

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 copies of two files about the Lockerbie bombing. The FCDO disclosed some information but withheld additional information on the basis of sections 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), 38(1)(b) (health and safety), 40(2) (personal data) and 41(1) (information provided in confidence).
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 38(1)(b).
3. The Commissioner does not require further steps.

Request and response

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

"I would like the contents of the following folders to be released to me.

FCO 93/5683:

<https://discovery.nationalarchives.gov.uk/details/r/C17054168>

FCO 93/5274:

<https://discovery.nationalarchives.gov.uk/details/r/C16927961>

FCO 93/6798:

<https://discovery.nationalarchives.gov.uk/details/r/C17487370>"

5. The FCDO contacted them on 17 January 2023 and confirmed it held all three files. However, the FCDO explained that they had already requested file FCO 93/6798 under request reference FOI2022/28070. Therefore, its response in relation to their request of 13 December 2022 (FCDO reference FOI2022/31767) would only cover files FCO 93/5683 and FCO 93/5274. (The complainant was provided with a separate response regarding FCO 93/6798 under reference FOI2022/28070.)
6. The FCDO contacted them again on 14 February 2023 and explained that it needed additional time to consider the balance of the public interest.
7. The FCDO provided them with a substantive response to request FOI2022/31767 on 14 March 2023. The FCDO explained that information that it considered to be disclosable from files FCO 93/5683 and FCO 93/5274 would be posted to them. However, the FCDO explained that the remainder of the information was being withheld on the basis of the exemptions contained at sections 27(1)(a) and 27(2) (international relations), 31(1)(b) and (c) (law enforcement), and 23(1) (security bodies) and 24(1) (national security) with the latter two exemptions being cited in the alternative.¹ The FCDO explained that all exemptions were being applied to information across both files, with the exception of sections 23(1) and 24(1) which were only being applied to information in FCO 93/5683.
8. The complainant contacted the FCDO on 22 May 2023 and asked it to conduct an internal review. They provided a number of documents on this subject that were already in the public domain and explained that in

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>

light of this they hoped that further documents could be disclosed from the two files which were in the scope of this request.

9. The FCDO informed them of the outcome of the internal review on 3 October 2023. The FCDO disclosed some additional information to the complainant at this stage. It also explained that some of the withheld information was considered to be exempt from disclosure on the basis of section 21 (information reasonably accessible) of FOIA and provided details as to where such information could be accessed. The internal review also concluded that the remainder of the information was exempt from disclosure on the basis of the exemptions cited in the refusal notice.

Scope of the case

10. The complainant contacted the Commissioner on 24 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 contacted the complainant on 19 January 2024 and explained that it had conducted a further review of the information in scope and this had concluded that some of the previously withheld information could now be disclosed. The review also concluded that some previously withheld information was now exempt under sections 38(1)(b) (health and safety), 40(2) (personal information) and 41(1) (information provided in confidence) of FOIA. However, the review also concluded that sections 31(1)(b) and (c) no longer applied to any information the scope of the request. The FCDO's response also confirmed that the exemptions contained at sections 21(1), 27(1)(a), 27(2), and either 23(1) or 24(1), were still considered to apply in line with the previous responses.

Reasons for decision

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:

- 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 number of different states. The FCDO provided the Commissioner with submissions that referred to the specific content of the withheld information and an explanation as to why disclosure of such information would be likely to harm relations with the states in question. For obvious reasons, the Commissioner has not included such submissions 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

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

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 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 UK's interests with a range of states.
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 relationships with the state in question, and taking into account the ongoing nature of the investigation in respect of the bombing.

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

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 towards 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 number of states, and in turn directly risks undermining the UK's ability to protect and promote its interests with these states, an outcome which the Commissioner accepts is clearly against the public interest. This is particularly the case taking into account the ongoing international investigation into 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.
23. Whilst the FCDO has also cited section 27(2) to withhold some information from disclosure, the Commissioner is satisfied that this information is also exempt on the basis of section 27(1)(a) and therefore he has not considered this exemption in this decision notice.

Section 38 – health and safety

24. The FCDO withheld a number of documents on the basis of section 38(1)(b) of FOIA. This states that:

“(1) Information is exempt information if its disclosure under this Act would, or would be likely to...

(b) endanger the safety of any individual”
25. The FCDO explained there was a risk that release of the information withheld on the basis of this exemption would endanger the safety of individuals, who could be subject to abuse and physical harm, if identified. The FCDO provided the Commissioner with confidential submissions, referencing the content of this information, which further explained on what basis it considered this endangerment would occur.
26. 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 38(1)(b) 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 endangerment occurring to the individuals identified by the FCDO, and that the risk of this occurring is more than a hypothetical possibility.

Public interest test

27. Section 38 is also a qualified exemption and therefore subject to the public interest test.
28. The FCDO explained that it takes its obligations under FOIA and Public Records legislation very seriously and adhere strongly to the principle that there is a public interest in showing a true and open account of the historical record. This makes for greater accountability, increases public confidence in government decision-making and helps to encourage greater public engagement with political life. However, despite this it was of the view that there was a greater public interest in it withholding information in order to ensure that the safety of individuals was not compromised.
29. The Commissioner agrees with this assessment. Whilst there is, as discussed above, a clear public interest in the disclosure of information regarding the Lockerbie bombing he does not consider that this should come at the expense of causing endangerment to the safety of individuals. The public interest therefore favours maintaining the exemption contained at section 38(1)(b).
30. The information withheld on the basis of sections 40(2) and 41(1) is the same information to which section 38(1)(b) has been applied. Therefore the Commissioner has not considered these two exemptions in this decision notice.

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

Section 24 – national security

31. The FCDO also withheld some information on the basis of sections 23(1) and 24(1), cited in the alternative.
32. 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).”
33. 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

34. 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”.

35. 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.

36. 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.

37. 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>

38. 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.
39. 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
40. 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
41. 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

42. 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

43. 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.
44. 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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