

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 21 July 2010**

**Public Authority:** Foreign & Commonwealth Office  
**Address:** Old Admiralty Building  
London  
SW1A 2PA

### Summary

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The complainant made a request to the Foreign & Commonwealth Office for information concerning José Mauricio Bustani, the former Director General of the Organisation for the Prohibition of Chemical Weapons. In response the public authority disclosed a quantity of information falling within the scope of the request. However, some information was redacted under the exemption in section 27(1) (International relations) of the Act. The Commissioner has investigated the complaint and has found that the exemption was correctly applied and that the public interest in maintaining the exemption outweighed the public interest in disclosure. In its handling of the request the Commissioner found that the public authority complied with section 10(1) Time for compliance) but breached section 17(1)(b) (Refusal of a request). The Commissioner requires no steps to be taken.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

### The Request

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2. On 8 January 2009 the complainant submitted the following freedom of information request to the public authority:

'Please disclose any letters, e-mails, reports, papers, memoranda or other documents held by the Foreign & Commonwealth Office concerning José Mauricio Bustani the former Director General of the Organisation for the Prohibition of Chemical Weapons.

I am particularly interested in receiving copies of documents relating to the meeting held at The Hague on 21st April 2002 where his removal was sought.

I am also interested in receiving copies of documents discussing or otherwise relating to Judgement 2232 of the Administrative Tribunal of the International Labour Organisation.'

3. The complainant sent his request via email and asked for the information to be provided in an electronic format.
4. The public authority responded to the request on 4 February 2009 when it informed the complainant that the exemption in section 27 of the Act (International relations) applied to the request and that it was currently balancing the public interest in maintaining the exemption against the public interest in disclosing the requested information. It explained that whilst the Act required it to respond to requests within 20 working days, where a qualified exemption applied it could extend this deadline by a reasonable time. It estimated that it would take an additional 20 working days to reach a decision on where the balance of the public interest lies and that therefore it aimed to respond by 4 March 2009.
5. On 4 March 2009 the public authority informed the complainant that it would take a further 5 working days to reach a decision on the public interest test and that it planned to have a response ready by 11 March 2009.
6. On 10 March 2009 the public authority provided the complainant with its substantive response to the request. It confirmed that it held relevant information and said that it was now prepared to disclose a quantity of information falling within the scope of the request and asked the complainant to supply a postal address so that the information could be supplied to him.
7. However the public authority said that some information was being withheld as it was exempt under section 27 of the Act. The public authority acknowledged that there was a public interest in disclosure but that it considered that the factors in favour of maintaining the exemption outweighed the public interest in disclosure. It explained

that the effective conduct of international relations depended on maintaining trust and confidence between governments (in this case the States party to the Chemical Weapons Convention) which allows for free and frank exchange of information. The public authority said that if the UK did not maintain this confidence its ability to protect and promote UK interests will be hampered as the States concerned may be reluctant to share information in future or respect the confidentiality of information supplied by the UK.

8. On 5 May 2009 the complainant wrote to the public authority to ask that it carry out an internal review of its handling of his request. In doing so the complainant set out his view that the public authority had not applied the public interest test correctly and outlined what he considered to be the strong public interest factors in favour of disclosure. He also questioned why it had not disclosed the information electronically, as requested, and was now asking for a postal address.
9. The public authority presented the findings of its internal review on 2 June 2009. First of all it said that it was satisfied that a thorough examination was made of possible sources of information and that all relevant files had been requested from its archive. However, it now clarified that it did not hold any information relating to 'Judgement 2232 of the Administrative Tribunal of the International Labour Organisation', despite a comprehensive search being carried out.
10. The public authority upheld the application of section 27(1) and said that it was satisfied that where it had been used it had been applied correctly and in accordance with the provisions of the Act. It went on to say that a 'significant collection of papers with substantive information relevant to your request' had been compiled and that its earlier response had explained that the information would be made available if he could supply a postal address. It also noted that it had separately sent him a number of emails asking for an address. It acknowledged the complainant's wish to withhold personal details but explained that the information was only held in hard copy as they were written before the public authority had an electronic registry system and it could see no reasonable way of forwarding it electronically. It also offered to make the information available for inspection at its offices, at a time convenient for the complainant.
11. On 3 June 2009 the complainant provided the public authority with a postal address to which it could send the disclosable information.

## The Investigation

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### Scope of the case

12. On 26 July 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the public authority's decision to refuse to disclose some of the information he requested under section 27(1) of the Act and its failure to comply with the request within 20 working days.

### Chronology

13. On 19 March 2010 the Commissioner wrote to the public authority with details of the complaint. The Commissioner asked it to supply him with copies of the withheld information, clearly marked to show where an exemption was being applied.
14. The Commissioner noted that the public authority was relying on section 27(1) of the request to refuse to disclose some of the requested information. The subsections of section 27(1) provide for a number of specific exemptions and therefore the Commissioner asked the public authority to clarify which particular sub-section(s) it was relying on as this was not clear from its initial response and internal review.
15. The Commissioner asked the public authority to explain why the exemption in section 27 was being applied and to elaborate on its reasons for concluding that the public interest in maintaining the exemption outweighed the public interest in disclosure. He also said that if the public authority was minded to argue that section 27(1)(a) and/or section 27(1)(b) applied it should confirm, if this would not otherwise be apparent, which state(s), organisation(s) or court(s) disclosure would prejudice relations with.
16. The public authority responded to the Commissioner on 8 April 2010 when it provided copies of the information falling within the scope of the request. The withheld information had been in the form of redactions made to the papers disclosed to the complainant. The public authority now provided the Commissioner with a set of un-redacted papers highlighted to show where the exemptions were being applied. For each document the public authority provided an explanation of why an exemption was being applied. From this it was apparent that the public authority were applying both section 27(1)(a) and section 27(1)(b) on the grounds that disclosure would prejudice relations with

states active in the Organisation for the Prohibition of Chemical Weapons (OPCW) and the OPCW itself.

## Findings of fact

17. The OPCW is an international organisation and the implementing body of the Chemical Weapons Convention (CWC). The OPCW's website states that it 'is given the mandate to achieve the object and purpose of the Convention, to ensure the implementation of its provisions, including those for international verification of compliance with it, and to provide a forum for consultation and cooperation among States Parties'.<sup>1</sup>
18. Jose Mauricio Bustani is the former Director-General of the OPCW. On 21 March 2002, at a session of the OPCW's Executive Council, a motion of no-confidence, calling for Mr Bustani to resign, was introduced by the United States of America. That motion failed. However, the United States of America subsequently called a special session of the Conference of States Parties. The Conference met on 22 April 2002 and adopted a decision to terminate the appointment of Mr Bustani with immediate effect. This vote was carried by a vote of 48 to 7 with 43 abstentions. The UK voted in favour of terminating Mr Bustani's appointment.
19. Mr Bustani subsequently appealed against his dismissal to the Administrative Tribunal of the International Labour Organisation, an agency of the United Nations which has the power to hear complaints from international civil servants of organisations who have recognised its jurisdiction. The Administrative Tribunal found Mr Bustani's dismissal to be unlawful and ordered the OPCW to pay damages.<sup>2</sup>
20. The Government has previously explained that its policy towards the removal of Mr Bustani had been guided by its judgement of what it considered to be in the best interests of the OPCW and it noted that prior to his dismissal Mr Bustani had 'lost the confidence of a significant number of the OPCW's executive Council'.<sup>3</sup> Subsequently, in evidence before the Foreign Affairs Select Committee, the Government explained that there had been serious concerns about the financial situation of the OPCW and mismanagement by Mr Bustani.<sup>4</sup>

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<sup>1</sup> <http://www.opcw.org/about-opcw/>

<sup>2</sup> <http://www.ilo.org/public/english/tribunal/fulltext/2232.htm>

<sup>3</sup> Hansard HC vol 385 cols 240W, 241W (8 May 2002)

<sup>4</sup> Foreign Affairs Select Committee, 'Foreign Policy Aspects of the War Against Terrorism' HC (2001-2002) 384

## Analysis

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21. A full text of the relevant provisions of the Act referred to in this section is contained within a legal annex.

## Exemptions

### Section 27(1) – International relations

22. Section 27(1) provides that information is exempt if disclosure would, or would be likely to, prejudice –
- (a) relations between the United Kingdom and any other State,
  - (b) relations between the United Kingdom and any international organisation or international court,
  - (c) the interests of the United Kingdom abroad, or
  - (d) the promotion or protection by the United Kingdom of its interests abroad.
23. In this case the public authority has said that the relevant parts of the exemption are sections 27(1)(a) and (b) because disclosure would prejudice relations with certain states party to the CWC and would prejudice relations with the OPCW itself.
24. In considering the nature of prejudice which this exemption is designed to prevent, the Commissioner is guided by the following comments of the Information Tribunal in respect of section 27:
25. "...we would make clear that in our judgement prejudice can be real and of substance if it makes relations more difficult or calls for particular diplomatic response to contain or limit damage which would not otherwise have been necessary. We do not consider that prejudice necessarily requires demonstration of actual harm to the relevant interests in terms of quantifiable loss or damage."<sup>5</sup>
26. The public authority has argued that disclosure would prejudice international relations because the information includes observations and comments on the voting intentions or negotiating positions of various states regarding the proposal to remove Mr Bustani as Director General. Some of the redacted information was also obtained from the representatives of certain states and from individuals within the OPCW.

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<sup>5</sup> Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence [EA/206/0040], para. 81

This information was obtained in the context of private diplomatic exchanges which rely on states and their representatives being able to exchange information in confidence. Were this information to be disclosed, the public authority argues, the states and individuals involved would be reluctant to share information or cooperate with the UK in future on counter proliferation (efforts to combat the proliferation of chemical weapons) matters or else would be less inclined to respect the confidentiality of information regarding UK interests or information supplied directly by the UK.

27. The public authority has not explicitly said if disclosure would, OR would be likely to, prejudice international relations. In light of this the Commissioner considers it appropriate to apply the lesser test, that is to say the exemption will be engaged where disclosure would be likely to prejudice international relations. This approach has found support in the Information Tribunal when it stated:

“We consider that where the qualified person does not designate the level of prejudice, that Parliament still intended that the reasonableness of the opinion should be assessed by the Commissioner but in the absence of designation as to level of prejudice that the lower threshold of prejudice applies, unless there is other clear evidence that it should be at the higher level.”<sup>6</sup>

28. The Information Tribunal has also considered the meaning of ‘would be likely to prejudice’ and found that for this to apply:

“the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk.”<sup>7</sup>

29. This in turn follows the judgement of Mr Justice Munby in the High Court in which the view was expressed that:

“Likely connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there ‘may very well’ be prejudice to those interests, even if the risk falls short of being more probable than not.”<sup>8</sup>

30. In this case the information has been obtained or gleaned from contact with representatives of foreign states or the OPCW through diplomatic

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<sup>6</sup> McIntyre, para. 45.

<sup>7</sup> John Connor Press Associates Ltd v Information Commissioner [EA/2005/0005], para. 15.

<sup>8</sup> R (on the application of Lord) v Secretary of State for the Home Office [2003] EWHC 2073 Admin

channels. It is not normally expected that such information would be disclosed. Indeed some of the information has been obtained on a discreet and unofficial basis on the clear understanding that it will not be disclosed. In this sense it seems reasonable to suggest that disclosure would provoke an unfavourable reaction from those states or individuals who have provided the information or who are referred to in the withheld information.

31. As regards the nature of the prejudice under section 27(1) a key consideration is the likely reaction of the states concerned and in this case the organisation concerned, the OPCW. The fact that disclosure is likely to provoke a negative reaction or make relations more difficult is sufficient to demonstrate that prejudice would occur. Moreover, it is clear that much of the information constitutes very frank and candid descriptions of various states' negotiating positions and voting intentions as well as candid descriptions of the problems then being experienced within the OPCW. The information is the result of private diplomatic exchanges and given the status of such information the Commissioner is satisfied that disclosure would lead to an adverse reaction from the States concerned and/or would impair the public authority's relations with the OPCW. For these reasons the Commissioner has decided that the exemption in section 27(1)(a) and section 27(1)(b) is engaged.

### **Public interest test**

32. Section 27 is a qualified exemption and therefore is subject to a public interest test under section 2(2)(b) of the Act. Section 2(2)(b) provides that where a qualified exemption applies, information shall only be withheld if in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure.

### **Public interest arguments in favour of disclosing the requested information**

33. In favour of disclosure the complainant has suggested that, as evidenced by the finding of the Administrative Tribunal of the International Labour Organisation, the decision to remove Mr Bustani was unlawful and therefore there is a strong public interest in revealing the extent of the UK's involvement in this process. The complainant has also advanced the following reasons why the public interest favours disclosing the information that was redacted from the bundle of papers the public authority released to him:

- i. 'There is clearly a public interest in the government's decision-making processes being transparent and open to both public scrutiny and accountability.
- ii. There is a public interest in ensuring that the public are able to scrutinise the manner in which important decisions were taken and that these decisions were not subject to undue pressure or influence.
- iii. The disclosure of information would also contribute to improving the public's knowledge of the way in which the government as a State Party to the Chemical Weapons Convention discharges its duties under that convention.
- iv. There is a strong public interest in demonstrating that the government are capable of independent thought and are allowed freedom of action in the discharge of their duties rather than simply being required to obey the orders of political figures in other countries who have clearly defined agendas which are contrary to both UK and global interests.

For the purposes of point iv. above, I am defining 'UK interests' as the wider interests of the UK and its people as a whole, rather than the political and financial interests of a select group of politicians, civil servants, their families and their supporters both within the UK and elsewhere.

- v. Due to the gravity and controversial nature of the subject matter I consider that an insistence upon non disclosure could be publicly construed as an admission of the government having something to hide or of having knowingly acted corruptly or unlawfully.'

### **Public interest arguments in favour of maintaining the exemption**

34. The public authority has argued that disclosure would not serve the public interest as it would make it more difficult for the public authority to pursue UK interests within the CWC and counter proliferation sphere.
35. The public authority has explained that the effective conduct of international relations depends upon maintaining trust and confidence between governments (in this case the States party to the CWC). It argues that disclosure of information shared with the UK in confidence could undermine the UK's role in the weapons proliferation and disarmament spheres. A relationship of trust exists which allows for the

free and frank exchange of information on the understanding it will be treated in confidence. The public authority argues that if the UK does not maintain this trust its ability to protect and promote UK interests through international relations will be hampered. This is because the States involved would be less likely to share sensitive information with the UK in future or to respect the confidentiality of information supplied to them and that this would not be in the public interest.

### **Balance of the public interest arguments**

36. The Commissioner considers that the main public interest in disclosure lies in knowing how the UK was involved in the dismissal of Mr Bustani, what factors they took into account when voting for his dismissal and whether they were influenced in any way.
37. However, having reviewed the requested information, the Commissioner finds that much of the redacted information relates to the voting intentions of other countries. The Commissioner is of the view that this would add little to the public's understanding of the UK's role in the dismissal of Mr Bustani although the Commissioner acknowledges that there will always be a public interest in releasing as much information as possible so as to give the fullest possible picture of what happened.
38. When considering the public interest in releasing the information the Commissioner is also mindful of the fact that the government has already explained its position regarding the dismissal of Mr Bustani at the time when it explained that it voted to remove Mr Bustani in light of the OPCW's financial and management problems and after it became clear that he had lost the confidence of leading contributors to the OPCW. The Commissioner is of the view that disclosure would not appreciably add to public understanding of the UK's involvement in the removal of Mr Bustani. Of course, this is not in itself a reason to withhold the information but it is important to balance the potential benefit of disclosure with the potential harm it may cause.
39. If it had been the case that the UK had somehow sought to exert undue influence in the dismissal of Mr Bustani, or if it had itself been unduly influenced, then the Commissioner acknowledges that there would be a compelling public interest in disclosure. However, the Commissioner has seen no evidence of this here.
40. As regards the public interest in maintaining the exemption, the Commissioner notes that the OPCW is a multi member organisation working towards the non-proliferation of chemical weapons. As such, it is important that the UK is able to maintain good relations and form

alliances with other nations in the organisation in order to effectively protect and pursue UK interests in the non-proliferation sphere. Disclosure would not just prejudice relations with one state, but with several states as well as the OPCW itself and so the extent and severity of the prejudice would be greater. Disclosure in this context would have a specific impact on the UK's international relations and so the Commissioner has given arguments in favour of maintaining the exemption particular weight.

41. The Commissioner recognises that there is a public interest in disclosure but having taken into account the information already in the public domain and the fact that disclosure would not shed much light on the issues, from a UK perspective, he has decided that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.

## **Procedural matters**

### **Section 10 – Time for compliance**

42. The complainant has argued that the public authority breached the Act by failing to disclose information falling within the scope of his request within 20 working days. The public authority initially responded to the request on 4 February 2009 when it informed the complainant that it held information but that the exemption in section 27 of the Act applied. Where a qualified exemption applies to a request a public authority, under section 10(3) of the Act, is not obliged to comply with section 1(1)(b) until such time as is reasonable in the circumstances. In this case the public authority took until 10 March 2009 to provide a substantive response at which point it informed the complainant that some of the requested information could be disclosed. Given the amount of information falling within the scope of the request (over 200 pages according to the complainant) the Commissioner considers that the extra time taken to respond was reasonable in the circumstances.
43. As it turned out the complainant was not able to receive this information until some time later. However, the Commissioner does not consider this to be the fault of the public authority. Given that it was not practical to send the information electronically the public authority had no option but to send that information in hard copy. The public authority asked the complainant to provide a postal address on more than one occasion and also invited the complainant to inspect the information at its London Office (although this proved impractical for the complainant). In the circumstances the Commissioner is satisfied that the additional delay in disclosing the information to the

complainant was through no fault of the public authority and therefore was also reasonable in the circumstances of the case.

## **Section 17 – Refusal of a request**

44. In its initial response to the complainant the public authority explained that some of the requested information was being withheld under the exemption in section 27(1) of the Act. However the public authority did not at this stage, nor at the internal review, state which particular sub-sections of the exemptions applied. Section 27(1) provides for a number of specific exemptions from the Act and it was only when contacted by the Commissioner that the public authority confirmed that it was sections 27(1)(a) and 27(1)(b) on which it was seeking to rely.
45. Section 17(1)(b) provides that a refusal notice issued by a public authority shall specify the exemption in question. Where a multi-limb exemption is being relied on a public authority should specify the section, sub-section, paragraph and sub-paragraph because without this information the complainant cannot be certain of the grounds on which the information is being withheld. Therefore, by failing to state which specific exemption it was relying on the public authority breached section 17(1)(b) of the Act.

## **The Decision**

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46. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
  - The public authority dealt with the request in accordance with the Act by correctly refusing to disclose information under section 27(1)(a) and section 27(1)(b).
47. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
  - The public authority breached section 17(1)(b) of the Act by failing to state which specific exemptions it was relying on.

## **Steps Required**

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48. The Commissioner requires no steps to be taken.

## Right of Appeal

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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,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is sent.

**Dated the 21st day of July 2010**

**Signed .....**

**Lisa Adshead  
Group Manager**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

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**Section 1(1)** 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."

**Section 2(2)** provides that –

"In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information"

**Section 10(1)** provides that –

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

**Section 10(3)** provides that –

"If, and to the extent that –

(a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or

(b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection

does not affect the time by which any notice under section 17(1) must be given."

**Section 27(1)** provides 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,
- (b) relations between the United Kingdom and any international organisation or international court,
- (c) the interests of the United Kingdom abroad, or
- (d) the promotion or protection by the United Kingdom of its interests abroad."