had not happened yet with no explanation given.⁴ The complainant noted that the correspondence he had received from the FCDO stated that it was unhelpful to connect wider bilateral issues with Mrs Zaghari-Ratcliffe's release but he suggested that such a comment was unhelpful given that Britain has a

³ The request was submitted before the release of Mrs Zaghari-Ratcliffe.

⁴ These points relate to the circumstances at the time of the request prior to the IMS debt being settled.

legal obligation to pay the debt and the humanitarian consequences of not doing so clearly outweighs any diplomatic considerations.

27. For its part, the MOD acknowledged that release of information relating to the IMS debt would demonstrate its commitment to transparency and openness. Furthermore, it accepted that release of information would also provide a better understanding, accountability and justification about the settlement of the debt and the options that have been considered to resolve it. The MOD also acknowledged that release would provide a greater understanding of the international relationship between the UK and interested international parties and nations.

Public interest in maintaining the exemptions

28. However, the MOD argued that there was stronger public interest in maintaining the exemptions given the harm that would occur to the UK's international relations with other states both in respect of this issue and in relation to other matters. The MOD also emphasised that the issues regarding the settlement of the IMS debt remained outstanding at the time of the request.

Balance of the public interest test arguments

29. The Commissioner acknowledges that there is significant public interest in the disclosure of information which would inform the public about the steps that were being taken by the UK to settle the IMS debt. Disclosure of the withheld information at the time of the request would have directly met that interest. However, the Commissioner is conscious of the sensitive nature of the discussions between the UK and others regarding this issue, and in particular the fact that the time of the request the matter had yet to be resolved. The Commissioner also notes that disclosure of the information risked not only disrupting the settlement of this particular issue but also the UK's relations, and its ability to protect its interests, in relation to other diplomatic matters in the future. Taking these reasons into account the Commissioner is satisfied that the public interest favours maintaining the exemptions contained at sections 27(1)(a) and (c) of FOIA.
30. In light of this decision, the Commissioner has not considered the MOD's reliance on section 35(1)(a) of FOIA.

Right of appeal

31. 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

32. 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.
33. 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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