

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 May 2023

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) seeking information about a minister's trip to the British Virgin Islands in March 2022. The FCDO disclosed some of the information falling within the scope of the request but withheld the remainder on the basis of sections 27(1)(a) and (c) (international relations) and 40(2) (personal data) of FOIA.
2. The Commissioner's decision is that the withheld information is exempt from disclosure on the basis of these exemptions.
3. No steps are required.

Request and response

4. The complainant submitted the following request to the FCDO on 13 April 2022:

'Please could you provide a copy of:

-The itinerary of Amanda Milling's trip to the BVI [British Virgin Islands] between 17th and 20th March, listing the meetings she held and the attendance lists for these meetings.

-The a [sic] copy of the minutes of these meetings.

-A copy of the civil service briefings prepared for her ahead of these meetings.'

5. The FCDO responded on 20 May 2022. It disclosed a schedule of the Minister's trip but explained that certain information from it had been withheld on the basis of sections 27(1)(a) and (c) (international relations) and section 40(2) (personal data) of FOIA. Furthermore, the FCDO explained that the information falling within the scope of parts two and three of the request was exempt from disclosure on the basis of sections 27(1)(a) and (c).
6. The complainant contacted the FCDO on 24 May 2022 and asked it to conduct an internal review of this response.
7. The FCDO informed him of the outcome of the review on 22 September 2022. The FCDO disclosed a digest of information falling within the scope of the request. It noted that some information previously withheld had now been disclosed, either as a result of the passage of time or as a result of a reassessment of the balance of the public interest test. The FCDO explained that it had not sought to rely on section 21 (information reasonable accessible) for information that was already in the public domain. It also noted that the request could have been refused on the basis of section 12 (cost limit) of FOIA, however the review had identified, and now disclosed, all of the information the FCDO considered to be releasable.

Scope of the case

8. The complainant initially contacted the Commissioner on 27 July 2022 in order to complain about the FCDO's handling of his request. More specifically, he complained about the FCDO's reliance on sections 27(1)(a) and (c) and section 40(2) of FOIA to withhold information falling within the scope of his request. Following the completion of the internal review the complaint still sought to challenge the application of these exemptions.

Reasons for decision

Section 27 – international relations

9. The FCDO argued that the majority of the withheld information was exempt from disclosure on the basis of sections 27(1)(a) and (c) of FOIA which state that:

'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...
- (c) the interests of the United Kingdom abroad.'

10. 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.'

The complainant's position

11. Firstly, the complainant argued that disclosure of the correspondence which shows the UK encouraging the BVI to implement the publicly accessible registers of beneficial ownership (PARBOs) would unlikely to be prejudicial as this is in line with public positions on this issue.
12. Secondly, the complainant argued that the impact on international relations was less in this case than in other section 27 cases. Whilst he accepted that keeping good relationships is important, he argued that in relation to Overseas Territories it is important to note these are not completely separate entities to the UK state. He noted that the UK does have the right to legislate for the BVI. Therefore he argued that the impact of any damage to relationships would therefore have less practical effect than should relationships with another country be damaged, where the UK government has no legislative powers. As a result the complainant argued that the weight of section 27 in this case should therefore be correspondingly less, given the less serious consequences to UK interests.

The FCDO's position

13. The FCDO argued that disclosure of the information held on the basis of these exemptions would be likely to damage the bilateral relationship between the UK and the BVI. In turn this would reduce the UK government's ability to protect and promote UK interests.

14. In support of this position the FCDO explained that it was important to take into account the context of UK and BVI relations. It explained that the UK has responsibility to promote self-governance and ensure long term good governance in the Overseas Territories. It explained that following the publication of the Commission of Inquiry (COI) Report¹ and the establishment of the Government of National Unity, the UK has worked with Premier Wheatly and the BVI Government to turn its public commitment to reform into a strong implementation plan to protect against corruption and ensure good government for the long term.
15. The FCDO emphasised that this partnership approach relies on trust and an ability to have full and frank conversations. The FCDO explained that progress on implementing the recommendations made in the COI Report relies on the continuance of trust that has recently been built between the UK and BVI governments.
16. With regard to the information falling within the scope of the request, the FCDO explained that the Minister visited the BVI to have frank conversations ahead of the publication of the COI report. The information withheld on the basis of section 27 includes sensitive information detailing the views of members of the BVI government on various key issues including the COI and governance in the Territory. The FCDO argued that these individuals would have a reasonable expectation that the meeting records of these discussions would not be made public and would remain confidential. The FCDO explained that similar considerations applied in respect of meeting records concerning the Minister's meeting with individuals from the financial sector, ie that they would expect such information to be treated confidentially. The FCDO noted that maintaining the trust and cooperation of the financial sector is important to enable the UK to continue to support BVI on international sanctions, including illicit finance and the introduction of publicly accessible registers of beneficial ownership.
17. In terms of the briefing document, the FCDO explained that this contained letters between the UK and BVI governments, with the latter having an expectation that such letters would remain confidential. The

¹ The former Governor of BVI established a Commission of Inquiry in January 2021. The inquiry was to establish whether there was evidence that corruption, abuse of office or other serious dishonesty took place in public office in recent years, and if so what conditions allowed this to happen. The report was presented to the current Governor on 4 April 2022 and published on 8 June 2022.

<https://www.gov.uk/government/publications/british-virgin-islands-commission-of-inquiry-report#:~:text=The%20inquiry%20was%20to%20establish,conditions%20allowed%20this%20to%20happen>

FCDO explained that briefing pack also contained an assessment of issues relevant to the Minister's visit and that disclosure of such information would be likely to impact on the UK's relationship with the BVI.

18. The Commissioner asked the FCDO to address the complainant's grounds of complaint in respect of the engagement of the exemption. With regard to the complainant's first ground of complaint at paragraph 11, in response the FCDO agreed that confirming that the UK encouraged the BVI government to implement PARBOs would not be prejudicial to the UK/BVI relationship. It noted that it had confirmed this fact to the complainant, as it did for journalists who sought clarification on this point at the time of the visit.
19. However, the FCDO argued that disclosure of information disclosing information from briefing documents or meeting minutes on this issue would be likely to be seen as a breach of trust for the reasons set out above.
20. With regard to the complainant's second ground of complaint at paragraph 12, the FCDO explained that it disagreed with the impact of any damage to the UK / Overseas Territory relationships would necessarily have less practical effect than the impact on relations with another State. The FCDO made reference to section 27(5) of FOIA and therefore argued that every request, including the impact on relations, should be judged on its own particular facts.
21. The FCDO noted that The Westminster Parliament is the supreme legislative authority of the UK and of all territories under UK sovereignty. Parliament has power to enact laws for all Overseas Territories. In practice this power is very rarely used. In any event, the FCDO do not agree that the legal ability to legislate for the Overseas Territories should, in itself, alter the application of section 27 to the UK's relations with them.
22. Furthermore, the FCDO explained that the inhabited British Overseas Territories are separate, largely self-governing jurisdictions with their own democratically elected representatives, and constitutions. The UK government's relationship with the Overseas Territories is based on partnership and shared values. The UK is broadly responsible for supporting the Overseas Territories to ensure good governance and security for the people in the Territories, most of whom are British. The FCDO argued that this cannot be achieved simply by enacting laws for the territories. Therefore, maintaining a good relationship with the Overseas Territory governments is no less important, and perhaps more important for the UK government to achieve its objectives, and promote its interests.

The Commissioner's position

23. 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.
24. 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
25. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the FCDO clearly relates to the interests which the exemptions contained at sections 27(1)(a) and (c) are designed to protect.
26. With regard to the second and third criteria, the Commissioner accepts that the UK's partnerships with the Overseas Territories are based on trust and the ability to have free and frank conversations. In the circumstances of this case the Commissioner is conscious of the recent challenges to the relationship between the UK and BVI governments in the context of the COI announced in January 2021 and which reported its findings shortly after the request was submitted. Against this backdrop, the Commissioner has little hesitation in accepting that disclosure of the information the BVI government provided to the UK government in confidence would be likely to result in harm this

² Campaign against Arms Trade v the Information Commissioner and Ministry of Defence EA/2007/0040 (26 August 2008)

relationship. As would disclosure of information relating to conversations between the two parties which were considered to be private. In the Commissioner's view similar considerations apply to information relating to the UK government's discussions with the BVI financial sector given the expectation that such discussions would be treated confidentially. Whilst such parties are not members of the BVI government it is not difficult to see how disclosure of such information could nevertheless harm relations between the two countries. In addition, the Commissioner accepts that it is logical to argue that disclosure of internal UK government discussions on matters relating to the UK's relations with BVI would be likely to have a direct impact on that relationship. In turn the Commissioner accepts that an impact on the UK's relations with BVI would be likely to have a prejudicial impact on the UK's ability to protect its interests in the context of this relationship.

27. With regard to the complainant's grounds of complaint, the Commissioner agrees with the FCDO's analysis at paragraph 20. In the Commissioner's view the exemption contained at section 27(1) should not be afforded any lesser weight simply because the relationship at risk is with an Overseas Territory rather than a different state entirely. With regard to the point raised at paragraph 11, the Commissioner agrees with the complainant that disclosure of information which reveals the UK encouraged BVI to implement PARBOs would not be prejudicial; a point accepted by the FCDO. However, the Commissioner considers there to be a distinction between information, the disclosure of which, would simply reveal this point and the disclosure of information which would reveal the nature of more detailed discussions or engagement between the UK government and BVI government on this point. For the reasons set out above, the Commissioner considers that the disclosure of such information is likely to be prejudicial.
28. The Commissioner has therefore concluded that exemptions contained at sections 27(1)(a) and (c) are engaged.

Public interest test

29. 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 exemptions cited by the FCDO outweighs the public interest in disclosing the information.

Public interest in disclosing the information

30. The complainant argued that in his view there was a compelling public interest in the disclosure of information falling within the scope of his request. In support of this point he explained that the BVI has a closed corporate register, with no requirement for the beneficial owners of BVI

companies to be disclosed. The complainant argued that this lack of transparency is widely reported to make BVI companies a favoured vehicle for tax evasion, fraud and money laundering. The complainant noted that the BVI entities have repeatedly featured in investigations such as the Panama Papers and the Pandora Papers. The complainant argued that BVI's lack of transparency has been regularly cited as a key weak point in the global financial regulation system.

31. The complainant noted that the UK has the powers to compel the BVI to introduce a register of beneficial owners, and the Sanctions and Anti-Money Laundering Act 2018 includes legislation that requires the UK government to legislate for this should Overseas Territories not do this for themselves by a deadline. However, the complainant explained that the UK government appears to have repeatedly delayed implementing this to force the BVI to introduce this key anti-corruption measure.
32. In this context the complainant argued that there was a very strong public interest in making public what the UK government has been saying to the BVI government on this topic in private. He suggested that should the UK government have, for example, been reassuring BVI officials that it was in no rush to legislate to force the introduction of such measures, which would cut financial crime and corruption, that is a matter which should clearly be on the public record.

Public interest in maintaining the exemptions

33. The FCDO acknowledged that whilst BVI's financial services and PARBOs are of interest to some members of the public, in its view this does not automatically mean that it is in the public interest to disclose the documents requested.
34. The FCDO noted that during the course of the Commissioner's investigation, it had provided the complainant with separate information outlining what the Minister had said about public registers during her visit. The FCDO noted that it had previously provided this information a number of media outlets, with a report of the visit being published here.³
35. The FCDO explained that in its views the public interest in maintaining trust in the UK / BVI relationship, and therefore maintaining the UK's ability to progress its interests, including supporting the Territories regarding implementing PARBOs, outweighs any public interest in

³ <https://www.theguardian.com/world/2022/mar/23/uk-minister-in-bvi-for-urgent-talks-on-sanctioning-russian-oligarchs>

releasing the documents. It emphasised that the UK government needs to be able to have private discussions with key partners and other governments to be able to advance its interests.

36. Whilst the FCDO recognised the general public interest in transparency regarding the UK government's work, it argued that releasing the particular documents in scope, would not be in the public interest. In the FCDO's view it would not advance the public understanding on the issue of PARBOs, because the UK's policy on both these issues is already widely publicly available. Additionally because the documents do not contain any new information about the UK's position on PARBOs, disclosure would not inform the media debate on the registers.
37. The FCDO also emphasised that disclosure of the information at the time of the result would have a significant impact on the UK government's relationship with the BVI government at a particularly critical time.

Balance of the public interest arguments

38. The Commissioner accepts that there is a public interest in the UK being open about its relations with the Overseas Territories. The Commissioner acknowledges that the disclosure of information in response to the request goes some way to providing an insight into the topics and issues covered by Minister Milling during her visit.
39. However, in the Commissioner's view disclosure of the withheld information would provide a significantly greater insight into such matters. In respect of the matter of PARBOs, on which the complainant's grounds of complaint focus, it should be noted that the information withheld on the basis of these exemptions contains information on a range of topics of which PARBOs are just one, relatively small, part. The Commissioner notes the FCDO's point that information does not contain any new information on the UK's position on PARBOs and details of Minister Millings' comments on this topic in the context of her visit have already been made public. However, in the Commissioner's view there is still a public interest in the disclosure of information on this topic given that firstly the importance of it as suggested by the complainant's submissions and also secondly because disclosure of the withheld information would, in the Commissioner's view provide an insight into this topic beyond that previously disclosed. Whilst the UK's position on this matter in respect of the BVI is in the public domain, the specific nature and content of the actual discussions about this topic during the visit are not.
40. However, the Commissioner accepts that there is clear public interest in the UK being able to maintain effective international relations. For the avoidance of doubt, in the Commissioner's view this point applies equally to the UK's relations with the Overseas Territories as it does to

any other State. In the circumstances of this case the Commissioner recognises that there is a particularly significant public interest in the UK being able to maintain the trust and confidence of the BVI government, particularly following the conclusion of the COI. As a result, in the Commissioner's view the public interest arguments in favour of maintaining exemptions attract additional, and in his view ultimately compelling weight.

41. In reaching this conclusion the Commissioner wishes to emphasise that he is not seeking to downplay or dismiss the points made by the complainant; as noted the Commissioner recognises that these do attract notable weight. However, given the timing of the request, and taking into careful account the content of the withheld information, the Commissioner ultimately considers the public interest is best served by allowing the UK to maintain effective relations with the BVI, in order to protect a range of UK interests, and allow the UK to best support the implementation of PARBOs.

Section 40 – personal data

42. The FCDO explained that it had redacted some information on the basis of section 40(2) which included the names, job titles and contact details of junior members of the UK and BVI civil service. The Commissioner notes that the FCDO has also redacted some biographical details of individuals who the Minister met during her visit on the basis of this exemption.
43. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
44. In this case the relevant condition is contained in section 40(3A)(a).⁴ This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
45. It is common practice for a public authority to argue that the names of junior officials are exempt from disclosure under FOIA on the basis of section 40(2) as disclosure would contravene the principles set out in Article 5 of the GDPR. Furthermore, unless there are very case specific circumstances, the Commissioner accepts that the names of the junior

⁴ As amended by Schedule 19 Paragraph 58(3) DPA.

officials are exempt from disclosure on the basis of section 40(2) of FOIA. This is in line with approach taken in the Commissioner's section 40 guidance.⁵ Therefore, in this case the Commissioner adopts the reasoning set out in these previous decision notices which found that the personal data of junior officials was exempt from disclosure on the basis of section 40(2) of FOIA.⁶

46. Furthermore, the Commissioner is also satisfied that disclosure of redacted information about the biographical details of certain individuals would be a breach of data protection principles as it would result in the disclosure of personal information about them that they would not necessarily expect to be made public. In addition, disclosure of such information would not contribute or meet in any way to the public interests considered above. Such information is therefore also exempt from disclosure on the basis of section 40(2) of FOIA.

Other matters

47. FOIA does not impose a statutory time within which internal reviews must be completed, albeit that the section 45 Code of Practice explains that such reviews should be completed within a reasonable timeframe.⁷ 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.⁸
48. In this case the complainant asked for an internal review on 24 May 2022 but this was not completed until 22 September 2022. The FCDO noted that it had apologised for this delay and advised the

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https://ico.org.uk/media/fororganisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf - see page 12

⁶ IC-114449-B7P7 - <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022310/ic-114449-b7p7.pdf> Paragraphs 49-71 and IC-110922-T9R1 <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022447/ic-110922-t9r1.pdf> paragraphs 39-62.

⁷ <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

⁸ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/request-handling-freedom-of-information/#internal>

Commissioner that the delay in finalising the review was due in large part to the staff absences across the teams that contributed to the 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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