

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 November 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) seeking information regarding the issuing of Cartes de Sejour to British nationals in France. The FCO initially responded by saying that it did not hold any information falling within the scope of the request. At the internal review stage it explained that it had located a small amount of information falling within part 3 of the request but it considered this to be exempt from disclosure on the basis of section 27(1)(a) (international relations); it maintained that it did not hold any further information falling within parts 1 and 2 of the request.
2. During the course of the Commissioner's investigation the FCO located some further information in the scope of part 3 of the request and disclosed some of this to the complainant albeit withholding parts of it on the basis of sections 27(2) and 40(2) (personal data) of FOIA. The Commissioner has concluded that the FCO is entitled to rely on sections 27(1)(a), 27(2) and 40(2) in the manner in which it has. She has also concluded that on the balance of probabilities the FCO does not hold any information falling within the scope of parts 1 and 2 of the request.

Request and response

3. The complainant submitted the following request to the FCO on 18 May 2018:

'I now make a formal request under the Freedom of Information Act as follows:

- 1. Has the Embassy received a copy of the (draft) guidelines/advice or any similar document from the French interior ministry (or other French government department) setting out the procedures/policy etc. for prefectures in handling applications from British nationals for CdSs [Cartes de Sejour]?*
 - 2. If so, supply me with a copy. If this request is refused, please identify the document sufficiently for me to request a copy from the relevant French government department.*
 - 3. If not, please provide copies of any other correspondence with the French government about the preparation of the said guidelines etc., since 1 January 2017.'*
4. The FCO responded on 15 June 2018 and explained that it did not hold any information falling within the scope of points 1, 2, or 3 of the request. However, the FCO explained that the name of the document sought by point 2 of the request was *Instruction Ministérielle du Ministre de l' Intérieur au Préfets* and explained that the complainant would have to approach the relevant authority to request a copy of it.
 5. The complainant contacted the FCO on 15 June 2018 and asked it to conduct an internal review of this response. He suggested that if the FCO was able to provide the name of the document he had requested it must hold some correspondence about it which fell within the scope of his request, ie information falling within the scope of point 3 of his request.
 6. The FCO informed him of the outcome of the internal review on 13 July 2018. The FCO maintained its position that it did not hold any information falling within the scope of points 1 and 2 of the request. However, it explained that it had now located a very small amount of information falling within the scope of the point 3 of the request, albeit that it considered this information to be exempt from disclosure on the basis of section 27(1)(a) (international relations) of the FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 19 July 2018 in order to complain about the FCO's handling of his request. At this stage the complainant asked the Commissioner to consider two points: firstly, he was dissatisfied that the FCO had sought to withhold information it had located falling within the scope of point 3 of his request; and secondly,

he disputed the FCO's position that it did not hold any information falling within the scope of points 1 and 2 of the request.

8. During the course of the Commissioner's investigation the FCO clarified the nature of the information which fell within the scope of point 3 of the request. This information consisted of four separate emails, namely:
 - a) An email dated 15 February 2018 and timed at 16:47
 - b) An email dated 9 February 2018 and timed at 11:26
 - c) An email dated 16 February 2018 and timed at 14:39
 - d) An email dated 16 February 2018 and timed at 13:59
9. The FCO explained that emails a) and b) also fell within the scope of the complainant's previous request, FCO reference 0306-18, and had therefore been already been disclosed to him in redacted form.¹ The FCO had redacted these emails on the basis of sections 40(2) and 27(1)(a) of FOIA. The FCO's handling of request 0306-18, including its decision to redact these emails a) and b) on the basis of sections 27(1)(a) and 40(2) of FOIA, was the subject of a previous decision notice issued by the Commissioner.²
10. The FCO disclosed email c), albeit with redactions on the basis of section 40(2) to the complainant on 19 October 2018. The FCO explained that it considered email d) to be exempt from disclosure in its entirety on the basis of section 27(2) of FOIA.
11. In response to this clarification, the complainant explained to the Commissioner that he was also dissatisfied with the FCO's failure to previously explain the nature of the information it held falling within the scope of point 3 of the request, and its failure to disclose the information which it accepted was not exempt from disclosure, within 20 working days of his request.
12. Therefore, this decision notice considers the following:
 - Whether the remaining withheld information is exempt from disclosure on the basis of the exemptions cited by the FCO;

¹ Both emails were provided to him on 20 July 2018 with a further version of less redacted version of email b) provided to him on 20 August 2018.

² [FS50737566](#)

- Whether the FCO breached FOIA by initially seeking to withhold the information which it disclosed to the complainant during the course of the Commissioner's investigation; and
- Whether the FCO holds any information falling within the scope of points 1 and 2 of the request.

Complaint 1 - The information which the FCO is continuing to withhold

Emails a) and b)

13. As noted above, emails a) and b) also fall within the scope of a previous request made to the FCO by the complainant, its reference 0306-18. Further, as also noted above, the FCO's decision to only disclose redacted versions of these emails to the complainant when responding to that earlier request – with the redactions made on the basis of sections 27(1)(a) and 40(2) – has already been the subject of a previous decision notice.
14. In that notice the Commissioner concluded that these two exemptions had been correctly applied to the information which the FCO was seeking to withhold in response to that request, including redacted versions of emails a) and b). That request was submitted to the FCO on 9 March 2018. The request which is the subject of this complaint was submitted to the FCO on 18 May 2018. Given that very little time has elapsed between the two requests the Commissioner sees no reason to vary her decision with regard to the FCO's reliance on sections 27(1)(a) and 40(2) in respect of the latter request.
15. Therefore, the Commissioner does not intend to set out in detail in this notice why she is satisfied that the information redacted from emails a) and b) is exempt from disclosure on the basis of sections 27(1)(a) and 40(2) of FOIA. Rather, the Commissioner adopts her reasoning as set in decision notice FS50737566. More specifically, paragraphs 14 to 28 explain why the Commissioner has concluded that section 27(1)(a) applies and paragraphs 30 to 32, 34, and 38 to 43 explain why section 40(2) applies.

Email c)

16. The FCO has provided the complainant with a copy of email c) albeit with the names of staff redacted on the basis of section 40(2) of FOIA.
17. In the previous decision notice the Commissioner concluded that she was satisfied that the FCO could rely on section 40(2) of FOIA to redact the names of staff from disclosures made under FOIA in response to the complainant's earlier request.

18. However, on 25 May 2018 the General Data Protection Regulation (GDPR) and Data Protection Act 2018 (DPA18) came into force. In line with the provisions contained within the DPA18, under FOIA for any request where a public authority has responded before 25 May 2018 the Data Protection Act 1998 (DPA98) applies. In terms of the complainant's previous request the DPA98 therefore applied as the FCO responded to that request on 13 April 2018. However, in terms of the complainant's request which is the focus of this complaint the FCO responded on 15 June 2018 and therefore the DPA18 applies.
19. Despite this change in data protection legislation, the Commissioner is nevertheless satisfied that disclosure of the names of the staff redacted from email c) would breach the DPA18 and therefore are exempt from disclosure on the basis of section 40(2) of FOIA. Her rationale for this decision is as follows:
20. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3) or 40(4) is satisfied.
21. In this case the relevant condition is contained in section 40(3)(A)(a). This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data set out in Article 5 of the.
22. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the DPA18. If it is not personal data then section 40 FOIA cannot apply.
23. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the data protection principles under the DPA.

Is the information personal data?

24. Section 2(2) of the DPA18 defines personal data as:-

"any information relating to an identified or identifiable living individual".

25. The Commissioner is satisfied that the names of civil servants and government officials clearly constitute personal data.

Would disclosure contravene the first data protection principle?

26. The first data protection principle under Article 5(1)(a) GDPR states that:-

'Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject'

27. In the case of a FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful (i.e. would meet one of the conditions of lawful processing listed in Article 6(1) GDPR), fair, and transparent.

28. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that **'processing shall be lawful only if and to the extent that at least one of the'** conditions listed in the Article applies. One of the conditions in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.

29. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) GDPR which provides as follows:-

'processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child'³.

³ Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 18 DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

30. In considering the application of Article 6(1)(f) GDPR in the context of a request for information under FOIA it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
31. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

32. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes as well as case specific interests.
33. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
34. In the circumstances of this case the Commissioner accepts that there is a legitimate interest in the disclosure of information about the UK's discussions with the French government about the difficulties that some British nationals have encountered in obtaining a Carte de Sejour ahead of Brexit. However, she is not persuaded that there is a particularly strong or compelling interest in the disclosure of the names of officials involved in these discussions in order to inform the public about the content of these discussions.

Is disclosure necessary?

35. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so a measure would not be necessary if the legitimate aim could be achieved by something less. Disclosure under FOIA must therefore be the least restrictive means of achieving the legitimate aim in question.

36. As the Commissioner's comments above suggest, she is not persuaded that disclosure of the names of officials is necessary in order to inform the public about the UK's discussions concerning the Carte de Sejour issue. Rather, in the Commissioner's opinion the disclosure of email c) in redacted form provides an alternative means of informing the public about the content of this communication and thus it is not necessary to disclose the names of the officials in order to meet any legitimate interest.
37. Given this finding the Commissioner has concluded that disclosure of the redacted names would not be lawful and therefore article 6(1)(f) of the GDPR is not met. Disclosure would therefore breach the first data protection principle and thus the information is exempt from disclosure on the basis of section 40(2) of FOIA.

Email d)

Section 27 – international relations

38. The FCO has withheld email d) on the basis of section 27(2) which states that:

'Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.'

39. With section 27(3) clarifying that:

'For the purposes of this section, any information obtained from a State, organisation or court is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.'

40. In support of its reliance on this exemption the FCO argued that email d) is an email sent by the French authorities to the UK. Furthermore, it argued that an implied confidentiality requirement applies to diplomatic exchanges the UK receives from officials of other governments which take place under a relationship of assumed confidentiality.
41. The Commissioner accepts the rationale of the FCO's submissions and also notes that the email was only received by the FCO some four months before the request was submitted and relates to ongoing matters. In light of this the Commissioner accepts that email d) constitutes confidential information for the purposes of section 27(2) and is therefore exempt on the basis of this exemption.

Public interest test

42. Section 27(2) 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 in relation to the information which she accepts is exempt from disclosure on the basis of section 27(2) outweighs the public interest in disclosing this information.
43. With regard to the public interest in maintaining this exemption the FCO referred the Commissioner to its previous public interest submissions in relation to its application of section 27(1)(a) in the previous case, namely:
44. The FCO acknowledged that disclosure of this information would increase the public's knowledge of the UK's relations with France about this issue. However, the FCO argued that disclosure of the information would undermine the UK's relations with the French government in the ways described above. Furthermore, it argued that if this relationship was undermined this would be likely to harm the UK's ability to protect and promote its interests abroad, an outcome which would be clearly against the public interest. More specifically, the FCO argued that disclosure would undermine spirit of trust and confidence which had been built between the UK and French governments which would impact on the position of the French towards the UK during the Brexit negotiations and affect the UK's ability to influence the creation of a working registration system for British citizens after Brexit.
45. As the Commissioner noted in the previous decision notice, she recognises that the difficulties that some British nationals have encountered in obtaining a *Carte de Sejour*, ahead of Brexit, is clearly a serious issue and it is understandable that those directly affected by this issue have a particular interest in understanding the actions the FCO is taking in response. Disclosure of email d) would provide some, albeit somewhat limited, insight into the UK's discussions with French authorities about this issue.
46. However, the Commissioner recognises that there is clear public interest in the UK being able to enjoy effective international relations with its partners. This includes being able to continue to receive confidential information from other states. In the context of this case, the Commissioner agrees that there is a very significant public interest in ensuring that the UK can continue to work effectively with France to protect the rights of British nationals both before, and after, Brexit. Consequently, in her view disclosure of information which would undermine the effectiveness of such discussions would be firmly against the public interest. The public interest there favours maintaining the exemption and withholding email d).

Complaint 2 – did the FCO breach FOIA in the way it responded to point 3 of the request?

47. As the earlier parts of this decision notice explain, the FCO did not explain to the complainant that emails a) and b) fell within the scope of his request. It only indicated at the internal review stage that it held a small portion of information relevant to this aspect of the request. It was during the Commissioner's investigation that the FCO explained to her, albeit not directly to the complainant, that emails a) and b) were in the scope of point 3 of the request and that redacted versions of these emails had already provided to the complainant as they were also in scope of request 0306-18.

48. With regard to the relevant provisions of the legislation, section 1(1) of FOIA states that:

*'(1) Any person making a request for information to a public authority is entitled—
(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
(b) if that is the case, to have that information communicated to him'*

49. Section 10(1) of FOIA which states that:

'Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.'

50. With regard to emails a) and b) the Commissioner has concluded that the FCO breached section 10(1) of FOIA because it failed to provide the complainant with redacted copies of these emails in response to request 0550-18, albeit that they were provided to him in response to request 0306-18.⁴ Moreover, the FCO's failure to explain to the complainant at an early stage that emails a) and b) also fell within the scope of the request 0550-18 led to confusion as to what information actually fell within the scope of this request.

51. Furthermore, with regard to the FCO's disclosure of email c), as this was not provided to the complainant within 20 working days of the request this constitutes a further breach of section 10(1) of FOIA.

⁴ Albeit it should be noted that in disclosing these emails to the complainant under that request also breached section 10(1) as it failed to provide them to him within 20 working days.

Complaint 3 - Whether the FCO holds any information falling within the scope of points 1 and 2 of the request

52. Points 1 and 2 of the request read as follows:

'1. Has the Embassy received a copy of the (draft) guidelines/advice or any similar document from the French interior ministry (or other French government department) setting out the procedures/policy etc. for prefectures in handling applications from British nationals for CdSs?

2.If so, supply me with a copy. If this request is refused, please identify the document sufficiently for me to request a copy from the relevant French government department.'

53. In response the FCO stated that it did not hold a copy of the document, albeit it knew that it was called '*Instruction Ministérielle du Ministre de l'Intérieur au Préfets*' and explained to the complainant that he would have to approach the relevant authority to request a copy of it.

54. The complainant has questioned the FCO's position that it does not hold information sought by points 1 and 2 of his request.

55. In cases such as this where there is some dispute as to whether information falling within the scope of the request is held, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.

56. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request.

57. In applying this test the Commissioner will consider the scope, quality, thoroughness and results of the searches, or as in the circumstances of this complaint, other explanations offered as to why the information is not held.

58. In order to consider this aspect of the complaint, the Commissioner asked the FCO to respond to a number of questions. The Commissioner has reproduced these questions below, along with the FCO's responses:

- What searches were carried out for information falling within the scope of points 1 and 2 of this request and why would these searches have been likely to retrieve any or indeed all relevant information?

Searches conducted of electronic information – including shared and personal drives, i-records, etc – as well as any paper documents.

- If searches included electronic data, please explain whether the search included information held locally on personal computers used by key officials (including laptop computers) and on networked resources and emails.

Searches were conducted on all devices where this information would have been held- on networked resources (including laptops, phones etc).

- If searches included electronic data, which search terms were used?

"Ministry of Interior", "MoI", "British Citizens", "Carte de Sejour"; "CdS". "Ministere de l'Intérieur".

- If the information were held would it be held as manual or electronic records?

Electronic.

- Was any recorded information ever held relevant to the scope of the points 1 and 2 of the request but deleted/destroyed?

No.

- If recorded information was held but is no longer held, when did the FCO cease to retain this information?

See above.

- Does the FCO have a record of the document's destruction?

See above.

- What does the FCO's formal records management policy say about the retention and deletion of records of this type? If there is no relevant policy, can the FCO describe the way in which it has handled comparable records of a similar age?

As the FCO never held the document concerned, and did not have a business need to hold it in the first place, the policy itself is potentially not useful to elaborate on for the purposes of this case.

- Is there a business purpose for which the requested information should be held? If so what is this purpose?

The document requested is a letter sent by the French government internally to prefectures. As such, it was not shared with the FCO and there is no business purpose for which to obtain it or indeed hold it.

- Finally, I would be grateful if you could clarify how, when responding to his request on 15 June 2018, the FCO was able to inform the complainant of the name of the document about which his request focused on despite the fact that at that stage it had not located any information which fell within the scope of his request.

On receipt of his request, and in an attempt to be helpful, staff at post found out the name of the document by making enquiries with the French authorities.

59. In light of the FCO's responses the Commissioner is satisfied that on the balance of probabilities the FCO does not hold a copy of the document sought by points 1 and 2 of the request. She has reached this finding for the following reasons: Firstly, because she considers the nature of the searches undertaken by the FCO to be reasonable and logical ones such that if the FCO did hold a copy of the document it would in all likelihood have been located as a result of these searches. Secondly, given that the document in question is an internal one shared amongst French authorities, there is no obvious business reason for the FCO to hold this information. Thirdly, the Commissioner considers the FCO's response to the final question provides a rational explanation as to why it was able to provide the complainant with the name of the document despite not actually holding a copy of it.

Right of appeal

60. 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

61. 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.
62. 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

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