

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice**

Date: 21 November 2011

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

Decision (including any steps ordered)

1. The complainant has requested information relating to the drafting of two reports, which considered the feasibility of the potential resettlement of some of the islands in the Chagos Archipelago (British Indian Ocean Territory). The complainant also requested a list of the documents held that fell under the scope of the request. The Foreign and Commonwealth Office (the "FCO") disclosed some information, but withheld some under the formulation of government policy exemption (FOIA sections 35(1)(a) and (d)); the legal professional privilege exemption (FOIA section 42); and the third party personal information exemption (FOIA section 40(2)). The FCO refused to provide a list of the documents that fell under the scope of the request on the basis that it did not hold this information.
2. The Commissioner's decision is that no further relevant information is held. He is satisfied that the FCO was correct to rely upon section 42 to withhold some of the withheld information. He has decided that some of the withheld information was environmental information, and that this information should be withheld under the internal communications exception (EIR regulation 12(4)(e)). However, the Commissioner has also decided that the FCO should have provided the complainant with a list of the documents that it held that fell under the scope of the request.

3. Therefore the Commissioner requires the FCO to take the following steps to ensure compliance with the legislation.
 - provide the complainant with a list of the documents that it held (at the time of the request) that fell under the scope of the request. This list should include both the information disclosed to the complainant as a result of his request, and the withheld information.
4. The FCO must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 30 April 2010, the complainant wrote to the FCO and requested the following information:
 - “(a) all submissions, minutes, memoranda and letters relating to the conduct of the ‘Feasibility Study’ for the relevant dates; and*
 - (b) all reports and drafts thereof relating to the preparation, amendment and publication of the Phase 2B Feasibility Study, including any such documents held by consultants or sub-consultants instructed in the matter.*

You have suggested that the relevant dates are between 1 January 2000 and 31 December 2002.”
6. By way of background, the Chagos Archipelago forms part of the British Indian Ocean Territory. In the late 1960s and early 1970s the inhabitants of the Chagos group – the Chagossians – were forced to leave the islands. At the same time a US military base was established on Diego Garcia, the largest of the Chagos Islands. The issue of the Chagossians removal from these islands and their right of abode has been a matter of considerable political and media debate – as well as ongoing legal proceedings. In 1999 the then Foreign Secretary established a ‘Feasibility Study’ to consider the feasibility of the resettlement of some of the islands in the archipelago. A preliminary study was completed in 2000. This was followed in 2002 by the Phase 2B Feasibility Study that concluded that the resettlement of the islands

in question would be costly and environmentally difficult.¹ The independence of this study has been questioned by supporters of the Chagossians, and also by elements of the media.²

7. The FCO responded on 2 June 2010 and disclosed some information. However, it refused to provide other information under section 35, section 40(2) and section 42.
8. The complainant requested an internal review of the FCO's decision to rely upon section 35 and section 42 on 26 July 2010. In this letter the complainant queried whether any further information was held and whether the FCO had carried out adequate searches. Finally, the complainant noted that he had not been provided with a list of documents that was held by the FCO that fell within the scope of the request (including documents that had been withheld) and asked to be provided with such a list.
9. The FCO carried out an internal review and responded on 9 September 2010. It disclosed two documents that it had believed were already in the possession of the complainant. It also stated that after reviewing the case it was satisfied that a full search of both electronic and paper records had been undertaken, and that other than the information it had already identified for withholding, no further relevant information was held (in particular the draft version of the Phase 2B Feasibility Study). It also upheld its previous use of the formulation of government policy exemption and the legal professional privilege exemption. Finally, it stated that it did not hold a list of the relevant information that it held, and that it was not obliged to create new information under the Act.

Scope of the case

10. On 5 November 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. In particular, he complained about the FCO's use of section 35 and section 42. He also argued that further relevant information was held. In addition, he also complained about the FCO's refusal to provide a list of the relevant information that it held. It should be noted that the complainant did not complain about the FCO's use of section 40(2), and

¹ www.parliament.uk/briefing-papers/SN04463.pdf ; <http://www.fco.gov.uk/en/travel-and-living-abroad/travel-advice-by-country/country-profile/asia-oceania/british-indian-ocean-territory/?profile=all>

² <http://www.timesonline.co.uk/tol/news/environment/article7104266.ece>

therefore the use of this exemption has not been considered any further in this case.

11. During the investigation of this case the Commissioner informed the FCO that the withheld information may be environmental information – and therefore subject to the EIR. If this was the case, the Commissioner invited the FCO to make alternative submissions as to why this information was exempt under the EIR. In a letter dated 16 September 2011 the FCO confirmed that if the withheld information was considered environmental, it believed that the following exceptions applied – the internal communications exception; the exception for information the disclosure of which would adversely affect international relations, defence, national security or public safety (EIR regulation 12(5)(a)); and the exception for information the disclosure of which would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature (EIR regulation 12(5)(b)). The FCO also referred to the exception for material which is still in the course of completion (EIR regulation 12(4)(d)); and the exception for third party personal data (EIR regulation 13).
12. Therefore the scope of this case has been to consider:
 - whether any further relevant information is held;
 - whether any of the requested information is environmental for the purposes of the EIR;
 - the FCO's use of the following exceptions to withhold the relevant information that is environmental – regulation 12(4)(e), regulation 12(5)(a), and regulation 12(5)(b);
 - the FCO's use of section 35 and section 42 for any relevant information that is not environmental; and
 - whether the FCO was correct to refuse to provide a list of the documents that it held that fell within the scope of the request.

Reasons for decision

Is further relevant information held?

13. The complainant has argued that further information is held by the FCO, and has also queried the adequacy of the searches it carried out when handling this request. In particular, he has argued that the information that has been disclosed to him does not contain information that falls

within part (b) of the request. He has also stated that he believes that the FCO does hold a copy of the initial draft of the Phase 2B Feasibility Study.

14. The standard of proof to apply in determining whether a public authority holds requested information is the civil standard of the balance of probabilities.³ In deciding where the balance lies, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority as well as considering, where appropriate, any other reasons offered by the public authority to explain why the information is not held. The Commissioner will also consider any evidence that further information is held, including whether it is inherently unlikely that the information so far located represents the total information held.
15. The Commissioner has first considered the quality of the searches carried out by the FCO. During the investigation he asked the FCO to detail the searches that it had carried out in order to establish what information it held that fell under the scope of the request. His questions, and the FCO's responses are detailed below:
 - What searches were carried out for information falling within the scope of this request and why would these searches have been likely to retrieve any relevant information?

Response: *"...A search of paper and electronic records was carried out in spring 2010 for any documents relating to the British Indian Ocean Territory (BIOT) Feasibility Study. The period searched was from Jan 2000-Dec 2002.*

...In respect of the paper files, all BIOT files that were held in the Overseas Territory Department...as well as BIOT files which had been sent to FCO archives in Hanslope Park were searched...

...In respect of documents produced in 2002, paper files were much more extensive than electronic files. Copies of the final version of the study are kept on paper at the BIOT Administration Office. Most of the documents relevant to the FOI request were found in paper files. As such we believe that the draft report would be much more likely to be on the paper files rather than saved electronically on the FCO system. Had the draft report been in the paper files our view is that it would have been easy to spot

³ *Bromley et al v Information Commissioner & Environment Agency* [EA/2006/0072], para's 10 to 13.

because it was a very large document and its format would have been different from most documents produced in the FCO.

...A further search was conducted through the paper files in July 2011. "

The FCO also pointed out that the large majority of the information that it had identified as falling within the scope of the request had already been disclosed to the complainant.

- If searches included electronic data, please explain whether the search included information held locally on personal computers used by key officials (including laptop computers) and on networked resources and emails.

Response: *"...When carrying [out] the searches for electronically stored material relating to BIOT, the following areas were searched:*

- 'I-records', the FCO's Management Information System for documents of particular importance;*
- The S drive or 'Shared Area' which contains the bulk of the FCO electronic data. Teams working on certain issues are supposed to save their working documents to this area.*

...In addition, please note that both Restricted and Confidential systems were checked.

...The FCO IT system was not as developed as it is now, and most officials work was kept in paper files. There were no 'personal' or 'P' drives at the time. As such, no material dating to 2002 is likely to have been stored in personal drives."

- If searches included electronic data, which search terms were used?

Response: The following search terms were used – "BIOT" and "Feasibility" and "2002".

- If the information were held would it be held as manual or electronic records?

Response: Information or documents dating back to 2002 was predominantly kept on paper files. In respect of the documents that were retrieved electronically the FCO discovered that most of them were also kept on paper.

- Was any recorded information ever held relevant to the scope of the complainant's request but deleted/destroyed?

Response: *"We have no record or knowledge that any information relevant to the scope of the complainant's request either in paper or electronic form was deleted/destroyed."*

- If recorded information was held but is no longer held, when did the public authority cease to retain this information?

Response: *"We presume that the draft report has been destroyed, but we do not know when this would have happened. We suspect that it is likely that this would have been done soon after the study was finalised. It could also have been done when files were weeded before being sent for storage."*

- Does the FCO have a record of the document's destruction?

Response: No.

- What does the FCO's formal records management policy say about the retention and deletion of records of this type? If there is no relevant policy, can the FCO describe the way in which it has handled comparable records of a similar age?

Response: The FCO provided details of the current Information Management Guidance on the retention of documents, but then went on to state,

"...Documents produced by consultants and commissioned by the administration of an overseas territory would be handled differently from those generated within the FCO. In this case the Government of BIOT commissioned a feasibility report and when this was completed, it was circulated widely. Once this final report had been disseminated there was no reason to keep earlier iterations."

- If the information is electronic data which has been deleted, might copies have been made and held in other locations?

Response: *"...We think the information was probably a paper copy rather than held electronically – given the information technology used at the FCO at the time."*

...In the unlikely event that it was held electronically, as we have informed you we have searched the archives and the systems

where it would have been saved. We do not think that there could be any copies held elsewhere."

- Is there a business purpose for which the requested information should be held? If so what is this purpose?

Response: *"No. The stakeholders only needed to see the final version of the Report."*

- Are there any statutory requirements upon the public authority to retain the requested information?

Response: *"Section 3(4) of the Public Records Act 1958 imposes a statutory duty on the FCO to retain or store 'public records selected for permanent preservation'. This would not apply to the draft Report."*

16. The Commissioner has gone on to consider whether there is any evidence that further information is held.

17. The complainant has argued that it 'lacks credulity' that no further relevant information is held – especially the initial draft of the Phase 2B Feasibility Study. In particular he argued that,

a. *"In case it be suggested that these matters are some years old and destruction would be expected, it should be pointed out that between 2002 and 2004 ministers and officials were actively considering this study before deciding to abolish the right of abode in 2004. A legal challenge was immediately mounted, and after passing to the House of Lords is now before the European Court of Human Rights. It cannot therefore be said that the usefulness and relevance of these documents has ever been exhausted. We enclose a copy letter of 26 November 2008 from the FCO Information and Technology Directorate in which it is made plain that draft reports, where there have been disagreement, must be retained, and that 'FCO has a responsibility to record evidence of its activities, and show how decisions are made'."*

b. *"Although highly material to the conduct and drafting of the Phase 2B Study, it was only on 7 October 2010 that an email between FCO and the consultant Project Manager was volunteered in the course of unrelated litigation. The failure to produce this email under FOIA is remarkable both at the stage of the initial request and in the review. It proves the existence of relevant electronic communications over and above those*

disclosed. Further, the failure to uncover this document by the internal review suggests that the review by [named individual] was insufficiently thorough or independent of the original search."

18. During the investigation the Commissioner provided these arguments to the FCO. It responded to these points on 16 September 2011 as follows:

- a. *"The relevance of drafts was exhausted once the final version was produced. We believe that it is likely that they were destroyed in 2002, a significant amount of time before the letter from the FCO ITD [referred to by the complainant]."*
- b. *"It is unfortunate that a related email was discovered in the context of unrelated litigation, and we apologise for this error. However, we have endeavoured to complete the necessary searches for the Freedom of Information request with all due diligence."*

19. The complainant has also provided the Commissioner with correspondence from the FCO relating to other FOIA requests for copies of the draft Phase 2B Feasibility Study (as well as other related information) – or for information about what had happened to it. In both of the FCO's responses to these requests (dated 9 November 2006 and 22 December 2008) it had stated that this information was not held. In particular, he notes that on the second of these letters the FCO stated that,

"It is standard [FCO] records procedure not to keep drafts on file after six months. The hard and electronic drafts were unclassified and were not relevant to any litigation process, consequently there would have been no requirement to consult anyone regarding their destruction or to keep a record detailing this destruction.

As drafts are not registered, it is not possible to state with total accuracy on whose computers the drafts would have been held. But it is likely that, before their subsequent deletion, electronic copies of the drafts would have been kept on the computers of those officials working on this particular subject.

You have asked about the destruction of hard drives. When hard-drives are either faulty or decommissioned, I understand that they are incinerated."

20. The Commissioner notes, with concern, the seeming disparity between this letter – which infers that when the draft Phase 2B Feasibility Study was provided to the FCO, it was held electronically – and the FCO's

response to him, which stated that it was 'unlikely' that the information had been held electronically. However, despite this he notes that in both of the letters referred to in the previous paragraph, as well as in its letter to him, the FCO's position has always been that this information was not held at the time of the request.

21. When querying the adequacy of the searches the complainant has also questioned whether the FCO should have contacted the consultants who drafted the Phase 2B Feasibility Study, in order to establish whether they held any relevant information. The key issue here is whether any relevant information held by the consultants would be held on behalf of the FCO. During the course of this investigation the Commissioner put this point to the FCO, and asked for its comments. In response it stated that,

"The consultants were employed up to the point when the final draft of the [Phase 2B Feasibility Study] was complete, and would have no reason to continue to 'hold information on behalf of' the FCO."

Taking this response into account, the Commissioner is satisfied that the FCO was under no obligation to contact the consultants who drafted the Phase 2B Feasibility Study.

22. The Commissioner acknowledges the complainant's belief that further relevant information is held by the FCO, In particular, he has noted the complainant's detailed arguments, and the supporting evidence he has provided to substantiate them. He also notes the complainant's opinion that it 'lacks credulity' that no further relevant information is held. However, these concerns do not, in themselves, prove that further relevant information is held by the FCO.
23. Instead, in reaching a decision as to whether any further relevant information is held the Commissioner has taken into account the details of the searches carried out by the FCO, and its responses to the complainant's points about whether any further information is held. Whilst he notes the complainant's arguments, he does not consider that they prove, in themselves, that further relevant information is held by the FCO. Finally, he has also noted the length of time since the relevant period of time set out in the request.
24. Bearing in mind the arguments presented by the FCO, the details of the searches that it has carried out, and the length of time since the information subject to the request was created, the Commissioner is satisfied that it does not hold any further information that would fall under the scope of the request.

25. The Commissioner has gone on to consider whether any of the withheld information is environmental information for the purposes of the EIR.

Is any of the withheld information environmental?

26. Regulation 2 of the EIR defines environmental information as being any information on:
- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
 - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
 - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
 - (d) reports on the implementation of environmental legislation;
 - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c).
27. In this instance some of the withheld information (that withheld under the formulation of government policy exemption) directly relates to the Feasibility Study which is at the heart of this request. The focus of this study was to consider whether it would be feasible for people to be resettled on certain of the Chagos Islands and evaluated, amongst other things, the potential environmental impact of such a resettlement.
28. The Commissioner is satisfied that given the potential impact on the environment of the Chagos Islands, the consideration of the potential resettlement of these islands was a measure affecting or likely to affect

the state of the elements of the environment – as set out in EIR regulation 2(1)(a) – and the factors listed in EIR regulation 2(1)(b).

29. Having considered the withheld information referred to above, the Commissioner is satisfied that it is information on this measure. Therefore he considers that the information withheld under FOIA section 35 falls under the definition of environmental information as listed in EIR regulation 2(1)(c).
30. However, he does not consider that the information withheld under FOIA section 42 is environmental.
31. As noted at paragraph 11 above, in relation to any of the withheld information that was deemed to be environmental, the FCO has relied upon the regulation 12(4)(e), regulation 12(5)(a), and regulation 12(5)(b).
32. The Commissioner has gone on to consider whether the withheld environmental information is exempt under any of these exceptions. He has first considered whether it is exempt under regulation 12(4)(e).

The internal communications exception

33. Under regulation 12(4)(e) a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications. This exception is subject to a public interest test.
34. The Commissioner has first considered whether the withheld environmental information can be considered to be an internal communication.
35. The FCO has not provided any arguments as to why it believes that the withheld environmental information is an internal communication. However, after considering the information the Commissioner is satisfied that it constitutes an internal communication for the purposes of this exception. Therefore he is satisfied that this exception is engaged.
36. As noted above, this exception is subject to a public interest test. Therefore the withheld environmental information should only be withheld where the public interest in maintaining the exception outweighs the public interest in disclosure.
37. In respect of the public interest in disclosure, the complainant has argued that as the two feasibility studies have now been published, there is no cogent reason for withholding this information. Given the passing of time since these studies were published (in 2000 and 2002),

the public interest lies in favour of disclosure. Disclosure would not impede on the formulation of existing government policy, but would serve to question the disputed decision making process, shifting the balance towards greater openness and accountability.

38. The Commissioner takes the view that there is a strong inherent public interest in releasing environmental information. It has long been recognised that in order to protect the environment it is important for people to have access to environmental information, to be able to participate in environmental decision making and have access to justice. The EU Directive from which the EIR is derived states that,

*"Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment."*⁴

39. In addition to this, the Commissioner considers that there is a public interest in increasing the openness, transparency and accountability of a public authority.
40. In this case, the Commissioner is satisfied that the removal of the Chagossians from the Chagos Islands, and whether they should be allowed to return to some of these islands, has been (and continues to be) a matter of considerable public and political debate. The two feasibility studies have played a role in the shaping of government policy on this issue, and the contents of these studies (in particular their accuracy and independence) have also been a matter of considerable debate (see paragraph 6 above). The Commissioner considers that there is a strong public interest in helping to inform these debates, and is satisfied that the disclosure of the withheld environmental information would help contribute to this.
41. The FCO has provided very limited arguments as regards the public interest in maintaining the exception. It quoted the Commissioner's own guidance notes on the public interest inherent in this exception, and also referred him to the public interest arguments as originally set out (in relation to the formulation of government policy exemption) in its original refusal notice to the complainant.⁵ Having considered this, the

⁴ EU Directive 2003/4/EC – <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF>

⁵ <http://www.ico.gov.uk/foikb/FOIPolicyPublicinterestargumentsinherentin124e.htm>

Commissioner notes that the only arguments given in the refusal notice were that,

"...routine disclosure of officials' advice to Ministers may lead to a risk that decision making will become poorer and will be recorded inadequately."

Other than this, it did not provide any specific arguments in relation to this exception.

42. Although not specifically argued by the FCO, the Commissioner considers that its reference to 'poorer decision making' relates to a more specific 'safe space' argument in favour of withholding the environmental information in this case.
43. The Commissioner accepts that there is a need for a 'safe space' for public authorities to formulate policy, debate 'live' issues, and reach decisions without being hindered by external comment and/or media involvement. The Commissioner accepts that it is in the public interest to preserve this 'safe space' – especially when the issues that relate to the information are live at the time of the request. In this instance, although the withheld environmental information dates back several years, it directly relates to an issue which is still live – as the matter of the Chagossians' right of abode is still subject to ongoing legal proceedings. Bearing this in mind, the Commissioner considers that the need for safe space is a strong public interest factor in favour of maintaining the exception in this case.
44. In balancing the public interest arguments in this case, as noted above, the Commissioner accepts that given the considerable public and political debate in relation to the Chagossians, and the contents of the feasibility studies, there is a strong public interest in informing the debate in this area. He also considers that there is a strong public interest in increasing the transparency of any decisions made by the FCO in relation to whether the Chagossians should be allowed to return to any of these islands.
45. However, conversely he considers that there is also a strong public interest in avoiding potential prejudice to the FCO's decision making process whilst this is still a live issue. This is especially the case given the presence of a US military base on one of these islands, and the subsequent inevitable international and diplomatic dimension of this decision making process. The Commissioner does not believe that it is in the public interest to cause unnecessary prejudice to this process by disclosure of information under EIR whilst this is still a live issue.

46. The Commissioner notes that the issues surrounding the Chagos Islands were a matter of debate and dispute at the time of the request. Given that the FCO's decision making process represented in the withheld information related to an issue that was live at the time of the request (and indeed remains live), the Commissioner finds the public interest in protecting this 'safe space' particularly weighty.
47. The Commissioner does recognise the strength of the public interest arguments in favour of the disclosure of the withheld environmental information. However, having carefully considered the arguments for and against disclosure, and given that the withheld environmental information relates to an issue that was live at the time of the request, the Commissioner considers that the public interest in maintaining regulation 12(4)(e) outweighs the public interest in disclosure. Therefore this information should be withheld.
48. Although he has found that this information should be withheld, the Commissioner is deeply concerned that in order to make this finding he has had to rely solely upon his own judgement and knowledge of events. Despite the FCO being invited to provide submissions to support its use of the FOIA exemptions and the EIR exceptions – and being given a considerable amount of time to provide these arguments – he is particularly concerned by its failure to produce any coherent or cogent arguments to support its use of this exception.
49. Because he has found that the withheld environmental information is exempt from disclosure under regulation 12(4)(e), the Commissioner has not gone on to consider the FCO's use of the other EIR exceptions it has cited.
50. The Commissioner has gone on to consider whether the information that is not environmental information should be disclosed. This information has been withheld by the FCO under section 42.

The legal professional privilege exemption

51. This provides an exemption for information in respect of which a claim to legal professional privilege (LPP) could be maintained in legal proceedings. This exemption is subject to a public interest test.
52. There are two types of LPP; advice privilege and litigation privilege. The Commissioner has first considered whether the information is subject to advice privilege. For advice privilege to apply, the information must record communications that were confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice.

53. The Commissioner is not able to detail the contents of the non-environmental withheld information. However, having considered this information, he is satisfied that it directly records legal advice, and that LPP applies to it. Therefore, section 42 is engaged in relation to this information.
54. As noted above, this exemption is subject to a public interest test. Therefore the information in question should only be withheld where the public interest in maintaining the exemption outweighs the public interest in disclosure.
55. In respect of the public interest in disclosure, the complainant has argued that,

"We consider a much higher level of transparency surrounding the feasibility of the Chagosians' relocation to their homeland and the external advice received by the FCO on this issue to be firmly in the public interest. We also note that a considerable passage of time has passed since this advice was given. Guidelines issued by the Information Commissioner indicate that the older the information the less detrimental the impact will be from allowing it to be made available in the public domain and the greater the onus for disclosure."

56. In regard to the public interest in maintaining the exemption the FCO has argued that:
- It is in the public interest to safeguard openness in all communications between client and lawyer to ensure access to full and frank legal advice.
 - It is important that the Government is able to seek legal advice so it can make its decisions in the correct legal context. The Government must therefore feel confident it can disclose all relevant facts to its legal advisors without fearing that this information will be disclosed to the public.
 - It has also argued that there is an inbuilt public interest in the maintenance of LPP.
57. In considering the balance of the public interest in connection with this exemption, the Commissioner has taken into account the inbuilt public interest in the concept of legal professional privilege.⁶

⁶ *Bellamy v Information Commissioner & Secretary of State for Trade and Industry* [EA/2005/0023], para 35.

58. The Commissioner considers that there is a strong public interest factor in informing the debate on the removal of the Chagossians from the Chagos Islands, and the debate on the contents of the feasibility studies (as outlined in paragraph 40 above). However, having considered the withheld non-environmental information, the Commissioner does not consider that the contents of this information would add much to these debates. Consequently, whilst there is a strong public interest factor in helping to inform these debates, as he does not consider that this information would add much to that debate the Commissioner has not attributed a significant amount of weight to this public interest factor.
59. Bearing these points in mind, and having reviewed the withheld non-environmental information, the Commissioner considers that the public interest in maintaining this exemption outweighs the public interest in favour of disclosure. Therefore this information should be withheld.
60. The Commissioner has gone on to consider whether the FCO was obliged to provide the complainant with a list of the information that it held that fell under the scope of the request.

Should the FCO have provided a list of the relevant information that it held?

61. In his request for an internal review the complainant noted that,
- "...we wish to receive confirmation more specifically as to whether the FCO holds certain information and documents, which fall under the categories of disclosure which we requested, but which have not been revealed [by the FCO in response to the request]. These documents include, but are not limited to the following:*
- a. A draft copy of the Preliminary Study dated May 2000;*
 - b. A copy of meeting notes of the meeting between consultants and officials from around May 2000;*
 - c. The published preliminary report dated June 2000;*
 - d. A copy of the draft Phase 2B Study prepared by consultants between March and May 2002;*
 - e. A copy of the letter dated 23 May 2002 from [named FCO employee] to [named consultant] and its drafts;*
 - f. A copy of notes of the meeting between officials and consultants at which the letter of 23 May 2002 was discussed in reference to the draft of the Phase 2B Report;*

- g. Copies of the Draft Executive summary in whole or in part by the several contributors in reference to the discussion at the said meeting; and*
- h. Communications between FCO and [named individual] relating to the preparation, amendment and publication of the Phase 2B Feasibility Study.*

Further, we note that we have not been supplied with a comprehensive list of the documents that the FCO holds in relation to these categories of information, together with a list of whether these documents are considered to be exempt...If you do not consider that our original request covered a list of documents, then please treat this as a request for such a list."

- 62. In response, the FCO stated (in the internal review) that it did not hold such a list, and that it was not required to create new information because of a request under the FOIA.
- 63. During the investigation of the case the Commissioner noted the FCO's refusal to provide the complainant with a list of the documents that it held that fell under the scope of the request. He referred the FCO to guidance he has issued on how to handle requests for schedules or lists of documents.⁷ Bearing in mind the contents of this guidance, the Commissioner asked the FCO to reconsider its position in relation to the provision of this information. In particular, he asked it to confirm whether it was now prepared to disclose this information, and if not, to provide further submissions as to why it did not believe that it was required to do so.
- 64. However, in its response to the Commissioner the FCO did not confirm whether it was now prepared to disclose this information. Nor did it provide any arguments as to why it did not believe that it was required to do so.
- 65. As per his published guidance on this issue, the Commissioner considers that requests for a schedule or list of documents are particularly common in the context of requests for correspondence. Very often no discrete list or schedule will exist, and public authorities may argue that for that reason the list or schedule is not held, and that there is no requirement to create new information. However, this is not the correct approach. Requests are for 'recorded information' and not for documents. The fact that a schedule does not exist does not mean that

⁷ <http://www.ico.gov.uk/foikb/PolicyLines/FOIPolicyRequestsforschedulesofdocuments.htm>

the information that it might contain does not exist. If the information which would be contained in the schedule described by the applicant is also contained in other documents held by a public authority, the Commissioner considers that that information is held.⁸

66. In this instance the complainant has requested a list of documents that were held by the FCO in relation to the categories of information (a) to (h) – as set out at paragraph 61 above – together with a list of those documents that it considered to be exempt. Given the scope of the documents referred to here, and the wording of the complainant's request, the Commissioner has interpreted this as a request for a list (or schedule) of the information held by the FCO that falls under the scope of the request.
67. Bearing in mind his guidance on requests of this kind, the Commissioner does not agree with the FCO that responding to this request would involve the creation of new information. He also notes that the FCO has not provided any arguments as to why this information should be withheld. Therefore after taking these factors into account the Commissioner considers that this information should be disclosed.

⁸ <http://www.ico.gov.uk/foikb/PolicyLines/FOIPolicyRequestsforschedulesofdocuments.htm>

Right of appeal

68. 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: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

69. 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.

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

Signed

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