Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 2 August 2011

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

Summary

The complainant requested information from the Foreign and Commonwealth Office (FCO) about the cost of the Pope's visit to the UK in September 2010. The FCO disclosed some information but relied on sections 22, 27(1)(a) and 29(1)(b) to withhold the remaining information. During the course of the Commissioner's investigation the FCO disclosed the withheld information albeit with a small number of redactions applied on the basis of sections 40(2) and 43(2). The complainant does not dispute the application of these two exemptions but wishes a decision notice to be issued to record the FCO's procedural failings in handling his request. The Commissioner has concluded that the FCO committed a number of breaches of section 17 of the Act in handling this request in addition to also breaching section 10.

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 Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. The complainant submitted the following request to the Foreign and Commonwealth Office (FCO) on 16 October 2010:

> 'I understand that the Catholic Bishop's conference is responsible for making a substantial contribution to the Pope's recent visit.

> How much has been received so far, and how much is still outstanding? Is there any schedule on which any outstanding payments are due or expected to be received? Are there any plans for interest to be charged?
>
> Please also supply a copy of any contracts or other legal agreements relating to this contribution.'

3. The FCO contacted the complainant on 12 November 2010 and explained that it considered section 27 of the Act to apply to the request but it needed to extend the time it required to consider the balance of the public interest test.

4. The complainant contacted the FCO on 13 November 2010 and argued that it was not clear on what basis section 27 would apply given that the requested information was about financial arrangements between the UK government and a domestic organisation. As required by sections 17(1)(c) and 17(2) the complainant asked the FCO to confirm what the prejudice in disclosure would be.

5. The FCO contacted the complainant again on 16 November 2010 and explained that it was the UK's relations with the Holy See (which has the same status as an Embassy) that the FCO believed were relevant to this request.

6. The complainant was dissatisfied with this explanation and contacted the FCO once more on 16 November 2010, arguing that it was not clear why financial arrangements with a domestic body would be likely to prejudice the government's relations with the Holy See.

7. Having received an 'out of office' response to his email, the complainant contacted the FCO again on 20 November 2010. In this correspondence the complainant asked for an 'internal review' of the FCO's handling of this request to be undertaken because he was dissatisfied with the FCO's failure to specify which clause(s) in section 27 it was seeking to rely on and furthermore its failure to explain why that clause(s) applied.

8. The FCO responded on 25 November 2010 and confirmed that it was relying on section 27(1)(a) and provided further reasoning to explain this. It also noted that as a final response had not yet been sent to this request it would be inappropriate for the FCO to complete an internal review at this stage. The FCO also informed the complainant that:

> 'The selection of s27(1)(a) is based on consideration of all the material we have available, to date.
>
> [We are] unable currently to state whether all the information we

> locate will be covered by s27 as we are still making searches for any additional suitable material in order to be able to respond as thoroughly as possible to your request. This will be by 10 December, as stated in our PIT [public interest test] letter sent to you on 12 November.'

9. On 10 December 2010 the FCO contacted the complainant again and provided him with copies of correspondence between Lord Patten and Archbishop Vincent Nichols dated 1 and 2 September 2010. The FCO explained that it considered the second annex to Lord Patten's letter to be exempt from disclosure on the basis of sections 22, 27(1)(a) and 29(1)(b) of the Act and that for all of the exemptions the public interest favoured withholding the information.

10. The complainant contacted the FCO on 12 December 2010 and asked for an internal review to be conducted.

11. The FCO informed him of the outcome of the internal review on 11 January 2011. The review upheld the application of the exemptions as set out in the refusal notice.

12. The FCO contacted the complainant again on 7 July 2011 and provided the complainant with a copy of the withheld annex. It was no longer relying on sections 22, 27(1)(a) and 29(1)(b) to withhold any parts of this annex although it had made a number of redactions on the basis of sections 40(2) and 43(2) of the Act.

The Investigation

Scope of the case

13. The complainant contacted the Commissioner on 26 February 2011. He disputed the application of sections 22, 27(1)(a) and 29(1)(b) by the FCO in addition to arguing that the FCO committed a number of technical breaches of the Act in handling his request.

14. As noted above, during the course of the Commissioner's investigation the FCO provided the complainant with a redacted copy of the withheld annex. Following this development the Commissioner established with the complainant that he did not wish to contest the application of sections 40(2) and 43(2). However, he still wished a decision notice to be issued which recorded the procedural breaches he believed the FCO had committed when handling his request. In his letter to the Commissioner of 26 February 2011 the complainant identified the following breaches:

- The notice extending the time for response to carry out a public interest test did not explain why section 27 applied and did not specify the specific clause;
- Sections 22 and 29 were cited out of time;
- With regard to the information that the FCO did release, if section 27 did not apply to it then the release was late. Again there is no documentation of any public interest test having been carried out with respect to that information;
- He first requested an internal review on 20 November 2010 and did not receive a reply until 10 January 2011, and there is no explanation of why it would have needed more than 20 working days; and
- By its own admission, the FCO had not even identified all the information caught by the request after 20 working days and was not sure if section 27 would apply to it all.

15. The focus of this Notice is therefore limited to considering the matters listed above rather than whether the FCO is entitled to withhold any of the requested information. Not all of the points raised by the complainant are requirements of Part 1 of the Act and therefore they do not form part of this Notice. The Commissioner has nevertheless commented on them in the Other Matters section.

Chronology

16. The Commissioner contacted the FCO on 30 March 2011 and asked to be provided with a copy of the withheld information along with submissions to support the application of sections 22, 27(1)(a) and 29(1)(b).

17. Having failed to receive a substantive response to his request, the Commissioner issued an Information Notice on 1 June 2011 which formally requested a response to his letter of 30 March.

18. The FCO responded to this Information Notice on 30 June 2011 and explained that it intended to disclose a redacted version of the previously withheld annex to the complainant (which as noted above, it did so on 7 July 2011).

Analysis

Procedural Requirements

Section 17 - Refusal notice

19. Section 17(1) requires that if a public authority is relying on exemptions to refuse a request it must, within 20 working days following receipt of the request, provide the requestor with a notice that states that fact; specifies the exemption(s) in question; and if not clear explain why the exemption(s) apply.

20. Although a public authority, under section 17(3), can extend the time it needs to consider the balance of the public interest test, it must still fulfil the requirements of section 17(1).

21. In this case the Commissioner believes that the FCO's refusal notice of 12 November 2010 was inadequate in the following respects:

22. It failed to specify which sub-section of section 27 it was seeking to rely and this constituted a breach of section 17(1)(b).

23. It failed to explain why it considered the sub-section which it was seeking to rely - which was in fact section 27(1)(a) - to apply. This constitutes a breach of section 17(1)(c).

24. The FCO also failed in its initial refusal notice to cite a number of additional exemptions which it later sought to rely on. This constitutes a breach of section 17(1).

Section 10 – Time for compliance

25. Section 10(1) of the Act requires a public authority to disclose any information which is not exempt within 20 working days following the receipt of the request. As the FCO has disclosed parts of the requested information outside the time for compliance, this constitutes a breach of section 10(1).

The Decision

26. The Commissioner has decided that the FCO committed the following breaches when dealing with this request:

- The failure to provide a sufficiently detailed refusal notice constituted breaches of section 17(1)(b) and (c).

- The late reliance on exemptions other than section 27(1)(a) constituted a breach of section 17(1).
- The failure to disclose information which it ultimately concluded was not exempt from disclosure constituted a breach of section 10(1).

Steps Required

27. The Commissioner requires no steps to be taken.

Other matters

28. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters:

29. The Commissioner notes the complainant's suggestion that the FCO used the time extension for its consideration of the public interest test as a means to also locate additional information relevant to this request. The Commissioner agrees that the wording of the FCO's response dated 25 November 2010 – which is quoted at paragraph 8 of the Notice – would seem to confirm that this was indeed the case. The Commissioner therefore wishes to emphasise that when a public authority relies on the provisions of section 17 to take further time to consider the balance of the public interest it must have first identified all of the requested information. This is because the purpose of the extension is simply to consider the balance of the public interest, not to locate information falling within the scope of the request and not to determine whether or not an exemption is engaged.

30. With regard to the complainant's suggestion that the internal review took too long to complete, the Commissioner is minded to agree with the FCO's suggestion in its correspondence of 25 November 2010 that it would have been inappropriate to commence an internal review at this stage given that a substantive response had yet to be issued. When the complainant did submit his second request for an internal review on 12 December 2010 the FCO informed him of the outcome on 11 January 2011 which the Commissioner considers to be within a reasonable time period.

Right of Appeal

31. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

    First-tier Tribunal (Information Rights)
    GRC & GRP Tribunals,
    PO Box 9300,
    Arnhem House,
    31, Waterloo Way,
    LEICESTER,
    LE1 8DJ

    Tel: 0300 1234504
    Fax: 0116 249 4253
    Email: informationtribunal@hmcts.gsi.gov.uk
    Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

32. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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

Dated the 2nd day of August 2011

Signed ……

Alexander Ganotis
Group Manager – Complaints Resolution
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Legal Annex

General Right of Access

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 2(3) provides that –

"For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

(a) section 21

(b) section 23

(c) section 32

(d) section 34

(e) section 36 so far as relating to information held by the House of Commons or the House of Lords

(f) in section 40 –

(i) subsection (1), and

(ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,

(iii) section 41, and

(iv) section 44"

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."

Section 10(3) provides that –

"If, and to the extent that –

(a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or

(b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given."

Refusal of Request

Section 17(1) provides that -

"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 that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies."

Section 17(2) states –

"Where–

(a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-

(i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or

(ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and

(b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached."

Section 17(3) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

(a) that, in all the circumstances of the case , the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

Information intended for future publication

Section 22(1) provides that –

"Information is exempt information if-

(a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),

(b) the information was already held with a view to such publication at the time when the request for information was made, and

(c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a)."

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."

The economy

Section 29(1) provides that –

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

(a) the economic interests of the United Kingdom or of any part of the United Kingdom, or

(b) the financial interests of any administration in the United Kingdom, as defined by section 28(2)."

Personal information

Section 40(2) provides that –

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

(a) it constitutes personal data which do not fall within subsection (1), and

(b) either the first or the second condition below is satisfied."

Section 40(3) provides that –

"The first condition is-

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data

Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

(i) any of the data protection principles, or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded."

Commercial interests

Section 43(2) provides that –

"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)."