

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 November 2022

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, Commonwealth & Development Office (FCDO) information about the attack on the Dusit D2 complex that happened in January 2019 in Nairobi, Kenya. The FCDO refused to confirm or deny whether it held any information on the basis of sections 24(2) (national security) and 27(4) (international relations) of FOIA.
2. The Commissioner's decision is that the FCDO is entitled to refuse to confirm or deny whether it holds any information falling within the scope of the request on the basis of section 27(4) of FOIA.
3. No steps are required.

Request and response

4. The complainant submitted the following request to the FCDO on 3 February 2021:

'I am looking for documents and internal correspondence relating to the Dusit D2 complex that happened on the 15th-16th January 2019 in Nairobi, Kenya. I am specifically looking for documents and correspondence relating to military assistance that was requested or

offered by the British High Commission during the attack and any reports of the outcome.'

5. The FCDO responded on 3 March 2021 and refused to confirm or deny whether it held any information falling within the scope of this request on the basis of section 24(2) (national security) of FOIA. The FCDO explained that it considered section 17(4) of FOIA to apply and therefore it was unable to explain why it considered this exemption to apply.¹
6. The complainant contacted the FCDO on 4 March 2021 and asked it to conduct an internal review of this decision.
7. The FCDO informed the complainant of the outcome of the internal review in a letter dated 8 April 2021 (albeit the complainant has explained to the Commissioner that he did not receive this until 26 July 2021). The internal review concluded that section 24(2) had been applied correctly. It also concluded that section 27(4) (international relations) also provided a basis on which the FCDO was entitled to refuse to confirm or deny whether it held the requested information. Again, the FCDO explained that in relation to that exemption section 17(4) also applied.

Scope of the case

8. The complainant contacted the Commissioner on 26 July 2021 to complain about the FCDO's refusal to confirm or deny whether it held any information falling within the scope of his request. The complainant's submissions to support his position are set out below.

¹ Section 17(4) states that public authority does not have to explain why an exemption applies when issuing a refusal notice if such an explanation would itself contain information that is exempt under FOIA.

Reasons for decision

Section 27 – International relations

9. Section 27(4) of FOIA provides an exemption against complying with section 1(1)(a) of FOIA – confirming or denying whether requested information is held – if to do so would, or would be likely to, prejudice the interests protected by section 27(1).
10. In the circumstances of this case the relevant interest is that contained at section 27(1)(a), namely relations between the UK and any other state.

The complainant's position

11. The complainant argued that the FCDO's refusal to confirm or deny whether it held any information falling within the scope of his request was unsustainable for the following reasons:
12. Firstly, it has been made clear by media reporting briefings by the Kenyan authorities and other security services that the FCDO was requested to give assistance and this was given permission. A neither confirm nor deny approach does not make sense if this is already out in the public domain.
13. Secondly, local sources have also confirmed that debriefing reports were produced which were passed to the FCDO for comment and approval.
14. Thirdly, a lot of the information that he had referred to and more will no doubt be appearing in a book about the attack, 'One Man In' by Chris Craighhead which was due to be published in July 2021.

The FCDO's position

15. The FCDO argued that to respond to the request confirming or denying UK military involvement would undermine the UK's bilateral relationship with Kenya.
16. The FCDO explained that Kenya was a key partner of the UK in countering terrorism in the region and protecting UK interests internationally. The UK's strong security and defence relationship with Kenya, included the establishment of the National Counter Terrorism Centre and UK/Kenyan Defence Cooperation Agreement. The FCDO explained that the UK provides training to over 1,100 Kenyan soldiers every year before they deploy to the African Union Mission in Somalia (AMISOM) to fight Al-Shabaab and the British Army and Kenya Defence Force (KDF) conduct around five joint training exercises every year, involving around 750 Kenyan and 5,000 British troops. The FCDO also

noted that the UK opened the first UK funded Anti-Terror Police Unit headquarters in Kenya in 2022. More broadly, the FCDO explained that the UK's bilateral relationship with Kenya has a strong focus on joint efforts to tackle global terrorism, violent extremism, organised crime and corruption.

17. The FCDO explained that Kenya puts a strong emphasis on the importance of private diplomatic engagement in pursuit of agreement on areas of mutual co-operation and in this context confirming whether not the requested information is held would be likely to harm the UK's relations within Kenya.
18. The FCDO provided the Commissioner, in confidence, with more detailed submissions to support its application of section 27(4) of FOIA. Given the nature of these submissions the Commissioner has not included these in this decision notice.

The Commissioner's position

19. In order for a prejudice based exemption, such as section 27, to be engaged the Commissioner believes that three criteria must be met:
 - Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if confirmation or denial was provided 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 such a confirmation or denial and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance.
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, confirmation or denial '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.
20. 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'.²

21. With regard to the first criterion, the Commissioner accepts that the potential prejudice described by the FCDO clearly relates to the interests which the exemption contained at section 27(1)(a) is designed to protect. With regard to the second criterion the Commissioner is satisfied that there is a causal link between the FCDO confirming whether or not it holds the requested information and harm occurring to the UK's relations with Kenya. Furthermore, in relation to the third criterion, he is satisfied that this likelihood of this prejudice occurring is one that is more than hypothetical; rather there is a real and significant risk. Section 27(4) is therefore engaged on the basis that confirmation or denial would be likely to harm the UK's relations with Kenya.
22. The Commissioner cannot explain why he has reached his conclusion in relation to the second and third criteria without referring directly to the FCDO's submissions, which as explained above, it considers to be covered by section 17(4) of FOIA. The Commissioner appreciates that this is likely to prove frustrating to the complainant.
23. However, the Commissioner wishes to emphasise that he has taken into account the complainant's submissions as set out above. The Commissioner appreciates that there is a considerable amount of information in the public domain regarding the details of the attack. However, in the context of FOIA it is important to note that there is a distinction between the availability of information in the public domain as a result of press reporting or comments on social media, and official disclosures by the UK government. The Commissioner is satisfied that the availability of the information referred to be the complainant, or the assumption that such information may exist, does not amount to an official disclosure of information and does not therefore undermine the FCDO's reliance on section 27(4).
24. Furthermore, the Commissioner is aware that the complainant submitted a request on the same topic to the MOD, in response to which it confirmed that it held some information.³ However, Commissioner the notes that the exact nature of the information sought by the two requests was different. The FCDO request sought information about

² Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence (EA/2006/0040), paragraph 81

³ The MOD's handling of that request is the subject of decision notice IC-120122-T0Z3.

'military assistance that was requested or offered by the British High Commission' whereas in making the request to the MOD the complainant explained that 'I understand that a member of the British military was at the scene assisting the local security forces. I would like the material relating to this assistance'.

Public interest test

25. Section 27(4) is a qualified exemption. Therefore, the Commissioner must consider the public interest test contained at section 2 of FOIA and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in confirming whether or not the requested information is held.
26. The FCDO argued that it would be firmly against the public interest if the UK's relationship with Kenya was damaged as it would make it harder for the UK to deliver its bilateral agenda, including, but not limited to defence, economic and energy cooperation. The FCDO argued that it would also make it harder to effectively raise concerns which it has done in the past, for example on Kenya's records on human rights, as it did during the visit of Britain's Global Ambassador for human rights in December 2021.
27. The Commissioner recognises that the incident in question attracted significant public interest and media reporting. The Commissioner also acknowledges that there is a genuine public interest in the disclosure of information that would provide an insight into any role or support that British authorities may, or may not, have provided. However, the Commissioner agrees with the FCDO that it would be clearly against the public interest for the UK's relations with Kenya to be harmed. Given this, and the underlying importance of maintaining trust between international partners, the Commissioner has concluded that the public interest favours maintaining the exemption.
28. In light of this decision the Commissioner has not considered the FCDO's reliance on section 24(2) of FOIA.

Right of appeal

29. 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

30. 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.

31. 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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Wycliffe House
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