

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 August 2022

Public Authority: Foreign, Commonwealth and Development Office

Address: King Charles Street
London
SW1A 2AH

Decision (including any steps ordered)

1. The complainant submitted a request to the Foreign, Commonwealth and Development Office (FCDO) seeking assessments or similar information in relation to the possibility of the UK establishing an asylum processing centre on Ascension Island or St Helena. The FCDO confirmed that it held information falling within the scope of the request but considered it to be exempt from disclosure on the basis of sections 27(1)(a) (international relations) or 35(1)(a) (formulation or development of government policy) of FOIA.
2. The Commissioner's decision is that the FCDO is entitled to withhold the information in the scope of the request on the basis of sections 27(1)(a) and 35(1)(a) of FOIA.
3. No steps are required.

Request and response

4. The complainant submitted the following request to the FCDO on 29 September 2020:

`BACKGROUND

<https://www.ft.com/content/ff1dc189-5531...>

"Priti Patel asked officials to explore the construction of an asylum processing centre on Ascension Island, a British overseas territory more than 4,000 miles from the UK in the south Atlantic, for migrants coming to Britain.

The home secretary's officials also looked at the possibility of building an asylum centre on St Helena, part of the same island group.

But the idea of transferring asylum seekers to remote volcanic outcrops appears to have been dropped by Ms Patel. The Foreign Office was consulted on the plan and provided an assessment of the practicality of shipping asylum seekers to the remote locations."

REQUEST

Provide the assessment or similar information referred to above.'

5. The FCDO contacted the complainant on 27 October 2020 and confirmed that it held information falling within the scope of his request but explained that it considered the information to be exempt from disclosure on the basis of section 27 (international relations) of FOIA and it needed additional time to consider the balance of the public interest test. The FCDO sent the complainant a similar letter on 24 November 2020.
6. The FCDO provided him with a substantive response to his request on 22 December 2020. The response explained that the requested information was considered to be exempt from disclosure on the basis of sections 27(1)(a), 35(1)(a) (formulation or development of government policy) and section 42(1) (legal professional privilege). The FCDO explained that the public interest in relation to each exemption was found to favour withholding the information.
7. The complainant contacted the FCDO on the same day and asked it to conduct an internal review of this refusal.
8. The FCDO informed him of the outcome of the review on 4 February 2021. The review upheld the application of exemptions 27(1)(a) and 35(1)(a) of FOIA but concluded that section 42(1) did not apply.

Scope of the case

9. The complainant contacted the Commissioner on 4 February 2021 in order to complain about the FCDO's decision to withhold the information falling within the scope of his request.

Reasons for decision

Section 27 – International relations

10. The FCDO's position is that part of the withheld information is exempt from disclosure on the basis section 27(1)(a) of FOIA. This states that:

'(1) 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 FCDO's position

11. The FCDO argued that disclosure of the information withheld on the basis of this exemption would be likely to prejudice the UK's relations with the governments of the Overseas Territories (OT).

12. In support of this position the FCDO provided the Commissioner with detailed submissions which referenced both the content of the withheld information and provided additional details which set this information into context. The FCDO explained that such submissions were considered to be confidential and therefore the Commissioner has not replicated these submissions in the decision notice. The remainder of the FCDO's submissions to the Commissioner are summarised below.

13. The FCDO explained that the UK Government's relationship with its OT is a modern one based on partnership, shared values and the right of the people of each Territory to choose to remain British. It explained that where the people of a territory have chosen to remain British, the UK Government has committed to maintaining and deepening the special relationship.

14. The FCDO explained that the UK, the OT and the Crown Dependencies form one undivided Realm, which is distinct from the other States of which Her Majesty the Queen is monarch. Each Territory has its own Constitution and its own Government and has its own local laws. As a matter of constitutional law, the UK Parliament has unlimited power to legislate for the OT. The Territory Constitutions set out the powers and responsibilities of the institutions of government. Governors or Commissioners are appointed by Her Majesty the Queen on the advice of Her Ministers in the UK, and in general have responsibility for external affairs, defence, internal security (including the police) and the appointment, discipline, and removal of public officers. Each Territory has its own unique constitution, but the fundamental structure of the constitutional relationship is the same: powers are devolved to the elected governments of the Territories to the maximum extent possible

consistent with the UK retaining those powers necessary to discharge its sovereign responsibilities. The FCDO explained that as part of the UK Government's strategy towards the Territories it focuses on strengthening the engagement and interaction between the UK and the Territories.

15. With regard to the specific information which is the focus of this request, the FCDO explained that immigration is a devolved responsibility for the OT. It explained that disclosure of the information, which discussed in detail the proposals described in the complainant's request, would jeopardise elements of the UK's overall stated approach to the OT and in turn this would damage the UK's relations with the local governments.
16. The FCDO argued that disclosure of the information would be particularly damaging to the UK's relations with Ascension and St Helena. More specifically, it could make it more challenging to negotiate what UK support would be required for both territories and risk increasing the financial support of the policy that the UK Government could have to offer both islands. The FCDO also explained why in its view disclosure of the information undermine trust in the UK government and its wider partnership with all of the OT.

The Commissioner's position

17. 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 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.
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e., disclosure would be likely to result in prejudice or disclosure would result in prejudice. If the likelihood of prejudice occurring is one that is only hypothetical or remote the exemption will not be engaged.

18. 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
19. With regard to the first criterion of the test set out above, the Commissioner accepts that the type of harm that the FCDO believes would be likely to occur if the information was disclosed is applicable to the interests protected by section 27(1)(a).
20. In reaching this decision, the Commissioner notes that section 27(5) explains that "State" includes the government of any State and any organ of its government, and references to a State other than the United Kingdom include references to any territory outside the United Kingdom'. Therefore, in the context of section 27(1)(a) this means that the exemption is relevant if disclosure of information would, or would be likely to, prejudice the UK's relations with any of its OT.
21. With regard to the second criterion, the Commissioner notes the matter of immigration is one that is devolved to the OT and that the proposals to have asylum seekers processed in the OT would be relevant to immigration law and arrangements of those territories. In light of this, and taking into account the content of the information, the Commissioner is satisfied that in such a context there is clearly a causal link between disclosure of the information and prejudice occurring to the UK's relations with its OT. This is particularly the case with Ascension and St Helena on whom the information focuses. Furthermore, and for the same reasoning, the Commissioner is satisfied that the risk of prejudice occurring is clearly more than a hypothetical one and therefore the third criterion is met.
22. Section 27(1)(a) is therefore engaged.

Public interest test

23. Section 27 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption contained at section 27(1)(a) outweighs the public interest in disclosing the information.

¹ Campaign against Arms Trade v the Information Commissioner and Ministry of Defence EA/2007/0040 (26 August 2008)

24. The FCDO acknowledged the significant media interest in the topic of immigration and the importance of transparency of government policies. However, it emphasised that disclosure of the withheld information would be likely to cause significant harm to the UK's relations with the OT, not just in the context of this issue, but also in relation to broader ongoing relations.
25. The Commissioner agrees that there is a significant public interest in the government being open and transparent about policy making regarding immigration issues. As the FCDO noted, it is a topic that garners notable media interest and moreover the particular proposals in question were not without some external criticism or concern.² Disclosure of the information withheld on the basis of this exemption would provide a direct insight into the government's early considerations of this policy option, in particular from the angle of the UK's relations with its OT.
26. However, the Commissioner recognises the importance of, and the particular nature of, the relationship the UK has with its OT. In view of this the Commissioner appreciates that there is clearly a significant public interest in the UK being able to maintain a close and effective relationship with them. As the Commissioner has found, disclosure of this information would be likely to impact not only on the UK's relations with the Ascension and St Helena in respect of this particular issue, but also on the UK's relations with the OT more widely, both in respect of this issue and on other matters. In view of these wider impacts on this partnership from disclosure of the withheld information, the Commissioner has concluded that despite the significant public interest in disclosure, by a relatively narrow margin the public interest in maintaining the exemption outweighs the public interest in disclosure.

Section 35(1)(a) – formulation or development of government policy

27. The FCDO withheld the remainder of the information on the basis of section 35(1)(a) of FOIA which states that:

'Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to-

(a) the formulation or development of government policy'

28. Section 35 is a class based exemption, therefore if information falls within the description of a particular sub-section of 35(1) then this

² <https://www.bbc.co.uk/news/uk-politics-54349796>

information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes.

29. The Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a minister or decision makers.
30. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
31. Ultimately, whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case by case basis, focussing on the precise context and timing of the information in question.
32. The Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:
 - the final decision will be made either by the Cabinet or the relevant minister;
 - the Government intends to achieve a particular outcome or change in the real world; and
 - the consequences of the decision will be wide-ranging.
33. The FCDO explained that the withheld information relates to the formation and development of UK immigration policy, and specifically the policy to deter illegal and clandestine migration to the UK. It further explained that it relates directly to policy formation as it comprises feasibility studies and assessment (and therefore recommendations) of implementing specific measures in possible development of that policy, namely setting up asylum processing centres on OT.
34. The Commissioner accepts that the information withheld on the basis of this exemption falls within the scope of section 35(1)(a) of FOIA as it clearly relates to both the formulation and development of government policy for the reasons set out by the FCDO in the preceding paragraph.

Public interest test

35. Section 35 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption contained at section 35(1)(a) outweighs the public interest in disclosing the information.

The FCDO's position

36. The FCDO again acknowledged the public interest in the topic of illegal immigration, as well as the openness and transparency of potential government policies to address it. However, it emphasised at that the time of the request the policy work remained live and ongoing. Indeed, as part of its submissions to the Commissioner the FCDO explained that at January 2022, a final decision had not been taken to pursue and asylum arrangements with any of the OT, and further work to assess the suitability and advise UK Ministers was being undertaken by officials on an ongoing basis.
37. The FCDO argued that premature disclosure of policy options could reduce the number of options available to the UK Government in the future in the face of potential reaction from key stakeholders. The FCDO also emphasised the need for officials to offer impartial advice without the threat of policy discussions being released before any decisions are taken. The FCDO explained that despite the public interest in the topic of migration, in its view the damage caused by releasing the information outweighed the public interest in releasing it to ensure future options are not removed and to ensure that policy officials are able to offer impartial advice and recommendations whilst the policy is still under consideration.

The Commissioner's position

38. With regard to the arguments advanced by the FCDO for maintaining the exemption, the Commissioner notes that these essentially relate to the need for a 'safe space' and also touch upon the concept of a 'chilling effect' if the information was disclosed.
39. In terms of the former concept, this means that the government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction - where the policy making process is live and the requested information relates to that policy making. In the context of this request, the Commissioner accepts that the policy making process was clearly live and ongoing at the point the request was submitted. Furthermore, the Commissioner accepts that the proposals set out in the withheld information are ones that have attracted interest, not only from relevant stakeholders but also more widely, and have been the subject of some criticism. In light of this, and taking into account the content of the withheld information which although only initial feasibility studies is still detailed, the Commissioner accepts that there is very real risk that disclosure of the information would result in particular attention and comment. In his view the safe space arguments therefore need to be given notable weight.

40. With regard to attributing weight to the chilling effect arguments, the Commissioner recognises that civil servants are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. Nonetheless, chilling effect arguments cannot be dismissed out of hand and are likely to carry some weight in many section 35 cases. If the policy in question is still live, the Commissioner accepts that arguments about a chilling effect on those ongoing policy discussions are likely to carry significant weight. Arguments about the effect on closely related live policies may also carry weight. However, once the policy in question is finalised, the arguments become more and more speculative as time passes. It will be difficult to make convincing arguments about a generalised chilling effect on all future discussions.
41. As set out above, the Commissioner accepts that the policy making in relation to this issue was live at the time of the complainant's request. The Commissioner also considers that the withheld information represents a candid assessment of the issues concerning the policy proposals and if disclosed, he considers it plausible to argue that those officials working on this area may be likely to reconsider how to draft similar documents in the future. In light of this the Commissioner has concluded that the chilling effect arguments also attract notable weight.
42. Turning to the public interest in favour of disclosing the information, as set out above, in the Commissioner's view there is a significant public interest in disclosure of information on this topic. Disclosure of the information withheld on the basis of this exemption, which is greater in volume than the information withheld on the basis of section 27(1)(a), would provide a detailed insight into the government's policy work on this topic and as a result the Commissioner considers there to be a significant public interest in disclosure of this information.
43. However, and again by a relatively narrow margin, the Commissioner has concluded that the public interest favours maintaining the exemption. The Commissioner has reached this conclusion given the cumulative weight he believes the safe space and chilling effect arguments attract in view of the fact that the policy making is ongoing.

Right of appeal

44. 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

45. 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.
46. 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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