

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 15 November 2010**

**Public Authority:** The Foreign and Commonwealth Office  
**Address:** King Charles Street  
London  
SW1A 2AH

### Summary

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The complainant requested information from the Foreign and Commonwealth Office (FCO) about meetings between UK Ministers and officials, or representatives of, the Libyan government for the period August 2008 to August 2009. The FCO provided the complainant with the dates, venues and attendees of relevant meetings but withheld the minutes of each meeting on the basis of sections 27(1)(a) and 27(2). The Commissioner has concluded that section 27(1)(a) is engaged and in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure of the meeting minutes.

### 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.

### Background

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2. Abdelbaset Ali Mohmed Al Megrahi was convicted in January 2001 of 270 counts of murder for the bombing of Pan Am flight 103 over Lockerbie, Scotland in December 1988 and sentenced to life in prison.

3. In November 2008 the British and Libyan governments signed a Prisoner Transfer Agreement (PTA). Despite the preference of the Scottish government, the PTA that was signed did not exclude al-Megrahi from making an application under it.
4. In May 2009 al-Megrahi made an application under the PTA to the Scottish Executive. This application was turned down specifically on the basis that the US Government and families of victims in the United States had been led to believe that such a prisoner transfer would not be possible for anyone convicted of the Lockerbie atrocity.<sup>1</sup>
5. In July 2009 al-Megrahi's legal team submitted an application to Scottish Executive for him to be released on compassionate grounds.
6. On 20 August 2009 al-Megrahi was released by Scottish Executive on compassionate grounds.

## The Request

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7. The complainant submitted the following requests to the FCO on 22 August 2009:

'I would like to request the following information under the Freedom of Information Act...

...Please note that I am only interested in information which relates to the period August 19 2008 to the present day.

1. A list of occasions when David Miliband, the Foreign Secretary and or any other member of the department's Ministerial team has met with officials and or representatives from the Libyan Government. In each case can you state which UK minister (s) was at each meeting and could you also identify the officials and or representatives from the Libyan Government. The term officials and or representatives will include but will not be limited to any Libyan diplomats based in London.

2. In each case can you provide a date for when the actual meeting took place and can you provide details of the venue.

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<sup>1</sup> See the comments in Alex Salmond's open letter to Senator Kerry:  
<http://politics.caledonianmercury.com/2010/07/22/alex-salmonds-letter-to-senator-kerry/>

3. In each case can you please specify the subject(s) which were discussed at the meeting.

4. In each case can you please provide full minutes of any meeting.

5. A list of occasions when David Miliband and or any other member of the department's Ministerial team has met with the Libyan leader Colonel Gaddafi or any other member of the Colonel's family. In each case can you provide a date for when the actual meeting took place and can you provide details of the venue. In each case can you provide the full minutes of any meeting. Can you also identify the member(s) of the Colonel's family who were present.'

8. The FCO contacted the complainant on 22 September 2009 and confirmed that it held some information falling within the scope of his requests. However, the FCO explained that where a qualified exemption applies a public authority can extend the time needed to consider the public interest test. In this case the FCO explained that it believed that the exemptions contained at sections 27, 35 and 42 were engaged and it estimated that it needed an additional 20 working days to complete its consideration of the public interest tests.
9. The FCO contacted the complainant on 21 October 2009, and again on 18 November 2009, in order to explain that it still needed further time to complete its assessment of the public interest test under section 27.
10. On 30 November 2009 the FCO contacted the complainant once more and confirmed that it had completed its public interest considerations. In response to requests 1 to 4, the FCO provided the complainant with the following details about seven meetings between Foreign Office ministers and officials and/or representatives from the Libyan government: date of meeting; venue of meeting (if known); UK ministers present; and Libyan officials present. The FCO explained that the relevant meeting notes were exempt from disclosure on the basis of sections 27(1)(a) and 27(2) of the Act. In respect of request 5, the FCO explained that neither David Miliband, the Foreign Secretary, nor any other FCO Minister had met with the Libyan leader, Colonel Gaddafi, or any other member of the Colonel's family during the timescale specified in the request. The FCO's letter of 30 November 2009 did not make any reference to sections 35 or 42 of the Act.
11. The complainant contacted the FCO on 2 December 2009 and asked for an internal review to be conducted of the decision to rely on sections

- 27(1)(a) and 27(2) to withhold the meeting notes. In asking for this review the complainant noted that the information he was seeking related to a very specific time period and therefore it was likely that any meetings and discussions which would have taken place would have related to a relatively small number of issues, primarily the discussions about the PTA and the release al-Megrahi. In light of the unique nature of these two incidents the complainant suggested that disclosure would be unlikely to cause any breakdown in relations between the two countries. The complainant also noted that the government had released certain documents about this issue into the public domain and he believed that there should be further disclosures.
12. The FCO informed the complainant of the outcome of the internal review on 5 January 2010. The review upheld the application of sections 27(1)(a) and 27(2). In response to the complainant's arguments about the specific time period and potentially limited number of issues covered in the meeting notes, the FCO emphasised that these meetings only took place because of the relationship of trust that the UK has with Libya on the understanding that any exchanges of information will be treated in confidence. If the FCO were to disclose any information regarding its meetings with Libyan counterparts it would damage this relationship.

## The Investigation

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### Scope of the case

13. The complainant contacted the Commissioner on 7 January 2010 and asked him to consider the FCO's decision to withhold the relevant meeting notes. The complainant set out a number of reasons why he believed that the requested information had been incorrectly withheld and although the Commissioner has not detailed these points here, they are included in the Analysis section below.

### Chronology

14. The Commissioner wrote to the FCO on 14 May 2010 and asked to be provided with a copy of the meeting notes along with submissions to support the FCO's position that this information was exempt from disclosure on the basis of sections 27(1)(a) and 27(2) of the Act.
15. The FCO wrote to the Commissioner on 22 June 2010 and provided arguments to support its decision to withhold the remainder of the requested information. The FCO's letter indicated that the withheld

information was enclosed although, in error, it transpired that this information had not been included.

16. The Commissioner contacted the FCO on 29 June 2010 and asked for the missing withheld information to be sent to him. After contacting the FCO on a number of further occasions, the FCO provided the Commissioner with a copy of the information in question on 13 August 2010.
17. Having reviewed the withheld information in detail the Commissioner realised that some of the meeting notes made reference to further 'separate notes' which had been separately circulated to various individuals but such additional notes had not been provided to him by the FCO. Therefore, the Commissioner contacted the FCO again on 16 September 2010 and asked the FCO to provide him with copies of any of the missing separate notes which it held.
18. The FCO provided the Commissioner with this information on 29 September 2010.

## Analysis

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### Exemptions

#### Section 27 – international relations

19. The FCO has argued that all of the withheld information is exempt from disclosure on the basis of sections 27(1)(a) and 27(2). The Commissioner has initially considered the application of section 27(1)(a).
20. This exemption states that information is exempt from disclosure if its disclosure would, or would be likely to prejudice, relations between the United Kingdom and any other State.
21. In order for a prejudice based exemption, such as section 27(1), 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; and

- 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.

22. 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'.<sup>2</sup>

#### *The FCO's position*

23. In its submissions to the Commissioner, the FCO explained that 'releasing the information would prejudice UK-Libyan relations', i.e. the higher limb of the prejudice test. In order to support this position the FCO highlighted the position set out in its internal review letter: the meetings in question that took place, mainly due to the relationship of trust between the UK and Libya, were based on the understanding that any exchanges of information would be treated in confidence. If the FCO were to disclose any information regarding meetings with Libyan counterparts it would damage this relationship. In relation to the complainant's suggestion that disclosure would not harm the UK's relations with Libya because the meetings presumably focused on the narrow issue of al-Megrahi's release and thus disclosure would be unlikely to harm long term interests, the FCO emphasised the fact that the subject matter covered in the meeting was immaterial with regard to the engagement of the exemption as it was the release of information itself regarding confidential government-to-government exchanges that was sensitive.
24. In its submissions to the Commissioner the FCO explained that it believed that the likelihood of prejudice occurring was so significant due to the nature and dynamics of the relationship with the Libyan regime. It therefore strongly believed that disclosing the withheld information would be perceived by the Libyans as a breach of trust

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<sup>2</sup> *Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence* (EA/2006/0040), paragraph 81.

resulting in potentially serious consequences for the UK and UK interests in Libya. The FCO highlighted the brief arrest of Colonel Gaddafi's son in Geneva in 2008 which escalated into the barring of two Swiss citizens from leaving Libya, the withdrawal of \$5bn from Swiss banks and the banning of entry to Libya of all Schengen citizens in February 2010 as a recent example of the fragility of Libya's relations with the West.

*The complainant's position*

25. In his submissions to the Commissioner the complainant emphasised the arguments he made to the FCO when asking for an internal review, i.e. the presumably narrow topic of the meeting notes thus the corresponding lack of likelihood in prejudice occurring. The complainant also suggested that many believed that the Lockerbie bombing took place with the involvement of the Libyan intelligence agencies and this did not cause lasting harm to any long term UK interests.

*The Commissioner's position*

26. The Commissioner accepts the FCO's argument that disclosure of the information would harm the UK's relations with Libya is clearly an applicable interest falling within the scope of section 27(1)(a). The first criterion set out at paragraph 21 is therefore clearly met.
27. With regard to the second criterion the Commissioner accepts that it is logical to argue that disclosure of the withheld information could potentially prejudice the UK's relations with Libya in light of the fact that the Libyan officials involved in the meetings considered the meetings to be confidential in nature. The Commissioner is therefore satisfied that there is a causal relationship between the potential disclosure of the withheld information and prejudice to the UK's relations with Libya. Furthermore, the Commissioner is satisfied that the resultant prejudice which the FCO believes would occur is one which can be correctly categorised, in light of the Tribunal's comments above, as real and of substance. In other words, subject to meeting the likelihood test at the third criterion, disclosure could result in making relations more difficult and/or demand a particular diplomatic response.
28. It follows that by reaching this conclusion the Commissioner does not accept the complainant's argument that simply because the meetings may have been restricted to the narrow topic of al-Megrahi, this means that there is little or no likelihood of prejudice occurring. Rather the Commissioner agrees with the FCO's suggestion that given the basis upon which the meetings took place, i.e. the expectation of

confidentiality, the topic or topics discussed at the meetings are not necessarily of primary importance in determining the engagement of the exemption.

29. In relation to the third limb of the test set out at paragraph 21 in the main body of the Notice, the Commissioner has been guided on the interpretation of the phrase 'would, or would be likely to' be a number of Information Tribunal decisions. With regard to likely to prejudice, the Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (Tribunal at paragraph 15). With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026 & 0030) commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (Tribunal at paragraph 36).
30. The Commissioner is somewhat sceptical that the example cited by the FCO to highlight the potential reaction of the Libyan government is directly relevant to this case. In the Commissioner's opinion there is a clear distinction between the arrest of one of Colonel Gaddafi's sons and the potential disclosure of information in response to a freedom of information request and it would not be appropriate to draw too direct a parallel between the two. Furthermore the Commissioner notes that the UK's relations with Libya at the time of this request had improved with the signing of four bilateral agreements in November 2008 and the UK making clear (and public) commitments to assisting Libya's reintegration into the international community. Therefore the likelihood of any prejudice occurring following the disclosure of the withheld information in August 2009 has to be seen in the context the UK's improved relations with Libya.
31. Nevertheless, the Commissioner is prepared to accept that the higher threshold of prejudice occurring is met. This is because despite the improvement in the UK's relations with Libya, the Commissioner accepts that it remains difficult to predict how Libya may react to what the FCO describes as 'perceived slights'. Moreover, in this context the Commissioner accepts that disclosure of notes about meetings which the Libyan participants understood to have taken place with the explicit expectation of confidentiality would result in making the UK's relations with Libya more difficult and/or demand a particular diplomatic response. The exemption contained at section 27(1)(a) is therefore engaged and provides a basis to withhold the various meetings notes held by the FCO.



32. In reaching this conclusion the Commissioner has taken into account the complainant's observation that the FCO had disclosed certain information concerning the release of al-Megrahi. The information which the Commissioner understands the complainant to be referring to is the disclosure by the FCO on 1 September 2009 of two letters from the FCO to the Scottish government.<sup>3</sup> Having reviewed these two letters the Commissioner is satisfied that there are clearly distinct differences between them and the information that the FCO withheld in response to this request. Consequently the Commissioner does not believe that the fact these letters have been placed into the public domain undermines his conclusion in respect of section 27(1)(a) above.

### **Public interest test**

33. Section 27(1) is a qualified exemption and therefore the Commissioner must consider the public interest test at section 2(2) of the Act. This requires a consideration of whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

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

34. The FCO acknowledged that disclosure would increase public knowledge of the UK's relations with Libya.
35. In his submissions to the Commissioner the complainant also argued that even if the exemption was engaged, the public interest favoured disclosure of the withheld information for the following reasons: The release of al-Megrahi has been the subject of intense public concern. There have been allegations that the British government did a deal with the Libyan government in order to further Britain's trade links with the North African state. Given that the existence of such a deal would undermine the government's own claims to be running an 'ethical' foreign policy, disclosure of these documents would be in the public interest and not just interesting to the public.

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

36. The FCO argued that there was a strong public interest in the UK maintaining strong relations with Libya given that the UK had significant policy interests with Libya and the wider North Africa and

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<sup>3</sup> These case be viewed here:

<http://www.fco.gov.uk/resources/en/news/11646391/20779431/al-megrahi-miliband-010909>

Middle East region. It was not in the public interest that the UK's ability to protect and promote its interests in Libya was undermined.

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

37. With regard to attributing weight to the public interest arguments in favour of disclosure the Commissioner recognises that issues of accountability and transparency are often cited in any consideration of the public interest test. However, as such concepts are inherent to the Act this should not diminish their relevance to this case and moreover the Commissioner would agree that there is a clear public interest in the public being informed as to how the UK manages its relations with its international partners.
38. Furthermore, in the Commissioner's opinion the specific arguments identified by the complainant deserve to be given notable weight. As the complainant argues, at the time of the request there was significant public interest in the events surrounding the release of al-Megrahi, not least because of concerns expressed from a number of independent and different sources about links between the release and the UK's trade relations with Libya. The Commissioner believes the arguments in favour of disclosure could be strengthened by the disclosure of information which could genuinely illuminate this controversy either by confirming that the UK government had acted appropriately, or indeed by confirming the complainant's, and others, concerns that the government may have deviated from its claims of running an ethical foreign policy.
39. However, as with all cases, the weight that is attributed the particular public interest arguments will depend upon the actual content of the requested information. That is to say, to what extent will disclosure of the requested information actually serve the public interest arguments in question? Having considered the various meeting notes, whilst the Commissioner accepts that their disclosure would contribute to the general public interest in openness and transparency and provide some insight into the PTA and the British government's position in respect of al-Megrahi, the level of insight is limited in this case.
40. With regard to attributing weight to the public interest in favour of maintaining the exemption, the Commissioner accepts that it is very strongly in the public interest that the UK enjoys effective relations with foreign States. The public interest would obviously be harmed by any negative impact on the exchange of information between the UK and its foreign partners, either through information ceasing to be provided or by a failure by these foreign partners to respect the confidentiality of the information that they received. The Commissioner

accepts that this is particularly true of a partner such as Libya given its strategic position in Northern Africa and the Middle East and the relatively recent improvement in UK and Libyan relations. Moreover, the Commissioner accepts that the UK's strong relationship with Libya is important not just in respect of the al-Megrahi case but for wider bilateral issues such as trade, migration and counter-terrorism. Furthermore, in the particular circumstances of this case, as the Commissioner has concluded that prejudice would occur, not simply be likely to, he accepts that this adds further weight to the arguments in favour of maintaining the exemption.

41. For these reasons the Commissioner has concluded that the maintaining the exemption outweighs the public interest in disclosing the information. In reaching this conclusion the Commissioner acknowledges that some of the points upon which he has placed weight in the above analysis could be seen as factors which are inherent in sections 27(1)(c) and (d) rather than section 27(1)(a) and thus should not be given weight in a public interest balance which focuses solely on section 27(1)(a). However, in the Commissioner's opinion the public interest in maintaining section 27(1)(a) cannot be seen in isolation; the public interest in the UK having strong relations with other States is in reality a means to an end; the end being the ability of the UK to protect and promote its interests abroad.

### **Procedural Requirements**

42. Part I of the Act includes a number of procedural requirements with which public authorities must comply:
43. Section 10(1) requires a public authority to respond to a request within 20 working days following the date of receipt. If a public authority wishes to rely on an exemption to refuse to provide the information requested, in line with section 17(1) it must issue a refusal notice to the applicant within the time period required by section 10(1).
44. Section 17(1)(b) requires that a public authority, when issuing a refusal notice, must specify the exemption, or exemptions, it is relying on. The Commissioner's interpretation of this requirement is that a public authority will breach section 17(1)(b) when it fails to cite the specific sub-section of a multiple limb exemption.
45. In this case the FCO's response of 22 September 2009 simply stated that it was relying on sections 27, 35 and 42. It was not until its response of 30 November 2009 that the FCO actually specified the sub-sections of the exemptions contained within section 27 that it was seeking to rely on. By failing to provide this confirmation within 20

working days of the complainant's request the FCO breached section 17(1).

## 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 meeting notes falling within the scope of the complainant's request are exempt from disclosure on the basis of section 27(1)(a) and in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

47. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act

The FCO breached section 17(1) of the Act by failing to provide the complainant with a refusal notice that met the requirements of section 17(1)(b) within 20 working days following the date of the request.

## Steps Required

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48. The Commissioner requires no steps to be taken.

## Other matters

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49. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

50. The Commissioner has issued guidance on the time limits on extending the public interest test considerations.<sup>4</sup> Whilst the current version of the Section 45 Code of Practice makes no reference to consideration of the public interest, the Commissioner's guidance suggests that public authorities should aim to respond fully to all requests within 20 working days. In cases where the public interest considerations are

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<sup>4</sup> [Freedom of Information Good Practice Guidance No. 4](#)

exceptionally complex it may be reasonable to take longer but, in the Commissioner's opinion, in no case should the total time exceed 40 working days. In this case, the complainant submitted his request on 22 August 2009 and the FCO did not complete its consideration of the public interest test until 30 November 2009, outside of the 40 working days recommended by the Commissioner's guidance.

51. In the future when the FCO conducts its consideration of the public interest the Commissioner expects it to adhere to the timelines set out in his guidance paper.

## Right of Appeal

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52. 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 15<sup>th</sup> day of November 2010**

**Signed .....**

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

## **Legal Annex**

### **General Right of Access**

**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 1(2)** provides that -

"Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14."

### **Effect of Exemptions**

**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"

### **Time for Compliance**

**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."

## **Refusal of Request**

**Section 17(1)** provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies."

**Section 17(3)** provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

## **International Relations**

**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."

**Section 27(2)** provides that –

"Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court."

### **Formulation of Government Policy**

**Section 35(1)** provides that –

"Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (a) the formulation or development of government policy,
- (b) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request or the provision of such advice, or
- (d) the operation of any Ministerial private office.

### **Legal Professional Privilege**

**Section 42(1)** provides that –

"Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information."