

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **30 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 Foreign and Commonwealth Office (FCO) for information relating to flights arriving into the British Indian Overseas Territory in March 2004. The FCO refused to disclose the information relying on section 27(1)(a) (international relations) of FOIA. The Commissioner has concluded that the FCO is entitled to rely on this exemption to withhold the requested information and that in all the circumstances of the case the public interest favours maintaining the exemption.

Background

2. The complainant originally sent the following request to the FCO on 4 July 2013:

'This is a request under the Freedom of Information Act 2000 for records relating to flights into and out of the British Indian Ocean Territory (BIOT).

Specifically, I am requesting copies of the monthly reports which summarise the BIOT Customs and Immigration Daily Occurrence Log, for three separate months: January 2002, September 2002 and March 2004.

Please also send me copies of any records of General Declarations made by arriving flights into BIOT in January 2002, September 2002 and March 2004, for any aircraft with registration prefix 'N' (e.g., N248AB, or N787WH) or otherwise

recorded as registered in the United States. I am specifically interested in information relating to the dates and times of flights by these aircraft, details of their operators and owners, prior and subsequent destinations, crew numbers and names, and passenger number and names. If records exist pertaining to military flights as well as civilian flights, please send me both.'

3. The FCO issued a substantive response in October 2013 in which it supplied the Monthly Reports for January and September 2002 but withheld the Monthly Report for March 2004 and the General Declarations for seven separate days, 6 to 12 March 2004. These documents were withheld on the basis of sections 31(1)(a) and (b) of FOIA (law enforcement exemption).

Request and response

4. The complainant subsequently submitted the following request to the FCO on 22 July 2014:

'This request relates to flight records into and out of Diego Garcia. Specifically, I would like to re-request the Monthly Report for March 2004 and the seven General Declarations for 6-12 March 2004, inclusive. I requested this information on 4 July 2013, where you gave it reference 0630-13.

On 25 October 2013 you confirmed that you held these documents but that, following consultation with the Metropolitan Police Service, you were withholding this information subject to Section 31(1)(a) and (b) of the Act. I have attached a copy of your letter dated 25 October 2013, for your reference.

In submitting a request for the same documents, I am seeking confirmation on whether this exemption still applies, more than a year since my original request.'

5. The FCO responded and confirmed that it no longer considered sections 31(1)(a) and (b) of FOIA to apply. However, it considered sections 26 (defence) and 27 (international relations) to apply and the FCO explained to the complainant that it needed additional time to consider the balance of the public interest test in relation to these exemptions.
6. After a series of public interest extensions, the FCO provided the complainant with a substantive response on 24 February 2015 in which it confirmed that it considered the requested information to be exempt

from disclosure on the basis of section 27(1)(a) of FOIA and that the public interest favoured maintaining this exemption.

7. The complainant contacted the FCO on 17 March 2015 in order to ask for an internal review of this decision.
8. The FCO informed him of the outcome of the review on 14 May 2015. The review concluded that section 27(1)(a) had been correctly applied. The FCO noted that this decision had been reached in light of discussions with US officials.

Scope of the case

9. The complainant contacted the Commissioner on 12 June 2015 to complain about the FCO's decision to withhold the information he had requested. He disputed whether the information engaged the exemption contained at section 27(1)(a) and even if it did he argued that the public interest favoured maintaining the exemption. Further details of the complainant's submissions to the Commissioner are referred to below.

Reasons for decision

10. Section 27(1)(a) states that:

'Information is exempt information if its disclosure would, or would be likely to, prejudice –

(a) relations between the United Kingdom and any other State'

11. In order for a prejudice based exemption, such as that cited by the FCO, to be engaged the Commissioner considers that three criteria must be met:

- Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and

- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, disclosure ‘would be likely’ to result in prejudice or disclosure ‘would’ result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner’s view this places a stronger evidential burden on the public authority to discharge.
12. Furthermore, the Commissioner has been guided by the comments of the Information Tribunal which suggested that, in the context of section 27(1), prejudice can be real and of substance *‘if it makes relations more difficult or calls for a particular damage limitation response to contain or limit damage which would not have otherwise have been necessary’*.¹

The complainant’s position

13. The complainant argued that in its refusal notice and internal review the FCO had done no more than repeat the language of FOIA in order to explain why it considered section 27(1)(a) to be engaged. He suggested that there was no specific explanation as to why the exemption should apply in this case. In particular, he argued that the FCO had failed to explain why disclosure of the information would more likely than not have a prejudicial impact on the UK-US relationship.
14. He noted that there was no general expectation amongst governments for the type of information requested to be kept confidential. Indeed, he argued that he had simply requested access to landing records that have previously been provided by both US and UK governments in many other contexts, including of course, in response to his original request where the FCO provided him with the landing records for Diego Garcia for January and September 2002. The complainant also noted that the US Government through both the Federal Aviation Administration and other agencies, supplies landing records as a matter of course through US freedom of information legislation.

The FCO’s position

15. The FCO explained to the Commissioner that it believed that disclosing this information *would* harm the UK’s relationship with the US (ie the
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¹ [Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence \(EA/2006/0040\)](#), paragraph 81.

higher threshold of prejudice). In order to reach this view the FCO explained that, as noted in the internal review, it had discussed this request with officials in the US.² The US provided an unequivocal answer that disclosure would harm its national security and therefore requested that the FCO did not release the information. The US explained that it remained of this view despite the previous disclosures of similar information referred to by the complainant. The FCO explained that having considered this response internally it reached the view that to disclose the withheld information – against the US' express wishes – would damage the UK's bilateral relationship with the US.

The Commissioner's position

16. With regard to the first criterion of the three limb test described above, the Commissioner accepts that potential prejudice to the UK's relations with the US clearly relates to the interests which the exemption contained at section 27(1)(a) is designed to protect.
17. With regard to the second criterion, given the US' indication that it did not wish the withheld information to be released, the Commissioner is satisfied that disclosure of it clearly has the potential to harm the UK's relations with the US. The Commissioner is therefore satisfied that there is a causal link between the potential disclosure of the withheld information and the interests which section 27(1)(a) is designed to protect. Moreover, the Commissioner is satisfied that the resultant prejudice which the FCO believes would occur is one that can be correctly categorised, in light of the Tribunal's comments above, as real and of substance. In other words, subject to meeting the likelihood test at the third criterion, disclosure could result in making relations more difficult and/or demand a particular damage limitation exercise.
18. With regard to the third criterion, based simply on the content of the refusal notice and internal review the Commissioner can understand why the complainant would doubt whether disclosure of the withheld information would harm the UK's relations with the US. However, the Commissioner has had the benefit of examining the FCO's exchanges with the US about the disclosure of this information. The Commissioner is satisfied that based upon the exchange of correspondence the

² The Commissioner was provided with copies of the FCO's exchanges with US officials in relation to this matter. The Commissioner was also provided with internal FCO emails discussing this request which comment on the US position.

likelihood of harm occurring is clearly more than a hypothetical possibility. In the Commissioner's opinion there would be a real and significant risk of prejudice occurring if the withheld information were to be disclosed. Moreover, the Commissioner is satisfied that this evidence is sufficient to demonstrate that the higher threshold of 'would prejudice' is met. The Commissioner has reached this conclusion primarily on the basis that US clearly asked the UK not to disclose the withheld information.

Public interest test

19. Section 27 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest in disclosure of the information

20. The complainant explained that he had submitted this request because of concrete allegations, set out in numerous newspaper articles, academic studies and legal actions, that the UK territory of Diego Garcia had been used during these months covered by the request to facilitate CIA 'rendition flights' – that is, the landing of aircraft on UK territory carrying secret prisoners between secret prisons where they were subjected to torture. He therefore argued that the request concerns a matter of utmost public interest, as it is asking for information which may shed light on UK government involvement (unwittingly or otherwise) in the illegal practices of secret detention and torture.

Public interest in favour of maintaining the exemption

21. The FCO argued that the effective conduct of international relations depends upon maintaining the trust and confidence between governments. It explained that if the UK does not maintain this trust and confidence its ability to protect and promote UK interests through international relations will be hampered. In the particular circumstances of this case the FCO explained that the UK's ability to protect and promote UK interests through its relationship with the US would be impaired, an outcome which would be firmly against the public interest.

Balance of the public interest

22. The Commissioner recognises the seriousness of the issues which are the focus of the complainant's request. Disclosure of the withheld information would – regardless as to the content of the information – clearly contribute to increased transparency in relation to the alleged use of Diego Garcia for rendition flights. In the Commissioner's opinion

the public interest in disclosing this information should not be underestimated.

23. However, the Commissioner accepts that there is a very significant and inherent public interest in ensuring that the UK enjoys a strong and effective relationship with the US. This is due, not least, to the significant ties between the two nations. In the particular circumstances of this case, the fact that disclosure of the information would prejudice these relations (rather than being likely to) adds, in the Commissioner's view, further weight to the public interest in maintaining the exemption.
24. Ultimately, and by a relatively narrow margin, the Commissioner has concluded that the public interest favours maintaining the exemption. In reaching this conclusion he is not seeking to dismiss the significant public interest in disclosing this information. However, on balance he believes that this is outweighed by the public interest in maintaining the exemption given the importance of the UK-US bilateral relationship. The Commissioner has also taken into account the fact that the US basis for requesting that the information is not disclosed is based upon its concerns for its own national security. In such circumstances it is hard not to envisage disclosure of this information having a fundamental impact on the UK's ability to protect and promote its interests abroad through its relationship with the US.

Right of appeal

25. 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 123 4504
Fax: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

26. 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.
27. 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

Alexander Ganotis
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