

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 23 April 2012

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

### Decision (including any steps ordered)

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1. The complainant requested information about the UK's official reactions to a report alleging serious crimes, including organ trafficking. The Foreign and Commonwealth Office (FCO) provided him with some information but withheld the remainder, citing the exemptions relating to international relations, law enforcement, formulation of government policy and effective conduct of public affairs. The Information Commissioner's decision is that the FCO correctly withheld the majority of the information. However, he does not find the exemption engaged with respect to some of the withheld text and orders disclosure of that information. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation: disclose the information identified in the confidential annex to this decision notice.
2. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

### Request and response

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3. The complainant first wrote to the Foreign and Commonwealth Office (FCO) requesting information in the following terms:

*"I wish to see copies of documents held by the FCO which mention and refer to the Council of Europe Report 'Inhuman treatment of people and illicit trafficking in human organs in Kosovo', written by Dick Marty.*

*In particular I am interested in seeing UK official reactions and assessments in response to the Marty report".*

4. Having been advised that the cost of compliance would exceed the appropriate limit the complainant wrote to the FCO on 26 July 2011, requesting information about the Council of Europe report by Dick Marty, specifically saying:

*"please limit your assessment to strictly those documents with UK official assessments of the Council of Europe report".*

5. The FCO responded on 19 August 2011. It provided the complainant with some information, citing sections 27, 31, 35 and 36 (international relations, law enforcement, formulation of government policy and effective conduct of public affairs) as the reasons for withholding the remaining information within the scope of the request. It also advised that it had made minor redactions under section 40 relating to personal information.
6. Following an internal review, on 17 October 2011 the FCO upheld its decision to rely on those sections to continue to withhold information within the scope of the request - apart from "*some limited passages of text*" which were provided to the complainant.

## Scope of the case

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7. The complainant contacted the Information Commissioner to complain about the way his request for information had been handled. He told the Information Commissioner:

*"When I saw the information that had been redacted first time but subsequently uncensored following the IR [internal review] – info that the FCO probably found embarrassing I am led to believe that more of the info the FCO has redacted is actually of an embarrassing nature rather than because it engages any exemptions".*

8. The Information Commissioner considers the scope of his investigation to be with respect to the FCO's reliance on sections 27, 31, 35 and 36 to withhold information within the scope of the request.

## Reasons for decision

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9. The FCO is relying on a single exemption to withhold some of the withheld passages of text. However, with respect to much of the withheld information, the FCO is citing multiple exemptions as the reason for non-disclosure. In considering that information, the Commissioner will consider each exemption in turn in order to reach a decision as to whether, in his view, the information should be withheld or disclosed.

### Section 27 International relations

10. Section 27(1) (international relations) focuses on the effect of disclosure and provides that information is exempt if its disclosure 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 other international organisation or international court;*

*(c) the interests of the United Kingdom abroad; and*

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

11. In this case, the FCO told the complainant that it is relying on section 27(1)(a). During the course of the Information Commissioner's investigation, the FCO told the Commissioner that it considered section 27(1)(b) "*to be equally valid*". In addition it told the Commissioner:

*"After careful consideration, we would add Section 27(2) to the exemptions that we have already applied".*

12. Information is exempt under section 27(2) if it is confidential information obtained from a state other than the United Kingdom, or from an international organisation or international court. Section 27(2) relates not primarily to the subject of the information, nor the harm resulting from its disclosure, but to the circumstances under which it was obtained and the conditions placed on it by its supplier.

### *Section 27(1)*

13. The Commissioner has first considered the FCO's citing of section 27(1).
14. In order for section 27(1) to be engaged, the FCO must show that the disclosure would, or would be likely to, prejudice the stated interest(s) – in this case relations between the UK and any other state, and relations

between the UK and any other international organisation or international court. In assessing the likelihood of the prejudice that a disclosure of information might cause it is necessary to identify the particular harm that may arise.

15. The request in this case relates to UK assessments of a Parliamentary Assembly of the Council of Europe (PACE) report. That report, which is also known as the Marty Report, alleges serious crimes, including trafficking in human organs.
16. In the Commissioner's view, the FCO's arguments in its correspondence with the complainant regarding the international relations exemption were more to do with the public interest test than why it considered the exemption to be engaged.
17. However, having viewed the withheld information, the Information Commissioner is satisfied that it relates to UK Government discussions with other States regarding sensitive political developments in Kosovo. He also notes that media coverage at the time the report was issued referred, amongst other things, to a statement from the international organisation EULEX (European Union Rule of Law Mission in Kosovo) about the report's findings.
18. Having considered the detailed arguments put forward by the FCO during his investigation, the Information Commissioner accepts that disclosure would, or would be likely to, harm relations between the UK and any other State, international organisation or court. It follows that he finds the exemption engaged.

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

19. The FCO accepted that disclosure would increase public knowledge and inform debate, notably about relations between the UK government and Kosovo.

*Public interest arguments in favour of maintaining the exemption*

20. The FCO argued that the effective conduct of international relations depends on maintaining trust and confidence between governments and between the UK and international organisations. It considered that, if the UK were unable to maintain that trust and confidence, relationships would be damaged, and its ability to protect and promote UK interests through international relations hampered.
21. With respect to international organisations, the FCO explained, in its submission to the Information Commissioner, why it considered that disclosure in this case would prejudice UK's relationships, for example

with EULEX, a scenario which it considered would not be in the public interest.

*Balance of the public interest arguments – relations between the United Kingdom and any other State*

22. As the FCO is citing multiple limbs of the exemption, the Commissioner has considered separately, in the case of each limb, whether the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner has considered, first, the public interest arguments in respect of relations between the United Kingdom and any other State.
23. The Commissioner considers that, when applying the public interest test to information withheld under section 27(1), the content of the information is likely to have a significant bearing on the decision of whether to disclose. There must be some detriment to the public interest arising from disclosure for the balance of the test to justify maintaining the exemption.
24. The Commissioner acknowledges the argument that releasing the information would inform public debate and promote understanding of international affairs.
25. However, the Commissioner also considers that it is strongly in the public interest that the UK enjoys effective relations with foreign States. The public interest would obviously be harmed if these international relationships were negatively impacted, for example if information ceased to be provided or the nature of discussions became less candid as a result of a lack of trust. He considers this to be especially true given the nature of the issues involved in this case and the likely harm if disclosure makes international relations more difficult.
26. He therefore finds the public interest in maintaining the exemption outweighs the public interest in disclosure.

*Balance of the public interest arguments – relations between the United Kingdom and any international organisation or international court*

27. The FCO is citing section 27(1)(b) in relation to some of the same information for which it is citing section 27(1)(a). As the Commissioner has found that the public interest favours maintaining the exemption, by virtue of section 27(1)(a), he has not considered the public interest arguments in relation to section 27(1)(b) in respect of that information.
28. With respect to the information withheld under 27(1)(b) but not under 27(1)(a), the Commissioner again acknowledges the public interest

argument that releasing the information would inform public debate and promote understanding of international affairs.

29. The FCO has argued strongly that the effective conduct of international relations depends on maintaining trust and confidence between the UK and international organisations. The Commissioner accepts that it would not be in the public interest if there was a negative impact on the effective conduct of international relations as a result of the release of the passages of text withheld under this exemption. He therefore gives weight to the FCO's arguments that it is strongly in the public interest that the UK enjoys effective relations with international organisations such as EULEX.
30. In conclusion, the Commissioner recognises the strength of the arguments on both sides of the public interest test; however, he has concluded that the public interest favours maintaining the exemption.

#### *Section 27(2)*

31. In this case the FCO is citing section 27(2) with respect to a small amount of information that it has also withheld under section 27(1). As the Commissioner has concluded that that information was correctly withheld under section 27(1) he has not gone on to consider the FCO's citing of section 27(2).

#### **Section 31 Law enforcement**

32. Section 31 of the FOIA creates an exemption from the right to know if releasing the information would or would be likely to prejudice a range of law enforcement functions and activities. This subsection effectively protects the conduct of investigations and proceedings which may lead to prosecutions or other legal action.
33. In this case, the FCO is relying on section 31(c) and (g) by reason of section 31(2)(a) and (b). In other words, it considers that disclosure would, or would be likely to, prejudice the administration of justice and the exercise by any public authority of its functions for the purpose of ascertaining whether any person has failed to comply with the law or is responsible for any conduct which is improper.
34. In considering the FCO's application of the law enforcement exemption, the Commissioner has considered the effect of disclosure in order to assess whether there is any likely prejudice to the law enforcement activities cited by the FCO.
35. With respect to prejudice to the administration of justice and the exercise of the functions of a public authority, the FCO has argued that disclosure in this case would affect EULEX's ability to investigate the

allegations contained in the Parliamentary Assembly of the Council of Europe (PACE) report. The Commissioner understands that, at the time of the request, an ongoing investigation into the allegations of the kind raised in the PACE report was being conducted by EULEX (European Union Rule of Law Mission in Kosovo).

36. The FCO told the complainant:

*"Some of the information within the scope of your request relates to government discussions on information that is sensitive in the context of the current investigation being conducted by EULEX".*

37. Having viewed the withheld information, and considered the FCO's arguments about the effect of disclosure, the Commissioner is satisfied, with respect to the majority of the withheld information, that it has demonstrated how prejudice could arise and that there is a real possibility of this occurring. He therefore finds the exemption engaged in respect of that information. However, he does not find the exemption engaged with respect to a small amount of text, and orders that it is disclosed. He has detailed that information in a confidential annex to this decision notice. That annex will be provided to the FCO only.

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

38. In correspondence with the complainant, the FCO cited a generic argument in favour of disclosure, namely that disclosure would increase public knowledge and inform debate.

*Public interest arguments in favour of maintaining the exemption*

39. Arguing in favour of maintaining the exemption, the FCO told the complainant that there were "strong factors" in favour of withholding the information and that these factors:

*"relate to the UK ensuring that the current investigation proceeds with the necessary protection of sensitive information whose release could jeopardise its successful conclusion".*

40. In its submissions to the Commissioner, the FCO emphasised the effect of disclosure in this case.

*Balance of the public interest arguments*

41. When balancing the opposing public interests in a case, the Information Commissioner is deciding whether it serves the public interest better to disclose the requested information or to withhold it because of the interests served by maintaining the relevant exemption. If the public interest in the maintenance of the exemption does not outweigh the



public interest in disclosure, the information in question must be disclosed.

42. The Commissioner accepts that there is a presumption running through the FOIA that openness is, in itself, to be regarded as something which is in the public interest.
43. With respect to the public interest in this case, the Commissioner understands that the ongoing investigation referred to by the FCO is with respect to serious crimes, including allegations of human rights violations. The Commissioner considers that there is undoubted public interest in international justice and in the success of investigations involving issues such as these.
44. Having weighed up the public interest factors for and against disclosure, the Commissioner has determined that the public interest in maintaining the exemption in this case outweighs the public interest in disclosing the information.

### **Section 36 Prejudice to effective conduct of public affairs**

45. Section 36 is the only exemption in the FOIA that requires a determination by a 'qualified person'. The exemption will only apply if the reasonable opinion of a qualified person is that one of the forms of adverse effect specified in subsection 2 would follow from disclosing the information.
46. Section 36(2) is expressed in broad terms, and in order for the opinion to be reasonable, it must be clear as to precisely how the prejudice or inhibition may arise. The term 'inhibit' is not defined in the FOIA. The Commissioner's view is that, in the context of section 36, it means to restrain, decrease or suppress the freedom with which opinions or options are expressed.
47. In this case, the FCO is relying on section 36(2)(b)(i) and (ii). Section 36(2)(b) states that:

*"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-*

*(b) would, or would be likely to, inhibit -*

*(i) the free and frank provision of advice, or*

*(ii) the free and frank exchange of views for the purposes of deliberation".*



48. Information may be exempt under section 36(2)(b)(i) and (ii) if its disclosure would, or would be likely to, inhibit the ability of public authority staff and others to express themselves openly, honestly and completely, or to explore extreme options, when providing advice or giving their views as part of the process of deliberation. It should be noted that these exemptions are about the processes that may be inhibited, rather than what is in the information. The issue is whether disclosure would inhibit the processes of providing advice or exchanging views.
49. In support of its reliance on section 36, the FCO provided the Commissioner with copies of the submissions that were provided to the qualified person. The Commissioner is satisfied that the Minister for Europe – the qualified person in this case – was provided with a submission in relation to the initial request and that a further opinion was sought at the internal review stage.
50. The Commissioner has some concerns about the quality of the submissions provided to the Minister, in particular with respect to any explanation of the consequences of disclosure and likelihood of inhibition. Furthermore, in his view, the arguments in the submissions refer to the public interest test, an issue which properly falls to be considered when, or after, the decision has been taken that the exemption is engaged.
51. Nevertheless, the Commissioner is satisfied that the opinion given by the qualified person is reasonable in this case with respect both to the free and frank provision of advice or exchange of views for the purposes of deliberation. It follows that he finds the exemption engaged with respect to the FCO's citing of the exemption in section 36(2)(b)(i) and (ii).
52. In this case, having considered the submissions, the Commissioner has carried the lower level of likelihood – that inhibition would be likely to occur - through to the public interest test.

*The public interest*

53. Even where the qualified person has concluded that the exemption applies, the public interest test must be applied to the decision whether or not to disclose the withheld information.

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

54. The complainant told the FCO:

*"I believe the balance of interest in releasing info is far greater than withholding for the simple reason that the public deserves to know*

*whether their money is being used to fund and support a regime accused of inhuman treatment of people and illicit trafficking in human organs”.*

55. The complainant did not provide further information in support of his argument. However, the Commissioner notes that the Department for International Development website states that about 15% of EU development spend in Kosovo comes from the UK - almost £9 million in 2011.

56. The FCO accepts that disclosure:

*“would increase public knowledge and raise awareness of UK efforts to ensure that the allegations in the Council of Europe report are dealt with effectively”.*

*Public interest arguments in favour of maintaining the exemption*

57. In favour of maintaining the exemption, the FCO argued that there is a strong public interest:

*“in protecting the space Ministers and officials have to consider and discuss the policy context freely and frankly, to ensure the full and proper consideration of policy options”.*

58. It argued that this process would be affected if officials thought that their advice could be disclosed in the future.

59. In correspondence with the Commissioner, the FCO confirmed its view that officials' candour when discussing options would be affected by their assessment of whether the content of such discussion would be disclosed in the near future, and that this would not be in the public interest.

*Balance of the public interest arguments – free and frank provision of advice*

60. As the FCO is citing multiple limbs of the exemption, the Commissioner has considered separately, in the case of each limb of the exemption, whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information under consideration.

61. The Commissioner has considered firstly the public interest arguments in respect of the free and frank provision of advice.

62. The Commissioner considers that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would be likely to have the stated detrimental effect, he must give weight to that opinion as an important piece of evidence in his assessment of the

balance of the public interest. However, he will also consider the severity, extent and frequency of inhibition to the subject of the effective conduct of public affairs.

63. In this case, the Commissioner accepts the importance of ministers receiving free and frank advice from officials to the ability of the FCO to function effectively. Having accepted the qualified person's opinion that the free and frank provision of advice would be likely to be inhibited as a result of disclosure, the Commissioner recognises that the impact of this inhibition could be severe given the importance of the provision of advice to the functioning of the FCO.
64. On the issue of the severity and extent of the inhibition resulting from disclosure in this case, the Commissioner accepts the importance to the ability of the FCO to function effectively of ministers receiving free and frank advice from officials, and of officials being capable of exchanging free and frank views. Where the severity, extent and frequency of inhibition resulting from disclosure results in prejudice to the ability of the public authority to conduct itself effectively, this contributes to the argument that maintaining the exemption is in the public interest.
65. In other words, he gives weight to the argument that it is in the public interest that decisions are made based on the best advice available and with full consideration given to all the options available.
66. The Commissioner recognises the complexity of the issues in the Balkans. He therefore gives weight to the argument that disclosure would give insight into those issues and that such openness would be in the public interest. However, having considered the opposing public interest factors in this case the Commissioner has placed the greatest weight on the negative side-effect on the ability to have full and frank discussions about international matters.
67. He has therefore concluded that the factors in favour of disclosure do not equal or outweigh those in favour of maintaining the exemption.

*Balance of the public interest arguments – free and frank exchange of views*

68. The FCO is citing section 36(2)(b)(ii) in relation to the same information for which it is citing section 36(2)(b)(i). As he has found the section 36(2)(b)(i) arguments in favour of maintaining the exemption persuasive, the Commissioner has not gone on to consider the public interest arguments in relation to section 36(2)(b)(ii).

**Section 35 Formulation of government policy**

69. Finally the Information Commissioner has considered the remaining small amount of information which he has not already concluded is

exempt from disclosure and in respect of which the FCO is citing section 35. In this case, the FCO is relying on section 35(1)(a). In other words, it is claiming that the information is held by a government department and relates to the formulation or development of government policy.

70. The thinking behind this exemption is that it is intended to prevent harm to the internal deliberative process of policy-making. In the Commissioner's view, although 'policy' is not a precise term, it can be about the development of options and priorities for ministers, who determine which options should be translated into political action and when.
71. Section 35 is a class-based exemption. This means that if, as a matter of fact, information falls within any of the categories listed in that section, it is exempt. In this case, the Commissioner does not consider that the FCO provided the complainant with a clear explanation as to why it was citing this exemption: in his view, the explanation that the FCO provided was generic and not specific to the information at issue. It was not until the Commissioner's investigation that the FCO confirmed that it considered that the policies in question were those in relation to events in the Balkans.
72. Having viewed the withheld information, the Commissioner is satisfied that it falls within the category of 'formulation or development of government policy'. He therefore finds the exemption engaged.

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

73. The FCO acknowledged the public interest in being able to understand better the way in which Government works and how or why decisions in the area of foreign relations are reached.
74. It told the complainant that disclosure would show that the FCO "*acted properly*" throughout this case and that its actions were "*guided by balanced, considered and impartial advice*".

*Public interest arguments in favour of maintaining the exemption*

75. Arguing in favour of maintaining the exemption, the FCO told the complainant that there is a strong public interest in protecting the space that Ministers and officials have in which to consider and discuss options to ensure that policy is given full and proper consideration.
76. It argued that the candour with which officials considered the drawbacks of various options could be affected by their assessment of whether the content of such discussion would be disclosed in the near future. It also argued that there is a risk that particularly sensitive exchanges of views would not be recorded for the written record.

*Balance of the public interest arguments*

77. This exemption is intended to prevent harm to the internal deliberative process of policy-making. In the Commissioner's view, the weight given to arguments in favour of disclosure will depend largely on the need for greater transparency in relation to the subject matter and the extent to which disclosure of the information in question will meet that need.
78. In this case, having considered all the factors, the Commissioner takes the view that there are strong public interest arguments both in favour of maintaining the section 35(1) exemption and in disclosing the information at issue.
79. He acknowledges that disclosure in this case would contribute towards the accountability and transparency of the Government's response to the allegations of inhuman treatment.
80. In coming to a conclusion on this matter, the Commissioner has taken account of the content and context of the withheld information, and considered whether its release would contribute to the general public interest in openness and transparency.
81. However, having considered the opposing public interest arguments in this case, the Commissioner considers that the subject matter is such as to result in the balance of the public interest being in favour of government being able to deliberate or think in private in order to formulate and develop policy effectively. He therefore finds that, in all the circumstances of this case, the FCO was correct to withhold the information.

## Right of appeal

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82. 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)

83. 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.

84. 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  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**