

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 February 2019

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

Decision (including any steps ordered)

1. The complainant submitted two requests to the Foreign and Commonwealth Office (FCO) seeking confirmation as to the identity of officials involved in locating and identifying files for Sir Jeremy Heywood's review in 2014 into allegations of UK involvement in the Indian Army's 'Operation Bluestar'. The FCO refused to confirm or deny whether it held the requested information by relying on section 40(5) of FOIA. The Commissioner is satisfied that the FCO is entitled to rely on this exemption to refuse the requests. However, she has also concluded that the FCO breached section 17(1) of FOIA by failing to issue a refusal notice within 20 working days.

Request and response

2. The complainant submitted the following requests to the FCO on 9 November 2017:

'Under the FOIA 2000, please will the department confirm the following:

1. *FCO sensitivity reviewer Bruce Cleghorn helped locate and identify FCO papers for Sir Jeremy Heywood's review in 2014 into allegations of UK involvement in the Indian Army's Operation Bluestar.*
2. *FCO officials who were involved in UK-India affairs in 1984 helped locate and identify FCO papers in 2014 for Sir Jeremy Heywood's*

*review into allegations of UK involvement in the Indian Army's operation Bluestar.*¹

3. The FCO contacted him on 7 December 2017 and explained that it considered section 36 (prejudice to the effective conduct of public affairs) of FOIA to apply to the request and that it needed additional time to consider the balance of the public interest test. The FCO sent further public interest holding letters on 9 January and 9 February 2018 both of which also cited section 26 (defence) and section 27 (international relations) of FOIA.
4. The FCO provided the complainant with a substantive response to his request on 27 March 2018. It explained that it was seeking to withhold the information he requested on the basis of section 40(2) (personal data) of FOIA.
5. The complainant contacted the FCO on the same day and asked it to conduct an internal review of this response.
6. The FCO informed him of the outcome of the internal review on 3 August 2018 and confirmed its reliance on section 40(2) of FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 3 September 2018 in order to complain about the FCO's failure to provide him with the information he requested. He was also unhappy with the time it took the FCO to provide him with a substantive response to the requests and the length of time it took the FCO to complete its internal review.
8. Having received this complaint the Commissioner clarified with the complainant the nature of the information his two requests were seeking. The complainant explained that in response to request 1 he was simply seeking a yes/no answer to the question as to whether Mr Cleghorn helped locate and identify FCO papers for the Heywood Review in 2014. Similarly, the complainant explained that in relation to request

¹ On 13 January 2014 the Cabinet Secretary was asked by the then Prime Minister, David Cameron, to lead an urgent review into allegations of UK involvement in the Indian operation at Sri Harmandir Sahib, Amritsar in June 1984. The report (The Heywood Review) was published on 4 February 2014 and is available here: <https://www.gov.uk/government/publications/alleged-uk-link-to-operation-at-sri-harmandir-sahib-amritsar-1984>

2 he was simply seeking a yes/no answer as to whether any officials had a) helped locate and identify FCO papers for the Heywood Review and b) were involved in UK-India affairs in 1984.

9. In light of this clarification, the FCO explained in its submissions to the Commissioner that it was now seeking to rely on section 40(5)(b)(i) of FOIA to refuse to confirm or deny whether it held information falling within the scope of either request.² In other words, it was seeking to rely on this exemption to refuse to provide a yes/no answer to each request.

Reasons for decision

Section 40 – personal data³

10. Section 40(5)(b)(i) of FOIA states that a public authority is not obliged to confirm nor deny under section 1(1)(a) of FOIA whether third party personal data is held if, or to the extent that:

'the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded'.

11. In the circumstances of this case, the FCO is relying on the first part of section 40(5)(b)(i), ie that complying with section 1(1)(a) would breach the data protection principles.
12. Therefore, for the FCO to be correct in relying on section 40(5)(b)(i) to neither confirm or deny whether it holds information falling within the scope of the requests the following two criteria must be met:

² The right of access provided by FOIA is set out in section 1(1) and is separated into two parts: Section 1(1)(a) gives an applicant the right to know whether a public authority holds the information that has been requested. Section 1(1)(b) gives an applicant the right to be provided with the requested information, if it is held. Both rights are subject to the application of exemptions.

³ On 25 May 2018 the General Data Protection Regulation and Data Protection Act 2018 came into force. However, in line with the provisions contained within the Data Protection Act 2018 under FOIA for any request where a public authority has responded before 25 May 2018 the DPA 1998 applies.

- Confirming or denying whether information is held would reveal the personal data of a third party; and
- That to confirm or deny whether information is held would contravene one of the data protection principles.

Would the confirmation or denial that information was held reveal the personal data of a third party?

13. 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.

14. In relation to request 1, the FCO argued that if it complied with section 1(1)(a) of FOIA and confirmed whether or not Mr Cleghorn was involved in locating and identifying FCO papers for the review in question then this would clearly reveal personal data about him. That is to say, it would reveal whether or not he was involved in processing files of this kind for the purposes of the Heywood Review. The Commissioner agrees that it is clear that if the FCO complied with section 1(1)(a) in respect of request 1 then this would reveal the personal data of Mr Cleghorn.
15. In relation to request 2, the FCO argued that the complainant would be able to use information in the public domain, e.g. information at The National Archives (TNA) to identify staff who were involved in UK-India affairs in 1984. It noted that it was also in the public domain that Mr Cleghorn was a sensitivity reviewer. Therefore, the FCO argued that if it complied with section 1(1)(a) of FOIA in respect of this request then it could be inferred (correctly or not) that Mr Cleghorn was involved in the review. The Commissioner notes that the request 2, unlike request 1, did not identify any specific individuals. However, the Commissioner acknowledges that it is the public domain that Mr Cleghorn worked in UK-India affairs in 1984 and is now a sensitivity reviewer. She is therefore persuaded by the FCO's line of argument that complying with section 1(1)(a) in respect of request 2 would be likely to have the same effect of complying with request 1.

Would confirmation or denial as to whether information is held contravene one of the data protection principles?

16. The Commissioner must therefore consider whether confirmation or denial as to whether information is held would contravene one of the data protection principles.
17. In support of its application of section 40(5)(b)(i), the FCO argued that to confirm or deny whether it held information falling within the scope of the two requests would contravene the first data protection principle.
18. The first data protection principle states that:
 1. Personal data must be processed fairly and lawfully; and
 2. Personal data shall not be processed unless at least one of the conditions in the DPA schedule 2 is met.

19. The most relevant condition in relation to this request is the sixth condition which states that:

'The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject'

20. In deciding whether complying with section 1(1)(a) 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;
 - the nature or content of the information itself (if held);
 - the circumstances in which the personal data was obtained;
 - particular circumstances of the case, e.g. 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 confirming whether information is held, i.e. what damage or distress would the individual suffer if the public authority confirmed whether or not it held the requested information? 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 confirmation; and even if the information has previously been in the public domain does the passage of time mean that confirmation now could still cause damage or distress?

21. Furthermore, notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to confirm whether or not the information is held if it can be argued that there is a more compelling public interest in disclosure. In considering 'legitimate interests' in order to establish if there is such a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests.

The complainant's position

22. In his submission to the Commissioner the complainant raised the following grounds of complaint:
23. The request was designed to establish whether or not there was a conflict of interest in the process of the Heywood Review into Operation Blue Star. The complainant noted that the First Tier Tribunal has already acknowledged the significant public interest in transparency around this Operation (see Tribunal decision in *Phil Miller v Information Commissioner v Cabinet Office* EA/2016/0223). To demonstrate this significant public interest, the complainant's submissions noted that clarifying whether any retired officials with a vested interest were involved in the review was necessary so that any perceptions of a government 'cover-up' could be avoided. He argued that such a potential conflict of interest threatened to undermine the review's integrity.
24. The complainant noted that Mr Cleghorn worked for the FCO's South Asia Department in 1984 and wrote scores of telegrams relating to

Operation Blue Star. In one, he said 'it would be dangerous if HMG [Her Majesty's Government] were to become identified, in the minds of Sikhs in the UK, with some more determined action by the Indian government, in particular any attempt to storm the Golden Temple in Amritsar.'⁴ The complainant explained that according to his LinkedIn profile, which is publicly accessible, in 2001-2006 Mr Cleghorn was British High Commissioner to Malaysia and since 2007 he was a 'contract officer' at the FCO. The complainant explained that in 2012, Mr Cleghorn attended a meeting of the Lord Chancellor's Advisory Council on National Records and Archives where he was minuted as being a 'sensitivity reviewer' for the FCO. The complainant noted that the minutes are publicly accessible.

25. The complainant explained that on 22 September 2017, an FCO press officer told him that 'Foreign and Commonwealth Office sensitivity reviewers helped to locate and identify FCO papers, but were not part of the [Heywood] review'. The complainant explained that when asked whether these sensitivity reviewers included Mr Cleghorn, the press officer said 'we don't comment on the specific tasking of staff'.
26. However, the complainant argued that FCO sensitivity reviewers do not work under anonymity. They are chosen because of their experience as senior diplomats and, for example, use their own signatures to certify that certain FCO documents at TNA should be retained. Their signature on these certificates are viewable to the public.
27. The complainant explained he has established that on 11 June 2015, Mr Cleghorn was working as a sensitivity reviewer for the FCO 'censoring' its records on India from 1984.⁵ The complainant therefore argued that it is therefore very likely that in January/February 2014, he would have been asked by the FCO to assist in locating/identifying FCO papers for the Heywood Review.
28. In light of the above, the complainant argued that it was a matter of openly available public records that Mr Cleghorn was working as a sensitivity reviewer from the FCO in March 2012 and June 2015. However, the FCO was unwilling to say if he was one of the sensitivity

⁴ Telegram sent on 31 May 1984; available at TNA in file FCO 37/3606

⁵ The complainant provided the Commissioner with a copy of a record taken from file FCO 37/3681. The complainant noted that the document's metadata listed a 'B Cleghorn' as the user.

reviewers who helped locate and identify FCO papers for the Heywood Review in January/February 2014.

29. Finally, the complainant argued that the Heywood Review was not given a crucial FCO file about India from 1984.⁶

The FCO's position

30. With regard to the expectations of the data subject, the FCO argued that sensitivity reviewers are usually retired members of the FCO. Whilst they may have been in senior, public facing roles previously, their official grade as a sensitivity reviewer is more junior and they work in a supporting role. Consequently, the FCO argued that sensitivity reviewers have an expectation of privacy with respect to their review work, which is of a sensitive nature, and would not expect their names to be disclosed. With regard to the consequences of complying with section 1(1)(a) of FOIA, the FCO noted that the subject of the Heywood Review is a significant and emotive issue for the Sikh community and if the identity of the sensitivity reviewers involved in the review were released then this could lead to significant activity on social media that could lead to them receiving attention that may cause them distress.
31. As part of her investigation, the Commissioner asked the FCO for its response to a number of the complainant's grounds of complaint. The Commissioner has summarised below a particular ground of complaint and then set out the FCO's response to it:
- In the light of disclosures at TNA it is public knowledge that Mr Cleghorn worked for the FCO's South Asia Department in 1984.

FCO's response: Mr Cleghorn's name may appear on these files. However, this is not relevant to either of the complainant's requests, as this by itself does not indicate that Mr Cleghorn, or any other official involved in UK-India affairs at that time, were responsible for helping to locate and identify FCO papers for the Heywood Review in 2014.

⁶ In support of this point the complainant directed the Commissioner to an article in *Private Eye*, available here https://philmillerresearch.files.wordpress.com/2018/03/eye1465-amritsar_1.jpg?w=1024

- It is public knowledge that Mr Cleghorn was working as a sensitivity reviewer for the FCO in 2012 and that on 11 June 2015 he was still in this position 'censoring' records on India from 1984.

The FCO's response: Mr Cleghorn's name may be in the public domain as an FCO sensitivity reviewer. However, this is not relevant to either of the complainant's requests, as this by itself does not indicate that Mr Cleghorn was responsible for helping to locate and identify FCO papers for the Heywood Review in 2014.

- In light of this it is very likely that Mr Cleghorn would have been asked by the FCO to assist in locating and identifying papers for the Heywood review.

FCO's response: this was an assumption on the complainant's part and in any event the FCO considered section 40(5) to apply to both requests for the reasons set out above.

- The complainant's point: sensitivity reviewers do not work in anonymity as their signatures are on closure records at TNA.

FCO's response: It is not our policy or practice for the names of sensitivity reviewers to appear on any files at TNA in their role as sensitivity reviewers.

- The complainant's point: There is a potential conflict of interest in an official who was involved in UK-India affairs being involved in deciding which files Sir Jeremy Heywood examined as part of his review. Consequently, there is a compelling public interest in confirming whether or not Mr Cleghorn was involved in selecting files for the review (point 1) or whether any officials who were involved in UK-India affairs in 1984 were involved in selecting files for the review (point 2).

FCO's response: This is the complainant's view and he had not advanced any evidence to support his accusation of impropriety.

The Commissioner's position

32. With regard to Mr Cleghorn's reasonable expectations, the Commissioner notes the fact that he is a sensitivity reviewer at the FCO is something which is in the public domain. She also notes that the complainant has located a record at TNA for which a 'B Cleghorn' was the sensitivity reviewer for a record concerning UK-Indian relations.

However, she accepts the FCO's point it would not routinely disclose details of what files a particular reviewer had been involved in considering in response to an FOI request. Consequently, the Commissioner accepts that Mr Cleghorn would have a reasonable expectation that the FCO would not, under FOIA, confirm whether or not he was involved in reviewing particularly files, and this extends to whether he was locating and identifying papers for the Heywood Review. In the Commissioner's opinion the sensitive nature of the issues at the centre of the Heywood Review lend further weight to this expectation. Following on from this point, given the subject of the Heywood Review, the Commissioner accepts the FCO's position that if it revealed which officials were involved in the review this may lead to repercussions for them that could cause them distress.

33. With regard to the legitimate interests in the FCO complying with section 1(1)(a) of FOIA, the Commissioner notes that it has argued that the complainant has not advanced any evidence to support his accusations about a conflict of interest. However, in the Commissioner's view there is still a legitimate interest in the government being open and transparent about the processes it followed in conducting the Heywood Review given the sensitivity of the subject matter. Moreover, in her view in this context even the perception of a possible conflict of interest adds weight to the argument that there is a legitimate interest in the FCO complying with section 1(1)(a) of FOIA. Nevertheless, the Commissioner has concluded that Mr Cleghorn's legitimate interests outweigh the legitimate interests in confirming or denying whether the requested information is held, ie in providing a yes/no response to each request. The Commissioner has reached this conclusion given the cumulative effect of both the data subject's reasonable expectations allied to the consequences in confirming whether information is held.

Time taken to respond to request

34. If a public authority is seeking to refuse to comply with a request, then section 17(1) of FOIA requires it to issue the requester with a refusal notice stating this fact within 20 working days. Under section 17(3) a public authority can, where it is citing a qualified exemption, have a 'reasonable' extension of time to consider the balance of the public interest. The Commissioner considers it reasonable to extend the time to provide a full response, including public interest considerations, by up to a further 20 working days, which would allow a public authority 40 working days in total. The Commissioner considers that any extension beyond 40 working days should be exceptional and requires the public authority to fully justify the time taken.
35. In the circumstances of this request the FCO initially sought to extend the time taken to consider the balance of the public interest before

deciding that section 40(2) applied to this request; that exemption is not a qualified one. By failing to issue the complainant with a refusal notice citing section 40(2) within 20 working days of the request the FCO breached section 17(1) of FOIA.

Other matters

36. FOIA does not contain a time limit within which public authorities have to complete internal reviews. However, the Commissioner's guidance explains that in most cases an internal review should take no longer than 20 working days in most cases, or 40 working days in exceptional circumstances. In this case the FCO took 90 working days to complete its internal review. The Commissioner hopes that in the future the FCO will conduct such reviews within the timescales set out within her guidance.

Right of appeal

37. 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

38. 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.
39. 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
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF