

Freedom of Information Act 2000 (Section 50)

Decision Notice

26 March 2007

Public Authority: Foreign and Commonwealth Office
Address: King Charles Street
Whitehall
London
SW1A 2AH

Summary

The complainant asked for information contained in communications between the Foreign and Commonwealth Office (the "FCO") and the Foreign Press Association (the "FPA") and information relating to the suspension of financial support for the FPA. The FCO delayed in replying to this request for around a year and then said that it held no relevant information. Following further discussion the FCO established that it did hold a small amount of information and agreed to release some of it to the FPA: other information was withheld under section 35(1)(a). The Commissioner found the FCO to be in breach of sections 1, 10 and 17 of the Freedom of Information Act (the "Act"), for which it was strongly criticised. The Commissioner upheld the FCO's decision to withhold the remaining information under section 35(1)(a).

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Act. This Notice sets out his decision.

The Request

2. The complainant originally contacted the FCO on 9 September 2005 to request "*all correspondence between the FCO and the FPA from January 2000 until 1 September 2005*". In its reply dated 21 September 2005 the FCO indicated that this request was too broad and asked the complainant to narrow it. In a revised request received by the FCO on 30 September 2005 the scope was amended to cover the period from January 2003 until 30 September 2005. Information was sent to the complainant on 21 October 2005 on the basis of that revised request but he remained dissatisfied. On 2 November 2005 he wrote again to the FCO. As an indication of the kind of material that he thought FCO should possess, and

should release to him, he said: *'The FCO partly funds the FPA, it receives regular briefing from elected official (sic) and your deputy head of communications,.....has email traffic and telephone records of conversation between himself and the FPA President.... The FCO has suspended its payments to the FPA and there is bound to be paperwork relating to this as well.'* On 14 November FCO wrote to the complainant to say that this would now be treated as a new request. This letter was never received by the complainant, who saw it for the first time only when FCO wrote to him again on 20 December, enclosing a copy of it.

3. On 1 January 2006 the complainant wrote to the Commissioner. He said that the material that FCO had sent to him consisted only of FCO copies of minutes and notices issued by the FPA to its members. He was also unhappy with the way in which FCO had dealt with his requests. Following correspondence with this office FCO confirmed, in a letter dated 13 March 2006, that it had taken the complainant's request of 2 November 2005 to be a new one and that, because the complainant had never received the letter of 14 November 2005, this new request would now be deemed to date from 19 December 2005. FCO said that it hoped to be able to respond to the request shortly. Following further representations from the complainant to the Commissioner that he had still not heard from FCO, this office wrote again on 11 July 2006 to FCO to establish the position. The outcome of this was that the FCO finally wrote to the complainant on 8 November 2006, apologising for the failure to deal with the revised request of 19 December 2005 (for which the FCO was unable to find any explanation), and to confirm that it held no further information in respect of the complainant's request.

The Investigation

Scope of the case

4. On 13 November 2006 the complainant contacted the Commissioner to confirm that he was dissatisfied with the FCO response. He asked the Commissioner to pursue his investigation. In view of the substantial delay, and the fact that FCO claimed that it held no further information relevant to the request, the Commissioner saw no reason to require the complainant to seek an internal review.

Chronology

5. In view of the FCO response a member of the Commissioner's staff met officials from the FCO in December 2006. Following that meeting some further information was provided by FCO which appeared to fall within the parameters of the complainant's request. In January 2007 the FCO said that it would be willing to release some of that information to the complainant: this consisted of copies of emails between the FCO and the FPA dating from April 2005, and a copy of the report entitled *'The Foreign Press Association in London – Investigation into Accounting Irregularities 2001 – 2004'* (although it was thought likely that the complainant already possessed a copy of this document through other sources).

The FCO refused to release a copy of the submission to Ministers dated July 2005 relating to the FCO funding of the FPA and cited section 35(1) (a) (the formulation or development of government policy) in justification.

Findings of fact

6. The FPA is an association looking after the interests of overseas journalists working in London, to which the FCO gives an annual grant in order to provide support for its activities as the interface between the foreign media and the Government. Following allegations of financial irregularities (resulting in the investigation referred to in the previous paragraph) that grant was, for a time, withheld. The grant was subsequently restored and the relationship between the FCO and the FPA is now regulated by a Memorandum of Understanding ("MOU"), which was agreed in January 2006, and which is monitored through regular meetings.

Analysis

Procedural matters

7. As set out in paragraph 2, the initial request for information made by the complainant was regarded by the FCO as too broad. He therefore submitted a revised, narrower request. The FCO responded to that request on 21 October 2005, enclosing some material which the complainant then made clear, in his response of 2 November 2005, was not what he was after. In that letter the complainant also gave examples of the kind of information which he thought the FCO ought to have available relevant to his request. The FCO, however, chose to regard this letter as constituting a new request altogether rather than as a clarification of the earlier one and then, instead of re-starting the clock straightaway in accordance with that view, extended the starting date of this new request to 19 December 2005 because FCO had had no contact with the complainant until that date given his non-receipt of its letter of 14 November 2005.
8. While the complainant's revised request received on 30 September 2005 was still broadly-based, it is difficult not to regard his letter of 2 November 2005 as a clarification of that revised request rather than as a completely new one altogether: he was simply indicating the kind of material, relevant to his request, that he expected the FCO to hold. It can then be argued that the FCO in fact received the revised request on 30 September 2005 rather than 19 December 2005. In terms of the requirements of the legislation, however, the difference is largely academic. Section 10 (1) of the Act (the full text of which can be found in the legal annex) requires a request for information to be responded to within twenty working days, subject to the operation of sub-sections which the FCO did not invoke in this case. The FCO finally provided a reply to this request on 8 November 2006. In the course of this investigation the FCO said that it was unable to establish the cause of this enormous delay. Both this failure, and the delay itself, merit the severest criticism.

9. In its refusal notice of 8 November 2006 the FCO informed the complainant that it did not hold any information of the kind he had sought. The FCO did not therefore cite any exemptions of the Act. As set out earlier, subsequent investigation by the FCO at the instigation of this Office established that it did in fact hold information relevant to the request, some of which it said it was willing to release to the complainant. Section 1(1) (a) of the Act (the full text of which can be found in the legal annex) requires that, on receipt of a request, the public authority should inform the requester as to whether or not it holds information of the kind specified in the request. By saying that it held no such information when in fact it did, including some that it wished to withhold, the FCO was clearly in breach of the requirements of section 1(1)(a) of the Act. By failing to provide the information that it was willing to release within the timescale provided by the Act, the FCO was also in breach of section 10(1) of the Act. Further, the provision of a refusal notice on 8 November 2006 which was clearly not in accordance with the facts, in that the FCO did hold material to which it wished to apply an exemption, was a clear breach of the requirements of section 17 of the Act (the relevant part of the text of which is to be found in the Legal Annex). For these failures the FCO merits severe criticism.

Exemption - Section 35

10. The FCO has sought to withhold the information contained in one document on the grounds that it relates to the formulation or development of government policy and is therefore protected by section 35(1) (a) of the Act. Although the FCO has not issued a valid refusal notice to the complainant in respect of this material (see paragraph 9) the Commissioner is of the view that it would be more practical, given the delays in this case, to deal with the FCO arguments through the medium of this Decision Notice.
11. The document at issue is a submission dated July 2005 from the Head of the Press Office setting out a strategy for dealing with the issue of the future relationship between the FCO and the FPA. Given that the document clearly relates to an issue potentially affecting all Government departments, and that it is concerned with creating a policy for dealing with that issue, the Commissioner is satisfied that section 35(1)(a) is engaged. This is in accordance with paragraph 58 of the ruling in the Information Tribunal case EA/2006/006 (DfES v ICO and the Evening Standard), which suggests that section 35 should be interpreted on the basis of a broad approach to documents that are concerned in the main with matters relating to the formulation of policy.
12. This exemption is a class-based qualified exemption. This means that there is no issue of prejudice to determine and that what is required is the application of the public interest test in order to determine whether or not the exemption should be maintained. In coming to a view on that, the Commissioner would normally take into account the opinions expressed by the parties involved. Much of the correspondence between the complainant and the FCO, however, centred on the FCO's denial that it held any relevant information and the complainant's continued assertions that it must do: as the FCO never cited an exemption involving the public interest test, the complainant was never given the opportunity

to express a view on the matter. However, the public interest in releasing information about the relationship between the FCO and the FPA, a body in receipt of public funds, is clearly suggested in letters and emails from the complainant. In its letter to this office of 25 January 2007 the FCO recognised that release of the information contained in the document would provide the public with an insight into the decision-making process in Government. However, the FCO felt that the formulation or development of policy, if it was to be done effectively, required officials to be able to put forward views in their submissions that were often extremely frank and candid and that the public interest would not be best served if officials no longer felt able to express themselves in such a way. This, in the view of the FCO, argued for the information to remain withheld.

13. The Commissioner has noted that, in respect of the issues covered by the submission, matters have now moved on: the FCO has restored financial support to the FPA and the relationship between the FCO and the FPA is now enshrined in an MOU. However, at the time the revised information request was made, the FCO policy on these issues was still in the process of clarification. Had the FCO therefore dealt with this request at the time it was made it would have been able to argue with some conviction that policy had yet to be finalised and that it would therefore not be appropriate to release information at a time when matters were still under consideration. It did not, of course, do that. The Commissioner is, however, of the view that the FCO would have been entitled to argue that the public interest was best served by withholding the information at the time the request was made on the grounds that it would be premature and not in the public interest to expose thinking on a matter which had yet to be finalised. This approach has again been endorsed by the Information Tribunal in paragraph 75(iv) of the case referred to earlier in paragraph 10.
14. The Commissioner has noted that the submission, which is covered by a security classification, is expressed in quite candid terms when considering how the FCO might address the issue of its relationship with the FPA, and the Commissioner is of little doubt that different terminology would have been used then, and would be used in the future, if it was thought that such advice would enter the public domain. In considering the public interest, the Commissioner needs to balance the interests of the public in seeing how policy is developed with the interests of the public in ensuring that decisions are made on the basis of advice that is not fettered through the possibility of subsequent disclosure. He also, when considering the public interest, needs to consider how broad that is in each individual case put before him. He fully accepts that the background to this matter remains of considerable interest to a small number of individuals but is unpersuaded that it is a matter of general interest to the extent that more needs to be disclosed than has already been put into the public domain. The Commissioner is therefore of the view that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

The Decision

15. The Commissioner's decision is that the FCO did not deal with the request for information in accordance with the Act. In particular, the FCO failed to comply with section 1(1) as the complainant was told by the FCO that it did not hold material relevant to his complaint when in fact it did, and by not releasing to the complainant that part of the information it did hold that should have been released to him.
16. The FCO also failed to comply with the requirements of section 10(1) of the Act by not releasing information within the timescale required by the Act (see paragraph 8 above). In addition, the FCO failed to comply with the requirements of section 17 of the Act by issuing a refusal notice which was not in accordance with the legislation in that it failed to identify exempt information and the section of the Act under which that material was being withheld. (see paragraph 8 above).
17. Despite these failings on the part of the FCO, the Commissioner has concluded that it was entitled to withhold the disputed submission as it related to the development of government policy and, in all the circumstances, the public interest in maintaining the section 35(1)(a) exemption outweighed the public interest in disclosure.

Steps Required

18. The Commissioner requires no steps to be taken other than, to the extent that it has not already been done, for the FCO to release to the complainant any information that falls within his request and that it has agreed to release to him.

Right of Appeal

19. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 26th day of March 2007

Signed

**Richard Thomas
Information Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 1(1) provides that:

“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.”

Section 10 (1) provides that:

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following receipt.”

Section 17 provides that:

“(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which-

- (a) states the fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.

Section 35 provides that:

“(1) Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (a) the formulation or development of government policy,
- (b)