



Neutral citation number: [2024] UKFTT 00254 (GRC)

Case Reference: EA/2023/0011

**First-tier Tribunal
General Regulatory Chamber
Information Rights**

**Heard by: remotely by video conference
Heard on: 1 February 2024 (hearing)
15 February, 15 March 2024 (in chambers)**

Decision given on: 26 March 2024

Before

**TRIBUNAL JUDGE HAZEL OLIVER
TRIBUNAL MEMBER JO MURPHY
TRIBUNAL MEMBER KERRY PEPPERELL**

Between

NGO MONITOR

Appellant

and

**(1) THE INFORMATION COMMISSIONER
(2) THE FOREIGN, COMMONWEALTH AND DEVELOPMENT OFFICE**

Respondents

Representation:

For the Appellant: Jonathan Turner, counsel

For the Respondent: Did not attend

For the Second Respondent: Aaron Moss, counsel

Decision: The appeal is allowed in part.

Substituted Decision Notice:

FCDO was not entitled to withhold information under section 38 of the Freedom of information Act 2000 ("FOIA"). FCDO has withdrawn its reliance on this exemption.

FCDO was entitled to withhold all of the requested information under section 27(1)(a), 27(1)(c) and 27(1)(d) FOIA. As we have found that these exemptions apply to all of the withheld information, no further action is necessary.

The directions made under Rule 14(6) in relation to the content of the closed bundle and closed witness statement remain in force.

REASONS

Mode of hearing

1. The proceedings were held by video (CVP). All parties joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.

2. This appeal was joined to be heard together with appeal EA/2023/0189, Dr Colin Leci v Information Commissioner and the Foreign, Commonwealth and Development Office (the “Leci appeal”). We have issued separate decisions in both appeals, but have taken account of the entirety of the evidence and submissions from the combined hearing where relevant in reaching this decision.

Background to Appeal

3. This appeal is against a decision of the Information Commissioner (the “Commissioner”) dated 7 November 2022 (IC-127531-F6J1, the “Decision Notice”). The appeal relates to the application of the Freedom of Information Act 2000 (“FOIA”). It concerns information requested from the Foreign, Commonwealth and Development Office (“FCDO”) about the details and funding amounts provided to a program of the Norwegian Refugee Council in occupied Palestinian territory for the years 2018-2020.

4. On 25 March 2021, the Appellant wrote to FCDO and requested the following information (the “Request”):

“Details and funding amounts of Foreign, Commonwealth & Development Office funding to the: Information Counselling and Legal Assistance (ICLA) program of the Norwegian refugee council in occupied Palestinian territory for the years 2018-2020.

Specifically, I am requesting:

- 1) Amount of funding allocated by the FCDCO (FCO and DFID) to the Norwegian Refugee Council.*
- 2) Names of subcontractors receiving FCDCO funding for this project.*
- 3) An explanation as to why this project and funding does not appear on the website <https://devtracker.fcdo.gov.uk/>”*

5. FCDO responded to the Request on 26 April 2021 and confirmed that it held information falling within the request but that it needed further time to consider the public interest tests. FCDO provided a substantive response on 23 June 2021. In relation to questions 1 and 2 FCDO explained that it considered such information to be exempt from disclosure on the basis of sections 27(1)(c) and (d) and section 38(1)(a) of FOIA and that the public interest favoured maintaining the exemptions. In relation to question 3, FCDO provided a link for the “CSSF MEPP programme” that does appear on “devtracker”.

6. The Appellant requested an internal review on 7 July 2021 and the FCDO provided an internal review on 27 August 2021. FCDO provided the details of amounts of funding it had provided to the Norwegian Refugee Council ICLA project from 2018-2020, broken down by financial year. The FCDO explained that the remaining information sought by the request was exempt on the basis of sections 38(1)(a) and (b) of FOIA. The review outcome also stated that, *“I can also confirm that Section 27 (International relations) no longer applies to any of the information.”*

7. The Appellant complained to the Commissioner on 5 September 2021 about FCDO’s decision to withhold the names of subcontractors receiving funding under question 2 of the Request. The Commissioner decided that this information is exempt from disclosure on the basis of sections 38(1)(a) and (b) and that in all the circumstances of the case the public interest favours maintaining the exemptions.

The Appeal and Responses

8. The Appellant appealed on 4 December 2022. The grounds of appeal are:

- a. Information provided by the FCDO to the Commissioner and relied on in his decision was based on input from the Norwegian Refugee Council (“NRC”), which was likely to be unreliable and self-serving. In the light of this, the Commissioner should have treated all the information provided by the FCDO with scepticism, particularly as the Appellant had little opportunity to challenge it.
- b. Many Israeli and Palestinian NGOs operating in Jerusalem and Area C of the OPTs have public profiles, some Palestinian NGOs report the annual funding from the NRC, and numerous Israeli and Palestinian NGOs proudly acknowledge their activities with the NRC. Much of this publicly available information includes pictures of individuals. Additionally, the names of NGOs that collaborate and partner with the NRC are available on the United Nations Financial Tracking Service. This undermines the reliability of information provided of alleged danger to staff, and there is no reason to believe that the information sought would increase any alleged danger to staff of those NGOs that already have a public profile.
- c. Information provided by the FCDO to the Commissioner regarding Israeli law on disclosure is out of date, and an amendment to the law in 2016 requires Israeli NGOs to identify foreign government entities from which they receive funding is information published by the Charities Registrar.

9. The Commissioner’s response maintains that the Decision Notice was correct, and makes the following points in response to the grounds of appeal:

- a. Website articles/extracts provided do not refer to direct funding from NRC or funding indirectly from any particular state – there is no connection to a foreign state and in most cases no reference to funding from the NRC. A document described by the Appellant as “UNOCHA 2018” cannot be located and it is unclear who created it. The FCDO confirmed that whilst some NGOs are known to work in this field, others try to keep a lower profile.

- b. The English language document regarding the amendments to Israeli law provide little detail, and any disclosure under Israeli Law would be a separate disclosure than under FOIA, and therefore the questions for the Tribunal to determine remain the same.

10. FCDO was joined as a party to the proceedings. FCDO relies on the following prejudice-based exemptions for the withheld information:

- a. Section 27(1)(a) (relations between the United Kingdom and any other State), stating that the argument will be developed in closed witness evidence.
- b. Sections 27(1)(c) (the interests of the United Kingdom abroad) and (d) (the promotion or protection by the United Kingdom of its interests abroad), based on it being harder for the government to pursue its policy aims abroad, and the likelihood that downstream partners would cut ties and cease to accept funding.
- c. Section 43(2) (commercial interests), on the basis that FCDO's partners for the projects have expressed concern that identifying them as working with FCDO could be used by entities to maliciously limit future funding of projects, which would have a negative commercial impact on these partners.

11. FCDO withdrew its reliance on section 38 in an email to the Tribunal on 21 January 2024. It therefore relies on new exemptions which were not considered by the Commissioner. The Appellant objected to the FCDO's reliance on new exemptions. Judge Oliver decided not to make any case management orders which limit the ability of FCDO to rely on new exemptions in its response to the appeal in directions dated 27 January 2024. The Appellant has applied for permission to appeal this case management decision and the Judge is providing a response at the same time as this decision is issued.

12. The Appellant submitted a reply to both responses, and relevant points are addressed in the discussion below.

Applicable law

13. The relevant provisions of FOIA are as follows.

1 General right of access to information held by public authorities.

- (1) *Any person making a request for information to a public authority is entitled—*
 - (a) *to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
 - (b) *if that is the case, to have that information communicated to him.*

.....

2 Effect of the exemptions in Part II.

.....

- (2) *In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—*
 - (a) *the information is exempt information by virtue of a provision conferring absolute exemption, or*
 - (b) *in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.*

.....

27 International relations

(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, or*

(d) *the promotion or protection by the United Kingdom of its interests abroad.*

.....

(5) *In this section—*

.....

“State” includes the government of any State and any organ of its government, and references to a State other than the United Kingdom include references to any territory outside the United Kingdom.

.....

43 Commercial interests

.....

(2) *Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).*

.....

58 Determination of appeals

(1) *If on an appeal under section 57 the Tribunal considers—*

(a) *that the notice against which the appeal is brought is not in accordance with the law, or*

(b) *to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) *On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.*

14. Sections 27 and 43 are a qualified exemptions, meaning that the information should only be withheld if the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

15. The approach to be taken prejudice-based exemptions was set out in the First Tier Tribunal decision of **Hogan v Information Commissioner** [2011] 1 Info LR 588, as approved by the Court of Appeal in **Department for Work and Pensions v Information Commissioner** [2017] 1 WLR 1:

- a. Firstly the applicable interests within the relevant exemption must be identified.
- b. Secondly the nature of the prejudice being claimed must be considered. It is for the decision maker to show that there is some causal relationship between the potential disclosure and the prejudice, and that the prejudice is “real, actual or of substance”.
- c. Thirdly, the likelihood of occurrence of prejudice must be considered. Whether disclosure “would” cause prejudice is question of whether this is more likely than not. To meet the lower threshold of “would be likely to” cause prejudice, the degree of risk must be such that there is a “real and significant risk” of prejudice, or there “may very well” be prejudice, even if this falls short of being more probable than not.

16. In relation to the exemptions in section 27, the Upper Tribunal in ***All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner and Ministry of Defence*** [2011] UKUT 153 held that appropriate weight needs to be attached to evidence from the executive branch of government about the prejudice likely to be caused to particular relations by disclosure of particular information (see paragraph 56). This reflects the fact that the executive is likely to be better informed and have more experience in assessing the consequences of disclosure. Similarly, as set out by the Upper Tribunal in ***FCO v Information Commissioner and Plowden*** [2013] UKUT 275, the international relations exemption requires the Tribunal to rely more on the evidence than on its own experience when considering the executive's assessment of the balance of the public interest. This is because the executive has expertise in relation to foreign policy matters, and Tribunal members are unlikely to have had personal experience of the diplomatic consequences of disclosure. As confirmed in the recent Court of Appeal decision ***in Department for Business and Trade v Information Commissioner and Brendan Montague*** [2023] EWCA 1378 (paragraph 97), this does not mean that the views of the executive should be unquestioningly accepted, but rather that such evidence should be given "due" deference and "appropriate" weight.

Issues and evidence

17. The withheld information is the names of subcontractors receiving FCDO funding for a specific project - the Information Counselling and Legal Assistance ("ICLA") program of the Norwegian Refugee Council in occupied Palestinian territory for the years 2018-2020.

18. The issues are:

- a. Are sections 27(1)(a), (c) and/or (d) engaged in relation to the withheld information?
- b. If so, does the public interest in maintaining the exemption outweigh the public interest in disclosing the information?
- c. Is section 43 engaged in relation to the withheld information?
- d. If so, does the public interest in maintaining the exemption outweigh the public interest in disclosing the information?

19. By way of evidence and submissions we had the following, all of which we have taken into account in making our decision:

- a. An agreed bundle of open documents.
- b. A closed bundle of documents (for both this appeal and the Leci appeal), containing the withheld information and unredacted versions of correspondence with the Commissioner.
- c. A redacted open witness statement from Alison McEwen, the Deputy Consul General, at the British Consulate General Jerusalem.
- d. An unredacted closed version of Ms McEwen's witness statement.
- e. Two witness statements from Shaun Sacks, senior researcher at NGO Monitor.
- f. A witness statement from Anne Herzberg, Legal Adviser at NGO Monitor.
- g. Comments from Dr Leci on Ms McEwen's witness statement.
- h. Written submissions from the FCDO and the Appellant.
- i. Oral submissions from all parties at the hearing.
- j. A joint bundle of Authorities.

20. The witness statements from Mr Sacks were largely directed at section 38 (which is no longer relied on by FCDO). We have taken them into account to the extent that they provide

relevant background information and material relevant to the public interest in disclosure. Similarly, we have taken account of Ms Herzberg's statement to the extent that it contains material relevant to the public interest balance.

21. The Appellant argued during the combined hearing that FCDO's evidence as provided to the Commissioner had not been accurate, and they also questioned the accuracy of Ms McEwen's evidence. We allowed cross-examination of Ms McEwen by both Appellants. The Tribunal also questioned Ms McEwen in some detail during the closed part of the hearing. This included points that had been raised by NGO Monitor's representative during cross-examination that could only be fully answered in the closed hearing. We note that Ms McEwen is the Deputy Consul General at the British Consulate General Jerusalem ("BCGJ"), which means she is well placed as a locally based expert to give evidence on the UK's relationships with Israel, the Palestinian Authority and local NGOs. Having heard and tested Ms McEwen's evidence, we find that she gave clear answers during cross-examination and questions from the Tribunal, and we find no reason to doubt the accuracy of this evidence.

Closed Evidence

22. We heard closed evidence from Ms McEwen and a gist of this evidence, as provided to the parties at the hearing, is as follows:

- a. The Tribunal asked why identifying named subcontractors was likely to cause more harm than the already public avowal that the FCDO funds ICLA more generally. Ms McEwen answered that this is because of the "extra level of detail" which creates more grit in the relationship.
- b. The Tribunal put specific questions to Ms McEwen that had been flagged by questions in open cross-examination as being matters that could only be answered in closed, and Ms McEwen answered these questions.
- c. In relation to Dr Leci's appeal, Ms McEwen clarified the position that no information was now being withheld for project 6, but the names of a number of initiators for project 7 are being withheld. Sections 27(1)(b), 27(2) and 27(3) are no longer relied on as these exemptions related to project 6 only.
- d. The Tribunal put some detailed questions to Ms McEwen in relation to the application of the remaining exemptions to both appeals, including in particular the basis for asserting prejudice to relations with other states.

23. During her closed evidence Ms McEwen also agreed to confirm in writing whether an answer to a specific question could be included in the open decision. FCDO maintained in writing after the hearing that this answer needed to remain closed, and the Tribunal is satisfied that this is correct.

24. We have prepared a short closed annex to this decision which is to be provided to the Information Commissioner and the FCDO only. It is not to be provided to the public or published on the public register of decisions. This closed annex discusses the content of the withheld information. It is closed because publishing this part of the decision publicly would reveal the withheld information and discussions held during the closed hearing, and would defeat the purpose of the proceedings.

Discussion and Conclusions

25. In accordance with section 58 of FOIA, our role is to consider whether the Commissioner's Decision Notice was in accordance with the law or whether the Commissioner ought to have exercised any discretion differently. As set out in section 58(2), we may review any finding of fact on which the notice in question was based. This means that we can review all of the evidence provided to us and make our own decision. We deal in turn with the issues.

26. **Are sections 27(1)(a), (c) and/or (d) engaged in relation to the withheld information?** We start with **section 27(1)(a)** – prejudice to relations between the United Kingdom and any other State. FCDO's position is based on relations between the UK and Israel, and between the UK and the Palestinian Authorities. Although the Palestinian Authorities are not recognised as a State in the UK, Ms McEwan explains in her statement (paragraph 67) that they are a territory outside the UK which may be the subject of international law or agreements, and are recognised by 139 UN Member States. We agree that relations with the Palestinian Authorities fall within this exemption.

27. **What are the applicable interests within the relevant exemption?** These are the UK's interests in maintaining good relations with Israel and the Palestinian Authority. Ms McEwen's statement sets out the UK Government's longstanding position on the Israeli-Palestinian conflict – support for the creation by agreement of a sovereign, independent, democratic, contiguous and viable Palestinian state living in peace and security side-by-side with Israel based along the 1967 borders (known as the two-state solution). She explains the importance of having a strong bilateral relationship with the Government of Israel, based on a deep and historic partnership. She also explains the UK's bilateral relationship with the Palestinian people and the Palestinian Authority, and the fact that this UK-Palestine relationship is important to helping the UK to achieve its goals in the Occupied Palestinian Territories ("OPTs"). We accept that the UK has clear interests in maintaining good relations with both Israel and the Palestinian Authority, both in support of work towards the goal of a two-state solution and more widely.

28. **Is there some causal relationship between the potential disclosure and the prejudice, and is that prejudice "real, actual or of substance"?** FCDO's position is that disclosure of the withheld information would risk damaging relations with both Israel and the Palestinian Authority. In relation to Israel, information was provided in the closed part of her statement and discussed during the closed hearing, and is addressed in the closed annex to this decision. In relation to the Palestinian Authority, Ms McEwen says that release of information about Norwegian Refugee Council ("NRC") partners would likely be considered a betrayal by the UK (paragraph 81), and that there will be a severe negative impact on the Palestinian Authority if the ICLA programme stops or is undermined (paragraph 82). Further context was provided in the closed part of her statement and is addressed in the closed annex to this decision.

29. Ms McEwen's overall position, as summarised in the gist of the closed session, was that provision of detail about funding partners by the UK Government would create more "grit" in these relationships – meaning more friction. We are satisfied on the detailed evidence provided by Ms McEwen (both open and closed) that there is a clear causal relationship between the potential disclosure and prejudice to relations between the UK and Israel, and the UK and the Palestinian Authority. We are also satisfied that this prejudice is real, actual and of substance. In making this assessment we have taken into account the need to give appropriate weight to evidence from the executive branch of government about the prejudice likely to be caused to international relations, acknowledging that this Tribunal is not expert in this area. We have seen detailed evidence and

explanation from Ms McEwen on this point, she is a local expert on these relationships, and we have no reason to doubt that this evidence is accurate.

30. ***If the information is disclosed, would this cause the prejudice, meaning this is more likely than not? Alternatively, or would it be likely to do so, meaning there is a “real and significant risk” of prejudice even if this falls short of being more probable than not?*** The Appellant argues that names of subcontractors under ICLA are already published in various places, and there is no evidence that this has caused any real prejudice. The Appellant drew the Tribunal’s attention to a number of different references to named subcontractors in the open bundle and said that this evidence had not been challenged. Ms McEwen confirmed in cross-examination that this publication has not had an adverse impact to date. However, her position is that there is a big difference between information being published by non-official sources, and official confirmation from the UK government as to whether this information is accurate. As put in her statement, it has not been “formally avowed” by the government. Ms McEwen’s evidence was that this information has a different status if it is declared by the UK government, meaning it is much more likely to cause prejudice. She pointed out that other information such as that published on websites may not be accurate or reliable.

31. The Appellant submitted that Ms McEwen’s position was “splitting hairs”, and the fact that existing published information was also published by the UK government would not add anything. We disagree. We give weight to Ms McEwen’s position on this point in light of how well informed she is on relationships with both Israel and the Palestinian Authority, taking into account her role at BCGJ. We accept that the prejudice likely to be caused by official confirmation by the UK government is very different from that likely to be caused by names on various websites which may or may not be accurate. As Ms McEwen explains in her open statement, some of the organisations mention on their website that they work with the NRC in some capacity, but most do not say that they work with the NRC on the ICLA programme, and they also do not publish that they have received funds for their work with the NRC from the UK government (paragraphs 32 and 33). We also provide some additional reasoning about subcontractor names being published elsewhere in the closed annex to this decision. We therefore find that the publication of alleged subcontractor names on various websites does not mean that prejudice would not be caused by official publication by the UK government under FOIA.

32. As covered in paragraphs 28 and 29 above, Ms McEwen’s statement explains the basis for saying that prejudice would be caused to the relationship with Israel. This is discussed further in the closed annex to this decision. She also explains in some detail in her open statement why disclosure of NGO partners would damage relations with the Palestinian Authority. She says that, although the Palestinian Authority do not have a universally good relationship with Palestinian NGOs, it does support those that seek to hold Israel to account for its conduct in the occupation and which challenge Israel to abide by International Humanitarian Law. She says that the NGO implementing partners in these cases are focused on providing legal aid to Palestinians at risk of forced displacement due to the occupation, so are in the category of NGOs the Palestinian Authority sees as allies. We note that this evidence was not challenged in cross-examination. Ms McEwen provided further information in the closed part of her statement about the likely reaction of the Palestinian Authority to release of the withheld information, which is discussed in the closed annex to this decision.

33. We have also taken account of the more general evidence that was given by Ms McEwen in the closed part of the hearing about extra “grit” being created in the relationships by disclosure of

the detail contained in the withheld information. Ms McEwen's statement assesses the likelihood of organisations using disclosed information to seek to embarrass the UK Government as "high" (paragraph 83 in her statement). This point was not challenged in cross-examination, and we accept this evidence.

34. On the evidence that we have which is relevant to this appeal, we find that disclosure would cause this prejudice (meaning it is more likely than not). In making this finding we have again taken into account the need to give appropriate weight to evidence from the executive branch of government in relation to this exemption, and the fact the evidence has been provided by a local expert on these relationships.

35. We have considered **sections 27(1)(c) and (d)** together – prejudice to the interests of the United Kingdom abroad, or the promotion or protection by the United Kingdom of its interests abroad. FCDO's position is that the UK Government depends on its relationships with foreign partners to deliver UK interests, and this is best served when they can operate internationally with the most appropriate partners.

36. ***What are the applicable interests within the relevant exemption?*** The relevant interests for both exemptions are the UK's interests in being able to work with the most appropriate chosen partners to deliver the UK's objectives abroad. As stated by Ms McEwen, "*UK interests are best served when the UK Government can operate internationally with the most appropriate partners to deliver our objectives*".

37. ***Is there some causal relationship between the potential disclosure and the prejudice, and is that prejudice "real, actual or of substance"?*** Ms McEwen explains in her statement why it may be necessary to withhold the names of some international partners – "*Sometimes those partners are not popular with the government of the country they operate in, and some governments actively try to reduce the space for civil society (including our partners) to operate, as we have seen in the treatment of some Palestinian NGOs by the Israeli government. However, this is not unique to Israel and the OPTs. In order to support UK interests, we may need to work with partners regardless of the views of their government of the day. This means that it is sometimes appropriate to keep the identity of those partners confidential; this protects the partners from unnecessary attention from their government and protects the UK's relationship with the government. If the UK could not guarantee that the identity of our partners could be kept confidential in these circumstances, the UK would lose the trust of those organisations and others like them around the world. This would not serve UK interests*" (paragraph 90).

38. We accept this explanation that, in some circumstances, disclosure of the identity of the UK's partners could cause them to lose trust in the UK. This would cause prejudice to the UK's interests in working effectively with its chosen partners. We also accept that this is potentially an issue for work within the OPTs. We note that this paragraph was not challenged in cross-examination. We are therefore satisfied that there is a causal relationship between disclosure and prejudice to the UK's interests abroad (both to the actual interests to the promotion or protection of those interests), and the prejudice is real and of substance.

39. ***If the information is disclosed, would this cause the prejudice, meaning this is more likely than not? Alternatively, or would it be likely to do so, meaning there is a "real and significant risk" of prejudice even if this falls short of being more probable than not?*** The points discussed in paragraphs 30 and 31 above about publication of names elsewhere is also relevant here. The Appellant argues that the prejudice claimed by FCDO is not likely to occur as

the information is already publicly available. We reject this argument for the same reasons as explained above. We also note that NRC used to disclose more information about ICLA, but they changed their policy in 2019. Ms McEwen explained that if a funding partner is not comfortable in disclosing information themselves, disclosure by the UK government would cause a breakdown in trust.

40. Ms McEwen's evidence is that disclosure of the identity of implementing partners is "highly likely" to undermine the UK's relationship with them and with other Palestinian NGOs. She says it is likely to mean they would not partner with the UK in the future, and likely to have a chilling effect on other future partners who would choose not to work with the UK. She says that this would be highly likely to undermine the UK's ability to deliver its objectives in the OPTs.

41. Ms McEwen says in her statement that there is a medium likelihood that current and potential future recipients of UK funding in the OPTs and Gaza will reassess the risk of partnering with the BCGJ in light of disclosure. This would not only affect current projects but would have a chilling effect on possible future projects in which the FCDO would wish to engage. She also believes other NGO partners in the region working on sensitive issues may reassess the risk of being beneficiaries of UK funding, impacting UK interests.

42. Ms McEwen also says in her statement that there is a medium risk that NGOs will respond to the increasing harassment and pressure by taking on less controversial or high-profile cases, outsourcing such cases to distance themselves from the case, or abandoning legal aid work over time. This would affect the BCGJ's ability to meet its country business plan objectives and have a negative impact on UK interests.

43. We have taken into account the need to give appropriate weight to evidence from the executive branch of government about the prejudice likely to be caused to the UK's interests abroad, acknowledging that this Tribunal is not expert in this area. We have seen detailed evidence and explanation from Ms McEwen on this point, she is a local expert on these relationships, and we have no reason to doubt that this evidence is accurate. Ms McEwen's evidence on this issue is credible and was not challenged in cross-examination.

44. We find based on this evidence that disclosure of the withheld information would undermine the UK's relationship with the implementing partners within the scope of the request (meaning it is more likely than not), as Ms McEwen assesses this as "highly" likely. We also find that it would be likely to cause current and future recipients of UK funding in the OPTs and Gaza to reassess the risks of partnering with the BCGJ, and would be likely to cause NGOs to change their work focus, as Ms McEwen assesses this as medium risk. If these things occurred, they would clearly damage the UK's ability to work with its chosen overseas partners and achieve its objectives in the OPTs.

45. ***If so, does the public interest in maintaining the exemption outweigh the public interest in disclosing the information?*** We have assessed this at the time of the Request, without taking into account more recent events in the area. In accordance with the recent Court of Appeal decision ***in Department for Business and Trade v Information Commissioner and Brendan Montague*** [2023] EWCA 1378, we have also considered together the public interests in upholding the specific exemptions relied on by FCDO (which all fall under the overall exemption relating to international relations under section 27).

46. ***Public interest in disclosure.*** The Appellant's position is based on the importance of transparency. As confirmed in the Appellant's closing submissions, this is primarily based on

concerns about diversion of aid to organisations involved in terrorism, and concerns that funding may be wasted or used in the wrong way.

47. We accept that there is a strong public interest in disclosure of the requested information in this case. There is a clear public interest in government departments being open and transparent about the destination of UK government funding, so that this can be questioned and the government held to account for what taxpayer money is being used for. This public interest is strengthened by the sensitive political context of the OPTs. Although we are considering matters at the time of the Request (so before the terrible recent events involving Israel and Gaza), there was still a complicated and difficult political environment which enhances the public interest in knowing about UK government funding in the OPTs.

48. This public interest is further enhanced by the concerns that the Appellant has raised about the involvement of Palestinian NGOs in terrorism. We heard evidence from Anna Hertzberg, legal adviser at NGO Monitor. Much of her written statement was directed at the position now, as opposed to the position at the time of the Request. However, the Tribunal asked her to explain the public interest in disclosure at the time of the Request. She said that there was lots of scrutiny of the role of terrorist organisations in the NGO humanitarian sector. There were various articles in the media and it was a topic of conversation in various governments. She also referred to a terrorist attack in August 2019, in which an Israeli citizen was murdered, and said that multiple NGO officials were involved. As explained in the Appellant's reply to FCDO's response, this resulted in six Palestinian NGOs being designated as terrorist organisations. Irrespective of whether these particular NGOs were involved in terrorism or not, this shows that concerns about NGOs and terrorism was a live issue at the time. There was considerable public interest in understanding the destination of UK government funding to Palestinian NGOs in order to scrutinise whether those organisations were suitable recipients, in light of genuine concerns that some NGOs might be involved in terrorist activities. Ms Herzberg also raised concerns about organisations that do not support a two-state solution and that promote antisemitism.

49. We heard some evidence from Ms McEwen during the hearing about the due diligence process for funded project partners. FCDO conducts its own due diligence process for its main project partners, and then relies on those partners to do their own due diligence for any subcontractors based on global criteria. In this particular case, FCDO did a due diligence exercise itself for NRC. FCDO did not directly vet NRC's sub-partners, but instead provided them with criteria for assessing those sub-partners. These global criteria are available on FCDO's website and include verifying that the sub-partner is not involved in terrorist financing. FCDO would be aware of who the chosen sub-partners were, and would be able to raise any concerns about them in project meetings. This process did provide some check on the suitability of subcontractors, including a specific check about involvement in terrorist financing. However, it is limited due to the lack of direct involvement by FCDO. There remains a strong public interest in transparency and wider scrutiny of the suitability of funded subcontractors.

50. **Public interest in maintaining the exemption.** Ms McEwen's statement did not directly address how to balance the interests in favour of and against disclosure. However, the detailed evidence about the risk of damage to international relations shows how disclosure would not be in the public interest. Based on the evidence, we have found that disclosure would damage international relations with both Israel and the Palestinian Authority, meaning more likely than not. We have also found that disclosure would damage relations with the implementing partners within the scope of the Request, meaning that it is more likely than not that it would prejudice the interests of the UK abroad and/or the promotion or protection by the UK of its interests abroad. We

have also found that disclosure would be likely to cause current and future recipients of UK funding in the OPTs and Gaza to reassess the risks of partnering with the BCGJ, and cause NGOs to change their work focus. This combined risk of damage to international relations and UK interests abroad is clearly not in the public interest. The public interest in preserving international relations in this case is particularly strong because of the sensitive and complicated political context of the OPTs at the time of the Request.

51. **Conclusions.** The public interests both in favour of and against disclosure are strong in this case. Disclosure would prejudice international relations with both Israel and the Palestinian Authority, and it would prejudice UK interests abroad. This is a combination of prejudice to UK interests that we have found is more likely than not to occur, and so it is seriously damaging to the public interest. The public interest in transparency is also strong. We have particularly taken into account the importance of scrutiny of organisations that might be involved in terrorist activities or terrorist financing. This includes consideration of some closed information that we discuss in the closed annex to this decision.

52. We find the public interests in this case to be quite finely balanced. Having considered all of the factors set out above (including matters discussed in the closed annex), we find on balance that the public interest in maintaining the exemptions does outweigh the public interest in disclosing the information. Although the interests in disclosure are strong, they are outweighed by the prejudice to UK interests that we have found is more likely than not to occur if the requested information is disclosed under FOIA.

53. We therefore find that FCDO was entitled to rely on the exemptions in sections 27(1)(a), 27(1)(c) and 27(1)(d) in relation to the withheld information.

54. **Section 43 exemption.** We had only limited evidence on this point in the statements and during the hearing. As we have already found that the withheld information is covered by the other exemptions, we have not gone on to make a decision on whether section 43 also applied.

55. We uphold the appeal in part for the reasons set out above and in the closed annex to this decision. As FCDO has withdrawn its reliance on section 38 FOIA, which was the basis for the Commissioner's decision this part of the appeal is upheld. No further action is necessary because the other exemptions apply to all of the withheld information.

56. We therefore uphold the appeal in part and issue the Substituted Decision Notice set out at the start of this decision.

Signed Judge Hazel Oliver

Date: 22 March 2024