

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 March 2016

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 about the dismissal of the Governor of St Kitts and Nevis in 1981. The FCO provided the complainant with information falling within the scope of this request but withheld certain parts on the basis of sections 40(2) (personal data) and 41(1) (information provided in confidence) of FOIA. It subsequently sought to also rely on section 37(1)(a) (communications with The Sovereign) to withhold some of this information, before extending its reliance on this exemption to use it as a basis to withhold all of the withheld information.
2. The Commissioner's decision is that all of the withheld information is exempt from disclosure on the basis of section 37(1)(a).

Request and response

3. The complainant wrote to the FCO on 17 January 2012 seeking any information on the refusal of royal assent to a Bill by the Governor of St Kitts and Nevis, Sir Probyn Inniss, and his subsequent removal from the office of Governor-General in 1981.
4. The FCO responded on 14 February 2012 and explained that under the terms of the Public Records Act 1967 (the PRA), FCO files for 1981 and 1982 were currently in the process of review and transfer to The National Archives (TNA). The FCO explained that it had identified the following files that may be relevant to the complainant's request:

1981 files (the following references are TNA references):

- FCO 44/2319 Leading Personalities and Ministerial Changes in St Kitts and Nevis
- FCO 44/2320 Constitutional Development for St Kitts and Nevis
- FCO 44/2321 Internal Political Affairs of St Kitts and Nevis
- FCO 44/2323 Governor General of St Kitts and Nevis
- FCO 44/2324 Governor General of St Kitts and Nevis

1982 files (the following reference is the original file reference):

- HWP 400/1 Ex Governor General of St Kitts and Nevis
5. The FCO explained that it considered the requested information to be exempt from disclosure on the basis of section 22 of FOIA, which provides an exemption for information which is intended to be published in the future.
 6. The complainant subsequently contacted TNA on two separate occasions (firstly in August 2012 and again in April 2014) in order to attempt to access the files referred to in the FCO's response to her of 14 February 2012. On both occasions TNA explained to the complainant that they were still awaiting receipt of the relevant files from the FCO.
 7. As a result, the complainant contacted the FCO again on 1 May 2014 in order to attempt access the files in question.
 8. The FCO responded on 1 August 2014 and explained that it would arrange for copies of the open documents from the 1981 file to be provided to her. It explained that the 1982 file was still in the review process, albeit at a different stage. On 5 August 2014 the FCO provided the complainant with copies of the files dating from 1981. However it explained that any sensitive information had been removed and replaced with a dummy card or an indication that material had been redacted from within a page. Such material had been withheld on the basis of the exemptions contained at sections 40 (personal data) and 41 (information provided in confidence) of FOIA.
 9. The complainant contacted the FCO on 3 September 2014 to dispute its decision to withhold or redact information from the files FCO 44/2323 and FCO 44/2324 on the basis of the exemptions contained at sections 40 and 41 of FOIA. In doing so she noted the inconsistent application of these exemptions, citing the example of words redacted from folio 117 from file FCO 44/2324 which had been left in the draft of that letter in folio 101 of the same file.
 10. The FCO informed her of the outcome of its internal review on 23 February 2015. It explained that the incorrect exemptions were applied in this case. Section 37(1)(a) should have been applied to the

information redacted from folio 117. Furthermore the text quoted by the complainant from folio 101 should have been redacted under section 37(1)(a) and had therefore been released in error.

Scope of the case

11. The complainant contacted the Commissioner on 24 February 2015 in order to complain about the way her request for information had been handled. She explained that she wished the Commissioner to consider whether the FCO has correctly relied on the exemptions cited to withhold and redact information from the files FCO 44/2323 and FCO 44/2324.
12. She also explained that she was dissatisfied with the manner in which the FCO had conducted its internal review; that is to say it focused in her view simply on the aforementioned redactions to folio 117 and the similar text in folio 101 in file FCO 44/2324 and failed to consider the application of sections 40 and 41 of FOIA to the *entirety* of the withheld information. Finally, the complainant explained that she was also unhappy with the time it took the FCO to conduct the internal review.
13. At the start of the Commissioner's investigation, he sought confirmation from the FCO as to which exemptions it was relying on to withhold particular parts of the withheld information.
14. Initially the FCO explained that it was seeking to rely sections 37(1)(a), 40(2) and 41(1) to withhold information from the following folios of FCO 44/2323:
 - 53, 61, 67.
15. And the same three exemptions to withhold the information from the following folios of FCO 44/2324:
 - 85, 93, 95, 97, 99, 101, 104, 105, 106, 108, 112, 113, 119, 120, 121, 129, 144, 145, 153 and 158.
16. However, the FCO explained that it was seeking to rely on sections 40(2) and 41(1) only (ie **not** section 37(1)(a)) to withhold the material redacted from the following folios of FCO 44/2323:
 - 10, 12, 18, 41, 46, 48, 49, 54, 57, 68, 72, 74.

And similarly, it was only seeking to rely on sections 40(2) and 41(1) to withhold the material redacted from the following folios of FCO 44/2324:

- 81, 92, 102, 110, 115, 116, 117, 126, 131, 133, 142, 145 and 165.¹

17. However, during the later stages of the Commissioner's investigation, the FCO explained that it wished to rely on section 37(1)(a) to withhold **all** of the information that had been redacted from both files.

Reasons for decision

Section 37(1)(a)

18. Section 37(1)(a) states that information is exempt if it relates to communications with the Sovereign. In line with his approach to the term 'relates to' when it appears in other sections of FOIA (for example section 35), the Commissioner interprets this term broadly and thus the exemption contained at section 37(1)(a) provides an exemption for information which 'relates to' communications with the Sovereign rather than simply to the communications themselves.
19. It is a class based and absolute exemption. This means that if the information in question falls within the class of information described in the exemption in question, it is exempt from disclosure under FOIA. It is not subject to a public interest test.
20. For the purposes of this exemption it is important to note that Communications with the Sovereign are not necessarily made directly by, or to Her Majesty. Communications made or received on the Sovereign's behalf by her officials are included within this exemption, as made clear in section 37(1)(ad).²
21. The Commissioner is satisfied that the information which the FCO has withheld on the basis of section 37(1)(a) falls within this scope of this

¹ With regard to the redaction made to folio 117, the Commissioner notes that FCO had actually indicated that section 37(1)(a) applied to this information at the internal review stage.

² Section 37(1)(ad) provides an exemption for information which relates to communications with the Royal Household (other than communications which fall within any of sections 37(1)(a) to (ac) because they are made or received on behalf of a person falling within any of those paragraphs.) The exemption contained at section 37(1)(ad) is qualified and thus subject to the public interest test.

exemption because either it constitutes a communication with the Sovereign (or an official acting on her behalf) or it relates to such a communication.

22. In reaching this conclusion the Commissioner recognises that the complainant has suggested that it is unlikely that a significant amount of the withheld information material would relate to communications with the Sovereign. Rather, she suggested that the majority of the information would be likely to relate to communications with the Royal Household and thus would fall instead under the exemption provided by section 37(1)(ad) of FOIA.
23. The Commissioner has taken this point into account but is satisfied for the reasons set out above that the FCO has applied section 37(1)(a) of FOIA correctly.
24. In light of his findings in relation to the application of section 37(1)(a) the Commissioner has not gone to consider the FCO's reliance on sections 40(2) and 41(1) of FOIA.

Other matters

25. FOIA does not impose a statutory time within which such reviews must be completed albeit that the section 45 Code of Practice explains that internal reviews should be completed within a reasonable timeframe. In the Commissioner's view it is reasonable to expect most reviews to be completed within 20 working days and reviews in complex cases to be completed within 40 working days. In the circumstances of this case the complainant requested an internal review on 3 September 2014. The FCO informed her of the outcome of the internal review on 23 February 2015.
26. In submissions to the Commissioner the FCO explained that the delays in completing the internal review were due to the fact that a number of different exemptions needed to be reconsidered, the requirement for consultation with stakeholders and general workload. Despite these mitigating factors the Commissioner cannot condone the FCO taking 120 working days to complete the internal review.
27. Moreover, the Commissioner shares the complainant's concerns as to the matters the internal review actually considered. In the Commissioner's opinion the complainant's letter of 3 September 2014 in which she sought an internal review made it clear that she was seeking to dispute the decision to withhold **all** of the material redacted or retained from files FCO 44/2323 and FCO 44/2324. Therefore, for the

internal review to appear to only consider the redactions applied to folios 101 and 117 in file 44/2324 is regrettable.

28. Therefore in the future he expects the FCO to ensure that internal reviews are completed within the timeframes set out within his guidance and that such reviews clearly address the matters which the requester has asked to be reviewed.

Right of appeal

29. 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

30. 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.
31. 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

Steve Wood
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