

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 4 May 2016

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

#### Decision (including any steps ordered)

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1. The complainant submitted a request to the Foreign and Commonwealth Office (FCO) for details of the despatches written by Lieutenant Colonel Anton Gash, the defence attaché of the British High Commission in Sri Lanka, to the FCO during the period January 2009 to May 2009. The FCO initially sought to withhold the requested information on the basis of sections 27(1)(a) and (b); 27(2); (international relations); 31(1)(a) to (c) (law enforcement); and 41(1) (information provided in confidence) of FOIA. During the course of the Commissioner's investigation the FCO provided the complainant with redacted versions of the despatches. The complainant disputed the FCO's basis of making these redactions and questioned whether the FCO had located all of the information falling within the scope of his request.
2. The Commissioner has concluded that:
  - The FCO has, on the balance of probabilities, located all of the information falling within the scope of the complainant's request
  - In all of the instances where the FCO has cited section 27(1)(a) this has been correctly applied and that in all the circumstances of the case the public interest favours maintaining the exemption.
  - The FCO is entitled to redact the names of junior officials on the basis of section 40(2) of FOIA. However, section 40(2) of FOIA does not provide a basis to withhold other information beyond the names of junior officials.

- With regard to the redactions which have solely been made on the basis of sections 31(1)(a) to (c), these exemptions are not engaged in relation to this information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
- Provide the complainant with the copy of Lt Col Gash's email of 28 January 2009 (sent at 12:35) with paragraph 9 unredacted (with the exception of the last sentence of this paragraph) and the redactions contained in paragraph 12 removed.
  - Provide the complainant with the copy of Lt Col Gash's email of 4 February 2009 (sent at 15:46) without the redactions contained in paragraphs 6 and 7.
  - Provide the complainant with a copy of Lt Col Gash's email of 5 February 2009 (sent at 15:13) with the paragraph withheld on the basis of section 31 unredacted.
  - Provide the complainant with a copy of Lt Col Gash's 'Military Analysis' dated 12 March 2009 with the information contained in paragraph 8b and the information in paragraph 10 unredacted, with the exception of the last sentence of this paragraph.
4. 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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5. The complainant submitted the following request to the FCO on 6 November 2014:

*'Details of the despatches written by Colonel Anton Gash, the defence attaché of the British High Commission in Sri Lanka, to the UK Foreign Office during the period January 2009 to May 2009. These despatches described his assessment of what he had seen during this period of the Sri Lankan civil war'.*

6. The FCO contacted the complainant on 3 December 2014 and confirmed that it held the requested information but needed further time to consider the balance of the public interest.

7. The FCO provided him with a substantive response on 5 January 2015. The response explained that the FCO considered the requested information to be exempt from disclosure on the basis of sections 27(1)(a) and (b); 27(2); (international relations); 31(1)(a) to (c) (law enforcement); and 41(1) (information provided in confidence) of FOIA.
8. The complainant contacted the FCO on 14 January 2015 in order to ask for an internal review of this decision.
9. The FCO informed him of the outcome of the review on 19 February 2015. The review upheld the application of the various exemptions cited in the refusal notice.
10. The complainant contacted the FCO again on 16 March 2015 in order to explain why he remained dissatisfied with the outcome of the internal review.
11. The FCO responded on 7 May 2015 and confirmed that its position remained as set out in its original refusal notice.
12. During the course of the Commissioner's investigation the FCO contacted the complainant on 21 December 2015 and explained that in consideration of changing circumstances, it had concluded that certain parts of the requested information were no longer exempt from disclosure and thus could be disclosed. The FCO confirmed that it had previously withheld information under section 27(1)(b) on the basis that disclosure could influence the investigation being carried out by the Office of the United Nations High Commissioner for Human Rights (OHCHR).<sup>1</sup> The FCO explained that following the publication of the OHCHR report's on the Investigation on Sri Lanka (OISL) on 16 September 2015 material which it previously believed would prejudice this investigation could now be disclosed. In disclosing this information to the complainant the FCO confirmed that it remained of the view that the remainder of the withheld information was exempt from disclosure on the basis of sections 27(1)(a), 31 and 41 of FOIA.
13. Following receipt of this information the complainant raised concerns – via the Commissioner – that the FCO may hold further information falling within the scope of his request. The FCO conducted further searches for relevant information and located three additional

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<sup>1</sup> The UNHRC adopted resolution A/HRC/25/1 in March 2014 which established an investigation into allegations of serious violations and abuses of human rights during Sri Lanka's recent conflict.

documents. These were disclosed to the complainant in a redacted form on 23 February 2016. The FCO explained that the redactions had been made on the basis of sections 27(1)(a), 31(1)(a)-(c) and 40(2) of FOIA. (The FCO also confirmed that the documents disclosed on 21 December 2015 also included redactions made on the basis of section 40(2) of FOIA).

## Scope of the case

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14. The complainant contacted the Commissioner on 10 June 2015 to complain about the way his request for information had been handled. He was dissatisfied with the FCO's refusal to provide him with the information falling within the scope of his request. The complainant has confirmed to the Commissioner that despite the FCO's disclosure of information during the course of his investigation, he is unhappy with the various redactions applied by the FCO. The Commissioner has therefore considered whether the exemptions cited by the FCO provide a basis upon which to withhold the remaining withheld information. The Commissioner has also considered whether the FCO's searches for information falling within the scope of this request have been adequate.

## Reasons for decision

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### **Has the FCO located all of the information falling within the scope of the request?**

15. As noted above, following the FCO's disclosure of information on 21 December 2015, the complainant questioned whether the FCO had located all of the information which fell within the scope of his request. The complainant's basis for such concerns was as follows:
- Firstly, he explained that the pages disclosed to him had a strange numbering system which indicated that the FCO held further pages of documents which had not been disclosed.
  - Secondly, he explained that he had noted that after 12 March 2009, there were only two other despatches which had been disclosed (22 April 2009 and 12 May 2009). The complainant emphasised that as April and May were key months towards the end of the war he found it hard to believe that these were the only two despatches sent by Lt Col Gash in those months. Furthermore, he suggested that with the war ending on 19 May 2009 he would have expected a further despatch to have been sent very soon after that date.

16. In response to the complainant's concerns the FCO undertook a further search of its records and located three further despatches from Lt Col Gash that fell within the scope of the request. Two of these were located in the FCO's paper records and one was found on a different computer system. These despatches were dated 7, 25 and 26 April 2009.
17. With regard to the page numbering used on the some of the documents that had been disclosed, the FCO explained that the despatches had been taken from a much longer document, the vast majority of which fell outside the scope of the request. The page numbers of the disclosed documents therefore related to this larger document.
18. In scenarios such as this where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
19. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities a public authority holds any further information which falls within the scope of the request.
20. In applying this test the Commissioner will consider:
  - The scope, quality, thoroughness and results of the searches for the requested information; and/or
  - Other explanations offered as to why no further requested information is held.
21. In light of the further searches undertaken by the FCO, the Commissioner is satisfied that on the balance of probabilities the FCO has located all of the information it holds which falls within the scope of the request. He has reached this conclusion on the basis that the FCO has now conducted two separate searches for relevant information, firstly when it initially dealt with the request and secondly in early 2016 in light of the concerns raised by the complainant which are described above. The Commissioner appreciates that the first search did not locate all of the requested information. However, given that these searches were repeated – and additional information was found – the Commissioner has sufficient confidence that taken together these searches were sufficiently effective to locate all of the requested information. Furthermore, the Commissioner considers the FCO's explanation in relation to the numbering system on some of the disclosed documents is logical and moreover does not indicate that further information, not previously located or disclosed, is held.

## Section 27 – international relations

22. The vast majority of the information redacted from the documents disclosed to the complainant had been redacted on the basis of section 27(1)(a). This section provides that information is exempt if its disclosure would, or would be likely to, prejudice relations between the UK and any other State.

### The FCO's position

23. The FCO argued that disclosure of the information withheld on the basis of section 27(1)(a) would be likely to prejudice the UK's relations with Sri Lanka. In support of this view the FCO explained that Lt Col Gash was the FCO's defence attaché at the British Commission in Colombo during the closing stages of Sri Lanka's civil war. It explained that many of his despatches contain information provided directly to him by his contacts in the Sri Lankan government, the Sri Lankan Army or other military sources. The FCO emphasised that as his reports indicate, he had access to reports on troop movements, Sri Lankan military strategic thinking, the movements of the Liberation Tigers of Tamil Eelam (LTTE) and assessments of casualty figures.
24. The FCO explained that the effective conduct of international relations depends upon the free, frank and confidential exchange of information such as this. It argued that if the UK does not respect these confidences then its ability to protect and promote UK interests through international relations will be hampered. Consequently, the FCO explained that it was of the view that releasing the information redacted on the basis of section 27(1)(a) would be likely to prejudice the UK's relationship with Sri Lanka and would negatively impact on the information that they would be willing to exchange with the UK in the future.

### The Commissioner's position

25. In order for a prejudice based exemption, such as section 27(1)(a), to be engaged the Commissioner believes 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. The anticipated prejudice must be more likely than not.
26. 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'*.<sup>2</sup>
27. 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 Sri Lanka clearly relates to the interests which the exemption contained at section 27(1)(a) is designed to protect.
28. With regard to the second criterion, the Commissioner is satisfied that disclosure of the information redacted on the basis of this exemption has the potential to harm the UK's relations with Sri Lanka. He has reached this conclusion because having seen the redacted information it is clear, as the FCO suggested, that it consists of information provided to Lt Col Gash by the Sri Lankan authorities, or consists of Lt Col Gash's comments on this information, and moreover that the information was provided with the expectation that it would be treated confidentially. In the Commissioner's view it is self-evident that if information provided in confidence by representatives of other States was disclosed by the UK then it would be logical to conclude that the UK's relations with the confider could be harmed. The Commissioner is therefore satisfied that 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 be likely to occur 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

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<sup>2</sup> [Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence \(EA/2006/0040\)](#), paragraph 81.

test at the third criterion, disclosure could result in making relations more difficult and/or demand a particular damage limitation exercise.

29. With regard third criterion, the Commissioner is satisfied that the disclosure of the redacted information would be likely to have the prejudicial effects envisaged by the FCO. The Commissioner has reached this conclusion in light of the sensitive and detailed nature of the information provided to Lt Col Nash, namely information concerning the actions and strategies of the Sri Lankan military during the closing stages of the civil war. The Commissioner is firmly of view that given the nature of this information, and the circumstances in which it was provided to the FCO, then if it was disclosed there is more than a hypothetical risk of prejudice occurring.

### **Public interest test**

30. 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**

31. The complainant provided the Commissioner with detailed submissions to support his view that there was a compelling public interest in the disclosure of the redacted information. The Commissioner has summarised these submissions below.
32. The complainant explained that he was motivated to submit his request because of the UK's decision, along with the US, to move a motion that there should be a formal investigation by the UN into the alleged war crimes by both sides during the Sri Lankan civil war, especially during its closing stages. As a prime driver in setting up OISL the complainant argued that the UK had a responsibility to supply to the investigators any evidence they have.
33. He emphasised that Lt Col Gash was one of the few independent observers of what happened in the closing stages of the war and thus his despatches were a particularly valuable source. He argued that it was verging on the criminal to withhold such relevant information from the investigation, particularly given that the potential allegations individuals faced included war crimes. He argued that it may be the case that the despatches would confirm that the Sri Lankan government took the greatest care to minimise civilian casualties. Moreover, the complainant argued that the failure to disclose the despatches reduced the legitimacy of the UN's investigation.



34. The complainant emphasised that there are about 500,000 British citizens from all ethnic groups who are of Sri Lankan origin and as taxpayers they have a right to know what happened during the latter stages of the war. Furthermore, the complainant argued that the Sri Lankan people themselves had a right to know as well and thus disclosure of the information was also in their interests.
35. Ultimately, the complainant argued that the aim of his request was to find clarity over the events that took place at the end of the war, not to support any side or follow any agenda. He argued that if the UK government were committed to that, then to assist rather than hinder that process, the despatches should be published in the interests of the British people, the UN and Sri Lanka.

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

36. The FCO emphasised that section 27(1)(a) recognised that the effective conduct of international relations depends upon maintaining trust and confidence between governments. It argued that if the UK government does not maintain this trust and confidence, then its ability to protect and promote UK interests through international relations will be hampered, which will not be in the public interest. In the FCO's view disclosure of the withheld information in this case was not in the public interest as it would be likely to damage the bilateral relationship between the UK and Sri Lanka. This would have the effect of reducing the UK government's ability to protect and promote UK interests through its relations with Sri Lanka.

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

37. In the Commissioner's view disclosure of the withheld information would provide a detailed insight into the closing stages of civil war and also, to some extent, the UK's defence attaché's views of these final stages. The Commissioner accepts that there is a clear, and significant, public interest in the disclosure of such information in order to aid accountability and reconciliation in Sri Lanka. As the complainant suggests, if this information had been disclosed at the point his request was submitted in November 2014 then such information would, in theory, have been available for consideration by OSIL. More broadly, the Commissioner accepts that individuals in the UK with links to Sri Lanka, or indeed an interest in the country, would be interested in the information.
38. However, in the Commissioner's view there is a very strong public interest in protecting the UK's relations with other States. In the Commissioner's opinion it would be firmly against the public interest for the UK's relations with Sri Lanka to be harmed. As noted above, the

Commissioner is satisfied there is a real and significant risk of such prejudice occurring and despite the public interest in disclosure of this information, the Commissioner has decided that the public interest favours maintaining the exemption. In reaching this conclusion the Commissioner wishes to emphasise that he is not seeking to dispute the clear public interests in disclosure of the withheld information; simply that he is of the view that there is a more compelling case for maintaining the exemption.

### **Section 31 - investigations**

39. The FCO sought to withhold a small portion of the redacted information on the basis of sections 31(1)(a) to (c). Some of this information was also withheld on the basis of section 27(1)(a). Therefore the Commissioner has not considered the FCO's reliance on sections 31(1)(a) to (c) to such information. Rather, he has simply considered whether sections 31(1)(a) to (c) have been applied correctly to information that has simply been withheld on the basis of these exemptions only.

40. These exemptions are also prejudiced based ones and provide that:

*'Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice -*

*(a) the prevention or detection of crime,*

*(b) the apprehension or prosecution of offenders,*

*(c) the administration of justice'*

### The FCO's position

41. The FCO explained that when initially responding to the request, it regarded it as essential that OISL remained independent and impartial. As the OISL mandate also required it to apply criminal law to the incidents and events under investigation in determining whether crimes may have been perpetrated, the FCO assessed that public disclosure of information on the actions of the military and government held by the FCO could prejudice that investigation and by doing so unduly prejudice the administration of justice.

42. The FCO explained that although the investigation had now been concluded, the recommendations it made and the new UNHRC resolution that the Sri Lankan government has agreed to meant that Sri Lanka has committed to undertake a credible accountability process. The FCO argued that as was the case with OISL, it was of the view that public

disclosure of information on the actions of the military and government could prejudice such further investigations and the administration of justice.

### The Commissioner's position

43. Firstly, in light of the FCO's submissions, it is important to confirm that the Commissioner's role in determining complaints is to focus on the circumstances that existed at the point the request was received.
44. As the section 31 exemptions cited by the FCO are prejudice based ones the Commissioner has again considered whether the three criteria set out above at paragraph 25 are met.
45. With regard to the first criterion, the Commissioner accepts that the nature of harm envisaged by the FCO is one that the exemptions contained at sections 31(1)(a) to (c) are designed to protect.
46. However, with regard to the second criterion, the Commissioner is not persuaded that there is a sufficiently clear causal relationship between the disclosure of the information withheld by the FCO on the basis of these exemptions and the harm which the exemptions are designed to protect. The Commissioner accepts that the redacted information comments on the actions of the military and government. However, in the Commissioner's view the FCO has not clearly explained **why** disclosure of this information could have prejudiced the OISL, or indeed any subsequent investigations by the Sri Lankan government. Furthermore, whilst the Commissioner notes that the OISL had to remain independent and impartial he fails to see how disclosure of the comments and opinions of the UK's defence attaché to Sri Lanka would directly prejudice the independence and impartiality of the OISL itself. As drafted, in the Commissioner's opinion the FCO's arguments that such prejudice could occur are speculative and thus he is not persuaded that the exemptions are engaged.
47. Consequently, the Commissioner has concluded that the information solely withheld on the basis of sections 31(1)(a) to (c) is not exempt from disclosure and therefore must be disclosed.

### **Section 40 – personal data**

48. Section 40(2) of FOIA states that personal data is exempt from disclosure if its disclosure would breach any of the data protection principles contained within the Data Protection Act 1998 (DPA).
49. Personal data is defined in section (1)(a) of the DPA as:

*'.....data which relate to a living individual who can be identified from those data or from those data and other information which is in the possession of, or likely to come into the possession of, the data controller; and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any person in respect of the individual.'*

50. The FCO redacted a small portion of information contained in the documents disclosed to the complainant on the basis of section 40(2) of FOIA. The Commissioner accepts that such information constitutes personal data within the meaning of section 1 of the DPA as it relates to identifiable individuals.

51. The FCO argued that disclosure of such information would breach the first data protection 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.'*

52. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:

- The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
  - what the public authority may have told them about what would happen to their personal data;
  - their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights (ECHR);
  - the nature or content of the information itself;
  - the circumstances in which the personal data was obtained;
  - any particular circumstances of the case, eg established custom or practice within the public authority; and
  - whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.

- The consequences of disclosing the information, ie what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor the Commissioner may take into account:
    - whether information of the nature requested is already in the public domain;
    - if so the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?
53. Furthermore, notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling legitimate interest in disclosure to the public.
54. In considering 'legitimate interests', in order to establish if there is a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sake, as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to consider a proportionate approach.
55. The FCO argued that it would be unfair to disclose the names of junior staff who do not have a public facing role. It explained that it was the FCO's standard practice to withhold these names and therefore the individuals in question would have a reasonable expectation that their names would not be disclosed.
56. The Commissioner accepts that the junior officials in question would have had a reasonable expectation that their names would not be disclosed in the context of the request. The Commissioner accepts that the individuals concerned were carrying out public functions and must therefore have the expectation that their actions in that regard will be subject to a greater scrutiny than would be the case in respect of their private lives. However, he is particularly mindful of the fact that the officials were not in public facing roles.
57. In view of the above, the Commissioner finds that it would have been unfair to disclose the names of the junior officials in question. Disclosure would have contravened the first data protection principle. The FCO was therefore entitled to withhold the names of the officials on the basis of section 40(2).

58. However, the Commissioner notes that the FCO also sought to apply section 40(2) to information that does not consist of the names of junior officials. Rather such information consists of names of the names of Sri Lankan officials or members of the Liberation Tigers of Tamil Eelam (LTTE). For such individuals the FCO's submissions on section 40(2) are clearly not relevant. Furthermore, the Commissioner is not convinced that there is a compelling case to argue that these additional redactions attract the exemption contained at section 40(2). For some of these redactions this is because the individuals in question are deceased and thus the information cannot constitute their personal data. For the individuals that are live, the Commissioner is not persuaded that disclosure of their personal data would be unfair.
59. For such information the Commissioner has concluded that section 40(2) is not engaged and thus such information should be disclosed.

**Sections 27(2) and 41(1)**

60. The Commissioner has not considered the FCO's reliance on sections 27(2) and 41(1) of FOIA because the information to which the FCO sought to apply these exemptions also attracts section 27(1)(a) and the Commissioner has of course already upheld the FCO's reliance on this latter exemption.

## Right of appeal

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61. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

62. 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.
63. 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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