

Freedom of Information Act 2000 (Section 50) and the Environmental Information Regulations 2004

Decision Notice

30 September 2008

Public Authority: Foreign & Commonwealth Office
Address: Old Admiralty Building
London
SW1A 2PA

Summary Decision

The complainant requested from the Foreign and Commonwealth Office (FCO) information about the Baku – Tbilisi – Ceyhan pipeline project. He was denied access to information in 272 documents held by FCO. There were major delays due to FCO's handling of the matter which were compounded by delays within ICO.

During the course of the Commissioner's investigation, FCO released the majority of the information requested.

The Commissioner decided that there had been breaches by FCO of both the Act and the EIR. A list of the relevant documents and exemptions and exceptions was agreed by the Commissioner's staff with FCO officials. He decided that:

some, but not all, of the information is environmental within the meaning of Regulation 2(1)(a) and 2(1)(c) of the EIR.

As regards **the Act**, he decided that:

FCO was in breach of section 1(1)(b) of the Act in wrongly withholding some of the information requested and in not providing information about the documents that were being withheld.

FCO was in breach of section 10(1) of the Act in not complying with section 1(1) of the Act within 20 working days.

FCO was in breach of section 17(1) of the Act in refusing to provide information outside the timescale set out in section 10(1).

FCO had correctly applied the exemptions contained in sections 27(1)(a), 27(1)(b) and 27(1)(d) when withholding the relevant information and in those cases the public interest in maintaining the exemptions outweighed the public interest in disclosing the information.

FCO had correctly applied the exemptions contained in sections 35(1)(a) and 35(1)(b) when withholding the relevant information and in those cases the public interest in maintaining the exemptions outweighed the public interest in disclosing the information.

The Commissioner decided that the section 41 exemption applied to information in two documents that FCO had withheld by incorrectly applying other exemptions.

As regards **the EIR**, the Commissioner decided that:

FCO's delays in considering the request and responding to it were in breach of EIR Regulations 5(2), 7(2) and 14(2).

The failure to specify in the form of a schedule what information was being withheld was a further breach of EIR Regulation 5(2).

FCO's delays in reviewing its refusal of the complainant's request were in breach of Regulation 11(4).

FCO had correctly applied the exception contained in Regulation 12(4)(e) when withholding the relevant information and the public interest in maintaining the exception outweighed the public interest in disclosing the information.

FCO had correctly applied the exception contained in Regulation 12(5)(e) when withholding the relevant information and the public interest in maintaining the exception outweighed the public interest in disclosing the information.

FCO had correctly applied the exception contained in Regulation 12(5)(f) when withholding the relevant information and the public interest in maintaining the exception outweighed the public interest in disclosing the information

The Commissioner's Role

1. The Commissioner's role 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 Freedom of Information Act 2000 ('the Act'). This Notice sets out his decision.
2. The Environmental Information Regulations (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

The Request

3. The Baku - Tbilisi - Ceyhan pipeline project (the BTC project) was established to build a 1760km long pipeline to carry crude oil from Baku to Ceyhan, thereby providing an export route from the oilfields of the Azeri sector of the Caspian Sea to the coast of the Mediterranean Sea. The total project cost was estimated to be around \$3.4bn. Construction began in September 2002. The first oil flow took place in June 2006.
4. On 18 January 2005 the complainant told FCO that he wished to inspect a set of files, the reference numbers of which he listed, relating to the BTC project. He said it would be helpful if a room in FCO's London office could be set aside for him to use to inspect the files along with a facility to allow him to make copies of documents contained within them. The subject matter of the named files related to the BTC project.
5. On 7 April 2005 the complainant thanked FCO for its assistance in making the files available which he had eventually accessed on 5 April 2005. However, he said that the outcome of his inspection had been entirely unsatisfactory and, in his view,

unlawful. The files provided had been thoroughly 'sanitised' and he requested an internal review in respect of the documents being withheld in part and those being withheld in their entirety.

6. On 17 May 2005 FCO told the complainant that, in view of the considerable volume of papers that he had requested, it was still conducting the review procedure and would send him the result by 3 June at the latest. On 2 June 2005 FCO said that it needed more time to deal with the complexities of the case and extended the time for its response to 17 June 2005. On 17 June 2005 FCO, while accepting that a further extension of time was 'not envisaged' by the EIR, further extended its response deadline to 1 July 2005.
7. On 22 June 2005 the complainant complained to the Commissioner of persistent, and in the case of the EIR unlawful, delay by FCO. On 14 February 2006 the Commissioner reminded FCO that the outcome of its internal review was still outstanding and asked FCO to give the matter urgent attention. Also on 14 February 2006 FCO wrote to the complainant apologising for the delay and providing him with the outcome of its internal review. FCO said that it would not provide details about each document requested as, in its view, neither the Act nor the EIR required it to provide such additional information in this way.

The Investigation

Scope of the case

8. On 3 March 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant asked the Commissioner to carry out an expedited investigation into FCO's decisions to withhold documents; and also into its failure to provide details of the documents withheld.
9. During the Commissioner's investigation, FCO released additional information to the complainant, a development which the Commissioner welcomed. His investigation, and this decision, focused on information which continues to be withheld. The complaint, and therefore the Commissioner's investigation, concentrated on those documents which were withheld in their entirety rather than other documents which had been withheld in part.

Chronology of the case

10. On 21 March 2006 the Commissioner's staff asked FCO to consider the complainant's request for details of the documents withheld and reminded FCO of its obligations under section 16 of the Act (Duty to provide advice and assistance). The Commissioner's staff also noted that FCO could consider the application of section 12 of the Act (Exemption where cost of compliance exceeds appropriate limit). Following reminders by telephone and email, FCO told the Commissioner on 31 May 2006 that there was an outstanding issue it wanted to clear up before giving a substantive response.

11. On 2 June 2006 FCO provided the Commissioner with a substantive response. FCO said that during its internal review it had made a thorough assessment of each document originally withheld; in each case the reviewer had confirmed that the relevant exemptions and EIR exceptions had been correctly applied and upheld the decision to withhold the information. FCO said that it was not obliged to provide details of individual documents withheld as requested by the complainant. FCO said it had sought to persuade the complainant to narrow the scope of his request from the outset, which he had consistently refused to do. FCO believed it was wholly inappropriate to ask it to disclose file titles, which it had done, and to disclose details of all the documents in those files so that the complaint could pick out any he might be interested in. FCO said that, as early as March 2005, it had estimated that the effort in preparing the documents for inspection was likely to exceed the appropriate limit but an undertaking had already been given by then to allow the complainant to inspect the files. FCO said that it had provided the complainant with photocopies of some 200 papers before the Commissioner's investigation began and that it considered that the time spent on this matter exceeded the appropriate cost limit by a considerable margin.
12. On 17 July 2006 the Commissioner's staff told FCO (incorrectly) that FCO was not obliged to prepare a list of documents withheld but wondered if it could be done on this occasion for ICO's benefit and purely as a gesture of goodwill. FCO then did so.
13. On 25 July 2006 FCO told the Commissioner that it had assessed some of the documents as being exempt in their entirety, including, for example, in some cases their title and date. FCO provided the Commissioner with a list of some 272 documents, being withheld under either the Act or the EIR, which had been prepared especially to facilitate his investigation and relevant discussion with FCO, and offered to supply him with copies of all of those documents.
14. On 17 August 2006 FCO told the Commissioner that it was under no obligation to provide the complainant with lists of information relating to any given subject and that it would not be desirable or in line with the obligations placed on it by the Act to do so. However, release of a document schedule had not been part of the complainants' original request. His complaint had been about not being in a position to challenge FCO's application of exemptions or exceptions. FCO supplied a revised schedule of the documents being withheld showing that 226 out of the 272 documents were being withheld under section 35(1)(a) of the Act, or Regulation 12(4)(e) of the EIR in the alternative. FCO explained that earlier, lower, estimates of the numbers of documents being withheld had been due to the grouping of some sets of documents.
15. On 29 August 2006 the complainant told the Commissioner that in its view the most appropriate and proportionate approach would be for the Commissioner to decide whether FCO was required to release to the complainant information about the documents that had been withheld in their entirety, such as their title, date, etc. Should the Commissioner rule in his favour then he would, he said, be much better placed to narrow the rest of his complaint to a smaller number of documents, if any. The complainant drew attention to his representations regarding another case subsequently decided by the Commissioner which, he said, was closely related (ICO

case reference FS50078600 – for which a Decision Notice was later issued by the Commissioner on 5 February 2007).

16. On 1 September 2006 FCO provided the Commissioner with copies of the 272 documents being withheld and indicated, by means of a schedule, the exemption(s) and/ or exception(s) being applied to each.
17. On 5 June 2007 the Commissioner's staff told FCO that, with regard to requests for a schedule of the documents being withheld, his view was that, even if a schedule of such information did not exist, where the information which would be in the schedule was also a part of other held information, it would still be held and should be disclosed unless exempt. As the information already existed, the public authority could not be said to be creating it. While producing a list of documents in which relevant information was contained might be a new task, it was not creating new information; it was simply re-presenting existing information as a by product of responding to the information request.
18. On 30 July 2007 FCO told the Commissioner that it did not accept it was reasonable for it to have to provide a schedule of documents being withheld as: such a requirement would go far beyond the spirit of advice and assistance in the Act; some of the information was itself covered by the exemptions cited; and, the costs of creating such a schedule, when added to the already considerable chargeable costs incurred in preparing the huge volume of material, would have greatly exceeded the appropriate limit.
19. On 7 August 2007 the Commissioner invited FCO to consider disclosing the majority of the 272 documents being withheld. On 7 November 2007 the Commissioner's staff and FCO staff met to consider the relevant information and agreed that FCO would further review the information still being withheld. As regards possible disclosure of the schedule of information being withheld, the Commissioner's staff explained his view that the costs of redacting information were not caught by the Regulations made under section 12 of the Act and that the costs of redacting other information could not be counted towards the appropriate limit.
20. On 12 December 2007 FCO said that, given the passage of time, it was now prepared to disclose much of the information at issue. There was a small number of documents about which FCO and ICO disagreed, and a further set of documents that would need to be reviewed by FCO in consultation with another government department. A further meeting of FCO officials with the Commissioner's staff took place on 7 February 2008 to review information the status of which had still not then been agreed.
21. On 6 March 2008 FCO provided the complainant with extensive information additional to that which it had previously disclosed. FCO did so indicating that, given the passage of time and the very different circumstances now, the balance of the public interest had changed significantly and it was now appropriate to release the bundle of information provided. FCO added that a further small amount of information was still being considered for release. The remaining information was being withheld under named exemptions of the Act, or exceptions under the EIR, and was being withheld with the concurrence of the Commissioner's staff.

22. On 17 April 2008 the complainant wrote to the Commissioner emphasising his desire for speedy resolution of this matter in the form of a Decision Notice. He said that he was concerned the FCO maintained that it was entirely correct to withhold information at the date of their response and internal review in 2005. He considered that, in respect of the vast majority of the information now disclosed, there could at the relevant time have been no lawful basis for maintaining any of the exemptions and exceptions claimed by FCO. He noted that the documents disclosed still contained a small number of other specific redactions. He complained of further continuing delay and said that he did not consider that the FCO's letter (and enclosures) resolved the complaint.
23. In early May 2008 FCO concluded its discussions with another government department and, on 9 May 2008, sent the complainant a further, smaller tranche of material.
24. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

Findings of the case

25. The position as at 9 May 2008 was that, of the 272 documents originally withheld by FCO and listed to the Commissioner, 165 had been disclosed and ten found, on closer examination, to have been outwith the scope of the request. Information in 97 documents continued to be withheld. The reasons for withholding the information were in most cases the section 27 and section 35 exemptions of the Act or the corresponding EIR exceptions.

Analysis

26. The Commissioner has considered the public authority's response to the complainant's request for information.

Application of the Act and EIR

27. The Commissioner decided that information in 82 of the documents was exempt due to the application of exemptions contained within the Act. The Commissioner also decided that information in a further 23 documents was covered by exceptions contained within the EIR. In a small number of cases more than one exemption or exception applied to a single document.
28. As regards application of the EIR, the Commissioner has seen that some of the information is on the state of the elements of the environment, in this instance notably the land surface and underground strata including the soil and the ground water existing within the soil and within the strata under its surface. The application of the EIR stems from the existence of information on how measures taken, notably the construction and use of the pipeline and its continuing presence in the soil in operational use as a working pipeline, might in some circumstances have an effect

on, or might have the potential to have an effect on, the nearby land, soil and water. The Commissioner therefore decided that the EIR applied, in particular Regulation 2(1)(a) and (c).

Procedural breaches – the Act

29. FCO took from 18 January 2005 until 5 April 2005 to provide the complainant with notice of refusal of his request. The volume of information requested was large; extensions of time were agreed by FCO and the complainant. FCO provided considerable help to the complainant, including access to its own facilities such as office accommodation and photocopying facilities as required by section 11(1) of the Act (Means by which communication to be made). However the time that FCO took to refuse the information it had decided not to disclose was well in excess of that provided for in section 10(1) of the Act (Time for compliance with request) and it was in breach of the Act in this matter. FCO then took from 7 April 2005 until 14 February 2006 to carry out its internal review of the request. This greatly exceeded the estimates it had given to the complainant and so was in breach of section 17(2) and of the guidelines for reviews under the Act.
30. On 29 August 2006 the complainant asked the Commissioner, following earlier requests to FCO, to agree that FCO should provide him with a schedule of information about the documents being withheld in their entirety, such as title, date, etc, as requested in his letter of 7 April 2005 to FCO. This FCO refused to do, telling the Commissioner on 30 July 2007 that: manipulating recorded data to produce a schedule of such size and complexity went far beyond the spirit of advice and assistance in the Act; much of the 'metadata' relating to the documents was itself covered by the exemptions cited; and, the costs of producing such a schedule, when added to the already considerable chargeable costs, would have greatly exceeded the appropriate limit. To comply with this part of the request, FCO would simply have had to redact the exempt information, a task not included within the calculation of where the cost of compliance exceeded the appropriate limit. Accordingly the Commissioner decided that a schedule identifying the information being withheld by reference to the date of the documents, title etc, other than that which had been exempt under the exemptions in the Act or EIR exceptions, was information that had been held at the date of the request and should have been provided. Failure to provide it was a breach of section 1(1)(b) of the Act.

Procedural breaches – the EIR

31. As already noted above, in the context of the Act, FCO took from 18 January 2005 until 5 April 2005 to provide the complainant with notice of refusal of his request. The time FCO took to provide some of the information disclosed was well in excess of the 20 working days provided for in, and therefore in breach of EIR Regulation 5(2) (Duty to make environmental information available on request). FCO extended the time to respond to the request as permitted by Regulation 7(1) (Extension of time) but provided information late in breach of Regulation 7(2). The failure to provide a refusal of parts of the request within 20 working days was a breach of Regulation 14(2) of the EIR. As outlined above, FCO took from 7 April 2005 until 14 February 2006 to carry out its internal review of the request and so was in breach of Regulation 11(4) (Representations and reconsideration).

32. On 29 August 2006 the complainant asked the Commissioner, following earlier requests to FCO, to agree that FCO should provide him with information about the documents being withheld in their entirety, such as title, date, etc, as requested in his letter of 7 April 2005 to FCO. As regards FCO's refusal to provide this information, in so far as it was not exempted by an EIR exception or exceptions, this refusal was in breach of the FCO's duty under Regulation 5(2) of the EIR (Duty to make available environmental information on request).

Exemptions

33. Following the Commissioner's investigation FCO continued to withhold information in 97 documents from the complainant as follows (in some cases, more than one exemption or exception was cited):

the Act

22 documents under the section 27(1)(a) exemption
5 documents under the section 27(1)(b) exemption
1 document under the section 27(1)(d) exemption;
51 documents under the section 35(1)(a) exemption;
1 document under the section 35(1)(b) exemption;
2 documents under the section 41 exemption;

the EIRs

5 documents under the regulation 12(4)(e) exception
4 documents under the regulation 12(5)(e) exception
14 documents under the regulation 12(5)(f) exception.

The complainant was concerned that the reasons given for withholding information were 'generic' with identical wording being applied to justify the withholding of information in more than one document.

34. The Commissioner's staff have considered, for each of the documents withheld by FCO, the application of the exemptions and exceptions at the time of the request. In respect of the information that has now been disclosed to the complainant, the Commissioner saw that the complainant now has the remedy he sought and the Commissioner did not therefore consider further the application by FCO of the exemptions considered at the time. As regards application of the public interest, the passage of time has, in some cases, weakened the public interest in withholding the information and has convinced FCO to disclose at a later date information that it withheld at the time of the initial request. For the information still being withheld, the Commissioner has to consider the public interest in the light of the circumstances as they existed at the time of the request or at least by the time of compliance with sections 10 and 17 of the Act. In this instance he considered the public interest at the time of the initial request in January 2005 and FCO's initial response to it in April 2005; his decision is based on the latter.

The case for the complainant

35. In respect of the 272 documents originally withheld, the complainant told the Commissioner that the manner of the withholding had been wholly inappropriate and

he provided samples of the 'redaction notices' that FCO had included in the files. Much of the earlier correspondence from the complainant, with both FCO and the Commissioner, concerned procedural matters particularly the delay in progressing the case and the broad approach adopted by FCO. The complainant did not focus on the substantive application of the exemptions and exceptions or make to the Commissioner a case against the application of each of the exemptions and exceptions. After the complainant had received most of the information disclosed by FCO in 2008, he told the Commissioner that the information which had by then been disclosed to him demonstrated clearly the correctness of much of his original complaint. He said that FCO had deliberately used the delays in the system in an effort to delay the release of the information requested, whilst avoiding a negative Decision Notice being issued against it. He added that the fact that the FCO has decided to release the information only now that the ICO has indicated that it was in the final stages of its investigation, and not at any other point in the three years since his complaint had been made, supported his view in this regard. Having carefully reviewed the information now released, he considered that the vast majority of the information now disclosed could have been disclosed at the time of the request. He also said that:

- the majority of the information disclosed had been 'historical'. It related to a period (mainly) from October 2002-June 2003, some two or three years before his (January 2005) request;
- by the date of his request for information the United Kingdom Government had already decided to give the project its financial backing, thereby bringing to an end the most significant element of its policy making processes to which the information requested largely related. By the date of his request in 2005 there was, in his view, no lawful basis for withholding the information that had now been disclosed;
- most of the information released was anodyne. That was not to say that there was no public interest in its disclosure; there was, bearing in mind the very considerable public interest surrounding the United Kingdom's involvement in the BTC project. He said he did not understand what harm could conceivably have arisen from disclosure of the vast majority of the information now disclosed and which to a large degree consisted of either internal 'chatter' about, for example, processes, lines of responsibility, information updates, meeting arrangements, etc; or discussions of lines to take in drafting responses to NGO concerns;
- whilst not determinative, he noted that nearly all of the documents which contained a security classification (most did not) were marked 'unclassified'.

The Act

Section 27 – International relations

36. FCO withheld 21 documents under the section 27(1)(a) exemption in the Act (Prejudice to relations between the United Kingdom and any other State). In addition five documents were withheld under section 27(1)(b) (prejudice to relations between the United Kingdom and any international organisation or international court) and one further document was withheld under section 27(1)(d) (the promotion or protection by the United Kingdom of its interests abroad).

37. FCO told the Commissioner that the documents being withheld related to specific international trade concerns, the disclosure of which would, or would be likely to, prejudice relations between the United Kingdom and the relevant countries and international organisations.
38. The Commissioner, through his staff, has seen the documents withheld. He is satisfied that disclosure of the documents would, or would be likely to, prejudice relations between the United Kingdom and the relevant countries, again mainly those through which the BTC pipeline passed (section 27(1)(a)), a relevant international organisation (section 27(1)(b)) and protection of United Kingdom interests in the region (section 27(1)(d)). These relate to communications between United Kingdom public authorities and official and other bodies in the relevant states, mainly those through which the pipeline passed. Some also relate to other stakeholders, including United Kingdom based and international trading partners in the enterprise and other interested bodies. Prejudice would, or would be likely to, be experienced by the FCO to the trust and reputation it enjoys within a partnership of the relevant United Kingdom public bodies if it disclosed information that they considered to be embarrassing or a breach of faith. The Commissioner is therefore satisfied that the exemption is engaged.

Public interest test

39. FCO said that the effective conduct of international relations depended upon maintaining trust and confidence between governments. This relationship of trust allowed for the free and frank exchange of information on the understanding that it would be treated in confidence. If the United Kingdom did not respect such confidences, FCO's ability to protect and promote United Kingdom interests, including those in international trade agreements and through international relations, would be prejudiced. The relevant countries and international bodies might be more reluctant to share sensitive information with the United Kingdom government in future and be less likely to respect the confidentiality of information supplied by the United Kingdom government to them, to the detriment of United Kingdom interests. For all of these reasons, FCO considered that, in all the circumstances of the case, the public interest in maintaining the exemptions outweighed the public interest in disclosing the information covered by these exemptions.
40. The Commissioner took account of the fact that disclosure of the information withheld could further understanding and participation in the public debate of the issues raised. He noted too that some of the information withheld could assist in promoting accountability and transparency in the spending of public money and would enable the complainant to better understand the decisions that had been taken by the United Kingdom government and other stakeholders. He saw too the significance of the pipeline and the prospective oil flows through it to the United Kingdom and its economy. He also noted that international relations between the United Kingdom and the countries concerned had their own individual differences and sensitivities stemming in part from differences in culture, religion, legislature and infrastructure between themselves and the United Kingdom. He noted that, at the time of the request in January 2005, again in April 2005, and well before the pipeline was completed and oil began to flow in mid-2006, many of the issues dealt with in the information being withheld were still live and of immediate concern to FCO, its correspondents and interlocutors. Accordingly he has concluded that, for the 27

relevant documents, the public interest in maintaining the section 27 exemptions outweighed the public interest in disclosing the information.

Section 35 – Formulation of government policy, etc

41. FCO withheld 52 documents under the section 35(1)(a) exemption (Formulation or development of government policy) and one document under the section 35(1)(b) exemption (Ministerial communications).
42. FCO said that the documents withheld under the section 35 exemptions related to the formulation and development of government policy so that it regarded the exemption as engaged.
43. Section 35(1)(a) creates a class based exemption for information that relates to the formulation or development of government policy. Section 35(1)(b) relates to Ministerial communications, itself also a based class exemption, which has been applied to one of the documents withheld by FCO. The Commissioner has seen from the Evening Standard case (*DfES v the Information Commissioner & the Evening Standard, 19 February 2007, EA/2006/0006*) that the expression 'relates to' can safely be interpreted broadly. His staff have reviewed all of the documents withheld under these exemptions and he is satisfied that the information contained within them was still current at the time of the request and of its consideration by FCO as regards the development of relationships with the relevant nations and as regards the supply of oil. He is therefore satisfied that the section 35(1)(a) and 35(1)(b) exemptions are engaged. He now turns to consider the public interest issues.

Public interest test

44. FCO said that, while there was a public interest in the transparency of the policy making and implementation process, transparency had the potential to undermine the strong public interest which existed in the full and frank discussion of policy within government. There was a strong public interest in high quality policy making and implementation and for government to succeed in upholding that public interest. Ministers needed to be able to consider, debate and understand the implications of a policy and how it was presented. Their candour in doing so would be affected by their assessment of whether the content of such discussion would be disclosed in the near future.
45. The Commissioner accepted that the candour and quality of discussions could be adversely affected if there were concerns that their contents might be disclosed in the near future. The Commissioner recognises that, within the field of international relations including relationships with representatives of countries from different cultural traditions, officials need space in which to consider matters with their counterparts and interlocutors, without fear that confidences exchanged within a setting of mutual confidence will subsequently be disclosed. He has seen from the Evening Standard case that the central question for his consideration of the public interest is the content of the information in question - which he has done through his review of the documents being withheld. He considered the timing of the request for information and the policy context which, at the time of the request in January 2005 and the refusal notice of April 2005, predated the first oil flows which took place in mid-2006. A significant number of policy issues were still live matters at the relevant

times and policy formulation and development had not then been completed and so the Commissioner decided that FCO acted correctly in protecting the thinking space within which policy officials were operating. Accordingly, he has concluded that the public interest in maintaining the section 35 exemptions outweighed the public interest in disclosing the information.

Section 41 - information provided in confidence

46. Neither the complainant nor FCO made specific representations to the Commissioner on the application of the section 41 exemption to two documents that were withheld under that exemption. FCO said that the exemption applied but declined to consider the public interest on the grounds that the exemption is absolute. The Commissioner saw, in respect of the two relevant documents, that they contained information from a stakeholder in this process to FCO. The Commissioner saw that the information had been obtained by FCO from another person. He also saw that the circumstances in which the information had been imparted were, and were intended to be, a confidential briefing. Disclosure of this would be, and would be seen to be, a clear breach of trust that could give rise to consequential damage to the confider and would deter provision of such confidences to FCO in future, making harder its job of furthering UK interests overseas. Communication of the information did not contain an express prohibition about disclosure but the context and content were such that it contained a clear implied expectation that the information was being given in confidence and that the confidence would be maintained. The Commissioner considered therefore that a breach of the confidence given would be a breach of trust that would be actionable. The Commissioner also considered whether there might be an overriding public interest in disclosing the information. He has seen from the Derry case (*Derry City Council v The Information Commissioner, EA/2006/0014*) that information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence. For the information in question, the Commissioner did not see an overriding public interest in disclosure and decided that the information had been withheld correctly.

The EIRs

Regulation 12(4)(e) – internal communications

47. The complainant made no specific representations to the Commissioner in respect of any of the EIR exceptions beyond his general representations set out above but, in reaching his decision, the Commissioner has taken fully into account all of the arguments that the complainant has put to him as well as those which he has seen in the complainant's correspondence with FCO. For its part FCO said that the Regulation 12(4)(e) exception applied to three withheld documents which were internal communications. The Commissioner saw that the documents were correspondence that was internal to FCO or between it and other government departments. He was satisfied that the exception was engaged and proceeded to consider the public interest.

Public interest test

48. FCO said that it had to balance the public interest in maintaining the exception against the public interest in disclosing the information. FCO considered that, while there was a public interest in the transparency of the policy making and implementation process, transparency also had the potential to undermine the strong public interest that existed in the full and frank discussion of policy within government. FCO said there was a strong public interest in high quality policy making and implementation and for government to succeed in upholding that public interest. Ministers needed to be able to consider, debate and understand the implications of the policy and how it was presented. FCO added that Ministers' candour in doing so would be affected by their assessment of whether the content of such discussions would be disclosed in the near future. FCO considered therefore that the public interest lay in maintaining the exception in relation to this information.
49. The Commissioner saw that the documents contained frank assessments of policy issues and that it was necessary to provide protection for the private thinking space within which the correspondents operated. Additionally he saw that withholding the information was in the public interest to preserve the quality of relationships with those referred to within the information. The policy issues and relationships being discussed had by no means all been settled at the time of the request. The Commissioner saw in disclosure the likelihood of harm being caused by misleading the public or making more difficult future policy making and productive engagement with external agencies whose roles or contributions might be discussed within government. He recognised that the decision makers, in making their policy decisions, needed to be apprised of the full facts of the situation as perceived by their officials and interlocutors. Accordingly, he has concluded that the public interest in maintaining the exception outweighed the public interest in disclosing the information.

Regulation 12(5)(e) – commercial or industrial information

50. FCO had applied the regulation 12(5)(e) exception to four documents and said that it had applied the exception to withhold commercial or industrial information where such confidentiality was provided by law and protected a legitimate economic interest. The Commissioner has seen the relevant documents and that the information within the scope of the request that they contain is commercial or industrial information, the disclosure of which could affect the legitimate economic interests of BTC stakeholders. Although there are no explicit statutory restrictions on disclosure, the Commissioner is satisfied that the circumstances in which the information was imparted were such that there were high expectations of confidence shared by the parties that the common law test of confidence applied. He was satisfied therefore that the exception was engaged.

Public Interest test

51. FCO said that, in applying this exception, it had balanced the public interest in withholding the information against the public interest in disclosure. There was a public interest in disclosing commercial information to ensure the effective, open and honest use of public money and the scrutiny of public licensing in accordance with published policy and to provide an environment where business could respond to government opportunities. However FCO considered that transparency also posed risks in that companies and individuals would, if the information were to be disclosed,

be much less likely to provide FCO with sensitive commercial information in future. This would then limit the sources of information and interlocutors available to FCO. Doing so, would seriously impair FCO's work in furthering the interests of the United Kingdom and in securing a safe, just and prosperous world. FCO therefore considered that the public interest lay in maintaining the exception.

52. The Commissioner accepted that there was a legitimate interest in disclosing information about the commercial and industrial aspects of the BTC project and also took the view that the sensitivity of some of the information would be likely to diminish with the passage of time. However he also saw that the information was sensitive at the date of the request and that its disclosure would seriously impair the confidence of relevant stakeholders in FCO's ability and willingness to respect the provision to it of sensitive commercial information confided in it. He has taken account of the arguments advanced by the complainant but does not see that there is an overriding public interest case for disclosure. Accordingly, he has concluded that, for the relevant documents, the public interest in maintaining the exemptions outweighed the public interest in disclosing the information.

Regulation 12(5)(f) – interests of the provider of the information

53. FCO withheld 14 documents which related to the interests of the person who had provided the information to it. The Commissioner has seen that the information in the withheld documents had been supplied in the expectation that it would not be disclosed to a third party and that the suppliers had not consented to disclosure. There is no legal obligation on FCO to supply the information and FCO was not entitled to disclose it other than by way of these Regulations. He saw that disclosure by FCO would undermine the trust of the information suppliers in FCO for the future. The Commissioner therefore decided that the exception was engaged.

Public interest test

54. FCO said that, in applying this exception, it had balanced the public interest in withholding the information against the public interest in disclosure. It considered that, while there was a general public interest in the transparency of information, in this case there was a serious risk that, since the information had been provided by a third party, its disclosure would make the providers much less likely to volunteer sensitive information to the FCO and other United Kingdom public authorities. Their candour in future would be affected by their assessment of whether the content of such discussions might be disclosed in the near future and what the implications could then be for themselves and perhaps their families. FCO said that as well as reducing the likelihood of 'whistle blowing', disclosure could limit the sources of information available to FCO in future and cause its interlocutors to be less candid. This would seriously impair FCO's ability to work for United Kingdom interests in securing a safe, just and prosperous world. FCO therefore considered that the public interest lay in maintaining the exception in relation to this information.
55. The Commissioner believes that there is a general public interest in the transparency of information which is heightened by the importance of issues such as those raised by the BTC project regarding the potential for significant damage to the environment from first building and then operating the pipeline. However he also noted that some of the documents explicitly indicated that the information being imparted was

intended to be protected and/ or had been security marked; he also saw that the context within which most of the remaining information was set was of confidences being offered. Disclosure of the content of sensitive information which had been provided voluntarily would adversely affect the reputations and commercial prospects of its providers. Breaching such confidences would, the Commissioner saw, cause detriment to the confider and would give potential providers of sensitive information to FCO reasonable cause for considerable concern about the security of any information vouchsafed to FCO in the future. The Commissioner has therefore concluded that the public interest in maintaining the exception outweighed the public interest in disclosing the information

The Decision

56. The Commissioner concludes that there were breaches by FCO of both the Act and the EIR. A list of the relevant documents and the exemptions and exceptions was agreed by his staff with FCO officials. His decisions on the matters complained about are set out below.
57. Some, but not all, of the information is environmental within the meaning of Regulation 2(1)(a) and 2(1)(c) of the EIR; the environmental information was identified in a schedule agreed by FCO and the Commissioner's staff.

The Act

58. FCO was in breach of section 1(1)(b) of the Act in wrongly withholding some of the information requested. FCO was in further breach of this section in not providing a schedule identifying the information that was being withheld.
59. FCO was in breach of section 10(1) of the Act in not complying with section 1(1) of the Act within 20 working days.
60. FCO was in breach of section 17(2) of the Act in delaying its refusal to provide access to information by a margin that greatly exceeded FCO's own estimates of how long it would take.
61. FCO had correctly applied the exemptions contained in sections 27(1)(a), 27(1)(b) and 27(1)(d) when withholding the relevant information and in those cases the public interest in maintaining the exemptions outweighed the public interest in disclosing the information.
62. FCO had correctly applied the exemptions contained in sections 35(1)(a) and 35(1)(b) when withholding the relevant information and in those cases the public interest in maintaining the exemptions outweighed the public interest in disclosing the information.
63. The Commissioner found that the section 41 exemption applied to information in two documents that FCO had withheld by incorrectly applying other exemptions.

EIR

64. FCO's delays in considering the request and responding to it were in breach of EIR Regulations 5(2), 7(2) and 14(2).
65. The failure to specify in the form of a schedule what information was being withheld was a further breach of EIR Regulation 5(2).
66. FCO's delays in reviewing its refusal of the complainant's request were in breach of Regulation 11(4).
67. FCO had correctly applied the exception contained in Regulation 12(4)(e) when withholding the relevant information and the public interest in maintaining the exception outweighed the public interest in disclosing the information.
68. FCO had correctly applied the exception contained in Regulation 12(5)(e) when withholding the relevant information and the public interest in maintaining the exception outweighed the public interest in disclosing the information.
69. FCO had correctly applied the exception contained in Regulation 12(5)(f) when withholding the relevant information and the public interest in maintaining the exception outweighed the public interest in disclosing the information.

Steps Required

70. The Commissioner requires FCO to provide to the complainant a schedule identifying the information being withheld but, beyond that, there are no further steps to be taken by FCO beyond those which it has already taken in disclosing the majority of the documents requested and originally withheld by FCO.

Right of Appeal

71. 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 30th day of September 2008

Signed

**Richard Thomas
Information Commissioner**

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

Time for Compliance

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 the date of receipt.”

Means by which communication can be made

Section 11(1) provides that –

“Where, on making his request for information, the applicant expresses a preference for communication by one or more of the following means, namely –

- (a) the provision to the applicant of a copy of the information in permanent form or in another form acceptable to the applicant,
- (b) the provision to the applicant of a reasonable opportunity to inspect a record containing the information, and
- (c) the provision to the applicant of a digest or summary of the information in permanent form or in another form acceptable to the applicant.

The public authority shall so far as is reasonably practicable give effect to that preference.”

Exemption where cost of compliance exceeds appropriate limit

Section 12(1) provides that –

“Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.”

Duty to provide Advice and Assistance

Section 16(1) provides that -

“It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it”.

International Relations

Section 27(1) provides that –

“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, or

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

Formulation of Government Policy

Section 35(1) provides that –

“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) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or
- (d) the operation of any Ministerial private office.

Information provided in confidence.

Section 41(1) provides that –

“Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

Section 41(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.”

The Environmental Information Regulations 2004. Statutory Instrument 2004 No. 3391.

Form and format of information

Regulation 6 provides that –

“(1) Where an applicant requests that the information be made available in a particular form or format, a public authority shall make it so available, unless -

(a) it is reasonable for it to make the information available in another form or format; or

(b) the information is already publicly available and easily accessible to the applicant in another form or format.

(2) If the information is not made available in the form or format requested, the public authority shall -

- (a) explain the reason for its decision as soon as possible and no later than 20 working days after the date of receipt of the request for the information;
- (b) provide the explanation in writing if the applicant so requests; and
- (c) inform the applicant of the provisions of regulation 11 and of the enforcement and appeal provisions of the Act applied by regulation 18.”

Extension of time

Regulation 7 provides that –

“(1) Where a request is made under regulation 5, the public authority may extend the period of 20 working days referred to in the provisions in paragraph (2) to 40 working days if it reasonably believes that the complexity and volume of the information requested means that it is impracticable either to comply with the request within the earlier period or to make a decision to refuse to do so.”

Representations and reconsideration

Regulation 11 provides that -

“(1) Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request.

(2) Representations under paragraph (1) shall be made in writing to the public authority no later than 40 working days after the date on which the applicant believes that the public authority has failed to comply with the requirement.

...

4) A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the date of receipt of the representations.

Exceptions to the duty to disclose environmental information

Regulation 12 provides that –

“(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if -

- (a) an exception to disclosure applies under paragraphs (4) or (5); and
- (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

...

(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that -

...

(e) the request involves the disclosure of internal communications.

(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect -

- (a) international relations, defence, national security or public safety;
- ...
- (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
- (f) the interests of the person who provided the information where that person –
 - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
 - (iii) has not consented to its disclosure; ...

Refusal to disclose information

Regulation 14 provides that -

“(1) If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.

(2) The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.”