

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 November 2018

Public Authority: Foreign and Commonwealth Office

Address: King Charles Street
London SW1A 2AH

Decision (including any steps ordered)

1. The complainant has requested information relating to the so-called "Chennai Six". The Foreign and Commonwealth Office ("FCO") refused to provide it citing provisions of section 27 (prejudice to international relations) and section 40 (unfair disclosure of personal data) as its basis for doing so. It upheld this at internal review.
2. The Commissioner's decision is that the FCO is entitled to rely on section 40 and section 27 as its basis for withholding the information.
3. No steps are required.

Request and response

4. On 9 October 2017 the complainant made the following request for information under the FOIA for:

"Please provide copies of all briefings for ministers on the case of six British men (Nick Dunn, Billy Irving, Ray Tindall, Paul Towers, John Armstrong and Nicholas Simpson) jailed in India over illegal weapons charges.

I look forward to receiving the information within the statutory time limit.

5. On 1 December 2017, the FCO responded. It refused to provide the requested information. It cited provisions of the following exemptions as its basis for doing so:

- section 27 (international relations)
- section 40 (unfair disclosure of personal data)

6. The complainant requested an internal review on 1 December 2017. On 11 December 2017, he sent the FCO a link to an online article (<https://www.thesun.co.uk/news/5105122/chennai-six-johnson-hammond-foreign-office-indian-prison/>) and said this added weight to the public interest in disclosure.
7. The FCO sent him the outcome of its internal review on 5 January 2018 – it had written to him on 3 January 2018 to apologise for the fact that it was not able to respond to him by that date.
8. In its letter of internal review, it upheld its original position and drew the complainant's attention to a statement by the Foreign Secretary published on the .gov.uk website regarding the release of the men. ¹

Scope of the case

9. The complainant contacted the Commissioner on 5 January 2018 to complain about the way his request for information had been handled.
10. The Commissioner has considered whether the FCO is entitled to rely on sections 27 and 40 as its basis for withholding the requested information. In the course of correspondence with the Commissioner, the FCO explained it was also relying on section 27(1)(c) and section 27(2) – provisions it had not previously cited as part of its refusal correspondence with the complainant. As part of her consideration of section 27, the Commissioner has therefore considered whether FCO is entitled to rely on section 27(1)(a), (c) and (d) and section 27(2).
11. The FCO also raised reliance on section 38(1)(a) – endangering health and safety. It applied this exemption to all the withheld information. The Commissioner only proposes to consider this exemption if she is not satisfied that the other exemptions can be relied upon. Section 38(1)(a) applies where disclosure would, or would be likely to “endanger the physical or mental health of any individual”. In the Commissioner's view, the use of the term “endanger” sets a high threshold in order to be engaged and is not interchangeable with the term more commonly found in FOIA, namely, “prejudice”.

Background

¹ <https://www.gov.uk/government/news/foreign-secretary-welcomes-news-that-chennai-six-can-leave-india>.

12. The Chennai Six was a name given to six British men who were imprisoned following charges made against them by Indian authorities related to illegal weapons. They were working as guards on a vessel which was allegedly in Indian waters without the necessary permits required for possessing certain firearms.
13. Media coverage of their predicament includes the BBC News website link found at Note 2 below.² As seen at Note 1, the men were subsequently released after a period of imprisonment.

Reasons for decision

14. The Commissioner has first considered section 40. This has been applied to the majority of the information.
15. Section 40 applies to personal data. At the time of the request (and the time for compliance with the request) the Data Protection Act 1998 ("DPA98") was still in force and applicable to the processing of personal data. This has since been superseded by the implementation of the General Data Protection Regulation ("GDPR"). However, for the purpose of considering the application of section 40, the Commissioner has considered whether or not the personal data in question can be disclosed without contravening the requirements of DPA98.
16. Personal data is information about an identifiable living individual that is biographically significant about them. There are additional rules in DPA98 for processing personal data where it is "sensitive personal data" and this includes information about the commission or alleged commission of any offence by that individual or information about their health. The Commissioner is satisfied that the majority of the withheld information is personal data and includes sensitive personal data about living identifiable individuals. In reaching this view, the Commissioner has read the withheld information and she has had regard for her own guidance.³
17. As noted above, the applicable data protection legislation is DPA98 and therefore the relevant FOIA provisions are as follows:
18. Section 40(2) provides that –

² <https://www.bbc.co.uk/news/uk-england-37802365>

³ <https://ico.org.uk/media/for-organisations/documents/1213/personal-information-section-40-and-regulation-13-foia-and-eir-guidance.pdf>

"Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied."

Section 40(3) provides that –

"The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - 1. any of the data protection principles, or
 - 2. section 10 of that Act (right to prevent processing likely to cause damage or distress), and
 - (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded."
20. The first principle of DPA98 is the most relevant. This requires personal data to be processed fairly and lawfully and in accordance with certain conditions set out in Schedule 6 of DPA98. There are additional requirements for processing where the personal data is sensitive personal data. This is information about, for example, a person's health or whether they are alleged to have committed any offence.
21. In determining whether it would breach the first principle of the DPA98 to disclose the personal data in question, the Commissioner has considered the legitimate interests of the individuals whose personal data it is. She has also considered whether, despite that legitimate interest, there is a more compelling legitimate interest in making that personal data public and whether disclosure is necessary to serve that more compelling interest.
22. When considering this point, she has looked at the reasonable expectations of the individuals and whether the information relates to their public or private role. As above, she has also had regard to her own guidance on section 40.

23. In her view, it would be wholly outside the reasonable expectations of the individuals in question to disclose their personal data. As regards any sensitive personal data, the Commissioner can see no legitimate basis for processing it in the manner requested – that is, disclosing it to the public under FOIA in response to this request. Leaving aside consideration of disclosing sensitive personal data, the Commissioner acknowledges a legitimate interest in transparency about how the matter was handled at ministerial level including how ministers were briefed. This could be served by disclosure of any non-sensitive personal data in the requested information.
24. However, the Commissioner is satisfied that there is a much more compelling and wholly legitimate interest in not disclosing the personal data caught by the scope of the request.
25. If the subjects of that personal data (who are not officials) wish to make public any information related to this topic, that is a matter for them.
26. For completeness, the Commissioner notes that where any officials' names appear in the documentation, those officials are sufficiently junior to warrant a greater level of protection of their personal data. This, in the Commissioner's view, is more compelling in the circumstances of this case than a legitimate interest in transparency.
27. In conclusion, the information to which the FCO has applied section 40 has, in the Commissioner's view, been properly exempted under that exemption. Where the personal data in question is sensitive personal data, the Commissioner can see no lawful basis for processing that information. Where the personal data is not sensitive personal data, the Commissioner acknowledges a legitimate interest in transparency on this topic. However, she does not agree that this outweighs the legitimate interests of the individuals whose personal data it is and who cannot reasonably expect their personal data would be disclosed under FOIA.
28. Where the withheld information is not personal data, the FCO has relied upon section 27 as its basis for withholding it.
29. Section 27 of FOIA states:
 - “(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,
 - (b) relations between the United Kingdom and any international organisation or international court,
 - (c) the interests of the United Kingdom abroad,
 - (d) the promotion or protection by the United Kingdom of its interests abroad.

(2) Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.”

30. 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 on 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.
31. The Commissioner is satisfied that the information identified falls to be considered within the section 27 exemption. The information described in the request relates to a legal situation in a foreign country involving UK citizens and the activities of UK officials in respect of that situation.
32. The Commissioner notes that this exemption does not necessarily focus on the importance, subject or content of the requested information, but on whether UK interests abroad, or the international relations of the UK would be prejudiced through the disclosure of the information. Thus section 27(1) focusses on the effects of the disclosure.
33. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the FCO clearly relates to the interests which the exemption contained at section 27(1)(a),(c) and (d) is designed to protect. With regard to the second criterion, having examined the withheld information, and taken into account the FCO's submissions to her, the Commissioner is satisfied that there is a causal link between disclosure of this information and prejudice occurring to the UK's international relations. Furthermore, she is satisfied that the resultant prejudice would be real and of substance with more than a hypothetical risk of prejudice occurring which therefore meets the third criteria.
34. Section 27(2) is not subject to a test of prejudice but applies only if the requested information is in fact confidential. The FCO has not clearly

identified which information this has been applied to. It has made reference in general terms to this provision and its applicability to the withheld information but the Commissioner does not find this particularly clear.

35. The FCO has argued that disclosure of that information to which provisions of section 27(1) have been applied and which are not exempt under section 40 would reveal UK Government strategy in dealing with consular cases in a manner which would be prejudicial to its conduct of international relations. In particular, it would be likely to prejudice its relations with other countries and jurisdictions and undermine UK interests abroad. It explained this with specific reference to the withheld information.
36. The complainant has argued that there is no evidence of likely prejudice to international relations. The Commissioner would disagree but recognises that the complainant does not have the benefit of access to the withheld information which would allow him to factor in its detail when reaching a view on the likelihood of prejudice.
37. The Commissioner has concluded that the information in question engages section 27(1)(a), (c) and (d). In reaching this view, she has had regard for the information itself and recognises that disclosure would be likely to reveal UK strategy in dealing with consular cases such as the "Chennai Six". This would be likely to undermine UK relations with other countries and jurisdictions in that it would make it more difficult for UK officials to discuss consular issues amongst themselves or with foreign officials. It would also make it more difficult to prepare strategies for dealing with consular cases such as the "Chennai Six" thus undermining the protection of UK interests abroad.
38. The Commissioner has not accepted the FCO's reliance on section 27(2) because the FCO has not explained clearly which information it has been applied to. In any event, she is satisfied that requested information which is not exempt under section 40, is exempt under provisions of section 27(1).
39. That said, section 27 is subject to a balance of public interest test. The FCO can only rely on section 27 as its basis for withholding information if the public interest in maintaining that exemption outweighs the public interest in disclosure.

Public interest in favour of disclosure

40. The complainant argued that there is "a compelling public interest in disclosure of information showing what ministers were told about the case back then and why it has taken four years for the men to be released. Clearly, there is a legitimate and significant public interest in disclosure of information which is capable of enabling pertinent

questions to be asked of the Government's actions or lack of in this case. Non-disclosure only leads to suspicions that the FCO has something to hide. Transparency, on the other hand, is capable of demonstrating how seriously, or otherwise, officials took this case and what was done about it. The public must be able to scrutinise the actions of officials and ministers and ask pertinent questions about their actions".

41. The complainant also drew attention to reported comments made by one of the six men which criticised the government's handling of his prolonged incarceration.

42. The FCO recognised a public interest in disclosure. It said:

"The FCO understands that there is a public interest in openness and transparency in order to allow the public to understand actions and decisions that the government takes on its behalf. In the context of this request, disclosure of the information that has been withheld on the basis of section 27(1) of FOIA would provide the public with an insight into the UK's interactions with a range of international partners and disclosure could provide the public with a better understanding of the UK's response to the Chennai Six".

Public interest in maintaining the exemption

43. The complainant did not put forward any submissions on this point nor did the Commissioner require him to.

44. The FCO argued that the public interest in avoiding the prejudice it had described was more compelling than the public interest in disclosure that it had acknowledged. It explained the importance of confidentiality of and confidence in its consular activities and why this added weight to the public interest in maintaining the exemption.

Balance of public interest test

45. The Commissioner recognises that there has been considerable controversy around the incarceration and eventual release of the Chennai Six. Disclosure would increase the public's understanding of these events and provide useful detail for any debate into how the UK government handles or should handle similar situations or consular cases in general. The Commissioner recognises the compelling public interest in such disclosure.

46. However, the Commissioner thinks that the public interest in avoiding likely prejudice to international relations by revealing its strategy in the conduct of a high profile consular case is stronger. Consular cases are, by their nature, very sensitive and involve careful bespoke handling. The Commissioner recognises that the passage of time may decrease

the strength of this argument in some cases but she does not consider that this is applicable here.

47. In conclusion, the Commissioner agrees that any of the requested information which is not exempt under section 40, is exempt under section 27(1). For the reasons outlined above, she has also decided that the public interest in maintaining this exemption, outweighs the public interest in disclosure.
48. The Commissioner did not go on to consider the application of section 38 because she is satisfied that the information is exempt under section 40 and section 27.

Right of appeal

49. 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@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

50. 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.
51. 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

**Gerrard Tracey
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