

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 9 July 2013

**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 requested files that the Foreign and Commonwealth Office (FCO) were due to make available at The National Archives (TNA) shortly following the date of the request. The FCO refused the request and stated that there would be a delay in transferring the requested information to TNA, but that this information would be made available at TNA after this delay. It cited the exemption provided by section 22 (information intended for future publication) of the FOIA.
2. The Commissioner's decision is that the FCO cited the exemption provided by section 22 incorrectly in that the public interest in the maintenance of this exemption did not outweigh the public interest in disclosure.
3. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation.
  - Disclose the information withheld under section 22 of the FOIA.
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.

## Request and response

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5. On 27 December 2012, the complainant wrote to the FCO and requested information in the following terms:

*"I wish to access all records in the FCO 8 Class Lists which are due to be made available to the public at [The National Archives] from 31st Dec 12 onwards."*

6. The FCO responded on 22 January 2013. It stated that, due to a backlog of files dating from 1981 and 1982, transfer to TNA of the information requested by the complainant would be delayed until the "2013-2014 period". The request was refused, with the exemption provided by section 22 (information intended for future publication) of the FOIA cited.
7. The complainant responded on 22 January 2013 and requested an internal review. The FCO responded with the outcome of the internal review on 27 February 2013. The refusal of the request under section 22 of the FOIA was upheld.

## Scope of the case

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8. The complainant contacted the Commissioner on 6 March 2013 to complain about the refusal of his information request. The complainant argued that disclosure in line with the "30 year rule" should take precedence over the project for the disclosure of colonial files, which the FCO had cited as the reason why a backlog of 1981 and 1982 files had built up. The complainant also cited the planned disclosure of the remaining colonial files in alphabetical order, following the earlier disclosure of files in which there was particular interest, as evidence that disclosure of these remaining files was not a high priority and so a possible delay to that process as a result of prioritising the disclosure of the files in the backlog would not be a significant issue.

## Background

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9. As mentioned elsewhere in this notice, the FCO stated that a backlog of files dating from 1981 and 1982 due to be transferred to TNA has built up owing to resources being dedicated to a project for the transfer of colonial files to TNA. This project is described on GOV.UK<sup>1</sup> as follows:

*"The Foreign and Commonwealth Office is making available to the public a large collection of files from former British territories, sometimes known as the "migrated archives". The files will be made available at the National Archives between April 2012 and November 2013.*

*The files are being transferred in alphabetical order of the colonial territory concerned with the exception of prioritised release for Kenya, Cyprus, British India Ocean Territories (BIOT) and Malaya files where there has been particular interest."*

10. In the internal review response the complainant was also referred to the following background<sup>2</sup>:

*"The FCO is currently in the process of transferring around 18,000 colonial administration files to the TNA. Over the 2011-2012 period, we have had to redeploy many of the resources normally committed to the 30-year transfer of files onto the colonial administration files project. This has resulted in a backlog of 1981 and 1982 files awaiting review and preparation for transfer."*

11. The TNA website gives the following title for FCO 8 class lists:

*"Foreign Office and Foreign and Commonwealth Office: Arabian Department and Middle East Department: Registered Files"<sup>3</sup>*

12. In correspondence with the ICO the FCO stated that the FCO 8 files dating from 1981 had already been transferred to TNA. The analysis below concerns the files dating from 1982.

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<https://www.gov.uk/archive-records#colonial-administration-files>

<sup>2</sup> <https://www.gov.uk/transfer-of-1981-and-1982-fco-files-to-the-national-archives>

<sup>3</sup> <http://discovery.nationalarchives.gov.uk/SearchUI/Details?uri=C7247>

## Reasons for decision

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### Section 22

13. Section 22 provides an exemption from the duty to disclose in relation to information that is intended for future publication. This exemption includes the caveats that the requested information must have been held with a view to publication at the time that the request was made, and it must be reasonable in the circumstances to withhold the information from disclosure until the date of the intended publication.
14. Consideration of this exemption is a two-stage process. First, for the exemption to be engaged the public authority must be able to demonstrate a clear intention to publish the requested information and the caveats referred to above must be satisfied. Secondly, this exemption is qualified by the public interest, which means that if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information must be disclosed.
15. Covering first whether the exemption is engaged, the first issue to consider is whether there was a settled intention on the part of the FCO to disclose this information. The reasoning for the position of the FCO relates to the background given above; the information in question will be transferred to TNA, but this will be later than the originally intended date of 31 December 2012. Instead, the FCO estimates that this will take place in 2013 or 2014. On the basis of the background descriptions given to the complainant, the Commissioner accepts that this information is held by FCO with a view to its future publication.
16. As to whether this was the case at the time that the request was made, the project for transferring colonial files to TNA has a timetable of between April 2012 and November 2013. As this project had begun at least several months prior to the date of the complainant's request, the Commissioner considers it reasonable to find that the intention to disclose the files, requested by the complainant, later than was originally planned was also in place by the time of the complainant's request. In any event, even without this timetable for disclosure in place there would have been an intention to disclose this information via TNA shortly after the date of the request.
17. On the issue of whether it was reasonable in the circumstances to withhold the information until the intended date of publication, the approach of the Commissioner on this point is that withholding the information until the future publication must be sensible, in line with accepted practices and fair to all concerned. On the issue of whether it would be sensible to withhold the information, whilst the FCO has not

given a specific date for disclosure, it clearly has a plan in place for this. The issue of fairness is dealt with below as part of the public interest consideration.

18. The complainant may argue that it was not in line with accepted practice for this information to be withheld as that practice would have been for this information to have been made available at TNA once it was 30 years old. However, in the internal review response the FCO quoted the following from TNA policy<sup>4</sup>:

*"Public records selected for permanent preservation should be transferred to The National Archives or an approved place of deposit by the time the records become historical records, unless the Lord Chancellor authorises a department to keep them for longer."*

19. The FCO stated that in relation to the files requested by the complainant a revised timetable for disclosure had been agreed with the Lord Chancellor's Advisory Council on National Archives and Records. In coming to this agreement about the revised timetable, the view of the Commissioner is that the withholding of this information was in line with accepted practices.
20. For the reasons given above, the Commissioner finds that the exemption provided by section 22 is engaged. The next step is to consider the balance of the public interest.
21. The approach of the Commissioner when considering the public interest in relation to this exemption is that this is more likely to favour disclosure where the planned date of the publication is far in the future, or where there is no firm indication of a likely date of publication. In this case the view of the Commissioner is that, whilst an indication has been given of when the transfer of the files may take place – 2013 or 2014 – giving a two year window within which information may be published does not constitute a firm date of the likely publication.
22. As to how soon following the date of the request the publication may take place, this timetable means that transfer to TNA may not occur until two years after the date of the request. The refusal notice also stated that TNA require a further period of "up to 60 working days" following transfer to prepare files for release. This means that the information requested by the complainant in December 2012 may not be

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<sup>4</sup> <http://www.nationalarchives.gov.uk/documents/information-management/access-to-public-records.pdf>

available at TNA until early 2015. No doubt the complainant would consider this date far in the future from the date of his request.

23. As to the public interest in favour of maintenance of the exemption, the FCO has referred to the disruption that it believes that disclosure of this information would cause to its existing plans to transfer information to TNA. The FCO argued that the best way to ensure the earliest disclosure of as much information as possible would be to keep to its existing schedule, rather than disrupt this by prioritising the information requested by the complainant.
24. The view of the Commissioner is that there is a strong public interest in ensuring that information is made available at TNA as promptly as possible, but regards this as a general public interest that would be as well served by the disclosure of the information requested by the complainant as it would be by the disclosure of the colonial files. The complainant argued that the transfer to the TNA of the high priority colonial files had already taken place. This was the transfer of files relating to Kenya, Cyprus, British India Ocean Territories and Malaya that is referred to at paragraph 9 above. The complainant argued that in prioritising the transfer of these files the FCO had already satisfied the most pressing public interest. The remaining colonial files are to be disclosed in alphabetical order, which the complainant argued indicated that these files are not of any particular priority and so it would not be contrary to the public interest to prioritise over the remaining colonial files the release of the files specified in his request.
25. The Commissioner is sympathetic to the view of the complainant in that his view is that disclosure of the files specified in his request would serve the public interest at least equally as well as disclosure of the remaining colonial files. As to the disruption that the FCO argues would be caused through the disclosure of the information specified by the complainant, it appears probable that such a disclosure would involve only a slight diversion of resources from the colonial files project. A step to disclose in this notice would not require the FCO to prepare this information for transfer to the TNA along with any work that is part of that process. Instead, such a step would require the FCO to simply disclose the information. To the extent that disclosing the FCO 8 files would be a separate process from the colonial files project, it would not appear to involve any significant diversion of resources from that project.
26. The view of the Commissioner is that the public interest would be as well served through disclosure of the information specified by the complainant as it would by prioritising the disclosure of the colonial files, and that it is unlikely that disclosure of the requested information would cause significant disruption to the colonial files project. He has also

found that the FCO has not given a firm date for publication and that the timetable that it has given means that it is possible that disclosure via TNA would not take place until more than two years following the date of the request. For these reasons the conclusion of the Commissioner is that the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure. At paragraph 3 above the FCO is required to disclose this information.

## Right of appeal

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27. 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)

28. 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.
29. 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** .....

**Gerrard Tracey**  
**Principal Policy Adviser**  
**Information Commissioner's Office**  
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