

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 April 2024

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 the actions of the Maltese government during the investigation of the Lockerbie bombing for the period October 1990-January 1991. The FCDO disclosed some information but withheld additional information on the basis of sections section 21 (information reasonably accessible), 23(1) (security bodies) and section 24(1) (national security) with these exemptions being cited in the alternative, 27(1)(a) and 27(2) (international relations), and 31(1)(b) and (c) (law enforcement) of FOIA.
2. The Commissioner's decision is that the disputed information is exempt from disclosure on the basis of sections 23(1) or 24(1), section 27(1)(a) and sections 31(1)(b) and (c).
3. The Commissioner does not require further steps.

Request and response

4. The complainant submitted the following request to the FCDO on 10 October 2022:

- "I understand that during October 1990, the Maltese government halted the investigation into the Pan Am 103 bombing from continuing on their island until January 1991. I would like documents and internal correspondence relating to this matter to be released to me. The timeframe of this request would be around October 1990-January 1991."
5. The complainant contacted the FCDO on 5 January 2023 and drew its attention to documents on this subject that were available in the National Archives (TNA) and to extracts from two books on this subject.
 6. After extending the time needed to consider the balance of the public interest, the FCDO issued a substantive response on 2 March 2023. It provided the complainant with some of the information falling within the scope of their request, noting that some of parts of the released documents had been redacted as being out of scope of the request. The FCDO explained that it was withholding further information on the basis of sections 27(1)(a), 27(2) (international relations) and 31(1)(b) and (c) (law enforcement) and that the public interest favoured maintaining these exemptions.
 7. The complainant contacted the FCDO on 3 March 2023 and asked it to conduct an internal review of this response. They argued that, as per their email of 5 January 2023, there was a significant amount of material in the public domain and they expected the FCDO to be able to disclose further information.
 8. The complainant informed the FCDO on 22 May 2023 that:

"With regards to this FOI request, I have recently discovered several more documents concerning the expulsion of the Lockerbie investigation team from Malta at the National Archive. These were sourced from the folder FCO 9/6938. They strengthen my argument that there can be more disclosure concerning my request and have attached several of them."
 9. The FCDO informed him of the outcome of the internal review on 19 October 2023. It provided him with a small amount of information that had previously been withheld. The FCDO also explained that a number of documents were now considered to be exempt from disclosure on basis of section 21 (information reasonably accessible) as they were available at TNA (the FCDO provided a list of these documents). The FCDO confirmed that sections 27(1)(a), and 31(1)(b) and (c), still applied to the withheld information, albeit that it was no longer seeking to rely on section 27(2). The FCDO also explained that it was now also seeking to withhold a small amount of information on the basis of

sections 23(1) (security bodies) or section 24(1) (national security) with these exemptions being cited in the alternative.¹

Scope of the case

10. The complainant contacted the Commissioner on 23 October 2023 in order to complain about the FCDO's handling of their request. They complained about the FCDO's decision to withhold information falling within the scope of their request on the basis of the exemptions cited, the only exception being the FCDO's reliance on section 21 of FOIA which they did not seek to dispute. In their view more material could be released with little or no redactions.
11. During the course of the Commissioner's investigation, the FCDO disclosed additional information to the complainant on 16 February 2024. However, it remained of the view that further withheld information was exempt from disclosure on the basis of exemptions previously cited.

Reasons for decision

Section 27(1)(a) - international relations

12. The FCDO argued that part of the withheld information was exempt from disclosure on the basis of section 27(1)(a) of FOIA which states 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"
13. In order for a prejudice based exemption, such as section 27, to be engaged the Commissioner believes that three criteria must be met:

¹ Citing the sections 23(1) and 24(1) of FOIA in the alternative means that although only one exemption is engaged the other one is also cited so as to disguise which exemption is in fact being relied upon. This approach may be necessary in instances where citing one exemption would in itself be harmful. Further information on this issue is contained in the Commissioner's guidance <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/how-sections-23-and-24-interact/#text4>

- 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.
14. 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

The FCDO's position

15. The FCDO emphasised that section 27 recognises that the effective conduct of international relations depends upon the maintaining trust and confidence between governments. It argued that disclosure of the material withheld on this case would be likely to harm the UK's relations with a particular state. The FCDO provided the Commissioner with submissions that referred to the specific content of the withheld information which, for obvious reasons, cannot be included in this notice. However, the Commissioner notes that the FCDO highlighted the high profile nature of this case, which in its view increased the risk of prejudice occurring, as did the broader context of ongoing legal proceedings in relation to the bombing.³

The complainant's position

16. The complainant argued that in the context of section 27, and the other exemptions which they disputed, that a significant volume of information had already been released into the public domain by public authorities

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

³ <https://www.bbc.co.uk/news/uk-scotland-63933837>

regarding the Lockerbie bombing. Therefore, in their view the FCDO's reliance on these exemptions was unjustified as disclosure of the information would be unlikely to be prejudicial.

The Commissioner's position

17. 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) of FOIA. With regard to the second and third criteria, the Commissioner is satisfied that there is a causal relationship between disclosure of the information and prejudice occurring, and that the risk of this occurring is more than a hypothetical possibility. In reaching this conclusion the Commissioner has taken into account the age of the information, and the information that has already been released into the public domain. However, he is satisfied that disclosure of the particular information that has been withheld on the basis of section 27(1)(a) nevertheless presents a real risk of harming the UK's interests with the state in question.

18. On this basis section 27(1)(a) is therefore engaged.

Public interest test

19. 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.

20. The FCDO recognised that there is a general public interest in transparency and openness in government. However it argued this must not be to the detriment to the UK's bilateral relationship with the state in question, and taking into account the ongoing nature of the investigation in respect of the bombing.

21. The Commissioner appreciates that there is a public interest in the disclosure of information which would provide further transparency, beyond the information already released and in the public domain, in relation into the details of the investigation following the Lockerbie bombing. Disclosure of the information would contribute to this aim and provide some insight in respect of the focus of this particular request.

22. However, the Commissioner considers there to be a significant and weighty public interest in ensuring that the UK is able to maintain effective relations with other states. Disclosure of the information in this case would be likely to harm the UK's relations with a particular state, and more broadly risks undermining international cooperation in ongoing attempts to investigate the Lockerbie bombing. Taking these factors into

account, and given the volume of information already released into the public domain, the Commissioner has concluded that the public interest favours maintaining section 27(1)(a) of FOIA.

Section 31– law enforcement

The FCDO's position

23. The FCDO also withheld some of the information on the basis of sections 31(1)(b) and (c) of FOIA which state that:

“Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice...

...(b) the apprehension or prosecution of offenders,
(c) the administration of justice”.

24. The FCDO argued that disclosure of information withheld on the basis of these exemptions 'would' prejudice a live criminal investigation in Scotland and the US, as well as the active US prosecution in relation to the Lockerbie investigation. The FCDO acknowledged the significant amount of information already in the public domain about the bombing. However, it argued that disclosure of the information withheld on the basis of these exemptions could nevertheless harm ongoing and future investigations and prosecutions.

The Commissioner's position

25. 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 sections 31(1)(b) and (c) of FOIA. With regard to the second and third criteria, the Commissioner is satisfied that there is a causal relationship between disclosure of the information and prejudice occurring, and that the risk of this occurring is more than a hypothetical possibility. Again, in reaching this conclusion the Commissioner has taken into account the age of the information, and the information that has already been released into the public domain. However, he is satisfied that disclosure of the particular information that has been withheld on the basis of these exemptions clearly presents a real risk of harming the live investigation and prosecution, and that the higher threshold of would prejudice is met.

26. Sections 31(1)(b) and (c) are therefore engaged.

Public interest test

27. Section 31 is also subject to the public interest test.
28. The FCDO accepted there is a general public interest in transparency but this must not be at the cost of successful investigations and prosecutions in such a high-profile case. In this case as disclosure would interfere with, and potentially compromise, the complex work being conducted by the relevant legal authorities disclosure of the information would be clearly against the wider public interest. Rather the FCDO argued that the public interest is in preserving the integrity of ongoing legal proceedings in such a high-profile criminal investigation.
29. The Commissioner is satisfied that as there is a live investigation into the Lockerbie bombing means the public interest in maintaining the exemption is stronger than the public interest in disclosure. In his view a safe space is needed to allow law enforcement bodies to consider all necessary material away from external interference, commentary and distraction. Clearly, the ongoing investigation could be readily undermined by premature disclosure and this is, of itself, contrary to the public interest. The Commissioner is therefore satisfied that the public interest favours maintaining the exemption contained at section 31(1)(b), and that the public interest favours maintaining the exemption contained at section 31(1)(c).

Section 23(1) – information supplied by or relating to bodies dealing with security matters

Section 24 – national security

30. The FCDO also withheld some information on the basis of sections 23(1) and 24(1), cited in the alternative.
31. Section 23(1) of FOIA provides an exemption which states that:

“Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).”
32. To successfully engage the exemption at section 23(1), a public authority needs only to demonstrate that the relevant information was

directly or indirectly supplied to it by, or relates to, any of the bodies listed at section 23(3).⁴

33. Section 24(1) states that:

“Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security”.

34. FOIA does not define the term ‘national security’. However in *Norman Baker v the Information Commissioner and the Cabinet Office* (EA/2006/0045 4 April 2007) the Information Tribunal was guided by a House of Lords case, *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, concerning whether the risk posed by a foreign national provided grounds for his deportation. The Information Tribunal summarised the Lords’ observations as follows:

- ‘national security’ means the security of the United Kingdom and its people;
- the interests of national security are not limited to actions by an individual which are targeted at the UK, its system of government or its people;
- the protection of democracy and the legal and constitutional systems of the state are part of national security as well as military defence;
- action against a foreign state may be capable indirectly of affecting the security of the UK; and,
- reciprocal co-operation between the UK and other states in combating international terrorism is capable of promoting the United Kingdom’s national security.

35. Furthermore, in this context the Commissioner interprets ‘required for the purpose of’ to mean ‘reasonably necessary’. Although there has to be a real possibility that the disclosure of requested information would undermine national security, the impact does not need to be direct or immediate.

36. As is clear from the wording of section 24(1), the exemptions provided by sections 23(1) and 24(1) are mutually exclusive. This means they cannot be applied to the same request.

⁴ A list of the bodies included in section 23(3) of FOIA is available here: <http://www.legislation.gov.uk/ukpga/2000/36/section/23>

37. However, the Commissioner recognises that the fact that section 24(1) can only be applied to information that is not protected by section 23(1) can present a problem if a public authority does not want to reveal whether or not a section 23 security body is involved in an issue. To overcome this problem, as referred to above at footnote 1, the Commissioner will allow public authorities to cite both exemptions 'in the alternative' when necessary. This means that although only one of the two exemptions can actually be engaged, the public authority may refer to both exemptions in its refusal notice.
38. As the Commissioner's guidance on this issue explains, a decision notice which upholds the public authority's position will not allude to which exemption has actually been engaged. It will simply say that the Commissioner is satisfied that one of the two exemptions cited is engaged and that, if the exemption is section 24(1), the public interest favours withholding the information. The approach of applying these exemptions in the alternative has been accepted by the Upper Tribunal.⁵
39. Based on submissions provided to him by the FCDO during the course of his investigation, including sight of the withheld information, the Commissioner is satisfied that the information to which these exemptions have been applied either falls within the scope of the exemption provided by section 23(1) of FOIA or falls within the scope of the exemption provided by section 24(1) of FOIA, and that if the exemption engaged is section 24(1) then the public interest favours maintaining the exemption.
40. The Commissioner cannot elaborate on his rationale behind this finding without compromising the content of the withheld information itself or by revealing which of these two exemptions is actually engaged.

⁵ Foreign, Commonwealth and Development Office v Information Commissioner, Williams & Others, [2021] UKUT 248 (AAC)
<https://www.gov.uk/administrative-appeals-tribunal-decisions/foreign-commonwealth-and-development-office-v-information-commissioner-williams-and-others-sections-23-and-24-2021-ukut-248-aac>

Right of appeal

41. 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

42. 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.
43. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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