

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 February 2017

Public Authority: The Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant submitted a request to the Cabinet Office seeking a copy of a file dating from 1974 concerning Diego Garcia. He also requested a list of the file's contents. The Cabinet Office sought to withhold the file, and a list of its contents, on the basis of the exemptions contained at sections 27(1)(a), 27(1)(c), 27(1)(d) and 27(2) (international relations), 24(1) (national security), 26(1)(a) and 26(1)(b) (defence) of FOIA.
2. During the course of the Commissioner's investigation, the Cabinet Office provided the complainant with a small amount of information contained in the file which it was established was in effect already in the public domain. The Commissioner has concluded that the remaining information contained in the file is exempt from disclosure on the basis of sections 27(1)(a), 27(1)(c) and 27(1)(d) of FOIA. The Commissioner is also satisfied that a list of the file's contents is also exempt from disclosure on the basis of the same exemptions.

Request and response

3. The complainant submitted the following request to the Cabinet Office on 8 February 2016:

'Please would you let me have copies of the documents contained in file CAB 196/71 Diego Garcia (former reference M/17/3 PART 1). This file is shown on the National Archives as retained by you under S 3.4 with a review date of 2014 which has now passed.'

4. The Cabinet Office responded on 29 February 2016 and confirmed that it held the requested information but considered it to be exempt from disclosure on the basis of section 27(1)(a) (international relations) of FOIA.
5. The complainant contacted the Cabinet Office on the same day and asked it to conduct an internal review of this decision. He questioned the apparently blanket way in which the exemption had been applied. He also asked that the Cabinet Office provide him with a list of documents contained within the requested file.
6. The Cabinet Office responded on 21 April 2016. It explained that the internal review had concluded that the entirety of the requested file was exempt from disclosure on the basis of section 27(1)(a) and furthermore that the file was also exempt from disclosure on the basis of the exemptions contained at sections 24(1) (national security) and 26(1)(a) and (b) (defence) of FOIA. With regard to the complainant's request for a list of documents contained in the file, the Cabinet Office explained that at the time of the request, it did not hold such a list, and even if it were to create such a list, it would also be exempt from disclosure on the basis of the exemptions cited above.

Scope of the case

7. The complainant contacted the Commissioner on 1 May 2016 to complain about the way his request for information had been handled. He disputed the Cabinet Office's position that the entirety of the file was exempt from disclosure. He also argued that in order to fulfil his request for a list of the file's contents, the Cabinet Office would not have to create new information as it had implied, and moreover that the disclosure of the information that would form any such list would not be exempt from disclosure.
8. Having examined the withheld information, the Commissioner identified a small number of documents within the withheld file that in her view could be disclosed because they only contained information that was already in the public domain, eg press cuttings and excerpts from Hansard. The Cabinet Office agreed to disclose these documents to the complainant and did so on 15 February 2017.
9. Furthermore, during the course of the Commissioner's investigation, the Cabinet Office clarified its position in respect of the exemptions it was relying on to withhold the remaining documents contained within the file. It explained that it considered all of these documents to be exempt from disclosure on the basis of the exemptions contained at sections 27(1)(a), 27(1)(c) and 27(1)(d). Furthermore, it considered the exemptions contained at sections 27(2), 24(1), 26(1)(a) and 26(1)(b) to

apply to various parts of the file. With regard to the complainant's request for a list of the file's contents, the Cabinet Office acknowledged that it held the information in question but it considered it be exempt from disclosure on the basis of the above exemptions.

Reasons for decision

The request for the contents of the file

Section 27(1) – international relations

10. As noted above, the Cabinet Office has relied on sections 27(1)(a), 27(1)(c) and 27(1)(d) of FOIA to withhold the remaining information contained within the file. These exemptions state 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...

...(c) the interests of the United Kingdom abroad, or

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

11. In order for a prejudice based exemption, such as that cited by the Cabinet Office, 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 Cabinet Office's position

13. The Cabinet Office provided the Commissioner with detailed submissions to support its view that the remaining information was exempt from disclosure on the basis of these three exemptions. The Commissioner has summarised these submissions below, with the exception of the various parts of the submissions which make direct reference to the contents of the withheld information. The Cabinet Office explained that it was relying on the lower threshold of prejudice that disclosure 'would be likely to', as opposed to 'would', result in the prejudice to the interests which the three exemptions are designed to protect.
14. The Cabinet Office explained that Diego Garcia hosts an active American base which plays a key role in the defence of US and UK national interests. The Cabinet Office argued that disclosure of the file which contains a variety of sensitive and confidential information about the British Indian Overseas Territory (BIOT) and Diego Garcia, including communications with a range of countries, could damage relations with a number of the UK's international partners, particularly the US. The Cabinet Office emphasised that the UK has a uniquely close relationship with the US which is vital to a large number of strategic priorities and the relationship includes cooperation in a multitude of ways across the range of governmental activity. The Cabinet Office explained that the UK has an interest in ensuring international stability in the region and HM Government works in partnership with other nations to maintain this. In doing this, the Cabinet Office explained that the HM Government relies on the confidence of these international partners. The Cabinet Office argued that the relationship of trust and goodwill on which diplomatic relations with the UK's international partners rely would be damaged if the remaining information was disclosed; the UK would acquire a reputation in the diplomatic community for indiscretion and this would

¹ [Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence \(EA/2006/0040\)](#), paragraph 81.

make it more difficult for HM Diplomatic Service to pursue the UK's national interests.

15. Finally, with regard to the age of the information, the Cabinet Office explained that whilst this was now some years old, it is not historic and remains sensitive. The Cabinet Office elaborated on this specific point in its submissions to the Commissioner.

The complainant's position

16. The complainant acknowledged that it was hard to envisage exactly what the file may contain. However, he suggested that it was possible to conclude from other files dating from the same period which are in the public domain, that the content is likely to involve advice to, and action by, the Cabinet concerning a request in 1974 by the US to expand its military facilities on the island. The complainant argued that in light of what is already in the public domain about this subject matter, it is hard to conclude that the entire file is exempt from disclosure with no attempt at selective disclosure and/or redaction. The complainant alleged that the blanket claim of exemptions implies that exemptions are being used simply to ease detailed and logical consideration and so reduce workload rather than a genuine attempt at open government.
17. Furthermore, the complainant argued that in its responses to him the Cabinet Office had made no attempt to explain why the matters dating from 1974 were still considered to be exempt from disclosure.

The Commissioner's position

18. With regard to the first criterion of the three limb test described above, the Commissioner accepts that potential prejudice envisaged by the Cabinet Office if the withheld information was disclosed clearly relates to the interests which the three exemptions are designed to protect.
19. With regard to the second criterion, given that the withheld information contains communications with (and about) a number of different countries in respect of sensitive matters associated with Diego Garcia, the Commissioner is satisfied that there is a causal link between the potential disclosure of the withheld information and the interests which the exemptions cited by the Cabinet Office are designed to protect. Moreover, the Commissioner is satisfied that the resultant prejudice which the Cabinet Office believes would be likely to 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.
20. With regard to the third criterion, the Commissioner is satisfied that the likelihood of harm if the withheld information was disclosed is clearly

more than a hypothetical possibility. Rather, in her view, there would be a real and significant risk of prejudice occurring both to the UK's relations with a number of other states - in particular the US - and the ability of the UK to protect and promote its interests in the region. In reaching this conclusion, the Commissioner has taken into account the points raised by the complainant. However, having examined the contents of the file carefully, the Commissioner is satisfied that the Cabinet Office has not applied the exemptions in a blanket fashion. Rather, the Commissioner is satisfied that each individual document which has been withheld is exempt from disclosure. Furthermore, whilst the Commissioner recognises that information on the subject in question is already in the public domain, the specific information which has been withheld is not. In the Commissioner's opinion, the content of this information, and the sensitivity of its subject matter, means that disclosure represents a real and significant risk of prejudice occurring. Finally, having considered the contents of the withheld information, and taken into account the submissions made to her by the Cabinet Office which referred directly to the content of file, the Commissioner is satisfied, despite the age of the information, it is exempt from disclosure.

21. The exemptions contained at section 27(1)(a), 27(1)(c) and 27(1)(d) are engaged.

Public interest test

22. 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

23. The Cabinet Office acknowledged that there was a general public interest in openness in government and that transparency may contribute to a greater understanding of public affairs. The Cabinet Office also accepted that there is a general public interest in being able to evaluate the foreign policy of the government, and following from this, there is a public interest in understanding how officials brief ministers, including the Prime Minister, on international relations.
24. The complainant argued that the Cabinet Office had failed to recognise that there was a public interest in disclosure of the file in order to present a 'full picture' of the actions and decisions concerning the expansion of the military facility on Diego Garcia in 1974. The complainant argued that it was important that such a full picture was available to the public, especially because it was a matter of particular public interest at the time of the request, when the agreement between

the UK and US regarding Diego Garcia was due for renewal for a further 20 years. The complainant noted that the matter had also been of particular recent concern to the Chagos Islands (British Indian Ocean Territory) All Party Parliamentary Group and also to the exiled islanders. The complainant suggested that disclosure of the requested file may even reveal that the information already in the public domain is incorrect, incomplete or misleading.

Public interest in maintaining the exemptions

25. The Cabinet Office argued that there is a very weighty public interest in the UK being able to successfully pursue its national interests abroad. It followed, the Cabinet Office argued, that it would be firmly against the public interest to disclose information which could undermine the UK's relations with other states. The Cabinet Office emphasised that disclosure of the information would do significant, and in some contexts, lasting damage to the presumption that HM Government conducts business with international partners and other foreign nations in line with the norms of international diplomacy.

Balance of the public interest

26. The Commissioner accepts that disclosure of the withheld information would provide a detailed insight into the matters considered by the government concerning Diego Garcia in 1974. For the reasons set out by the complainant, the Commissioner agrees that this is a clear public interest in the disclosure of this information.
27. However, the Commissioner accepts that there is a very significant public interest in ensuring that the UK enjoys strong and effective relationships with other states. In the particular circumstances of this case, disclosure of the information would prejudice the UK's relations with a number of different states, including, of course, the US, a key ally of the UK. In light of these broad prejudicial consequences of disclosure, the Commissioner is persuaded that the public interest favours maintaining the exemptions contained at sections 27(1)(a), 27(1)(c) and 27(1)(d).

The request for a list of the file's contents

28. As noted above, the Cabinet Office accepts that it holds the information which would constitute a list of the file's contents but considers this to be exempt from disclosure on the basis of the same exemptions which it was relying on to withhold the contents of the file itself. The Cabinet Office explained that this was because a list of the documents contained within the file makes reference to some communications by heads of state and the dates these occurred. The Cabinet Office argued that release of this information out of context may give rise to negative inferences about the issues discussed which could not be rebutted

without disclosure of the file's contents, which it maintained was itself exempt from disclosure. Furthermore, the Cabinet Office argued that given the limited public interest in disclosing the list, the public interest favoured maintaining the various exemptions upon which it was relying to withhold the list.

29. The complainant questioned the Cabinet Office's position that the information contained in the list would be exempt from disclosure. He noted that it is already public knowledge that the file exists, that it is concerned with defence matters and overseas matters, that its contents is dated between 10 January 1974 and 20 January 1975 and that its subject matter concerns Diego Garcia. The complainant suggested that disclosure of a list of the file's contents may result in the disclosure of information which is no more innocuous than the details of the file which are already in the public domain.
30. The Commissioner accepts that complying with the complainant's request for a list of the file's contents would result in the disclosure of significantly less information than disclosure of the file itself. Nevertheless, the Commissioner is persuaded that in the circumstances of this case, disclosure of a list of the file's contents would still result in the prejudicial consequences that sections 27(1)(a), 27(1)(c) and 27(1)(d) of FOIA are designed to protect. Furthermore, for the reasons outlined by the Cabinet Office, the Commissioner is satisfied that the public interest favours maintaining these exemptions.

Right of appeal

31. 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

32. 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.

33. 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
Principal Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF