

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 November 2015

Public Authority: Foreign and Commonwealth Office

Address: King Charles Street
London
SW1A 2AH

Decision (including any steps ordered)

1. The complainant submitted a request to the public authority for information in relation to flight and immigration records for the Island of Diego Garcia which had been subjected to some water damage.
2. The Commissioner's decision is that the public authority was entitled to withhold information within the scope of the relevant part of the request (the disputed information) on the basis of the exemptions at sections 36(2)(b)(i) and (ii) FOIA.
3. The Commissioner however finds the public authority in breach of section 10(1) FOIA for failing to respond to the request within 20 working days.
4. No steps are required.

Request and response

5. On 22 August 2014 the complainant submitted a request for information to the public authority in the following terms:

'On July 8, the following parliamentary question was published, which confirmed flight logs from 2002 were subject to water damage:

Diego Garcia

Mr Tyrie: To ask the Secretary of State for Foreign and Commonwealth Affairs which Government Department or Office keeps a list of flights

*which passed through Diego Garcia from January 2002 to January 2009.
[203500]*

Mark Simmonds: *Records on flight departures and arrivals on Diego Garcia are held by the British Indian Ocean Territory immigration authorities. Daily occurrence logs, which record the flights landing and taking off, cover the period since 2003. Though there are some limited records from 2002, I understand they are incomplete due to water damage.*

On July 15, in response to a question from Tory MP David Davis, it was later reported by the Foreign Office that the records subject to water damage had dried out and the files were being moved.

In connection with this incident, I'd like to ask:

How many files were initially damaged by water and have subsequently dried out?

What date was it discovered the files had been damaged by water?

When was the Foreign Office first notified of the damage to the files?

How long did it take to dry the files out? Any information available on how they were dried out?

When was the fuller inspection carried out by BIOT (British Indian Ocean Territory) immigration officials?

Who initiated the fuller inspection (BIOT officials or Foreign Office)?

Where will the records now be stored after they are transferred from the airport?

Were any reports compiled by the FCO or BIOT officials on the incident? If so, would it be possible to see the reports?...

6. The public authority initially wrote to the complainant on 22 September 2014. It informed the complainant it held information within the scope of his request which the authority considered engaged the exemptions at sections 36(2)(b) (i) & (ii) and (c) FOIA. The authority however also advised the complainant that it needed an additional 20 days to consider the balance of the public interest. From that point on, between 20 October 2014 and 12 February 2015, the public authority wrote to the complainant on five separate occasions, each time advising him that it

required an additional 20 days to take a decision on the balance of the public interest.¹

7. Finally on 12 March 2015 the public authority provided the complainant with its substantive response to his request which was made on 22 August 2014. The authority provided information as well as explanations relevant to the first seven parts of the request. The authority confirmed that it held information within the scope of the last part of the request but withheld it in reliance on the exemptions at sections 36(2)(b)(i) and (ii) and 36(2)(c).
8. The Commissioner understands that the complainant requested an internal review on 31 March 2015. The public authority wrote to the complainant with details of the outcome of the review on 1 May 2015. It upheld the original decision to rely on the exemptions at sections 36(2)(b) and (c).

Scope of the case

9. On 1 June 2015, the complainant contacted the Commissioner to complain about the way his request for information had been handled. The Commissioner subsequently confirmed that the complainant disagreed with the application of the exemptions.
10. The scope of the investigation therefore was to determine whether the public authority was entitled to rely on the exemptions at sections 36(2)(b)(i) and (ii) and 36(2)(c) to withhold information relevant to the following part of the request: *'Were any reports compiled by the FCO or BIOT officials on the incident? If so, would it be possible to see the reports?..'*
11. It is however pertinent to mention at this stage that during the course of the Commissioner's investigation, the public authority clarified to both the Commissioner and to the complainant that there were no formal reports produced in respect of the incident. The information it had considered relevant to the request consisted of advice to Ministers and correspondence between officials following the discovery of the incident (the disputed information). The complainant was satisfied with the information that the public authority identified as relevant to his

¹ The Commissioner has commented on this further below in the 'procedural matters' and 'other matters' sections.

request. The Commissioner's investigation was therefore restricted to those set of documents described by the public authority.

Reasons for decision

Section 36(2)(b)

12. The Commissioner initially considered the application of the exemptions at sections 36(2)(b)(i) and (ii).²

13. Section 36(2)(b) states:

'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...'

14. The Commissioner is satisfied that the Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs, James Duddridge was the appropriate qualified person for purposes of the exemptions at sections 36(2)(b) and (c).

15. The exemptions at section 36(2) can only be engaged on the basis of a qualified person's opinion. In order for the Commissioner to determine whether the exemptions were correctly engaged, he must determine whether the qualified person's opinion was a reasonable one. In doing so the Commissioner has considered all of the relevant factors including:

- Whether the prejudice relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection, the opinion is unlikely to be reasonable.
- The nature of the information and the timing of the request, for example, whether the request concerns an important ongoing issue on

² Although it is sufficient to engage either limb of the exemption, because the exemptions are so closely linked, it makes little difference when considered jointly.

which there needs to be a free and frank exchange of views or provision of advice.

- The qualified person's knowledge of, or involvement in, the issue.
16. Further, in determining whether the opinion is a reasonable one, the Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that no reasonable person in the qualified person's position could hold. The qualified person's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.
 17. On 10 March 2015 the qualified person accepted the recommendation by officials that the exemptions at sections 36(2)(b) and (c) should be relied on to withhold the disputed information. The recommendation and accompanying submissions in support were sent to him previously on 4 March 2015. In the qualified person's opinion, disclosure of the disputed information would be likely to inhibit the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation between officials and Ministers. He considered that disclosure would discourage the frank exchange of views by officials to inform Ministerial advice.
 18. The Commissioner accepts that it was reasonable for the qualified person to hold the view that disclosure of the disputed information would be likely to inhibit the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberations between officials and Ministers.
 19. The exchanges between officials and between officials and Ministers took place at the height of speculation about the accuracy of the Government's response to a Parliamentary Question on 8 July 2014 regarding what had happened to some of the records for flights which had passed through Diego Garcia from January 2002 to January 2009. Mark Simmonds, the Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs at the time explained that some records from 2002 were incomplete due to water damage which is suspected to have happened during a period of extremely heavy weather. In a subsequent update on 15 July 2014, Mr Simmonds explained that the records subject to water damage had been dried out and that all records from the affected area would be transferred to a new location and digitised.

20. The public authority explained that due to the level of media and Parliamentary attention following the discovery of the incident, correspondence over the period was quite frank, seeking to understand the potential problem and advise Ministers about how to respond to numerous queries relating to the incident.
21. The Commissioner notes that the correspondence within the scope of the relevant request were in the main between 10 July 2014 and 21 August 2014. He accepts that they mostly contain the candid views of officials in relation to understanding and advising Ministers about the incident. Given that the request was made on 22 August, the Commissioner does not consider it unreasonable for the qualified person to have held the opinion that disclosure of the disputed information at the time of the request would be likely to inhibit the free and frank provision of advice to Ministers, and the free and frank exchange of views between officials and between officials and Ministers, in relation to the incident. It was still clearly a fluid situation at the time and officials would not have expected that their views would be made public whilst the issues pertaining to the incident were still effectively live.
22. The Commissioner has therefore concluded that the exemptions at sections 36(2)(b) were correctly engaged by the public authority.

Public interest test

23. The exemptions are however qualified by the public interest test set out in section 2(2)(b) FOIA.³ Therefore, the Commissioner must also decide whether in all the circumstances of the case, the public interest in maintaining the exemptions outweighs the public interest in disclosing the disputed information.
24. In the complainant's view, there has been a track-record of contradiction regarding the incident. He therefore argued that disclosure would help provide clarity particularly because in his view, the incident is linked to highly sensitive logs from a period when renditions took place on Diego Garcia.
25. The public authority considered that there was a public interest in disclosure to greater transparency in relation to the nature of the incident but more importantly in the authority's view, to combat the vast number of conspiracy theories about the incident. It considered that disclosure would also demonstrate that there was a high level of

³ <http://www.legislation.gov.uk/ukpga/2000/36/section/2>

attention at senior levels to the issue and that would be in the public interest.

26. The public authority however argued that disclosure could set a precedent for disclosure of discussions internally that led to policy formulation at the time of a fast moving event where there is significant public and media interest and that would not be in the public interest.
27. The public authority further argued that there was a strong public interest in officials knowing that they could exchange frank views and offer unpopular options during such fast moving events. It submitted that there was a strong public interest in protecting the space for Ministers and officials to consider and discuss options to ensure that policy is given full and proper consideration.

Balance of the public interest

28. The Commissioner agrees that disclosure would increase transparency and public understanding in relation to the Government's handling of the incident. He also considers that it would shed additional light on the veracity of the allegations about rendition flights to Diego Garcia. These would be in the public interest.
29. Nevertheless, the Commissioner does not consider that the disputed information would add any substantially new information to the Government's response to some of the allegations made regarding rendition flights to Diego Garcia.
30. Therefore, the Commissioner does not consider that the significant public interest in not inhibiting the free and frank provision of advice and exchange of views in the circumstances of this case has diminished as a result of those allegations. He considers the timing of the request significant in that respect. While the situation remained fluid and officials could still have been asked for their views in relation to the incident, there was certainly a strong possibility that disclosing the disputed information would have affected the candidness of their contributions to an incident which had attracted lot of attention from politicians and the media.
31. Furthermore, at the time of the request, the Commissioner considers that the public interest in protecting the space for officials and Ministers to understand the nature and extent of the incident in order to respond to numerous enquiries relating to it was especially strong. Without that private thinking space, it would have been difficult for officials and Ministers to properly assess the incident and respond appropriately to enquiries.

32. The Commissioner therefore finds that, on balance, in all the circumstances of the case, the public interest in maintaining the exemptions at sections 36(2)(b) outweighs the public interest in disclosing the disputed information.
33. In light of his decision, he did not consider the applicability of the exemption at section 36(2)(c).

Procedural Matters

34. Section 10(1) FOIA requires a public authority to provide a response to a request within 20 working days. However, section 10(3) enables a public authority to extend the 20 working days limit to a reasonable time in any case where it requires more time to determine whether or not the balance of the public interest lies in maintaining an exemption, or it needs further time to consider whether it would be in the public interest to confirm or deny whether the information is held.
35. The extension at section 10(3) will therefore only apply to requests where the public authority has determined that a qualified exemption is engaged. The additional time cannot be used to determine whether the exemptions themselves are engaged. This means that the public authority should have identified the relevant exemptions, and satisfied itself that they are applicable, within the initial 20 working days.
36. The public authority's substantive response to the request which was submitted on 22 August 2014 was issued on 12 March 2015 following a number of extensions by the authority in reliance on section 10(3). However, the public authority could not have properly engaged the exemptions at sections 36(2)(b) and (c) because the qualified person did not issue his opinion until 10 March 2015. The opinion itself was not sought by officials until 4 March, some six months after the request was made.
37. In view of the above, the Commissioner finds that the public authority was not entitled to rely on section 10(3) and consequently breached section 10(1) for failing to provide its response to the request within 20 working days.

Other Matters

38. Furthermore, the Commissioner would like to place on record that he does not consider the estimated 125 days (from 20 October 2014) it took the public authority to respond to the request as a time that is '*reasonable in the circumstances*' within the meaning envisaged in section 10(3), certainly not in the circumstances of this case. As far as he can see there is nothing in the public authority's response to the complainant or indeed in its subsequent representation to the

Commissioner which justifies such an extraordinary length of time to respond to the request. The Commissioner considers that an additional 20 working days should have been sufficient for the public authority to consider the balance of the public interest in this case.

Right of appeal

39. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

40. 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.
41. 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

**Gerrard Tracey
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