

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 March 2023

Public Authority: Foreign, Commonwealth & Development Office
Address: King Charles Street
London
SW1A 2AH

Decision (including any steps ordered)

1. The complainant requested from the Foreign, Commonwealth & Development Office (the FCDO) information regarding surveillance on residents, tenants or visitors to the Ecuadorean embassy in London. The FCDO refused to confirm or deny whether it held information within the scope of the request and cited sections 23(5) (Security bodies), 24(2) (National security) and 27(4) (International relations) of FOIA.
2. The Commissioner's decision is that the FCDO is entitled to rely on these exemptions as its basis for refusing to confirm or deny whether it holds the requested information. However, the FCDO breached section 10 (time limits for compliance) of FOIA by not responding to the request within 20 working days.
3. The Commissioner does not require the FCDO to take any steps as a result of this decision.

Request and response

4. On 4 October 2022 the complainant wrote to the FCDO and requested information in the following terms:

"I was seeking any records in your custody and or any records your offices might have reviewed and documented of surveillance being done on any residents, tenants, or visitors to the Ecuadorean embassy in London for the timeframe 2016 – April 2019."

5. On 11 November 2022 the FCDO provided its response. It refused to confirm or deny whether it holds information within the scope of the request and relied on sections 23(5) (Security bodies), 24(2) (National security) and 27(4) (International relations) of FOIA.
6. On 15 November 2022 the complainant asked for an internal review and on 17 February 2023 the FCDO provided its review response. The FCDO maintained its original position.

Reasons for decision

7. This reasoning covers whether the FCDO is entitled to rely on sections 23(5), 24(2) and 27(4) of FOIA to refuse to confirm or deny whether the requested information is held.
8. The FCDO has not revealed to the Commissioner whether it does or does not hold the requested information, nor did the Commissioner ask the FCDO to do so. Therefore, nothing in this decision notice should be taken as inferring that the information is, or is not held.

Section 23(5) – Security bodies

9. Section 23(5) of FOIA provides an exemption from the duty to confirm or deny whether information is held if doing so would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied by, or relates to, any of the bodies specified in section 23(3). The list includes the Security Service, the Secret Intelligence Service and other similar bodies. This is a class-based exemption, which means if confirmation or denial would have the result described in section 23(5) of FOIA, the exemption is engaged.
10. The FCDO stated it can neither confirm nor deny it holds the information requested as to do so would, on the balance of probabilities, reveal information about one or more of the security bodies listed in section 23(3) of the FOIA. The FCDO said this is because confirmation or denial would likely reveal information about intelligence operations.

Section 24(2) – Safeguarding national security

11. Section 24(2) of FOIA provides an exemption from the duty to confirm or deny whether information is held, where the exemption is required for the purposes of safeguarding national security.
12. The FCDO said it can neither confirm nor deny it holds information in scope of the request, as to do so would likely threaten UK security and intelligence agency operations that contribute to UK national security. In its submission to the Commissioner, the FCDO explained in further detail and asked the Commissioner not to replicate its rationale within the decision notice.

Public interest test

13. Section 24 is a qualified exemption. This means that even where its provisions are engaged, the Commissioner must consider whether the public interest in maintaining the exemption outweighs the public interest in confirming or denying the information is held.
14. The complainant disputes the exemptions which the FCDO cited. He believes the public interest in disclosure outweighs any potential harm that may result from releasing the information. The complainant highlighted to the Commissioner “that the actions and/or subject matter in his information request occurred during a time period when the United Kingdom was a member state of the European Union, and therefore, EU human rights laws would also apply.” The complainant referred the Commissioner to “the broader legal framework in which the FCDO operates, including its obligations under EU law and the United Nations treaties to which the UK is a signatory.”
15. The Commissioner notes that the FCDO had not provided its arguments in favour of confirming or denying whether information is held, and only provided a brief response in favour of maintaining this exemption. However, the Commissioner recognises from its reasoning, the damage would be significant and wide ranging to national security should the FCDO confirm or deny that the information is held.

Section 27(4) – International relations

16. Section 27(4) of FOIA provides an exemption from complying with section 1(1)(a) of FOIA if to do so would or would be likely to prejudice the interests protected by section 27(1), or would involve the disclosure of confidential information protected by section 27(2).

17. The FCDO explained to the complainant that confirmation or denial of the information requested, would likely prejudice relations between the United Kingdom and the Republic of Ecuador. The FCDO referred to the ICO guidance regarding this exemption, and said 'neither confirm nor deny responses' must be applied consistently across similar requests, regardless of whether the requested information is held. The reason is, if an identical or similar type of request were made on multiple occasions, a change in response could be implied to reveal whether or not relevant information is held.

Public interest test

18. Section 27 is also a qualified exemption. The FCDO stated that irrespective of what information may or may not be held, confirmation would provide openness, transparency and public accountability.
19. However, the FCDO determined that in all the circumstances of this case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in confirming whether the FCDO holds the information. It said, to provide the reasons for this, would involve the disclosure of information which would itself be exempt information. The FCDO added, this should not be taken as evidence that any information that would meet the request exists or does not exist.
20. In its submission to the Commissioner, the FCDO stated its reasons for relying on this exemption and why the balance of the public interest favours maintaining the exemption under section 27(4) of FOIA. The FCDO explained that the Government works with other states to promote UK interests in trade, defence, the environment, human rights, and to combat terrorism and international crime. It said, if the FCDO was to confirm or deny information in scope of the request was held, this would likely undermine the UK's bilateral relationship with Ecuador, and its reputation amongst other countries as a reliable bilateral and multilateral partner.
21. The Commissioner accepts the FCDO's rationale for not confirming or denying whether it holds the requested information, and agrees it is not in the public interest to do so. He considers that to do so, could reveal information that any Embassy, or similar organisation, would expect to be kept confidential, i.e. whether or not FCDO holds records of surveillance relating to the Ecuadorean Embassy in London. The Commissioner recognises to confirm or deny whether the requested information is held, would likely undermine the UK's relationship with Ecuador, and could impact on wider relationships with other countries. This is clearly, not in the public interest.

22. The Commissioner is satisfied the balance of the public interest favours maintaining section 27(4) of FOIA.

The Commissioner's position

23. The Commissioner is satisfied each exemption is engaged and where it is qualified, the public interest favours maintaining the exemption. He therefore considers, the FCDO is entitled to rely on the exemptions cited to refuse to confirm or deny whether the requested information is held.

Procedural matters

Sections 10 – time limits for compliance

24. Section 10(1) of FOIA says that a public authority should comply with section 1(1) promptly and no later than the twentieth working day following the date of receipt of the request.
25. In this case, the FCDO provided its response to the request of 4 October 2022 on 11 November 2022, which is outside the 20 working day time limit. Therefore, the FCDO breached section 10(1) of FOIA.

Other matters

26. The Commissioner notes the time taken for the FCDO to respond to the complainant's internal review request of 15 November 2022 exceeded 40 working days. Although there is no statutory time limit for carrying out a review, it is best practice¹ to do so within 20 working days, or in exceptional circumstances, 40 working days.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

Right of appeal

27. 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

28. 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.
29. 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

Alice Gradwell
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