

## **Freedom of Information Act 2000 (Section 50) Environmental Information Regulations 2004**

### **Decision Notice**

**Date: 16 January 2012**

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

### **Summary**

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The complainant requested information from the Foreign and Commonwealth Office (FCO) about a number of companies and developments on the Turks and Caicos Islands. The FCO provided some information but withheld the remainder on the basis that it was exempt from disclosure on the basis of section 27 (international relations) and section 40 (personal data) of the Act. The Commissioner decided that some of the withheld information was in fact environmental information and thus this should have been considered under the Environmental Information Regulations. Nevertheless the Commissioner is satisfied that this environmental information is exempt from disclosure under the equivalent provisions in that legislation, regulation 12(5)(a) and 13(1).

### **The Commissioner's Role**

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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.
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

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3. The complainant submitted the following request to the Foreign and Commonwealth Office (FCO) on 7 October 2010:

*'I would be grateful if you could supply me with all information held by the Foreign & Commonwealth Office in relation to the following companies and/or developments in the Turks & Caicos, since January 1st 2004:*

*Leeward Resort & Spa  
Nikki Beach Resort & Spa  
Star Island*

*This should include but is not limited to memoranda, notes, email, or other communication between the UK Governor's office in the Turks & Caicos, the Overseas Territories Directorate, and elsewhere within the FCO, and any other information on this company held by them. Please also search for briefs, assessments, minutes of meetings, and records of discussions where these companies and/or developments are mentioned.'*

4. The FCO responded on 23 December 2010 and explained that it held five documents relating to Star Island. It provided one of these documents albeit with a number of redactions made on the basis of section 40(2) and explained that the remaining four documents were exempt from disclosure on the basis of sections 27(1)(a), (c), (d) and 27(2) of the Act. The FCO also explained that it had held three documents relevant to the Nikki Beach Resort. It disclosed two of these documents with the parts of them not relevant to the request redacted. The third document was withheld in its entirety on the basis of section 40(2). The FCO also explained that it did not hold any documents relating to the Leeward Resort and Spa.
5. The complainant contacted the FCO on 7 February 2011 and asked it to conduct an internal review of his handling of his request. He asked the FCO to address three specific points: firstly the decision to redact the identities of the individuals in the first document disclosed to him; secondly the decision to withhold four documents on the basis of section 27; and thirdly whether the document withheld in its entirety concerning the Nikki Beach Resort and Spa could be disclosed in a redacted form.
6. The FCO informed him of the outcome of the internal review on 2 March 2011; the review upheld the application of the exemptions as set out in the refusal notice.

## The Investigation

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### Scope of the case

7. On 11 April 2011 the complainant contacted the Commissioner to complain about the way his for information had been handled. The basis of his complaint mirrored the three specific points he had asked the FCO to consider when conducting its internal review.
8. During the course of the Commissioner's investigation the complainant was provided with the name of the Acting Governor which had been redacted from the first document. The Commissioner has not therefore considered the FCO's original redaction of this name on the basis of section 40(2). However, the Commissioner has considered whether the identities of the individuals to whom the email was sent have been correctly withheld.

### Chronology

9. The Commissioner contacted the FCO on 12 May 2011 in order to inform it that this complaint had been received. In doing so the Commissioner asked to be provided with a copy of the withheld information.
10. The FCO provided the Commissioner with a copy of the withheld information on 10 June 2011.
11. The Commissioner contacted the FCO again on 24 June 2011 and asked it to clarify a number of issues with regard to its handling of this request. The Commissioner noted that having reviewed the withheld information he believed that some it constituted 'environmental information' as defined by the EIR and these pieces of information should have been considered under this access regime rather than the Act. The Commissioner advised the FCO that he was prepared to consider such parts of the withheld information under the equivalent exceptions contained in the EIR, namely regulations 12(5)(a) and 13(1) as these were very similar to the exemptions cited by the FCO in its refusal notice.
12. The FCO responded on 10 August 2011 and provided the Commissioner with the clarification he had sought. The FCO also asked the Commissioner to read its arguments for relying on sections 27(1) and 40(2) as arguments for relying on the exceptions contained at regulations 12(5)(a) and 13(1) of the EIR.

## Analysis

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13. As indicated by the FCO's responses to the complainant there are 8 documents falling within the scope of this request. For ease of reference the Commissioner has referred to these documents as A to H. The documents relevant to this complaint are A – i.e. the first document disclosed to the complainant to which he disputes the application of section 40(2) to withhold the names of the recipients; B to E which have been withheld in their entirety on the basis of sections 27(1)(a), (c), (d) and 27(2); and H which has been withheld in its entirety on the basis of section 40(2).
14. A number of these documents contain information not relevant to this request because it does not relate to either Nikki Beach Resort & Spa or Star Island. The Commissioner has not therefore considered these parts of the documents as part of his investigation.
15. The Commissioner believes that all of the information relevant to this request in documents A to E constitutes environmental information and thus it should have been considered under the EIR rather than under the Act. His reasoning is as follows:
16. Regulation 2(1) of the EIR defines environmental information as any information in any material form on:
  - (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*
  - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*
  - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;*
  - (d) reports on the implementation of environmental legislation;*
  - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities*

*referred to in (c); and*

*(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)'*

17. The Commissioner considers that the phrase 'any information...on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. In the Commissioner's opinion a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor etc in question. In other words, information that would inform the public about the matter under consideration and would therefore facilitate effective participation by the public in environmental decision making is likely to be environmental information.
18. As the quote from regulation 2(1) above suggests there are a number of different ways in which information can be classed as environmental information. In the Commissioner's opinion all of the information falling within the scope of the requests and contained in documents A to E constitutes environmental by virtue of regulation 2(1)(c).
19. In order to be environmental information under this regulation the Commissioner believes that the following two criteria have to be met:
  - The information itself must be on a measure or activity;
  - The measure or activity (**not** the information itself) must affect, or be likely to affect, the elements and factors in 2(1)(a) and (b), or be designed to protect the elements in (a).
20. In the Commissioner's opinion all of the information relevant to the request contained in documents A to E is information on the proposed Star Island development. The proposed development is part of a project to build a marina in the Leeward Channel of the Turks and Caicos Islands (TCI). Under the proposals the sand in the channel would be dredged in order to deepen the channel and then put on a sandbank in the channel in order to reclaim the land which could be turned into an artificial island. The Commissioner's believes that it is clear that this activity would be likely to affect the elements listed in 2(1)(a).

21. However, the Commissioner accepts that the information contained within document H is not environmental information as defined by the EIR.
22. The Commissioner has considered the FCO's decision to withhold the environmental information, i.e. documents A to E, first.

## **Exceptions**

### **Regulation 12(5)(a)**

23. This regulation provides that information is exempt from disclosure if its disclosure would adversely affect international relations, defence, national security or public safety.
24. The Commissioner is conscious that the threshold to engage an exception under regulation 12(5) of the EIR is a high one compared to the threshold needed to engage a prejudiced based exemption under the Act: It is necessary for the public authority to show that disclosure 'would' have an adverse effect, not that it may or simply could have an effect. With regard to the interpretation of the phrase 'would' the Commissioner has been influenced by the Tribunal's comments in the case *Hogan v Oxford City Council & Information Commissioner* in which the Tribunal suggested that although it was not necessary for the public authority to prove that prejudice would occur beyond any doubt whatsoever, prejudice must be at least more probable than not.<sup>1</sup>

#### *The FCO's position*

25. The FCO has argued that disclosure of this information would be prejudicial to the UK's relations with the TCI because the documents record or report discussions with individuals which were conducted in confidence, including the proceedings of the TCI Cabinet. Given that this information was provided to the UK on a confidential basis, if that confidence was broken it would have damaging effects on the UK's relations with the TCI and also with the governments of other British Overseas Territories.

#### *The complainant's position*

26. The complainant argued that the FCO's argument that the disclosure would also prejudice relations with other British Overseas Territories failed to take into account the unique situation in the TCI. Namely that self government had been suspended in early 2009 following the

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<sup>1</sup> These guiding principles in relation the engagement of exceptions contained at regulation 12(5) were set out in Tribunal case *Archer v Information Commissioner & Salisbury District Council* (EA/2006/0037)

publication of the Commission of Inquiry which had identified a 'high level of systemic corruption' and a 'serious deterioration from an already low level in the Territory's system of governance and public financial management and control in the country's government'. The complainant therefore argued that the situation in the TCI was not comparable to that in other Overseas Territories and consequently disclosure of information pertaining to Cabinet discussions in this case would not necessarily have implications for other Territories.

### *The Commissioner's position*

27. Regulation 12(5)(a), unlike section 27(1), does not provide a definition of how 'international relations' could be harmed. However, the Commissioner is satisfied that the consequences envisaged by the FCO if this information was disclosed are ones that can be described as effects on the UK's international relations and would thus fall within the scope of regulation 12(5)(a). For clarity, although the TCI is defined as an overseas British Territory the Commissioner is satisfied that the UK does enjoy 'international relations' with it in light of the fact that section 27(5) of the Act confirms that in that legislation at least references to States other than the UK include references to *any* territory outside the UK. The Commissioner considers it appropriate to adopt the same interpretation when considering the application of regulation 12(5)(a).
28. The Commissioner accepts that the effective conduct of international relations depend upon countries maintaining a degree of trust and confidence and clearly, if information which was disclosed by one State which was provided to it by another on a confidential basis, this risks undermining that relationship. Therefore the Commissioner accepts that it is logical for the FCO to argue that disclosing the withheld information would undermine its relations with the TCI. In accepting this point the Commissioner recognises that the Cabinet Papers of any government are often protected very carefully thus increasing the prospect of a negative impact on relations between the UK and the TCI if the information was disclosed. The Commissioner therefore accepts that likelihood of prejudice occurring if the information was disclosed is certainly more probable than not and thus the exception is engaged.
29. In reaching this conclusion the Commissioner has taken into account the constitutional status of the TCI at the time of the request: As the complainant's submissions indicate, in August 2009 the UK Government instructed the Governor to bring into force an order which suspended certain parts of the TCI constitution for two years, in particular the provisions relating to the Cabinet, which ceased to exist, and the House of Assembly, which was dissolved and its members' seats vacated. These bodies were replaced with an Advisory Council

and a Consultative Forum, both of which provide the Governor with advice and guidance on carrying out his functions. The Commissioner therefore accepts that because at the time of the request the TCI were no longer self governing it could be argued that there not in effect any formal relations between the UK and TCI governments, simply because the latter has ceased to exist. Therefore, disclosure of the withheld information could not be said to harm relations between the two.

30. However, the Commissioner accepts that both the Advisory Council and Consultative Forum could both be seen effectively as organs of the State of TCI. In the Commissioner's opinion disclosure of TCI Cabinet minutes by the UK, albeit from a TCI administration that no longer existed, would still harm relations between the UK and the Advisory Council and Consultative Forum.
31. However, the Commissioner is not prepared to accept the FCO's argument that disclosure of this information would harm its relations with the other British Overseas Territories. The Commissioner notes that the FCO has not explained exactly why it believes that the disclosure of the withheld information would result in prejudice to its relations with other such Territories beyond simply asserting that such a prejudicial consequence would occur. The Commissioner presumes that this is because of the similarity of the relationship between the TCI and the other Territories and their relationship with the UK. However, the Commissioner notes that each of the Territories has separate constitutions and although most have elected governments each one has varying degrees of responsibility for domestic affairs. A direct parallel between the affairs of the TCI and other Territories should not necessarily be drawn. Moreover, as explained above the Commissioner believes that prejudice would occur to the UK's relationship with the TCI because the TCI provided this information on a confidential basis. It is not the confidence of the other Territories that would be undermined if the information was disclosed. In the absence of a clearer explanation, and the bearing in mind the high threshold for engaging the exception, the Commissioner is not prepared to accept the argument that disclosure of the information, in the circumstances of this case, would also harm the UK's relations with the other Overseas Territories.

### **Public interest test**

32. Regulation 12(5)(a) is subject to the public interest test. The Commissioner has therefore gone on to consider the public interest test arguments submitted by the FCO in relation to its application of section 27 in the context of regulation 12(5)(a). Regulation 12(2) of the EIR sets a presumption in favour of disclosure and the Commissioner has



borne this requirement in mind in carrying out his assessment of the public interest test.

### **Public interest arguments in favour of maintaining the exception**

33. The FCO argued that it would not be in the public interest to undermine the UK's relationship with the TCI because this would impact on the UK's ability to protect and promote its interests abroad. This consequence would clearly not be in the public interest.

### **Public interest arguments in favour of disclosing the requested information**

34. The FCO acknowledged that there may be a legitimate interest in the nature and result of the discussions between leaders and representatives of the government of the TCI and UK government during the period specified in the request. In particular the FCO noted that disclosure of the information may contribute to a greater understanding of the Star Island development.
35. The complainant argued that disclosure of the information would not only contribute to a better understanding of the Star Island development, but also to the state of governance in the TCI and the FCO's knowledge and perception of the conduct of government in the TCI at that time. The complainant suggested that the public interest in disclosure of the proceedings of the Cabinet was particularly high in light of the findings of the Commission of Inquiry referred to above.
36. More specifically, the complainant highlighted the fact that in relation to the Star Island development it has been established in the TCI courts that the decision to grant the developer planning permission was not legal and thus there was even greater public interest in relation to disclosure of information about that decision.

### **Balance of the public interest arguments**

37. With regard to attributing weight to the public interest arguments in favour of disclosure the Commissioner recognises that the issues of accountability and transparency identified by both the complainant and FCO are often cited in any consideration of the public interest test. Such concepts are inherent to the EIR but this does not diminish their relevance to this case and moreover the Commissioner would agree that there is a clear public interest in the public being informed as to how the UK manages its relations with its international partners.
38. Furthermore, in the Commissioner's opinion such arguments attract particular weight in light of the circumstances identified by the complainant; that is to say, the local controversy surrounding the

proposed Star Island development given its consequences for the local environment and the manner in which planning permission was initially granted. In particular the Commissioner agrees that disclosure of the withheld information would provide some insight into relations between the TCI government and the UK government, as represented by the Governor, during a period in which there was later found to be evidence of possible corruption and other serious dishonesty of members of the TCI legislature, including some members of the Cabinet.

39. However, the Commissioner believes that it is very strongly in the public interest that the UK enjoys effective relations with foreign States. This is particularly true in its relations with the British Overseas Territories, including the TCI, given that the Governor, representing The Queen, maintains responsibility for the TCI's external affairs, internal security and defence. It would be strongly against the public interest if the UK's relations with the TCI were harmed to such an extent that it could not manage these aspects of the TCI's affairs effectively. In the Commissioner's opinion it is in the public interest that once the TCI returns to a position of self-government its Cabinet can share information with the UK government safe in the knowledge that such information would be treated confidentially.
40. Therefore whilst disclosure could provide the public with some insight into a particular issue within the TCI, namely the Star Island development, disclosure would undermine the UK's ongoing relations with the TCI on a broad range of issues. In the Commissioner's opinion in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosure of the information.

### **Regulation 13**

41. The FCO redacted the names of the individuals to whom the email which comprises document A was sent and copied on the basis of section 40(2). Regulation 13(1) is the equivalent provision within the EIR and provides that information is exempt from disclosure if it is the personal data of any third party and where disclosure would breach any of the data protection principles contained in the Data Protection Act 1998 (DPA).
42. The relevant principle is the first principle which states that:

*'Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –*

- (a) at least one of the conditions in Schedule 2 is met, and*

*(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.'*

43. The FCO argued that its decision to redact the names of recipients of the email was in line with its policy of not disclosing the names of its staff who were not in public facing roles. Thus disclosure would be unfair as such staff would have an expectation that their names would not be disclosed.
44. In a previous decision notice, FS50267949, also involving the FCO the Commissioner concluded that in light of this expectation of non-public facing civil servants, disclosure of their names would be unfair. The Commissioner sees no reason to adopt a different approach in this case and therefore he accepts that disclosure of the names redacted from document A would constitute a breach of the first data protection principle and therefore the names are exempt from disclosure on the basis of regulation 13(1).<sup>2</sup>

## **Section 40(2)**

45. The FCO has relied on section 40(2) to withhold document H in its entirety. It has argued that disclosure of the document would cause significant distress to a particular individual and thus disclosure would be unfair and breach the first data protection principle.
46. The complainant has queried whether this document could be disclosed in a redacted format.
47. The Commissioner has considered the content of the document carefully – along with the more specific submissions provided to him by the FCO – and is satisfied that the entire document constitutes personal data and that disclosure of that information would clearly result in substantial distress to the individual concerned and the invasion of that person's privacy. The Commissioner is therefore satisfied that disclosure of the entire document would breach section 40(2) of the Act. The Commissioner is not able to provide further details as to his basis for reaching this conclusion as to do so would result in revealing details about the content of the withheld document itself.

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<sup>2</sup> [FS50267949](#), paragraphs 39-49.

## **The Decision**

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48. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act and EIR.

## **Steps Required**

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49. The Commissioner requires no steps to be taken.

## Right of Appeal

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

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

Tel: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

51. 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.
52. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Signed** .....

**Graham Smith**  
**Deputy Commissioner**  
**Information Commissioner's Office**  
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