

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 15 October 2012

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

### Decision (including any steps ordered)

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1. The complainant asked the Foreign and Commonwealth Office for research papers related to Kosovo's unilateral declaration of independence in February 2008. The Foreign and Commonwealth Office provided some information but refused to provide the remainder on the basis of the following exemptions: prejudice to international relations (section 27), formulation and development of government policy (section 35) and unfair processing of personal data (section 40).
2. The Commissioner's decision is that the Foreign and Commonwealth Office is entitled to withhold the majority of the remainder on the basis of the exemptions it has cited. However, it should disclose a small amount of personal data that it previously withheld. In failing to provide this personal data, it contravened the requirements of section 1 and 10 of the Act.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - It must disclose the names listed in a Confidential Annex to this Notice by reinstating them into the documents it has already disclosed and then supplying those documents to the complainant. It is entitled to withhold the remainder of the information in those documents which has not already been disclosed.
4. The public authority 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.

## Background

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5. Kosovo declared independence from Serbia on 17 February 2008. The UK recognised this unilateral declaration of independence on 18 February 2008.<sup>1</sup>

## Request and response

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6. Prior to the request which will be the subject of this case, the complainant made requests for information related to research papers held about the consequences and outcome of Kosovo's declaration of independence from Serbia. These requests had a broad focus. There was an exchange of correspondence between the complainant and the Foreign and Commonwealth Office ("FCO") regarding details as to scope and timeframe.
7. Following this exchange of correspondence, on 28 September 2011, the complainant requested information of the following description:  
  
"In response to your request for clarification:  
1. I wish to see FCO Research Analysts, MOD and US State Department papers [on the consequences and outcome of Kosovo declaring independence from Serbia in February 2008] produced BEFORE Kosovo declared independence on 17 February 2008.  
2. The time period I wish to see information from is 2nd February 2007 to 17th February 2008. If this will exceed the appropriate limit please focus on papers from 1st December 2007 to 17th Feb 2008."
8. This request is the subject of this decision notice.
9. On 12 October 2011, FCO responded. It advised that it was intending to apply section 27 (international relations exemption) but that it needed more time to consider the balance of public interest. It gave a target date for response of 9 November 2011. When a response did not arrive by that date, the complainant contacted the FCO. The FCO said that it needed further time to consider the public interest test and gave a new target date for response was 7 December 2011.
10. It provided its response on 29 November 2011. It released some information. It had made some redactions and cited the following exemptions as its basis for doing so:

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<sup>1</sup> <http://uk.reuters.com/article/2008/02/18/uk-kosovo-serbia-britain-idUKL1824693920080218>

- section 27 (1)(a) (likely to prejudice relations between the UK and any other State); and
- section 27(1) (b) (likely to prejudice relations between the UK and an international organisation)

11. The complainant requested an internal review on 29 November 2011 and queried the extent of FCO's disclosure.
12. FCO sent the outcome of its internal review, to the complainant, on 9 March 2012. It revised its position. It explained that it had broadened the scope of its initial search and had found further information within the scope of the complainant's request. It made a further disclosure of information but said that the remainder was exempt under the following provisions of the Act:
- section 27 (1) (a) (likely to prejudice relations between the UK and any other State),
  - section 27 (1) (c) (likely to prejudice UK interests abroad),
  - section 27 (2) (confidential information obtained from another State),
  - section 35 (1) (a) (the formulation or development of government policy); and
  - section 40 (personal information)

### **Scope of the case**

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13. The complainant contacted the Commissioner to complain about the way his request for information had been handled. Initially this related to his concern about the public authority's delay in conducting an internal review. When this was eventually resolved, the complainant reiterated concerns he had about the FCO's reliance on exemptions.
14. In order to reach a decision on this case, the Commissioner has considered the arguments of both parties and has read the withheld information. He has also taken his own published guidance into consideration. During the course of the Commissioner's investigation, the FCO introduced reliance on section 27(1)(b) (Prejudice to relations with any international organisation or international court).

### **Reasons for decision**

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15. Sections 27(1)(a), (b) and (c) of FOIA state 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".*

16. The Commissioner considered the three exemptions within section 27(1) at the same time.
17. In order for a prejudice-based exemption, such as those set out in section 27(1), to be engaged the Commissioner believes that three criteria must be met.
18. 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.
19. 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.
20. Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, that is, 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.
21. 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'* (*Campaign Against the Arms Trade (CAAT) v the Information Commissioner and Ministry of Defence* (EA/2007/0040)).<sup>2</sup>

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<http://www.informationtribunal.gov.uk/DBFiles/Decision/i205/Campaign%20Against%20the%20Arms%20Trade;%20EA.2007.0040%20.pdf> (EA/2007/0040)  
Paragraph 81.

## **Section 27(1)(a), (b) and (c) – Engaging the exemptions**

22. With the above in mind, the Commissioner has considered both the withheld information and the FCO's detailed submissions in support of its reliance on section 27(1)(a), (b) and (c).

### **Does the alleged harm relate to the exemptions cited?**

23. The alleged harm claimed by the FCO clearly relates to the exemptions within sections 27(1)(a), (b) and (c). That is, FCO has asserted that there will be a likely detrimental impact upon bilateral relations between the UK and another State and upon relations between the UK and international organisations operating in the Kosovo region. It has also asserted that there will be a likely detrimental impact on the interests of the UK abroad. The first criterion for engaging these exemptions is therefore met. The Commissioner agrees that the prejudicial outcome envisaged by the FCO relates to those described in the exemptions in question.

### **Is there a causal relationship between disclosure and the harm described in the exemption?**

24. The FCO provided detailed arguments with specific reference to the withheld information. Unfortunately, the Commissioner is unable to set these out on the face of this notice without disclosing the withheld information itself. He has set out some of the specific detail in a confidential annex to this notice, disclosed to the FCO only.
25. In the Commissioner's view, the FCO has satisfactorily established a causal link between disclosure of the withheld information and the prejudicial outcome described in all three exemptions in section 27(1). He also agrees that the alleged likely prejudice is real and of substance. The Commissioner, therefore, agrees that the second criterion for engaging section 27(1)(a), section 27(1)(b) and section 27(1)(c) is met.

### **Likelihood of prejudice**

26. Considering the third criterion, that is, likelihood of prejudice, the Commissioner notes that the FCO has generally asserted the higher threshold of prejudice described in the exemptions. It has asserted that prejudice *would* arise. That said, it has also asserted at various stages of its correspondence that prejudice "could" arise which, in the Commissioner's view, is less unequivocal. The Commissioner has therefore considered the FCO's arguments against the lower threshold of likely prejudice.

27. In the Commissioner's view, information which relates to international relations has a particular sensitivity where it addresses current or very recent events as is the case here.
28. The Commissioner notes that, at the time of the request, Serbia was bidding to become a candidate for membership of the European Union.<sup>3</sup> Serbia did not recognise Kosovo's unilateral declaration of independence and there had been talks around this subject. Progress on this point formed part of discussions around Serbia's EU candidate status.
29. The Commissioner also notes that, at the time of the request, tensions had risen on the border between Kosovo and Serbia.<sup>4</sup> The Commissioner acknowledges that this made any comments on the question of Kosovo's status all the more sensitive at the time of the request even though the UK had already formally recognised Kosovo's unilateral declaration of independence.<sup>5</sup>
30. The Commissioner thinks that Kosovo's unilateral declaration of independence in 2008 is still a controversial topic internationally, particularly given that it has not been universally accepted. Kosovo's independence has been recognised by, for example, the UK, but not by a number of other countries. Inevitably, the information described in the request approaches this controversial subject. Disclosure of all the detail would, in the Commissioner's view, be likely to make a number of bilateral relationships more difficult. It would also be likely to necessitate particular damage limitation responses to contain or limit damage which would not have otherwise have been necessary.
31. With the above in mind, the Commissioner agrees that prejudice described in section 27(1)(a), section 27(1)(b) and section 27(1)(c) would be likely to arise if the FCO were to disclose the withheld information to which those exemptions have been applied.

### **Section 27(1)(a), (b) and (c) – Public interest test**

32. Section 27 is a qualified exemption. This means that, even where its provisions are engaged, the information can only be withheld when the public interest in maintaining the exemption(s) in question, outweighs the public interest in disclosure.

### **The complainant's arguments**

33. The complainant's arguments as to the balance of public interest emphasised his view that the FCO had given too much weight to the

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<sup>3</sup> <http://www.bbc.co.uk/news/world-europe-17225415>

<sup>4</sup> <http://www.bbc.co.uk/news/world-europe-14943576>

<sup>5</sup> [http://news.bbc.co.uk/1/hi/uk\\_politics/7252212.stm](http://news.bbc.co.uk/1/hi/uk_politics/7252212.stm)

public interest arguments for maintaining the exemptions it had cited.

### **The FCO's arguments**

34. In correspondence with the complainant, the FCO recognised that disclosure would increase public knowledge and inform debate.
35. However, it argued, the effective conduct of the UK's international relations depends on maintaining trust and confidence with other governments. It went on to say that, in the case of this request, to release certain pieces of information would undermine the trust and confidence the UK has built within the region and with other countries and peoples.
36. In correspondence with the Commissioner it accepted that disclosure would increase public knowledge about relations between the UK Government and Kosovo.
37. In correspondence with the Commissioner, the FCO also set out further arguments which expanded upon these points but which were made with specific reference to the information that has been withheld.

### **Balance of public interest test**

38. The Commissioner accepts that there is a public interest in developing the public's understanding about how the UK Government has analysed Kosovo in this context. The recent troubled history of the Balkan region remains the subject of considerable international attention. UK troops were deployed to this region in the 1990s and there are ongoing peace-keeping operations in the region where UK armed forces remain involved.<sup>6</sup> Clearly, this necessitates the expenditure of UK public funds and the commitment of UK armed forces at a time when the UK has high-profile financial and military commitments elsewhere in the world. Disclosure of the withheld information would add to the public's understanding of the UK's approach to this topic in this context.
39. However, the Commissioner thinks that the public interest in avoiding any of the three likely prejudicial outcomes described in sections 27(1)(a), (b) and (c) is far stronger. He therefore agrees that the FCO is entitled to maintain these exemptions in relation to the information to which they have been applied. As noted above, Kosovo's unilateral declaration of independence has provoked

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<http://www.mod.uk/DefenceInternet/DefenceNews/MilitaryOperations/UkCommitsMoreTroopsToBalkansPeacekeepingMission.htm>



international controversy. Progress towards peace and prosperity in the region depends in part on support from a number of countries and international agencies. The UK's part in that would be impeded if it was required to take steps to limit the damage to international relationships that would be likely to be arise as a result of disclosure. He would give particular weight to the timing of the request, the heightened tensions on the Serbia/Kosovo border that were reported at the time and the developing negotiations on Serbia's status as a candidate to join the EU.

40. The Commissioner also notes that the FCO has already disclosed relevant information that it holds within the scope of the complainant's request, albeit following an internal review of the balance of public interest.

### **Section 27(1)(a), (b) and (c) - Conclusion**

41. The Commissioner agrees that the FCO is entitled to rely on these exemptions where it has applied them. He has concluded that the public interest in maintaining these exemptions outweighs the public interest in disclosure.

### **Section 27(2) – Engaging the exemption**

42. 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."*

43. This exemption applies to information which matches the description set out in the previous paragraph. It is therefore a class-based exemption with no test of prejudice or harm; the information in question either matches this description or it does not.
44. The Commissioner has reviewed the information to which this exemption has been applied. He is satisfied that it is confidential information within the meaning of section 27(2). Unfortunately, he is unable to elaborate on this point without disclosing the detail of the withheld information, which would defeat the object of the exemption. However, and in conclusion, he is satisfied that section 27(2) is engaged in relation to this information.

### **Section 27(2) – Public interest test**

45. As above, the complainant made no specific arguments as to any of the exemptions within section 27 other than to assert that the FCO had considered the balance of public interest incorrectly.



46. The FCO explained its reliance on section 27(2). It stressed the importance of maintaining positive relationships with other governments and the negative consequences of undermining confidences.

### **Section 27(2) – Balance of public interest test**

47. Section 27(2) was considered in the aforementioned Tribunal case, *Campaign Against the Arms Trade (CAAT) v the Information Commissioner and Ministry of Defence* (EA/2007/0040). At paragraph 95, the Tribunal accepted that Parliament recognised that the Act, by virtue of the provisions in s27, assumes an "*inherent disservice to the public interest in flouting international confidence*". It ascribed particular weight to the importance maintaining confidences in the context of what it referred to as "*international comity*". The Shorter Oxford Dictionary definition of comity is: the mutual recognition by nations of the laws and customs of others.<sup>7</sup>
48. The Commissioner recognises there is some public interest in knowing what another State or another international organisation or international court has said to the UK on a controversial topic but, in the circumstances of this case, he considers this to be slight. He thinks that the public interest in protecting international confidences is more weighty in the circumstances of this case. He considers the timing of the request to be significant for reasons that are set out above in relation to section 27(1).

### **Section 27(2) - Conclusion**

49. The Commissioner agrees that the FCO is entitled to rely on this exemption where it has applied it. He has concluded that the public interest in maintaining this exemption outweighs the public interest in disclosure.

### **Section 35(1)(a)**

50. 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,"*

51. As with section 27(2), section 35(1)(a) is a class-based exemption. This exemption applies to information which matches the description set out in the previous paragraph. It does not include a test of

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<sup>7</sup> <http://oxforddictionaries.com/definition/english/comity?q=comity>

prejudice or harm; the information in question either matches this description or it does not.

52. The Commissioner thinks that the term 'relates to' can safely be given a broad interpretation. The exemption is qualified and a public authority would be obliged to disclose information where it was in the public interest to do so.
53. The Commissioner also takes the view that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a Minister or decision makers. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy. At the very least '*formulation or development*' suggests something dynamic, that is, something that is actually happening to policy. Once a decision has been taken on a policy line and it is not under review or analysis, then it is no longer in the formulation or development stage.
54. Although section 35(1)(a) can be applied to information relating to the formulation or development stage of a policy that has been decided and is currently being implemented, it cannot apply to information which purely relates to the implementation stage.
55. The Commissioner acknowledges that the FCO made a disclosure of some information it held within the scope of the request, albeit after internal review. Most of the information it withheld was withheld under the provisions of section 27. However, there is a small portion of the requested information which has been withheld solely on the basis of section 35(1)(a).
56. The Commissioner is satisfied that the information relates to the formulation and/or development of government policy on the question of Kosovo's status. This policy decision has now been taken. However, as was explained to the complainant in the FCO's letter to him of 9 March 2012, the information also includes reference to on-going policy development in relation to other countries.
57. The Commissioner agrees that a small portion of the withheld information matches the description set out in section 35(1)(a) and that it is, therefore, exempt information on that basis.

### **Section 35(1)(a) – Public interest test**

58. Section 35 is a qualified exemption. This means that, even where its provisions are engaged, the information can only be withheld when

the public interest in maintaining the exemptions in question, outweighs the public interest in disclosure.

59. As above, the complainant made no specific arguments as to section 35 other than to assert that the FCO had considered the balance of public interest incorrectly.
60. The public authority set out the following arguments in favour of disclosure in correspondence with the complainant:
  - Disclosure would inform public knowledge about how the UK developed its policy in relation to Kosovo.
  - Disclosure would show that the UK's actions were guided by balanced, considered and impartial advice.
61. It reiterated these arguments in correspondence to the Commissioner.
62. The public authority set out the following arguments in favour of maintaining the exemption (and therefore in withholding the requested information) in correspondence with the complainant.
  - There is a strong public interest in protecting the space that Ministers and officials have to consider and discuss options to ensure that policy is given full and proper consideration.
  - There is on-going policy development in relation to other countries referenced in the text of the withheld information.
63. The public authority reiterated and expanded upon these arguments in correspondence with the Commissioner. It gave particular emphasis to the public interest in maintaining a safe space for policy development.
64. It also argued that there would be a negative effect on the candour of officials giving advice in the future. The Commissioner would characterise this as a "chilling effect" argument.

### **Section 35(1)(a) – Balance of public interest**

65. There are, therefore, two main strands to the FCO's argument. The first is that, in FCO's view, there is a strong public interest in protecting a safe space for policy development. The second is that, in FCO's view, there is a strong public interest in avoiding the chilling effect that disclosure would have on advice giving in the future.

*Safe space*

66. The Commissioner considers that there is considerable merit in arguments about needing a safe space for policy development where the policy making process is live and the requested information relates to that policy making. He also considers that it is unlikely that in such cases the public interest will favour disclosure unless, for example, disclosure would expose any wrongdoing.
67. The Commissioner notes that the narrow question of developing the UK's position on Kosovo's unilateral declaration has been resolved – the UK has recognised Kosovo. However, there is on-going UK policy development in relation to other countries and this is referenced in the text. The Commissioner notes that, in this case, withheld information about the completed policy and about policies still in development are inextricably linked. Any attempt to separate them would, in the Commissioner's view, be likely to render the information meaningless.
68. In the Commissioner's opinion, there is very considerable public interest in ensuring that the FCO is able to discuss its policy options candidly away from public scrutiny.
69. The Commissioner believes that the public interest arguments favouring disclosure over the application of section 27 are relevant here. He has particular regard to the public interest in understanding more about the context of UK's on-going commitment to Kosovo.
70. On balance, the Commissioner thinks that the public interest in protecting a safe space for discussing the matters covered in the withheld information significantly outweighs the public interest in disclosure

*Chilling effect*

71. The Commissioner notes that 'chilling effect' arguments can include a number of scenarios:
  - disclosing information about a given policy, whilst that policy is still in the process of being formulated and developed, will affect the frankness and candour with which parties will make future contributions to that policy;
  - the idea that disclosing information about a given policy, whilst that policy is still in the process of being formulated and developed, will affect the frankness and candour with which relevant parties will contribute to other policy debates in the future; and

- finally, an even broader scenario where disclosing information relating to the formulation and development of a given policy (even after the process of formulating and developing that policy is complete), will affect the frankness and candour with which relevant parties will contribute to other policy debates in the future.
72. In considering the FCO's arguments, the Commissioner has taken into account the comments made in a number of decisions of the First-Tier Tribunal (Information Rights) and the High Court in which the chilling effect has been considered. Taking these cases into account and bearing in mind the underlying principles set out above, the Commissioner considers that the weight attached to chilling effect arguments has to be considered on the particular circumstances of each case and specifically with regard to the content of the withheld information itself.
73. The Commissioner accepts that the withheld information contains genuinely free and frank comments. Although the UK's approach to Kosovo's declaration of independence had been decided by the time of the request, the information in question also addresses policy matters that were still in the formulation and development stage when the request was made.
74. Although as a general rule the Commissioner is reluctant to attribute much, if any, weight to the broader types of chilling effect asserted by public authorities, he accepts that the first scenario, as described above, should be given some weight in the circumstances of this case. The Commissioner accepts that disclosure of the withheld information would make it more difficult for Ministers and officials to conduct a full and frank assessment and formulate government policy related to the other countries effectively.
75. The Commissioner has considered all the public interest arguments. He believes that the public interest in maintaining the exemption outweighs the public interest in disclosing it. This is for two main reasons: first, the considerable weight that should be attached to the safe space arguments; secondly, the weight (albeit less significant) that should be attached to the chilling effect arguments. In light of the above, the Commissioner has concluded that the public interest in maintaining the exemption at section 35(1)(a) outweighs the public interest in disclosing the information to which this exemption has been applied in isolation.

#### **Section 40 – Unfair disclosure of personal data**

76. The relevant provisions of section 40 are section 40(2) and section 40(3)(a)(i). These are somewhat complex provisions and can be

accessed in full via a website which is delivered by the National Archives.<sup>8</sup>

77. However, they can readily be summarised as follows: the relevant exemption in section 40 is engaged where disclosure under FOIA of requested information would breach any of the eight data protection principles of the Data Protection Act (DPA).<sup>9</sup>
78. The data protection principles of the DPA only apply to personal data. Personal data is information which relates to a living and identifiable individual and is biographically significant about them.
79. The FCO has argued that a very small portion of the withheld information is personal data and that disclosure of it would be unfair and thus breach the first data protection principle. The first data protection principle requires personal data to be processed fairly and lawfully and in accordance with at least one of the conditions for processing listed in Schedule 2 of the DPA.
80. This means, in summary, that if disclosure under FOIA would be unfair, unlawful *or* would not be in accordance with any relevant conditions, that disclosure would contravene the first data protection principle. The information in question would, therefore, be exempt under the personal data exemption.
81. In considering the fairness of disclosure the Commissioner has taken into account the following factors:
  - a. The expectations of the individuals
  - b. The possible consequences of disclosure
  - c. Whether the legitimate interests of the public are sufficient to justify any negative impact on the rights and freedoms of the data subjects
82. This analysis also takes into account the factors which underpin the most relevant condition in Schedule 2 of the DPA, namely condition 6.
83. When considering 'legitimate interests', in order to establish if there is such a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to take a proportionate approach. This means that it may still be possible to meet the legitimate interest by only disclosing

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<sup>8</sup> <http://www.legislation.gov.uk/ukpga/2000/36/contents>

<sup>9</sup> <http://www.legislation.gov.uk/ukpga/1998/29/contents>



some of the requested information rather than viewing the disclosure as an all or nothing matter.

84. The information at issue here is the names of officials who either sent or received emails, the substantive content of which falls within the scope of the request and which has been disclosed. The Commissioner is satisfied that sender/recipient information also falls within the scope of the request. This is because it provides important factual detail about who sent the substantive content to whom and when. The provenance of a particular email is crucial to the assessment of its significance as is the record of its recipient.
85. The FCO withdrew reliance on section 40 in relation to a small number of names which are listed in a Confidential Annex to this Notice. The FCO accepted that some of the named individuals were sufficiently senior for disclosure of their names to be warranted.
86. However, it argued that the names of certain individuals, characterised as "junior officials", were exempt under section 40(2) because disclosure would be unfair and wholly outside their reasonable expectations. It should withhold the information in order to protect the identities of FCO staff working in sensitive roles in the region.

### **Is the information personal data?**

87. The Commissioner is satisfied that information showing where a person works, how they can be contacted there and what projects they were involved with at work is information which relates to them and is biographically significant about them. The Commissioner is satisfied that, in the context of this case, the names of individuals who sent or received the emails in question relates to those individuals and is biographically significant about them. As such, it is personal data which is subject to the provisions of the DPA.

### **Would disclosure of the officials' names be unfair?**

88. The Commissioner's guidance on personal information states that it is important to draw a distinction between the information which senior staff should expect to have disclosed about them and what junior staff should expect to be disclosed. The rationale for this is that the more senior a person is the more likely it is that they will be responsible for making influential policy decisions.<sup>10</sup> In this case, the

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[http://www.ico.gov.uk/for\\_organisations/freedom\\_of\\_information/information\\_request/~media/documents/library/Data\\_Protection/Detailed\\_specialist\\_guides/PUBLIC\\_AUTHORITY\\_STAFF\\_INFO\\_V2.ashx&src=IE-Address](http://www.ico.gov.uk/for_organisations/freedom_of_information/information_request/~media/documents/library/Data_Protection/Detailed_specialist_guides/PUBLIC_AUTHORITY_STAFF_INFO_V2.ashx&src=IE-Address)



information shows that certain individuals were involved in the email exchanges in question.

89. The FCO's policy is that all officers below the grade of SMS ("Senior Management Service") constitute junior officials.
90. Regardless of the merits of this argument, the Commissioner has concluded that none of the individuals below the grade of SMS would expect the disclosure of their names in this context given that it would contravene the FCO's policy in this regard.
91. Having concluded that none of the individuals would expect the disclosure of their names in this context, the Commissioner has gone on to consider whether such an expectation is reasonable. Where it is not reasonable, disclosure may be fair.
92. The Commissioner notes the FCO's particular concern about a security risk to staff below the grade of SMS in the circumstances of this case, particularly where they do not expect disclosure of their names in this context as set out above. He is satisfied that the FCO's concern is reasonable. He is therefore satisfied that the individuals in question hold a reasonable expectation that their names would not be disclosed. It would follow standard FCO policy and it relates to matters of personal security.
93. The Commissioner agrees therefore that the disclosure of names of officials below the grade of SMS would be unfair. He has reached this view based on the particular circumstances of this case and the security implications for the individuals concerned where their names are disclosed. His view is confined to the context of this case and does not necessarily read across to any other FCO case where the disclosure of names of individuals below the grade of SMS is at issue.

#### **Section 40(2) – Junior officials: Conclusion**

94. He is therefore satisfied that, in the circumstances of this case, the disclosure of the names of officials below the grade of SMS would be unfair and in contravention of the first data protection principle of the DPA. These names are therefore exempt from disclosure under section 40(2) of FOIA.
95. Disclosure of the names of junior officials here would add very little to the information that has already been disclosed. Whilst it could be argued that there is a legitimate interest in promoting transparency and accountability. The Commissioner's view is that this can be served by the disclosure of the names of officials at SMS grade and above.

## **Section 40(2) – Officials at SMS grade and above**

96. At the Commissioner's request, the FCO revisited the names contained in the withheld information. It accepted that some that were redacted from disclosure were at SMS grade or higher. It also accepted that these names could have been disclosed. These names are listed in a Confidential Annex to this Notice.
97. In failing to provide this information the FCO contravened the requirements of section 1(1)(b) (Right of access) and section 10(1) (Time for compliance).
98. 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."*
99. The Commissioner has therefore decided that the FCO should now reinstate the names listed in the Confidential Annex to this Decision Notice. These names should be restored to the information that is not exempt from disclosure and sent to the complainant.

## Right of appeal

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100. 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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

101. 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.

102. 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**