

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

Decision notice

Date: 9 August 2012

Public Authority: Department for International Development
Address: 1 Palace Street
London
SW1E 5HE

Decision (including any steps ordered)

1. The complainant requested information in relation to a meeting between the British High Commissioner to India and senior officials of the Indian state of Orissa. The public authority withheld most of the information on the basis of sections 27(1) (a), (c), (d), 27(2) and 43(2) of FOIA. It withheld the remainder on the basis of the exceptions at regulations 12(4)(e), 12(5)(a) and 12(5)(f) of the EIR. The Commissioner found that the public authority was entitled to withhold all of the information within the scope of the request on the basis of sections 27(1) (a), (c), (d) and regulation 12(5)(a).
2. The Commissioner's decision is that:
 - The public authority was entitled to withhold the information in paragraphs 10, 11 and 12 of the withheld minute on the basis of the exceptions at regulations 12(5)(a) of the EIR.
 - The public authority was entitled to withhold the remainder of the information in the withheld minute on the basis of the exemptions at sections 27(1) (a), (c) and (d) of FOIA.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 2 December 2011 the complainant wrote to public authority and requested the following information:

'minutes and any other details held of the meeting between the Chief Minister of Orissa Naveen Patnaik, the Chief Secretary Bijay Kumar Patnaik, British High Commissioner Richard Stagg and senior members of the DFID in India on Wednesday 2nd November (as described here: <http://ibnlive.in.com/news/Britain-keen-to-invest-in-orissa/198860-60-117.html>).'

5. The public authority responded on 5 January 2012. It confirmed it held information within the scope of the request but explained that it considered the information exempt from disclosure on the basis of the exemptions at sections 27 (1) (a), (c), (d) and 43(2) of FOIA.
6. Following an internal review the public authority wrote to the complainant on 9 February 2012. It upheld the original decision and additionally relied on the exemption at section 27(2) to withhold the information within the scope of the request.

Scope of the case

7. On 24 February 2012 the complainant contacted the Commissioner to complain about the public authority's decision to withhold the information within the scope of his request. He explained that he was appealing the public authority's decision for the following reasons:
 - The international relations exemption concerns the interests of the UK as a whole, not particular UK government departments. Citing the interests of DFID along those of the UK is therefore without legal basis.
 - It was not clear from the response whether the information requested was subject to a formal confidentiality agreement, yet the DFID claimed that disclosure would damage the confidence and trust between the UK and the Orissa governments.
 - In addition, the internal review response states:

"the representatives of the UK and Orissa Government shared information on a confidential basis and would not expect their remarks to be made public. They shared their views frankly, believing that they were intended for private discussion."

However, the Government of Orissa knows there is a Freedom of Information Act in the UK and, given there is a similar Right to Information in India, know that the details of ministerial meetings can be made public. And the fact they appear to have briefed the local media on the content of these discussions suggests they did not see the discussion as worthy of the upmost secrecy.

- The commercial interests balancing test should have only considered any likely harm to the commercial interests of the public authority concerned, in this case DFID. If other parties' commercial interests were taken into account, such as those of the Orissa government, consultation would be needed with that third party before the exemption can be applied. There is no indication in either the initial response or the review that this was done.
 - There was a strong public interest in promoting transparency and accountability by public authorities for the decisions they take and how they spend public money, which the DFID does not seem to have taken into account when conducting the public interest tests. Media reports of the meeting mention mining was discussed. Given the urgent social issues around mining in Orissa presently, with villagers' refusal to leave their lands to mining companies, and the visibility and awareness of these issues in the UK, the public interest in this case seems especially strong. That some of these mining companies, such as Vedanta, are UK-based, only increases the need for transparency in the UK government's actions in Orissa.
 - Much of the DFID's work in Orissa has been concerned with increasing the transparency and accountability of the state government and the transparency of the DFID itself is seen to be in question it will no doubt weaken the legitimacy and efficacy of the department's work.
8. The scope of the investigation therefore was to determine whether the public authority was entitled to withhold all of the information it had denied the complainant (the withheld information) on the basis of exemptions under FOIA.

Reasons for decision

Applicable Access Regime

Environmental Information Regulations 2004

9. According to the public authority, the withheld information is a minute containing a record of issues of interests learned during a visit to the Indian State of Orissa by the UK High Commissioner to India. On reviewing the withheld information, the Commissioner informed the public authority that it considered the information contained in paragraphs 10, 11 and 12 fell within the scope of the Environmental Information Regulations 2004 (the EIR).
10. The public authority did not challenge the Commissioner's finding in relation to the applicable access regime for the information at paragraphs 10, 11 and 12 of the withheld information. It however

argued that the relevant information was in any event exempt from disclosure on the basis of the exceptions at regulations 12(4)(e), 12(5)(a) and 12(5)(f) of the EIR.

Sections 27(1) (a), (c) and (d)

11. The Commissioner first considered whether the public authority was entitled to withhold the information within the scope of FOIA (i.e. all of the information in the minute other than paragraphs 10, 11 and 12) on the basis of the exemptions at sections 27(1), (a), (c) and (d).
12. The public authority submitted that the arguments for each of the above exemptions were sufficiently interrelated that it was reasonable to consider the exemptions together rather than separately. The Commissioner agrees with the public authority's approach in the circumstances of this case.
13. Information is exempt from disclosure on the basis of sections 27(1) (a), (c) and (d) if it would, or would be likely to, prejudice-
 - relations between the UK and any other State,
 - the interests of the UK abroad, or
 - the promotion or protection by the UK of its interests abroad
14. The public authority argued that disclosing the requested information would be likely to prejudice the UK's relations with India because it is information that the Orissa government would regard as private conversations conducted on the basis of the long-standing international convention on the confidentiality of such exchanges between diplomats and officials of the hosting country. It explained that exchanges between British government representatives and representatives of overseas governments are frequently frank in order to ensure that messages of importance are delivered to high-ranking representatives of the UK and other governments of national and international importance. Against that background, the public authority was keen to stress that India is regarded as a foreign policy priority for the UK government with relations on broad ranging areas including development, regional stability, trade and investment, climate change, counter terrorism and reform of the global international systems.
15. The public authority further argued strongly that the very act of disclosing the information within the scope of FOIA would be viewed by officials in the state of Orissa and more widely by the Indian government as a breach of long-standing conventions whereby discussions between state and diplomatic officials are held to be private and details only released on a mutually agreed basis. This would therefore likely prejudice relations between UK and Indian officials

thereby reducing the UK's ability to carry out foreign policy objectives, including international development obligations and policies in India.

16. The Commissioner is generally sceptical of chilling effect arguments which envisage a wide impact from the disclosure of information on the future candour of public officials. Furthermore, the Commissioner is not persuaded that the requested information is entirely candid in nature. However, in the circumstances of this case, the Commissioner has given particular weight to the prejudicial effect disclosure could have in respect of the particular issue at play, i.e. the long standing convention whereby discussions between state and diplomatic officials are held to be private. The Commissioner agrees with the Information Tribunal¹ (the Tribunal) that prejudice can be real and of substance if it makes international relations more difficult or calls for particular diplomatic response to contain or limit damage which would not otherwise have been necessary. The Commissioner further agrees with the Tribunal that there would or could be prejudice to the interests of the UK abroad or the promotion of those interests if the consequence of disclosure was to expose those interests to the risk of an adverse reaction from another country or to make them vulnerable to such a reaction, notwithstanding that the precise reaction of the country in question would not be predictable either as a matter of probability or certainty.² The Commissioner does not believe that a 'formal confidentiality agreement' is necessary to show that the discussions were held in confidence. As mentioned, it is a long-standing convention that exchanges on diplomatic channels are regarded as private and confidential.
17. The Commissioner is therefore persuaded that the very act of disclosure and to some extent the nature of the information within the scope of FOIA would have been likely to make future discussions between the UK government and the state of Orissa (and consequently the Indian government), in relation to their shared interests less free and frank. He believes it was likely that disclosure would have at the very least required officials of the public authority and the FCO (i.e. UK government) to seek to reassure their counterparts in the state of Orissa (and consequently, the Indian government) of the confidentiality of similar discussions in the future. Therefore, the likelihood of prejudice to relations between the UK government and the Indian

¹ In *Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence (EA/2006/0040)* (CAAT) at paragraph 81.

² CAAT at paragraph 81.

government and to the UK's interests in the state of Orissa was, in the circumstances, real and significant.

18. He is satisfied that the interests at stake here are of the UK as whole and not of the public authority's alone or particular government departments. Discussions at that level would have been conducted on behalf of both governments.
19. The Commissioner acknowledges that officials in the state of Orissa would have been aware of the fact that there is a Freedom of Information Act in UK. However, in his view, they would equally expect that such high level discussions would be protected by the long-standing convention on the confidentiality of discussions on diplomatic channels. The complainant has not provided any evidence to persuade the Commissioner that the withheld information or a substantive part of it was in the public domain at the time of his request. The Commissioner therefore believes it would not have been unreasonable for the government of the state of Orissa to have that expectation. Disclosure could have resulted in a negative reaction and it is the possibility of such a reaction that consequently made the likelihood of prejudice to relations between the UK and India and to the UK's interests in the state of Orissa, real and significant.
20. The Commissioner finds that the public authority was entitled to rely on the exemptions at sections 27(1) (a), (c) and (d) to withhold the information within the scope of FOIA.

Public Interest Test

21. Sections 27(1) (a), (c) and (d) are qualified exemptions. The Commissioner must therefore also consider whether in all the circumstances of the case, the public interest in maintaining each of the exemptions outweighed the public interest in disclosure.
22. In favour of disclosure, the public authority acknowledged the general public interest in transparency. It specifically noted that there is a public interest in raising awareness and understanding of how the UK government interacts with other countries in delivering its policy objectives as well as promoting accountability and transparency.
23. The public authority also pointed out that there is a public interest in gaining knowledge to inform debate and stimulate discussion about international development.
24. In favour of maintaining the exemptions, the public authority argued that there is a strong public interest in ensuring that the UK government is able to promote international development and protect UK interests abroad. Maintaining good working relationships with other governments based on confidence and trust is therefore essential to

promoting the UK's interests. Disclosure was therefore not in the public interest in view of the likelihood of prejudice to maintaining good working relationships with officials in the state of Orissa and consequently, India.

25. It further argued that disclosure was not in the public interest because it would harm the ability of the UK government to work with, and influence the government of Orissa and indeed other governments and donors more generally in eradicating poverty. It could also undermine the ability of the UK to respond to international development needs.

Balance of the Public Interest

26. The Commissioner agrees with the complainant that there is generally a strong public interest in promoting transparency and accountability by public authorities. He agrees that the disputed information could inform the debate about the UK's contribution to international development. The Commissioner also considers there was a public interest in increasing knowledge of the precise nature of the commitments the UK government was/would be undertaking in the state of Orissa. There was also a public interest in informing the debate as to whether those commitments addressed any possible ethical and/or social concerns which might otherwise arise.
27. The Commissioner however believes there is a very strong public interest in protecting the good working relations between the UK government and the state of Orissa (consequently, India). As mentioned, the UK government considers India to be a foreign policy priority with relations on a broad range of areas including trade and investment, climate change and counter terrorism. It is therefore essential that UK officials maintain good working relationships with their counterparts in the state of Orissa and elsewhere with other Indian officials.
28. The Commissioner considers the argument in favour of the very strong public interest in maintaining good working relations between the governments of the UK and India is strengthened by the importance of the discussions to the UK's economy and development priorities in the state of Orissa. Conversely, the discussions were likely to be of no less importance to the economy of the state of Orissa in particular and to the Indian economy in general. It would not be in the public interest to create an environment which might not be conducive to similar discussions in the future. This would be detrimental to the economies of both countries.
29. The Commissioner finds that in all the circumstances of the case, the public interest in maintaining each of the exemptions at sections 27(1)

(a), (c) and (d) outweighed the public interest in disclosing the information within the scope of FOIA.

30. In light of the above, the Commissioner did not consider the applicability of the other exemptions at sections 27(2) and 43(2) of the Act. It is for the same reason that he did not consider the complainant's arguments against the application of section 43(2) (commercial interests).

Information exempt on the basis of exceptions under the EIR

31. As mentioned, the public authority considered the information within the scope of the EIR (i.e. paragraphs 10, 11 and 12 of the withheld information) exempt from disclosure on the basis of the exceptions at regulations 12(4)(e), 12(5)(a) and 12(5)(f).

Regulation 12(5)(a)

32. The Commissioner first considered the exception at regulation 12(5)(a) in light of the similarity of the public authority's arguments under this exception to the arguments it had previously made in relation to sections 27(1) (a), (c) and (d) of FOIA.
33. Regulation 12(5)(a) states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect international relations, defence, national security or public safety.
34. The public authority submitted that disclosing the information within the scope of the EIR would have an adverse effect on relations between the UK and India because it was provided during a wide-ranging and candid exchange between the most senior government officials in the state of Orissa and the most senior UK diplomat in India. It reiterated that exchanges on diplomatic channels are made on the basis of long-standing conventions on discretion and confidentiality. It concluded that the exception at regulation 12(5)(a) was engaged for the same reasons it had decided that the exemptions at sections 27(1) (a), (c) and (d) were engaged.
35. The Commissioner considers 'would adversely affect' or 'would prejudice' (in FOIA) sets a higher threshold for disclosure than would be expected for 'would be likely to prejudice'. He has already found that disclosing the information within the scope of FOIA would be likely to prejudice the exemptions at sections 27(1) (a), (c) and (d). Therefore, in relation to the exception at regulation 12(5)(a), the Commissioner only has to consider the information within the scope of the EIR (i.e. paragraphs 10, 11 and 12 of the withheld information).

36. The information broadly relates to the interests of various parties and includes a candid expression in relation to the discussions. The Commissioner finds it was more likely than not that officials in the State of Orissa would have reacted adversely to its disclosure. The Commissioner is also persuaded that the very act of disclosure in the circumstances would be regarded as a breach of diplomatic conventions. This would in turn require a response from UK officials to limit any damage to the working relationship between officials of both the UK and India. As mentioned, the Commissioner does not consider it necessary to predict what the precise reaction of the officials in state of Orissa (consequently, the Indian government) would be either as a matter of probability or certainty. It is sufficient that the effect of disclosure would be to expose the UK to the risk of such an adverse reaction.
37. The Commissioner therefore finds that the public authority was entitled to withhold the information within the scope of the EIR (paragraphs 10, 11 and 12) on the basis of the exception at regulation 12(5)(a).

Public Interest Test

38. The exception at regulation 12(5)(a) is subject to a public interest. The Commissioner must therefore consider whether in all the circumstances of the case, the public interest in maintaining the exception outweighed the public interest in disclosing the information within the scope of the EIR.
39. The public authority's arguments on the balance of the public interest were understandably similar to the public interest arguments it had previously made in relation to sections 27(1) (a), (c) and (d).
40. The Commissioner is satisfied those arguments as well as his findings under the public interest test for sections 27(1) (a), (c) and (d) apply with equal force to the information within the scope of the EIR.
41. The Commissioner therefore finds that in all the circumstances of the case, the public interest in maintaining the exception at regulation 12(5)(a) outweighed the public interest in disclosing the information within the scope of the EIR.

Right of appeal

42. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
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

43. If you wish to appeal against a Decision Notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
44. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Signed

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