

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 November 2023

Public Authority: Foreign, Commonwealth & Development Office

Address: King Charles Street
London
SW1A 2AH

Decision (including any steps ordered)

1. The complainant has requested information from the Foreign, Commonwealth & Development Office ("the FCDO") in relation to legal submissions for specific concluded cases. The FCDO refused to provide the information, citing section 32(1) of FOIA. It also advised that the remaining information is not held.
2. The Commissioner's decision is that the FCDO has correctly applied section 32(1) to the request. He is also satisfied that, on the balance of probabilities, the FCDO does not hold the remaining information.
3. The Commissioner does not require the FCDO to take any steps as a result of this decision notice.

Request and response

4. On 9 December 2022, the complainant wrote to the FCDO and made a request for information.
5. On 12 December 2022, the FCDO asked for the complainant to clarify/refine the request.

6. On 7 February 2023, the complainant wrote to the FCDO and made the following refined request:

"Specifically, I would like to be provided with copies of all legal submissions, made by both the UK government as well as the applicant(s), that are held by you with regard to the following concluded cases before the European Court of Human Rights:

— For the case of *S. and Marper v. United Kingdom* (Applications nos. 30562/04 and 30566/04): 16 August 2004 to 4 December 2008.

— For the case of *P.G. and J.H. v. United Kingdom* (Application no. 44787/98): 1 November 1998 to 25 September 2001.

— For the case of *Peck v. United Kingdom* (Application no. 44647/98): to 1 November 1998 to 28 January 2003.

— For the case of *Stephen Arthur Perry v. United Kingdom* (Application no. 63737/00): 6 October 2000 to 17 July 2003.

— For the case of *Gaughran v. United Kingdom* (Application no. 45245/15): 13 July 2017 to 13 February 2020.

Please note that my request does not relate to copies of decisions or judgements by the European Court of Human Rights, which are in the public domain and already available online on the Court's portal."

7. The FCDO responded on 31 March 2023. It stated that it holds information relevant to the request. However, under section 21 of FOIA, it was not required to provide information in response to a request if it is already reasonably accessible.
8. Following an internal review FCDO wrote to the complainant on 31 July 2023. It stated that for parts 1 and 5 of the request, section 32(1) was applicable. For parts 2,3 and 4 of the request, it advised that it does not hold the requested information.

Scope of the case

9. The complainant contacted the Commissioner on 25 July 2023, to complain about the way their request for information had been handled.

10. The Commissioner considers that the scope of his investigation is to determine whether section 32(1) has been correctly applied by the FCDO. He will also determine whether, on the balance of probabilities, the FCDO holds the remaining information.

Reasons for decision

Section 1 – information not held

11. Section 1(1) of FOIA provides that any person making a request for information to a public authority is entitled -
 - a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
 - b) if that is the case, to have that information communicated to him.
12. FOIA provides a right of access to recorded information which is held by a public authority at the time when it receives the request; this does not extend to the right to ask questions, or for explanations, clarification of information or to debate the contents of information, unless the answer to those questions, or requests for explanation or clarification is already held by the public authority in recorded form. Essentially, public authorities are not obliged to 'create' new recorded information in order to comply with a request.
13. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal (Information Rights) decisions, applies the civil standard of the balance of probabilities.
14. The FCDO has explained that it has conducted searches of its digital and physical records and confirms it does not hold the documents in relation to points 2, 3 and 4 of the request.
15. The FCDO has explained to the Commissioner that it has carried out searches for the documents in points 2,3 and 4. It described the searches it has carried out, which includes the names and dates of the hearings.
16. The FCDO explained that any documents it did locate were reviewed by a lawyer to confirm that they were not within the scope of the request. It added that it does not hold the original paper documents or files in respect of the 3 cases.

17. The FCDO advised that it searched paper documents and were unable to locate any documents concerning the cases within points 2, 3 and 4.
18. The FCDO also explained that none of the current staff in the team would have had the opportunity to hold the documents on individual devices.
19. The FCDO explained that due to the dates of the cases, it is likely that they were destroyed in line with its retention policy.
20. From the above information and including the searches carried out by the FCDO, the Commissioner is satisfied that, on the balance of probabilities, the FCDO does not hold the requested information for points 2, 3 and 4 of the request.

Section 32 – court records

21. Section 32(1) of FOIA states that information held by a public authority is exempt information if it is held only by virtue of being contained in:
 - “(a) any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter,
 - (b) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter, or
 - (c) any document created by
 - (i) a court, or
 - (ii) a member of the administrative staff of a court,for the purposes of proceedings in a particular cause or matter”.
22. Section 32(1) is a class based exemption. This means that any information falling within the category described is automatically exempt from disclosure, regardless of whether or not there is a likelihood of harm or prejudice if it is disclosed. Section 32 is an absolute exemption and therefore it is not subject to the public interest test.
23. The FCDO explained that the Court in question is the European Court of Human Rights.
24. The FCDO advised that in cases where the UK is a party to proceedings in the Court, through the UK's Agents to the Court, is the department responsible for conducting the litigation on behalf of the UK and responding to the proceedings.

25. It went on to explain that in the case of documents drafted by and submitted by the UK government, the documents in question will have been created by the FCDO. It added that the purpose of creating these documents would be for the purposes of proceedings in the particular matters.
26. The FCDO explained that given the scope of the request is for “all legal submissions”, it is satisfied that the information in scope of the request meets all the criteria in section 32(1)(a) and (b), as it is only held in virtue of being contained within those criteria.
27. In this case, having considered the FCDO’s submissions, and in the absence of any evidence that the FCDO held the information for any other purpose, the Commissioner is satisfied that the requested information would only be held for the particular proceedings.
28. Therefore, the Commissioner’s decision is that the requested information for parts 1 and 5 of the request falls within the scope of section 32(1) of FOIA and the FCDO was entitled to rely on it to withhold the information.

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

Michael Lea
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF