

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 December 2021

Public Authority: Foreign, Commonwealth & Development 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) (now the Foreign, Commonwealth & Development Office, FCDO) seeking copies of three files concerning Sri Lanka in the 1980s. The FCO disclosed two of these files in full. It also provided the majority of the information from the third file but sought to withhold the remaining information on the basis section 23(1) (security bodies) or, in the alternative, section 24(1) (national security) and sections 27(1)(a) and 27(2) (international relations) of FOIA.
2. The Commissioner's decision is that parts of the withheld information are exempt from disclosure on the basis of section 23(1) or section 24(1) of FOIA and that the remaining withheld information is exempt from disclosure on the basis of section 27(2). However, he has also concluded that the FCO breached section 17(3) of FOIA by failing to conclude its public interest test considerations and provide the complainant with a substantive response to his request within a reasonable timeframe.
3. No steps are required.

Request and response

4. The complainant submitted the following request to the FCO¹ on 29 January 2019:

'Under the FOIA 2000, I am requesting copies of the following three files from 1986 that the FCO plans to destroy:

1. UK security assistance to Sri Lanka, FSC 061/2, 2. Training of Sri Lankan armed forces in the UK, FSC 070/1, 3. Defence attaches reports: Sri Lanka, FSC 074/1'

5. The FCO acknowledged receipt of this request and explained that it needed additional time to consider the balance of the public interest test. The FCO provided him with a substantive response to his request on 25 June 2019. It disclosed files FSC 061/2 and FSC 070/1 in full. However, the FCO only disclosed a partially redacted version of file FSC 074/1 and explained that it considered the withheld information to be exempt on the basis of section 23(1) or section 24(1) of FOIA, citing these two exemptions in the alternative.²
6. The complainant contacted the FCO on 15 July 2019 and asked it to conduct an internal review of this decision. He explained that he was dissatisfied with the FCO's decision to redact information from folios 15 and 35 in file FSC 074/1 and to withhold, in its entirety folio 22, from the same file.
7. The FCO informed him of the outcome of the internal review on 4 November 2019. The FCO provided the complainant with a redacted version of folio 22 noting that information had been redacted on the basis of sections 23(1) or 24(1), which were again cited in the alternative, and on the basis of section 27(2) (international relations). The review also concluded that it was satisfied that the information

¹ The FCO merged with the Department for International Development on 2 September 2020 to form the FCDO. This decision notice is therefore served on the FCDO but refers to the FCO where it was the body that took certain actions in relation to the request.

² Citing these two exemptions in the alternative means that although only one exemption is engaged the other one is also cited so as to disguise which exemption is in fact being relied upon. This approach may be necessary in instances where citing one exemption would in itself be harmful. Further information on this issue is contained in guidance issued by the Commissioner: <https://ico.org.uk/for-organisations/foi-guidance/how-sections-23-and-24-interact/#text4>

redacted from folios 15 and 35 was exempt on the basis of sections 23(1) or 24(1).³

Scope of the case

8. The complainant initially contacted the Commissioner on 29 October 2019 in order to complain about the FCO's failure to complete the internal review. Following the completion of the internal review, the complainant contacted the Commissioner again on 29 January 2020 in order to complain about the FCO's decision to redact information from folios 15, 22 and 35 in file FSC 074/1. He also noted that it was his understanding that the FCO had originally intended to destroy the three files in question, and that it was only as a result of his request and the request for an internal review that led to the disclosure of information from these files.
9. During the course of the Commissioner's investigation of this complaint the FCDO explained that a further review of the material had determined that additional information could be disclosed from folio 22 and an updated version of this document was provided to the complainant in February 2021. The FCDO clarified that in addition to section 27(2), it also considered section 27(1)(a) to apply to some information in folio 22.
10. The Commissioner has noted that the complainant's concerns regarding the FCO's decision making in respect of the destruction or retention of particular files from this period. Public authorities review their files in line with the requirements of the Public Records Act 1958 before making a decision on permanent preservation. However, such a process is outside of the Commissioner's remit and therefore he cannot comment on the complainant's concerns regarding the FCO's (as was) retention of records from this period.
11. Consequently, this decision notice focuses simply on whether the remaining withheld information is exempt from disclosure on the basis of the exemptions cited by the FCO.
12. The notice also considers the time it took the FCO to issue a substantive response to the request. The time it took to complete the internal review

³ The FCO also informed the complainant that the file 074/1 had been selected for permanent preservation and not destruction.

is considered in the Other Matters as there is not statutory requirement to complete such reviews within a particular time period.

Reasons for decision

Section 23(1) – information supplied by or relating to bodies dealing with security matters

Section 24 – national security

13. Section 23(1) of FOIA provides an exemption which states that:

'Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).'

14. To successfully engage the exemption at section 23(1), a public authority needs only to demonstrate that the relevant information was directly or indirectly supplied to it by, or relates to, any of the bodies listed at section 23(3).⁴

15. Section 24(1) states that:

'Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security'.

16. FOIA does not define the term 'national security'. However, in *Norman Baker v the Information Commissioner and the Cabinet Office* (EA/2006/0045 4 April 2007) the Information Tribunal was guided by a House of Lords case, *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, concerning whether the risk posed by a foreign national provided grounds for his deportation. The Information Tribunal summarised the Lords' observations as follows:

- 'national security' means the security of the United Kingdom and its people;

⁴ A list of the bodies included in section 23(3) of FOIA is available here: <http://www.legislation.gov.uk/ukpga/2000/36/section/23>

- the interests of national security are not limited to actions by an individual which are targeted at the UK, its system of government or its people;
 - the protection of democracy and the legal and constitutional systems of the state are part of national security as well as military defence;
 - action against a foreign state may be capable indirectly of affecting the security of the UK; and,
 - reciprocal co-operation between the UK and other states in combating international terrorism is capable of promoting the United Kingdom's national security.
17. Furthermore, in this context the Commissioner interprets 'required for the purposes of' to mean 'reasonably necessary'. Although there has to be a real possibility that the disclosure of requested information would undermine national security, the impact does not need to be direct or immediate.
18. As is clear from the wording of section 24(1), the exemptions provided by sections 23(1) and 24(1) are mutually exclusive. This means they cannot be applied to the same request.
19. However, the Commissioner recognises that the fact that section 24(1) can only be applied to information that is not protected by section 23(1) can present a problem if a public authority does not want to reveal whether or not a section 23 security body is involved in an issue. To overcome this problem, as referred to above at footnote 2, the Commissioner will allow public authorities to cite both exemptions 'in the alternative' when necessary. This means that although only one of the two exemptions can actually be engaged, the public authority may refer to both exemptions in its refusal notice.
20. As the Commissioner's guidance on this issue explains, a decision notice which upholds the public authority's position will not allude to which exemption has actually been engaged. It will simply say that the Commissioner is satisfied that one of the two exemptions cited is engaged and that, if the exemption is section 24(1), the public interest favours withholding the information.

The complainant's position

21. In relation section 23(1), the complainant argued that this did not cover foreign special forces, foreign intelligence agencies, nor British 'mercenaries such as KMS'⁵. He noted that the fact that Sri Lanka's army commando unit was trained by the SAS is a matter of public record which has been disclosed in the Ministry of Defence (MOD) files at The National Archives. The complainant argued that public bodies must act in a proportionate and rational fashion, and it was neither proportionate nor rational for the FCDO to withhold information of a similar nature to which the MOD had already released.
22. In relation to section 24(1), the complainant noted that it was already in the public domain that the SAS trained Sri Lankan army commandos in 1980s. As a result he argued that subsequent references to this in the FCO files cannot be said to jeopardise national security.

The Commissioner's position

23. Based on submissions provided to him by the FCDO during the course of his investigation, the Commissioner is satisfied that the parts of the withheld information either fall within the scope of the exemption provided by section 23(1) of FOIA or fall within the scope of the exemption provided by section 24(1) of FOIA, and that if the exemption engaged is section 24(1) then the public interest favours maintaining the exemption.
24. The Commissioner cannot elaborate on his rationale behind this finding without compromising the content of the withheld information itself or by revealing which of these two exemptions is actually engaged.

Section 27 – international relations

25. Section 27(2) of FOIA 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.'

26. Section 27(3) of FOIA explains that:

'For the purposes of this section, any information obtained from a State, organisation or court is confidential at any time while the terms

⁵ KMS refers to Keenie Meenie Services, a private British military contractor.

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.'

27. Section 27(2) is a class based exemption and is not subject to the prejudice test.

The FCDO's position

28. In the internal review the FCO explained that the information withheld on the basis of section 27(2) was given in confidence to UK officials and the country concerned would expect the UK to continue to protect its confidentiality.
29. In its submissions to the Commissioner that FCDO provided more details as to why it considered this information to be exempt from disclosure on the basis of section 27(2). However, these submissions made direct reference to the content of the withheld information itself and therefore the Commissioner has not included such submissions in the decision notice.

The complainant's position

30. The complainant noted that the folio 22, to which the FCDO had applied section 27(2) was marked confidential and it was hard to discern why the redacted portions are regarded as more confidential than the unredacted parts, given that in his view the disclosed portions of the document are already deeply embarrassing for the Sri Lankan state. Consequently he argued that if the FCDO was prepared to release these parts of the folio then the redacted portions must be substantially more prejudicial if they are to be justifiably withheld.

The Commissioner's position

31. Having considered the content of the withheld information, and the FCDO's submissions, the Commissioner is satisfied that the information is exempt from disclosure on the basis of section 27(2). The information was clearly obtained from another State, was provided with the clear expectation that it would be treated confidentially, and furthermore the State in question would expect the UK to continue to protect its confidentiality.

Public interest test

32. Section 27(2) is a qualified exemption and therefore subject to the public interest test set out in section 2(2)(b) of 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 information.

Public interest in disclosing the information

33. In the internal review response the FCO acknowledged that there is a public interest in the disclosure information relating to the UK's relations with Sri Lanka. It also acknowledged that there is public interest in a greater understanding of the UK's foreign relations and the information could provide the public with a better historical understanding of Britain's conduct overseas.
34. The complainant argued that the declassified material contains details about the KMS, including an admission by the company's most senior staffer in Sri Lanka that the Special Task Force⁶ (a unit whose chief instructor at that point was a KMS member) did open fire and shoot civilians. Furthermore, the complainant noted that it was clear from content of the disclosed information that it was historically significant material, given Britain's Defence Adviser's comment in the telegram that *'the STF [Special Task Force], for all their knowledge and respect for the rule of law, can indulge in irresponsible and reckless shooting when sufficiently frightened, resulting in the killing of civilians.'*⁷
35. The complainant therefore argued that there was a public interest in the disclosure of withheld material which would provide further information on this subject.

Public interest in maintaining the exemption

36. The FCDO emphasised that the information in question had been provided to the UK in confidence. It argued that if it did not respect this confidence then the UK's relations with the country in question would be harmed, an outcome which would be against the public interest. The FCDO provided the Commissioner with further submissions to support its view that the public interest favoured maintaining the exemption but these submissions referred to the content of the withheld information and therefore are not included in this decision notice.

⁶ A unit of the Sri Lankan police.

⁷ Source: FS 074/1, Folio 37, 24 September 1986

Balance of the public interest test

37. In the Commissioner's opinion there is an inherent public interest in protecting confidentiality. This is because disclosure of confidential information undermines the principle of confidentiality, which depends on a relationship of trust between the confider and the confidant. Furthermore, in the Commissioner's view there is a public interest in respecting international confidences to ensure that states, international organisations or courts are not deterred from providing information.
38. In terms of the weight that should be applied to the public interest arguments both for and against disclosure consideration has to be given to the likelihood and severity of any harm, the age of the information, how far the requested information will help public understanding and whether similar information is already in the public domain.
39. In terms of this case, the Commissioner agrees that there is a public interest in the disclosure of information in order to inform the UK's relations with other states, as well as to improve the historical understanding Britain's conduct abroad. Disclosure of this information would meet both of these aims, and taking into account the arguments made by the complainant, the Commissioner accepts that public interest in disclosure should not be dismissed lightly.
40. However, the Commissioner notes that the FCDO has disclosed other parts of the files, and that wider further disclosures from the period have resulted in additional information on this subject being in the public domain. In the Commissioner's opinion the availability of this information reduces, slightly, the weight that should be attributed to the public interest arguments in favour of disclosure.
41. Furthermore, the Commissioner is satisfied that taking into account the FCDO's submissions he is satisfied that there is a significant risk of an adverse effect on the UK's international relations if the information was disclosed. Consequently, on balance the Commissioner has concluded that the public interest favours maintaining the exemption contained at section 27(2) of FOIA.
42. In light of this finding the Commissioner has not considered the FCDO's reliance on section 27(1)(a) of FOIA.

Time taken to respond to the request

43. Section 10(1) of FOIA provides that a public authority must comply with section 1(1), ie the right to access information, promptly and in any event not later than the twentieth working day following the date of receipt.

44. 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.
45. In this case the complainant submitted his request on 29 January 2019 but the FCO did not provide him with a substantive response to his request until 25 June 2019. The FCDO explained to the Commissioner that the nature of requested information resulted in the material having to be referred to both internal and external stakeholders for sensitivity assessments and the public interest test. It explained that the Easter bombings in Sri Lanka also impacted on the geographical desk team's response time when its input was sought. The FCDO explained that it is reliant on stakeholders responding to deadlines which were missed due to resource constraints on these parties. However, it acknowledged that its responses to the original request (and internal review, discussed in the Other Matters below) took longer that they should have done.
46. Despite these factors, the Commissioner does not accept that it was reasonable for the FCO to have taken the time it did to provide the complainant with a substantive response to his request. The FCO therefore breached section 17(3) in its handling of this request.

Other matters

47. The FOIA does not impose a statutory time within which internal reviews must be completed, albeit that the section 45 Code of Practice⁸ explains that such reviews should be completed within a reasonable timeframe. The Commissioner expects that most internal reviews should be completed within 20 working days, and even for more complicated requests, reviews should be completed within a total of 40 working days.
48. In this case the FCO took 80 calendar days to complete the internal review. In its response to the Commissioner, the FCDO explained that as

⁸ <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

with its public interest test considerations, the internal review was delayed due to consultations with stakeholders which were important to the case as some material in folio 22 was considered to be releasable. As noted, the FCDO acknowledged that it took longer than it should have done to complete the internal review.

Right of appeal

49. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

50. 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.
51. 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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