

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 May 2022

Public Authority: Cabinet Office
Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant submitted a request to the Cabinet Office seeking a copy of the congratulatory statement which would have been published if President Trump had been re-elected in November 2020. The Cabinet Office confirmed that it held the requested information but sought to withhold it on the basis of sections 27(1)(a) (international relations) and 35(1)(d) (operation of any Ministerial private office) of FOIA.
2. The Commissioner has concluded that withheld information is exempt from disclosure on the basis of section 27(1)(a) of FOIA and that in all the circumstances of the case the public interest favours maintaining the exemption.
3. No steps are required.

Request and response

4. The complainant submitted the following request to the Cabinet Office on 10 November 2020:

'As reported in today's press, your spokesperson said: "As you'd expect, two statements were prepared in advance for the outcome of this closely contested [American] election."

Please provide an electronic copy of the statement prepared for a Trump victory.¹

5. The Cabinet Office responded on 8 December 2020 and confirmed that it held information falling within the scope of the request but it considered this to be exempt from disclosure on the basis of sections 27(1)(a) (international relations) and 35(1)(d) (operation of any Ministerial private office) of FOIA.
6. The complainant contacted the Cabinet Office on the same day and asked it to conduct an internal review of this response.
7. The Cabinet Office informed him of the outcome of the internal review on 15 January 2021. The review upheld the application of the exemptions cited in the refusal notice.

Scope of the case

8. The complainant contacted the Commissioner on 27 January 2021 in order to complain about the Cabinet Office's decision to withhold information falling within the scope of his request.

Reasons for decision

9. The Cabinet Office argued that the withheld information was exempt from disclosure on the basis of section 27(1)(a) of FOIA.
10. 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'

¹ The complainant's request refers to press articles such as this one:
<https://www.theguardian.com/politics/2020/nov/10/johnsons-biden-win-tweet-contains-hidden-trump-congratulations>

As the article explains, due to a technical error a tweet by No 10 Downing Street congratulating Joe Biden on his victory in the 2020 US presidential election contained parts of an alternative message visible in the background. The alternative message offered congratulations to President Trump on winning a second term.

The complainant's position

11. The complainant noted that the Cabinet Office had acknowledged that draft statements anticipating the outcomes of the 2020 US presidential election were prepared and as a result it was difficult to see what negative consequences could flow from disclosure of the requested information.

The Cabinet Office's position

12. The Cabinet Office argued that disclosure of the withheld information would be likely to prejudice the UK's relations with the US.
13. In support of this position the Cabinet Office emphasised that the effective conduct of international relations depends upon maintaining the trust and confidence between governments.
14. In the circumstances of this case the Cabinet Office explained that there were differences between the draft Trump statement and the published Biden statement. It argued that there is a potential for negative inferences to be drawn as to the differences between the two statements, with people searching for a meaning behind such differences even when none were intended.
15. The Cabinet Office argued that a potential consequence of the disclosure is that the UK may feel it is necessary to give further explanation as to the differences between the statements and it considered this would be a detrimental consequence.
16. With regard to the complainant's argument above, the Cabinet Office suggested that he may well be correct to suggest that the existence of the statements would be of no surprise. However, the Cabinet Office argued that the complainant was overlooking the prejudicial effect which is likely to result from the exposure of the statements and their differences.

17. The Commissioner's position

In order for a prejudice based exemption, such as section 27(1), to be engaged the Commissioner considers 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; and

- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, disclosure '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.
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'.²
 19. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the Cabinet Office clearly relates to the interests which the exemption contained at section 27(1)(a) is designed to protect, ie relations between the UK and another state.
 20. With regard to the second criterion, having considered the content of the withheld information and taken into account the Cabinet Office's submissions, the Commissioner is satisfied that there is a causal link between disclosure of this information and prejudice potentially occurring to the UK's relations with the US.
 21. Furthermore, the Commissioner is satisfied that the resultant prejudice would be real and of substance and that there is a more than a hypothetical risk of prejudice occurring. In reaching this conclusion, the Commissioner considers the Cabinet Office's point that the risk of prejudice comes not from the existence of the statements, but from the comparison of their differences, to be key. Having carefully considered the information the Commissioner is persuaded that the risk of negative inferences being drawn is not a hypothetical one and that as a result it is plausible to argue that disclosure presents a real risk to UK and US relations. Furthermore, the Commissioner accepts that in this context it

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<https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i205/Campaign%20Against%20the%20Arms%20Trade;%20EA.2007.0040%20.pdf>

may be necessary for the UK to provide a clarification or an explanation of the differences, which taking into account the comments of the Tribunal quoted above, provides further support for the Cabinet Office's reliance on this exemption. The third criterion is therefore met and section 27(1)(a) is engaged.

Public interest test

22. Section 27(1) 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.
23. The complainant argued that given what he described as 'the rather humiliating incident' in which excerpts of the Trump statement were accidentally published, there was a considerable public interest in completing the picture.
24. The Cabinet Office argued that the importance of the UK-US relationship is well documented and that it is in the interests of the UK that a strong relationship is maintained with the US government, irrespective of its political leadership. The Cabinet Office argued that it was therefore of great importance that the UK government should not be seen as favouring candidates of any party in the US or to be seen to regard certain subjects to be more important in a relationship with one administration over another. The Cabinet Office emphasised that disclosure of this information would undermine that objective.
25. In any event, the Cabinet Office argued that the disclosure of the information would not aid the public's understanding of the UK's relationship with the US. It explained that the preliminary Trump statement was not approved or published and as such did not represent the UK government's official lines on its relationship with the US.
26. The Commissioner notes the Cabinet Office's reasons as to why, in its view, disclosure of the withheld information would not aid the public's understanding of the UK-US relationship. The Commissioner accepts that the statement was not a final or published version. Whilst the Commissioner accepts that only a final version of the statement would represent the government's official position, disclosure of the draft could in the Commissioner's opinion still provide some insight into that relationship. This is because disclosure of the draft would nevertheless reveal the content of the statement that was at least being contemplated in the event of a Trump victory.
27. Furthermore, the Commissioner can understand why, given the accidental publication of small excerpts of the draft Trump victory statement, there is a natural curiosity to see the full statement so that

the public could potentially gain some insight to how a Trump victory may have been responded to in comparison to a Biden victory. Taking these factors into account, in the Commissioner's view there is a public interest, albeit a limited one, in disclosing the withheld information.

28. However, in contrast the Commissioner accepts that there is a very strong public interest in ensuring that the UK's relationship with other states is not harmed in order to ensure the UK can protect and promote its interests abroad. In the circumstances of this case he appreciates the significance of the UK-US relationship, the fact that the withheld information dated from just prior to the request and touches upon relations at the highest level of government. In light of these factors in the Commissioner's view the public interest favours maintaining the exemption.
29. In light of this decision the Commissioner has not considered the Cabinet Office's reliance on section 35(1)(b) of FOIA.

Right of appeal

30. 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

31. 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.
32. 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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