

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 May 2018

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 documents concerning the attempted bombing of an El Al flight that was to fly out from Heathrow Airport in April 1986. The FCO provided the complainant with some of the information but withheld the remainder on the basis of section 23(1) (security bodies), sections 27(1)(a) and (2) (international relations) and section 40(2) (personal data) of FOIA. The complainant challenged the FCO's reliance on sections 27(1)(a) and (2). The Commissioner has concluded that the FCO has correctly relied on section 27(1)(a) and this exemption also provides a basis to withhold the information to which section 27(2) was applied. However, she has also concluded that the FCO breached section 17(3) by failing to complete its public interest test considerations within a reasonable timeframe.

Request and response

2. The complainant submitted the following request to the FCO on 7 October 2014:

'I am looking for documents concerning the attempted bombing of an El Al flight, that was to fly out from Heathrow Airport, UK to Tel Aviv, Israel on the 17th April, 1986.'
3. The FCO contacted the complainant on 3 November 2014 and confirmed that it held information falling within the scope of the request but considered this information to be exempt from disclosure on the basis of

section 27 of FOIA and it needed additional time to consider the balance of the public interest test.

4. The FCO continued to send the complainant further public interest test extension letters until it provided him with a substantive response to his request on 23 March 2017. The FCO explained that it had concluded that most of the information could be released with redactions made under section 23(1) (security bodies), sections 27(1)(a) and (2) (international relations) and section 40(2) (personal data) of FOIA.
5. The complainant contacted the FCO on 25 March 2017 and explained that he wished to dispute its reliance on sections 27(1)(a) and 27(2) of FOIA. In support of this position the complainant contacted the FCO again on 22 April 2017 and provided it with copies of documents about this subject which he had obtained from the US State Department.
6. The FCO informed the complainant of the outcome of the internal review on 28 September 2017. The review upheld the application of the exemptions cited in the refusal notice.

Scope of the case

7. The complainant contacted the Commissioner on 3 October 2017 in order to complain about the FCO's handling of his request.
8. The Commissioner agreed with the complainant that the scope of her investigation would be limited to investigating the FCO's application of sections 27(1)(1) and (2) and that he did not wish to complain about the FCO's reliance on sections 23(1) and 40(2).

Reasons for decision

Section 27(1) – international relations

9. Section 27(1)(a) of FOIA states that:

'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

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

The FCO's position

10. The FCO argued that this exemption recognised that the effective conduct of international affairs depended upon maintaining the trust and confidence between governments. It argued that if the UK does not maintain this trust and confidence its ability to effectively conduct international affairs would be hampered. The FCO explained that part of the withheld information was provided to the UK in confidence by other States and that if this information was disclosed under FOIA this would be likely to harm the UK's bilateral relations with the States in question. The FCO explained that some parts of the withheld information also contained internal comments about other States which if disclosed the FCO argued would be likely to undermine the UK's relations with the States in question. The FCO provided the Commissioner with more detailed submissions which referenced the specific information that had been withheld in order to support its reliance on this exemption. The FCO acknowledged that the sensitivity of information can decrease with time, however in the circumstances of this request it remained of the view that disclosure of the withheld information would be likely to prejudice the UK's international relations.

The complainant's position

11. The complainant explained that upon receiving some of the requested information from the FCO he cross referenced this with declassified US State Department documents that indicated that a substantial number of correspondences between the UK and several other nations had been removed. As noted above, he submitted several of these declassified documents showing that section 27 should not apply as the US had already released papers that had not jeopardized UK and other countries foreign relations.
12. Furthermore, the complainant argued that given the current situation in Syria, he doubted whether any relations with them would be impacted by the release of this information. He also argued that the considerable length of time since the event took place also further decreased the potential damage to other countries if the withheld information was disclosed. For example, he suggested that if Israel had provided the UK with information, whilst it was understandable that this trust and confidence should be kept for more recent events, the attempted bombing of the El Al flight was so long ago that any information is now of historical value only.

The Commissioner's position

13. In order for a prejudice based exemption, such as section 27(1) 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. The anticipated prejudice must be more likely than not.

14. 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

15. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the FCO clearly relates to the interests which the exemption contained at section 27(1)(a) is designed to protect. With regard to the second criterion having examined the withheld information, and taken into account the FCO's submissions to her, the Commissioner is satisfied that there is a causal link between disclosure of this information and prejudice occurring to the UK's international relations. Furthermore, she is satisfied that the resultant prejudice would be real and of substance. Moreover, the Commissioner is satisfied that there is more than a

¹ *Campaign Against the Arms Trade v Information Commissioner and Ministry of Defence* EA/2007/0040

hypothetical risk of prejudice occurring and therefore the third criteria is met. The Commissioner cannot elaborate in detail on why she has reached this view without referring to the content of the withheld information itself. However, she would emphasise that in reaching this conclusion she has considered both the age of the information and the complainant's point about the nature of the political situation in Syria. The Commissioner would also note that the FCO's submissions provide specific and focused – and in her view rationale – arguments for each piece of information that has been withheld. Moreover, as the FCO noted in its responses to the complainant the amount of information withheld on the basis of section 27(1)(a) is minimal when compared to the amount of material already disclosed to the complainant. The Commissioner would also note, as she has in previous notices, that she considers the FCO's argument that in order for the UK to maintain effective relations with international partners it needs to enjoy their trust to be a compelling one and in the circumstances of this case she is persuaded that disclosure of the information withheld on the basis of section 27(1)(a) would undermine this trust.

16. Section 27(1)(a) is therefore engaged.

Public interest test

17. However, section 27(1) is a qualified exemption and therefore subject to the public interest test set out in section 2(2)(b) of the FOIA. The Commissioner has therefore considered whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.

18. The FCO argued that if the UK does not maintain the trust and confidence of its international partners then the UK's ability to protect and promote its interests through international relations will be hampered, an outcome which would be firmly against the public interest.

19. The complainant argued that there is still a public interest in this case given the circumstances of the attempted bombing (a pregnant woman was duped by her lover to put an explosive device on the plane) and the misinformation that came afterwards, most of it spread by the parties involved in trying to plant the device.

20. The Commissioner acknowledged that there is a clear public interest in openness and transparency in order to allow the public to understand actions and decisions that the government takes on its behalf. In the circumstances of this request, disclosure of the information that has been withheld on the basis of section 27(1)(a) of FOIA would provide the public with a greater insight into the UK's interactions with some of

its international partners about the attempted bombing of the EI Al flight, as well as a potential insight into the UK's views on the situation following the attempted bombing. The Commissioner agrees with the complainant that despite the passage of time, there remains a public interest in the disclosure of such information in order to allow the historical records of the UK's actions at the time to be properly understood. However, the Commissioner agrees with the FCO that there is strong public interest in ensuring that the UK's relations with its international partners are not harmed and in the circumstances of this case given that the FCO has provided compelling and specific evidence to explain why the information withheld on the basis of section 27(1)(a) would be likely to prejudice the UK's international relations, she has concluded that the public interest favours maintaining the exemptions contained at section 27(1)(a).

21. The Commissioner is satisfied that the information the FCO has withheld on the basis of section 27(2) is exempt from disclosure on the basis of section 27(1)(a). Therefore she has not considered the application of section 27(2) in this notice.

Section 10 and section 17

22. Section 10(1) of FOIA requires public authorities to respond to a request promptly and in any event within 20 working days of receipt.
23. Section 17(1) of FOIA explains that if a public authority intends to refuse to comply with a request it must provide the requestor with a refusal notice stating that fact within the time for compliance required by section 10(1). Section 17(3) allows a public authority to extend its consideration of the public interest for a reasonable period of time if necessary. The Commissioner considers that this should normally be no more than an extra 20 working days, which is 40 working days in total to deal with the request. Any extension beyond this time should be exceptional and the public authority must be able to justify it.
24. In this case the complainant submitted his request on 7 October 2014 but the FCO did not inform him of the outcome of its public interest considerations until 23 March 2017, 627 working days later.
25. In its refusal notice the FCO explained that the delays were due to the complex nature of the case and extensive stakeholder consultation which had been necessary. It also noted that the material identified in the scope of the request was scattered across files and within a large number of documents. Despite these factors, the Commissioner cannot accept that 627 working days is a reasonable amount of time for the FCO to complete its public interest. It follows that the Commissioner has concluded that the FCO breached section 17(3) of FOIA.

Other matters

26. FOIA does not impose a statutory time within which internal reviews must be completed albeit that the section 45 Code of Practice explains that such 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 exceptional cases to be completed within 40 working days.
27. In this case the complainant submitted his request for an internal review on 25 March 2017. The FCO informed him of the outcome of the internal review on 28 September 2017, some six months year later. The Commissioner clearly considers this to be an unsatisfactory period of time, especially when taking into account the significant amount of time the FCO had already taken in considering the balance of the public interest test.
28. Moreover, the Commissioner would note that this is not the only case which she has recently dealt with involving the FCO where such delays have occurred. In that case, [FS50709892](#), the Commissioner stated that:
- '75. In the future the Commissioner expects the FCO to ensure that it completes internal reviews – and its public interest considerations - within the timeframes set out in her guidance. Furthermore, she would note that in her view if, as in this case, public authorities take over three years to process a request from the date of its submission to the completion of the internal review then this severely undermines the purpose and value of the legislation and a requester's right of access to information.'*²
29. Such comments apply equally to the FCO's handling of this case. If further such cases are brought to the attention of the Commissioner she will consider taking any action open to her in order to ensure that the FCO complies with not only its statutory responsibilities under the legislation, ie the completion of public interest considerations in a timely manner, but also to ensure that internal reviews are undertaken in line with the timeframes set out in her guidance.

² [FS50709892](#)

Right of appeal

30. 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

31. 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.
32. 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

Jonathan Slee
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