

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 21 November 2013

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

#### Decision (including any steps ordered)

---

1. The complainant has requested emails between an FCO official and a named company. FCO provided some information but withheld other information relying on the section 27(1), 40(2), 41(1), 42(1), and 43(2) FOIA exemptions. A further small amount of information was disclosed during the Commissioner's investigation and FCO also withdrew from its reliance on section 43 FOIA.
2. The Commissioner's decision is that FCO has applied the section 27(1), 40(2), 41(1) FOIA exemptions correctly to the withheld information.
3. The Commissioner does not require FCO to take any further action to comply with the legislation.

#### Request and response

---

4. On 7 March 2013, the complainant wrote to FCO and requested information in the following terms:

*"Under FOI can I please be provided with all emails sent from and received by [the then UK High Commissioner to Uganda] concerning [a named company, company A] between 2011-2012, and 2012-present."*

5. The FCO responded on 17 April 2013. It disclosed some of the information requested but redacted other information relying on the exemptions in FOIA at section 27(1)(a) (international relations), section 40(2) (Personal information), section 41(1)(a) (Information

provided in confidence), section 42(1) (Legal professional privilege) and section 43 (Commercial interests).

6. On 3 May 2013 the complainant wrote to FCO qualifying his request and saying:

*"I would like the information provided under this FOI to be reviewed. In my submission redacting out who [named official 1] is specifically emailing is not in the spirit of the Act. [named official 2] also cites the fact that there is an on-going court case between [named company A] and [named company B] - this case did not involve a jury (therefore it could not have been influenced) and is in any case now finished.*

*It also strikes me as extremely odd that there is no material available after February 2012.*

*It is also well known that [official 1's] wife [named] was working for [company A] at the time and in the interests of openness I do not think it is acceptable to be redacting so much information about his correspondence."*

7. Following an internal review the FCO wrote to the complainant on 7 June 2013 and provided a slightly revised schedule of information, but continued to redact much of the requested information, relying on the same set of exemptions as before.

## **Scope of the case**

---

8. The complainant contacted the Commissioner on 10 June 2013 to complain about the way his request for information had been handled.
9. The Commissioner received representations from FCO and the complainant and has reviewed the withheld information. During the course of his investigation, on 29 August 2013, FCO amended its redactions, ceasing to rely on the section 43 FOIA exemption and making some further disclosures. FCO also provided to the Commissioner a schedule ("the FCO schedule") setting out the information now being withheld and the exemptions relied upon.
10. The Commissioner also examined a set of information disclosed by FCO in 2010 and a contemporary newspaper article to which the complainant had drawn his attention.

## Reasons for decision

---

11. The Commissioner considered the FCO's application of the relevant sections of FOIA to the withheld information as set out in the FCO schedule.

### Section 27 - International relations

12. Section 27(1) FOIA provides that:

*"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice –  
a) Relations between the United Kingdom and any other State".*

13. In order for a prejudice based exemption, such as section 27(1)(a), to be engaged the Commissioner considers that three criteria must be met.

- First, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption.
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance.
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e. disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Information Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority to discharge.

14. In this case, having viewed the withheld information, the Information Commissioner accepts that the prejudicial effect of disclosing the withheld information alleged by FCO - causing damage to the relationship between the UK and any other state – relates to the applicable interest in section 27(1)(a).

15. The Information Commissioner also accepts that there is a causal link between disclosure of the withheld information and FCO's evidence of the anticipated prejudice to relations with the relevant foreign state. He

is satisfied that the nature of the prejudice that could occur is real and of substance.

16. With respect to the likelihood of prejudice, the Commissioner notes that the FCO told him that:

*"The redactions ... consist of records of discussions in confidence between the [UK] High Commissioner to Kampala and senior figures in the Government of Uganda. ... Releasing information of these confidential discussions ... would be seen as a breach of trust [and] would damage the relationship."*

17. Having viewed the withheld information and having considered the arguments of both the complainant and FCO, the Information Commissioner finds the section 27(1)(a) FOIA exemption engaged. In reaching that conclusion, the Commissioner was mindful of the fact that prejudice to international relations 'would' occur.

*The public interest test*

18. Although the Commissioner is satisfied that the exemption is engaged, section 27 is a qualified exemption and therefore he must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

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

19. The complainant told the Commissioner that FCO had disclosed a set of papers in 2010 which had been used as the source for a contemporary newspaper article. He said that more information had been disclosed than FCO was now disclosing to him and that it was nonsense and offensive to say that the information he was seeking now was different in kind from the information disclosed in 2010. The Commissioner considered the 2010 disclosures and invited FCO to consider this issue, which it did. FCO said, and the Commissioner agreed, that its 2013 disclosures were consistent with those in 2010.

20. The FCO acknowledged that disclosure in this case would increase public knowledge about the relationship between HM Government and the government of Uganda.

*Public interest arguments in favour of maintaining the exemption*

21. In favour of maintaining the exemption, the FCO told the complainant that disclosing the information at issue would be seen by the government of Uganda as a breach of trust and that it was in the public interest for FCO to maintain the trust and confidence of other governments. FCO said that its ability to protect and promote UK

interests would be hampered by disclosure and that this would not be in the public interest.

22. The Commissioner accepted, that prejudice to international relations 'would' occur so that the section 27(1)(a) exemption was engaged at the higher level. This in itself is a factor favouring maintaining the exemption, in that avoiding the actuality, rather than just the likelihood, of such prejudice is very much in the public interest.

*Balance of public interest arguments*

23. The Commissioner considers that there is a clear public interest in transparency and accountability of public authorities. In that respect, the Commissioner notes that the FCO has been able to disclose to the complainant some of the information within the scope of the request. He considers that the public interest in disclosure has been met by the disclosures that FCO has already made.
24. The Commissioner did not agree with the complainant's argument that FCO's decision in the current matter was inconsistent with disclosures FCO had made in 2010.
25. Although he cannot provide an expert opinion on such matters, the Commissioner is satisfied that the arguments put forward by the FCO in relation to the continuing sensitivity of the withheld information carry considerable weight and has noted the FCO evidence that, if the disclosures were made, then the prejudice identified 'would' occur.
26. In the Commissioner's view it is strongly in the public interest that the UK maintains good international relations with other states. He considers that it would not be in the public interest if there were to be a negative impact on the effective conduct of international relations as a result of the release of the information still being withheld by FCO. The Commissioner is clear that such a prejudicial outcome is firmly against the public interest and he has therefore concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
27. FCO told the Information Commissioner that it considered the section 27(1)(d) FOIA exemption (prejudice to the promotion or protection of UK's interests abroad) to be also engaged in respect of some of the information being withheld under section 27(1)(a) FOIA. In the light of his conclusion in respect of the engagement of section 27(1)(a) and the associated public interest balancing test, the Commissioner did not go on to consider the FCO's application of section 27(1)(d) to the same information. He notes, however, that the two exemptions and the interests at stake are closely related.

## **Section 40 – Personal information**

28. The relevant provisions of section 40 are section 40(2) and section 40(3)(a)(i). 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 1998 (DPA). 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.
29. The FCO applied the section 40 exemption to withhold information comprising the names and contact details of individuals involved in the correspondence, working either for company A or for FCO, saying that disclosure would breach the first data protection principle.
30. 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. This means that if disclosure under FOIA would be unfair, unlawful or would not be in accordance with any relevant conditions, it would contravene the first data protection principle. The information in question would, therefore, be exempt.
31. In considering the fairness of disclosure the Commissioner has taken into account: the expectations of the individuals concerned (“the data subjects”); the possible consequences of disclosure; and whether the legitimate interests of the public are sufficient to justify any negative impact on the rights and freedoms of the data subjects. He also took account of condition 6 from Schedule 2 of the DPA.
32. When considering the ‘legitimate interests’ of the data subjects, the Commissioner considered if there were a compelling reason for disclosing the contact details of FCO officials, the names of junior FCO officials and the names of FCO’s correspondents in company A, but has seen none.
33. The Commissioner is satisfied that information showing where a person works, how they can be contacted there and the nature of their work is all information which relates to them and is biographically significant about them. It follows that the information being withheld by FCO relying on the section 40 FOIA exemption is personal data which is subject to the provisions of the DPA.
34. The Commissioner distinguishes 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. In this case, he decided that

disclosure of the names of junior FCO officials would be unfair and that disclosure would contravene the first data protection principle; these names are therefore exempt from disclosure under section 40(2) FOIA. Disclosing the names of the junior FCO officials and the work contact details of junior and senior FCO officials would add nothing of significance to the information that has already been disclosed and would not contribute to achieving the legitimate aim of promoting transparency and accountability.

35. FCO withheld the names of the officers of company A who had corresponded with it in these matters. The Commissioner has heard from FCO, and seen from the correspondence, that the officers had corresponded with FCO in good faith and in confidence about the progress of sensitive negotiations with the government of Uganda. Disclosing their names would breach that confidence. It would also risk causing them to experience adverse effects such as unwanted media attention.
36. The Commissioner therefore decided that FCO had acted appropriately in withholding the relevant information relying on the section 40(2) and 40(3) FOIA exemption.

#### **Section 41 – Information provided in confidence**

37. Section 41 (1) of the FOIA states that:

*“Information is exempt information if-*

*(a) It was obtained by the public authority from any other person (including another public authority), and*

*(b) The disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”*

38. As section 41 FOIA is an absolute exemption, it is not subject to a public interest test. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner will consider the following:

- whether the information has the necessary quality of confidence;
- whether the information was imparted in circumstances importing an obligation of confidence; and
- whether disclosure would be an unauthorised use of the information and to the detriment of the confider.



39. The Commissioner considers that information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial.
40. In this case, FCO applied the exemption to information it holds which was provided by company A. Therefore, the requirement of section 41(1)(a) FOIA, for the information to have been obtained from another person, is satisfied.
41. From his inspection of the withheld information, the Commissioner is satisfied that it relates to matters that are sensitive and of importance to company A and that it was shared with FCO in confidence. The Commissioner has seen no evidence that the withheld information is otherwise accessible.
42. The Commissioner has gone on to consider whether the information had been imparted in circumstances importing an obligation of confidence. He has received confidential representations from FCO confirming that there was an obligation of confidence on FCO arising from the circumstances in which the information had been shared. FCO said that confidence was implied by the means of communication – to the High Commissioner only within FCO – and the sensitivity of the discussions. In addition, FCO told the Commissioner that it had since been in touch with company A on the matter and that company A had confirmed its expectation and understanding that the email exchanges took place on an implied basis of confidentiality.
43. The Commissioner went on to consider whether disclosure of the information would be to the detriment of the confider. FCO said that unauthorised disclosure could cause detriment to company A by damaging its relationship with the government of Uganda, its relationship with other companies and its ability to defend its commercial interests in country. Disclosure would therefore be very likely to be actionable.
44. The Commissioner then considered whether there would be a public interest defence for a breach of confidence. Disclosure of confidential information will not constitute an actionable breach of confidence if there is a public interest in disclosing the information which outweighs the public interest in keeping the information confidential.
45. In weighing this against the public interest in keeping the information confidential, the Commissioner has been mindful of the wider public interest in preserving the principle that it is in the public interest that confidences should be respected. The encouragement of such respect may in itself constitute a sufficient ground for recognising and enforcing the obligation of confidence. The Commissioner is mindful of the need to protect the relationship of trust between confider and confidant; and the



need not to discourage or otherwise hamper a degree of public certainty that confidences will be respected by a public authority.

46. In this matter FCO said, and the Commissioner accepts, the damage that could be caused in disclosing the information, which would form an actionable breach of confidence, outweighed any public interest in disclosure. FCO added that the Ugandan Parliament had now passed the relevant legislation. In so doing, it had exposed the legislation to public scrutiny, thereby reducing any public interest there might otherwise have been in disclosure.
47. FCO added that judgment had been delivered too in a court action involving company A. In the view of FCO, the publication of the Ugandan legislation and the court judgment, taken together, provided a good account of the issues which satisfies the public interest.
48. Given all these circumstances, the Commissioner has concluded that the section 41 FOIA exemption had been correctly applied to the relevant information.

#### **Section 42 – Legal professional privilege**

49. From the outset, FCO withheld some information relying on the section 42 FOIA exemption, a position that was confirmed at internal review when the reviewer observed that the sections 41 and 43 FOIA exemptions also applied to that same information.
50. In evidence to the Commissioner FCO said that, even if the section 42 exemption did not apply, then the section 41 and section 43 FOIA exemptions would still apply to that same information. During the Commissioner's investigation, FCO withdrew reliance on the section 43 FOIA exemption. The Commissioner examined the relevant information in the light of this evidence and decided, for the reasons already given above, that the information was being correctly withheld under the section 41 FOIA exemption. Accordingly he did not proceed to consider application, to that same information, of the section 42 FOIA exemption.

## Right of appeal

---

51. 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)

52. 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.
53. 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 and Director of Freedom of Information**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**