

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 January 2014

Public Authority: The Foreign and Commonwealth Office

Address: King Charles Street
London
SW1A 2AH

Decision (including any steps ordered)

1. The complainant requested 18 named documents from the Foreign and Commonwealth Office (FCO) regarding the *Kiobel v Shell* case heard by the US Supreme Court. The FCO withheld some of the documents in their entirety and disclosed digests of the remaining documents, albeit with material it considered to be exempt from disclosure redacted. In total, the FCO cited eight separate exemptions, namely: sections 27(1)(a) and 27(2) (international relations); section 35(1)(a) (government policy); section 36(2) (effective conduct of public affairs); section 40(2) (personal data); section 41(1) (information provided in confidence); section 42(1) (legal professional privilege); and section 43(2) (commercial interests). The complainant disputes the application of all the exemptions with the exception of section 40(2). The complainant also argued that the FCO should have provided a more specific indication as how the exemptions had been applied to each particular redaction.
2. The Commissioner's decision is as follows:
 - The exemptions contained at sections 27(1)(a), 27(2) and 42(1) are engaged and the public interest for each exemption favours upholding the exemption in question.
 - The exemption at section 35(1)(a) is engaged but the public interest favours disclosing the information.
 - The exemptions contained at sections 36(2), 41(1) and 43(2) are not engaged.

- The FCO breached section 17(1)(b) by failing to specify which exemption had been applied to each particular redaction.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
- Provide the complainant with a digest of document 4 without the information previously withheld on the basis of section 41(1) redacted.
 - Provide the complainant with a digest of document 5 without the information previously withheld on the basis of sections 35(1)(a), 36(2) and 43(2) redacted.
 - Provide the complainant with a digest of documents 10 and 11 without the information identified in the confidential annex redacted. (This confidential annex has been provided to the FCO only).
 - Provide the complainant with a digest of document 16 with the only information redacted being that previously withheld on the basis of section 40(2).
 - Provide the complainant with a digest of document 17 without the information previously withheld on the basis of sections 35(1)(a), 41(1) and 43(2) redacted.
 - Provide the complainant with a copy of the information it disclosed to her on 19 July 2013 but this time annotating each redaction with the appropriate exemption.
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 FOIA and may be dealt with as a contempt of court.

Background

5. This complaint relates to a request which sought information on the UK government's decision to submit two "amicus" briefs in the case *Kiobel v Shell* ('*Kiobel*'). (An amicus brief is a document filed in a court by a party who is not directly related to the case under consideration). *Kiobel* was a case before the Supreme Court of the United States brought under the US Alien Torts Statute 1789 ('ATS'). The ATS allows foreign victims of human rights abuses to seek civil remedies in US courts.

6. The *Kiobel* case was brought against Shell by Nigerian citizens who alleged that the company had aided and abetted the Nigerian authorities in the torture and extrajudicial killing of unarmed protesters in the 1990s.
7. The UK government's first amicus brief was submitted to the US Supreme Court on 2 February 2012 and the second on 13 June 2012.
8. On 17 April 2013 the US Supreme Court issued its decision in which it concluded that the ATS could not be used to sue foreign entities for alleged violations of international law on foreign soil.

Request and response

9. On 16 July 2012 the complainant submitted a request to the FCO in which she asked for the documents listed on a spreadsheet entitled '[complainant's name redacted] Kiobel final list.xls' to be disclosed. The spreadsheet in question had been provided to the complainant in response to an earlier request she had made to the FCO.
10. The FCO responded on 13 August 2012 and provided the complainant with a number of documents listed on the spreadsheet. (She was also provided with the FCO's response to Liberty dated 22 June 2012, which although not falling within the scope of the request, was provided voluntarily). However, the FCO explained that the remaining documents listed on the spreadsheet had been withheld on the basis of the following sections of FOIA: 27(1)(a), 27(2), 35(1)(a), 40(2) and 42(1).
11. The complainant contacted the FCO on 4 October 2012 in order to ask for an internal review of its handling of this request. The complainant challenged the FCO's application of all of the exemptions, with the exception of section 42(1). The complainant also complained that it was not clear how the documents released on 13 August actually corresponded to the documents listed on the relevant spreadsheet.
12. The FCO informed the complainant of the outcome of the internal review on 29 November 2012. The FCO provided a revised version of the original spreadsheet which explained which exemptions had been applied to each of the documents listed. The FCO also explained how the released documents related to the documents on the revised spreadsheet. The internal review response went on to explain that the FCO had concluded that the exemptions cited in the refusal notice had been correctly applied. Furthermore, the FCO explained that it considered some of the withheld information to be exempt from disclosure on the basis of additional exemptions, namely sections 27(1)(d) and 27(3), albeit that the latter is not in fact a separate

exemption but rather simply explains how information can be exempt by virtue of section 27(2). (During the course of the Commissioner's investigation the FCO withdrew its reliance on section 27(1)(d)).

13. On 19 July 2013, during the course of the Commissioner's investigation, the FCO provided the complainant with a number of the documents falling within the scope her request, albeit that it redacted various parts of these documents under the exemptions previously cited. Furthermore, it explained that it also considered the following exemptions to apply to some of the redacted information: sections 36(2), 41(1) and 43(2).

Scope of the case

14. The complainant contacted the Commissioner on 22 February 2013 to complain about the way her request for information had been handled. She disputed the FCO's application of all of the exemptions it had relied upon as a basis to withhold various parts of the requested documents, with the exception of section 40(2). She was also dissatisfied with the FCO's failure to specify which exemption had been applied to each redaction.
15. As noted above the FCO disclosed some further information to the complainant in July 2013. However, the complainant continues to dispute the FCO's decision to withhold the remaining parts of the withheld information. The Commissioner has therefore considered whether this remaining information is exempt from disclosure on the basis of the exemptions cited by the FCO.
16. In support of her complaint, the complainant provided detailed submissions to the Commissioner on 15 April and 23 August 2013 to support her view that the various exemptions were either not engaged, or if they were engaged, then the public interest favoured disclosure of the withheld information. The Commissioner has referred to these submissions where appropriate in his analysis below. The fact that the complainant's submissions have not been reproduced in full in this notice is not an indication, and nor should it be as such, that the Commissioner did not carefully consider the submissions in their entirety. Rather given the detailed nature of the submissions it is neither necessary nor appropriate to reproduce them in full in this notice.
17. The Commissioner notes that in her second set of submissions the complainant argued that the FCO's reliance on the exemptions was weakened since the judgement in the Kiobel case was given on 17 April 2013. However, the Commissioner's role is limited to considering the application of the exemptions as they applied at the time the request

was submitted, i.e. on 16 July 2012. Therefore the parts of the submissions which focus on the changed circumstances cannot be taken into account.

18. In order to clarify the FCO's position with regard to the remaining withheld information the Commissioner has compiled a schedule of this information and identified which exemptions the FCO has applied to each document. The Commissioner's findings in respect of each document are also included in this schedule. This schedule appears at the end of this notice.

Reasons for decision

Scope of information falling within the scope of the request

19. In its submissions to the Commissioner, the FCO identified parts of documents 10, 11, 13 and 15 as out of scope of the request. In doing so it noted that technically the complainant had sought specific documents, however it was clear that the complainant's interest was on the *Kiobel* case. Much of these four documents concerned unrelated issues and thus the FCO argued that there were grounds for concluding that such information was out of scope. In the alternative, the FCO argued that such information was exempt from disclosure on the basis section 27(2).
20. The complainant disputes the FCO's approach to these documents. She noted that she had requested 18 specific documents and therefore she considered all information contained within those documents to be within the scope of her request. The Commissioner agrees the complainant's position and is of the view that all of the information contained with all of the 18 requested documents falls within the scope of the request.

Section 35(1)(a) – formulation and development of government policy

21. The FCO has withheld documents 16 to 18 in their entirety and parts of document 5 on the basis of section 35(1)(a).
22. Section 35(1)(a) of FOIA states 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'*

23. Section 35 is a class based exemption, therefore if information falls within the description of a particular sub-section of 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes.
24. The Commissioner 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.
25. At the very least 'formulation or development' suggests something dynamic, i.e. 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. 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.
26. Furthermore, the Commissioner does not accept that there is inevitably a continuous process or 'seamless web' of policy review and development. In most cases, the formulation or development of policy is likely to happen as a series of discrete stages, each with a beginning and end, with periods of implementation in between. This was confirmed by the Information Tribunal in *DfES v Information Commissioner & the Evening Standard (EA/2006/0006, 19 February 2007)* at paragraph 75(v), and *DWP v Information Commissioner (EA/2006/0040, 5 March 2007)* at paragraph 56.
27. In describing these general principles the Commissioner fully recognises that policymaking can take place in a variety of ways: there is no uniform process. Whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case by case basis, focussing on the precise context and timing of the information in question.
28. Nevertheless, the Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:
 - the final decision will be made either by the Cabinet or the relevant minister;

- the government intends to achieve a particular outcome or change in the real world; and
- the consequences of the decision will be wide-ranging.

The FCO's position

29. The FCO argued that the information withheld on the basis of section 35(1)(a) related to the government's policy with regard to the extraterritorial application of ATS and not just its position with regard to the *Kiobel* case. It explained that although the government's view was that the balance of the legal arguments meant that ATS should not be applied extraterritorially, this was a relatively complex and contentious point of law and its position regarding ATS, business and human rights is still evolving. With regard to the *Kiobel* case, it noted that the information requested related to proceedings that at the time of the request were still before the US Supreme Court and in which final proceedings had not yet taken place or a judgement been issued.

The complainant's position

30. The complainant argued that section 35(1)(a) was not engaged because the information did not relate to the formulation or development of government policy.
31. Firstly, the complainant argued that the government's opposition to ATS dated back at least nine years to when it filed a previous amicus brief to the US Supreme Court on this issue. She suggested that the UK had developed and explored its ATS policy since 2004, which appears to have remained consistently in opposition to ATS throughout changes in government. Consequently, the complainant argued that the requested information relates to the implementation of a long established government policy regarding ATS, not the formulation or development of policy on that issue.
32. Secondly, the complainant argued that the government's policy on generic issues such as 'business and human rights' are likely to be developed for many years to come and touch on a vast range of issues and cases. She suggested that the FCO was arguing for a policy making process with no clear end in sight and both the Commissioner and Information Tribunal had rejected this sort of 'seamless web' argument.
33. Thirdly, with regard to the FCO's suggestion that the information related to the formulation and development of its position in the *Kiobel* case the complainant emphasised that the focus of her request, and the one that preceded it, was to specifically seek information concerning the

government's intervention in the *Kiobel* case (ie the submissions of the amicus briefs). The complainant emphasised that for the purposes of section 35(1)(a) the intervention in *Kiobel* was distinct from any wider ongoing concerns. The complainant argued that the government's formulation and/or development of policy in terms of intervention was a finished product as represented in the filing of the second amicus brief on 13 June 2012. She argued that it was highly unlikely that there would be further opportunities for the government to intervene in the case after then.

The Commissioner's position

34. The Commissioner does not accept that the information withheld on the basis of section 35(1)(a) relates to the formulation and/or development of the government's policy on ATS. This is because the Commissioner understands that the government's position that a) corporations cannot be liable for alleged human rights violations under customary international law, as there is no such established rule of international law and b) that the US courts should not assert jurisdiction in respect of claims brought by foreign plaintiffs against a foreign defendant wholly committed on foreign territory with little nexus with the US are both long standing positions. Therefore, the Commissioner agrees with the complainant that the information withheld on the basis of section 35(1)(a) relates to the implementation of a long established government policy regarding ATS, rather than the formulation and development of a policy in relation to ATS.
35. Similarly, the Commissioner does not accept that the withheld information can be said to relate to the government's position on human and business rights, even in the specific context of ATS, given that, as the complainant suggests, policy formulation and development in the area of human and business rights is one that will continue to evolve for many years. In the Commissioner's view, the complainant is justified in suggesting that the FCO's argument that the withheld information relates to the formulation and development of policy on human and business rights is akin to arguing for a seamless web of policy making within this area. For the reasons explained above, the Commissioner does not accept that section 35(1)(a) can be applied so broadly.
36. This leads to the question as to whether the withheld information relates to the formulation and development of government policy in respect of the narrower issue, its intervention in the *Kiobel* case itself. Having considered the content of the information withheld on the basis of section 35(1)(a), the Commissioner is satisfied that the withheld information does relate to the formulation and development of the government's policy decision regarding the intervention in the *Kiobel* case, ie whether amicus briefs should be filed with the US Supreme

Court. The Commissioner has reached this conclusion given that the government's decision to intervene in *Kiobel*, and indeed the nature of that intervention, followed a decision making process that meets all three of the key criteria listed above at paragraph 28. As to whether this formulation and development was complete by the time the complainant submitted her request of 16 July 2012 request does not determine whether section 35(1)(a) is engaged. Rather that is a question for the balance of the public interest test.

Public interest test

37. Section 35 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption contained at section 35(1)(a) outweighs the public interest in disclosing the information.

Public interest arguments in favour of maintaining the exemption

38. The FCO's arguments for maintaining the exemption are set out below. (These arguments should be seen in the context that the FCO considered the information withheld on the basis of section 35(1)(a) to relate to the formulation/development of government policy in a broad sense, i.e. to ATS, human and business rights, in addition to its policy concerning the *Kiobel* case. This first line of argument has been rejected by the Commissioner for the reasons discussed above).
39. The FCO emphasised that the issues associated with ATS revolved around a complex and contentious point of law. Although the government had established its position on this point, it recognised that there were differing legal views on this matter and it is necessary for Ministers and officials to be able to fully consider both sides of the legal argument in order to reach an informed view as to where the balance lies. However, publically airing such counter arguments would weaken the government's argument and risk undermining its ability to actively promote its view.
40. The FCO emphasised that its inability to defend its position could lead to the extraterritorial application of the statute in question. This posed a significant risk to UK companies in terms of repeated claims being brought, potentially of a frivolous nature, with a view to seeking a settlement and/or damaging the reputation of UK businesses.
41. With regard to the specific concepts of safe space and chilling effect, the FCO argued that much of the policy advice is very closely related to the background legal advice. It therefore argued that the need for a safe space for the provision of frank and open legal/policy advice and the

need to avoid a chilling effect on the frankness of this advice were strong.

Public interest arguments in favour of disclosing the withheld information

42. In her submissions to the Commissioner the complainant identified four 'common' public interest arguments that she believed applied to all of the qualified exemptions, in addition to identifying further specific arguments for the public interest test under each of the qualified exemptions. The Commissioner has summarised these four common public interest arguments as follows:
43. Firstly, the circumstances of the *Kiobel* case and the nature of the information. The complainant argued that the case was exceptional for two main reasons: a) the severity of the allegations made against Shell; and b) the outcome of the *Kiobel* case would determine the future of ATS.
44. Secondly, the complainant argued that there were specific reasons in this case why disclosure was necessary to promote the accountability and transparency of public authorities. She argued that there were legitimate concerns around the proper functioning of government departments in the area of business and human rights. The FCO has a wide range of commitments on corporate responsibility and the UK's intervention in the *Kiobel* case appeared to run counter to the UK's stated commitments to human rights and responsible business practices.
45. In particular, the complainant noted that the government had welcomed and promoted the UN Guiding Principles on Business and Human Rights (the GPs) which reiterate the State duty to protect human rights including, the requirement for States to take steps to ensure that people affected by corporate human rights abuse have access to an effective remedy. The complainant noted that whilst the government described its position on the GPs as nuanced, there was evidence that there are legitimate questions about the performance and priorities of government departments addressing these issues. It was important to know how the UK's wider commitments to the GPs and other initiatives were considered in discussions about *Kiobel*.
46. Thirdly, promoting the understanding of government decisions that affect people's lives. The potential impact of the intervention was significant as it could lead to a decision which will prevent victims of international crimes accessing justice. The complainant noted that the UK's position was that responsibility for protecting rights and providing redress lies with the plaintiffs home state of Nigeria. The complainant

argued that whilst it was desirable for the plaintiffs to bring such cases in their home countries, in this case the government's position was unrealistic and should be measured against the realities of the Nigerian justice system. Furthermore it was unclear to what extent the government had considered the real challenges faced by the *Kiobel* plaintiffs, amongst others, whose home states do not provide effective redress at present. As the intervention may impact adversely on the individual rights of ATS claimants at present and in the future, and on an international scale, this weighed heavily in favour of disclosing the information.

47. Fourthly, furthering the understanding and participation in public debate. The complainant represents a network of interested parties with expertise and experience on UK corporate accountability in relation to international development, the environment and human rights. The network was keen to get a full picture of what went on in the intervention in order to better understand the reasons for it. The complainant argued that UK policy in this important case appeared to have been developed without any, or any adequate, consultation with key participants from civil society in order to balance the debate and enhance the rigour of the policy-making process.
48. The complainant also advanced three specific arguments relating the balance of the public interest under section 35(1)(a):
49. Firstly, in terms of the safe space argument, the complainant noted this argument only applied if the formulation and development of policy was ongoing at the time of the request and that therefore a safe space was in fact necessary. She argued that the government's formulation and development of its policy regarding the *Kiobel* case was complete by the date her request as the second amicus brief had been filed 33 days previously.
50. The complainant argued that it was also relevant to consider what is included or excluded from safe space. She noted that the Commissioner's guidance described safe space as protecting government policy from the influence of lobbyists. However, the complainant suggested that it would appear that the government engaged with at least one lobbyist whose vested interests were clear. The engagement of such a lobbyist appears to call into question a) the argument that UK policy was being developed neutrally or at all, and, b) the integrity of the safe space required if it was indeed being developed.
51. Secondly, the influence of lobbyists: the complainant noted that the Tribunal found that there was a strong public interest in disclosing information that revealed how lobbyists were trying to influence policy so that others could participate in the debate by presenting counter

balancing views. If the UK's policy development towards *Kiobel* was ongoing at the time of the request then disclosure would be required to promote meaningful debate.

52. Furthermore, the complainant argued that a list of *Kiobel* related documents released under FOIA by Department for Business, Innovation and Skills included documents entitled 'CALL ON THE SHELL LEGAL ADVISER' and which were dated 3 March 2012, ie between the filing of the first and second amicus briefs. The complainant suggested that this implied active engagement/communication with Shell.
53. The complainant argued that there was a strong public interest in understanding the interaction between Shell and the government in relation to *Kiobel*. This was because by engaging with Shell, the UK may have compromised its independence and/or neutrality in this case. The complainant argued that it was necessary to disclose the withheld information in order to confirm or dispel concerns over the role Shell or any other parties may have played in this decision.
54. Thirdly, the complainant argued that disclosure would make the policy making process in the *Kiobel* case or similar cases in the future more robust, fair and balanced. If government officials were more aware of the need to engage a broad range of stakeholders when taking controversial policy decisions, the quality of decision making would improve. This would reduce the risks that decisions were or could be unduly influenced.

Balance of the public interest arguments

55. In considering the balance of the public interest arguments outlined above, the Commissioner has taken into account the comments of a key Information Tribunal decision involving the application of the section 35(1)(a). In that case the Tribunal confirmed that there were two key principles that had to be taken into account when considering the balance of the public interest test: firstly the timing of the request and secondly the content of the requested information itself.¹
56. The Commissioner has initially considered the weight that should be attributed to the public interest arguments in favour of maintaining the exemption.

¹ *DFES v Information Commissioner and Evening Standard* (EA/2006/0006)

57. With regard to the safe space arguments, the Commissioner accepts that the government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. This will carry significant weight in some cases. The need for a safe space will be strongest when the issue is still live. Once the government has made a decision, a safe space for deliberation will no longer be required and this argument will carry little weight. Nevertheless, the Commissioner does accept that the government may also need a safe space for a short time after a decision is made in order to properly promote, explain and defend its key points. However, this safe space will only last for a short time, and once an initial announcement has been made there is also likely to be increasing public interest in scrutinising and debating the details of the decision. The timing of the request will therefore be an important factor in determining the weight that should be given to safe space arguments.
58. In the circumstances of this case the Commissioner is satisfied that by the time of the request the government's policy formulation and development regarding the *Kiobel* case was complete, and indeed had been implemented, with the submission of the second amicus brief some 33 days before the request was made. Therefore in the Commissioner's view there was no need for the government to have a space safe in which to discuss the formulation or development of its policy on the *Kiobel* case. Furthermore, although the Commissioner recognises that this was clearly a high profile issue which attracted significant interest, he is satisfied that by the time of the request the government's need to have a safe space in which to discuss how to explain and defend its decision had weakened considerably given that by that date the government, in the form of an FCO minister, had written to a number of interested parties (Liberty, CORE, Amnesty International and the All Party Parliamentary Group on International Corporate Responsibility: Business, Human Rights and the Environment) in order explain its decision to submit two amicus briefs. Consequently, in the circumstances of this case the Commissioner is of the opinion that the safe space arguments attract very little weight.
59. With regard to attributing weight to the chilling effect arguments, the Commissioner recognises that civil servants are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. Nonetheless, chilling effect arguments cannot be dismissed out of hand and are likely to carry some weight in most section 35 cases. If the policy in question is still live, the Commissioner accepts that arguments about a chilling effect on those ongoing policy discussions are likely to carry significant weight. Arguments about the effect on closely related live policies may also carry weight. However, once the policy in question is finalised, the arguments become more and more speculative as time passes. It will be

difficult to make convincing arguments about a generalised chilling effect on all future discussions.

60. As discussed above, the Commissioner is of the opinion that the policy making in question was not live at the time of the request and thus he does not accept that disclosure of the withheld information could have had a chilling effect on the government's ongoing policy discussions regarding the *Kiobel* case. Nevertheless, although rejecting the concept of a seamless web of policy making, the Commissioner does recognise that disclosure of information such as this certainly has the potential to have a chilling effect on future contributions to similar policy making discussions in the future which focus on similar issues, e.g. business and human rights. Having considered the content of the information that has been withheld on the basis of this exemption the Commissioner recognises that it consists of detailed considerations of the various policy options, including the assessment of the potential counter arguments, and thus given the nature of the content the Commissioner accepts that some notable weight should be given to the chilling effect arguments. Furthermore, although the policy making was complete by the time of the request, it had only been completed relatively recently. In the Commissioner's opinion this adds weight to the chilling effect arguments.
61. The Commissioner notes that the FCO has argued that there is a public interest in maintaining section 35(1)(a) because disclosure of the information withheld under this exemption risks undermining its ability to defend its extraterritorial application of the statute in question and this poses a significant risk to UK companies. The Commissioner does not believe that these interests are ones that are inherent to section 35(1)(a) and thus he has not accorded these arguments any weight.
62. The Commissioner does not intend to comment or attribute weight specifically to each of individual public interest arguments advanced by the complainant. However, taken together he fully accepts that they represent a forceful case for disclosure of the information withheld by the FCO. In particular, the Commissioner believes that the public interest in disclosing the information attracts notable weight given the potential of the *Kiobel* case in determining the future of ATS and the consequences that this could have for victims of human rights abuses (and indeed the potential liability of corporations under ATS). In light of the significance of the *Kiobel* case the Commissioner believes that arguments regarding transparency and accountability, and furthering the public debate, attract notable weight. With regard to the information that has been withheld on the basis of section 35(1)(a), the Commissioner believes that its disclosure, at the time of the request, would certainly have served these public interests to a very significant degree.

63. In conclusion, the Commissioner has decided that the balance of the public interest under section 35(1)(a) favours disclosure of the information withheld under this exemption. The Commissioner has reached this finding given the limited, albeit not insignificant, weight that he believes can be attributed to the public interest in maintaining the exemption given that the policy making is now complete and moreover, the comprehensive and persuasive case for disclosure that the complainant has advanced. The Commissioner would note that the face of such submissions, the FCO's arguments in favour of maintaining section 35(1)(a), appear generic and, as a consequence, relatively weak.

Section 42 – legal professional privilege

64. Section 42(1) of FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings.

65. There are two categories of legal professional privilege: advice privilege and litigation privilege.

66. In this case the FCO is relying on litigation privilege. This applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. There must be a real prospect or likelihood of litigation, rather than just a fear or possibility. For information to be covered by litigation privilege, it must have been created for the dominant (main) purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation. It can cover communications between lawyers and third parties so long as they are made for the purposes of the litigation.

67. In order for public authorities to determine whether LPP applies, they will need to be clear who the parties to the confidential communication are. Communications with third parties are not covered by advice privilege and are only covered by litigation privilege if they have been made for the purposes of the litigation; it is therefore important to determine who the lawyer's client is. This will depend on the facts of the case.

68. The FCO has withheld documents 12, 14 and 18 in their entirety on the basis of section 42(1). The Commissioner notes that the dominant purpose of these documents consists of the FCO's internal lawyers advising their non-legal colleagues on the UK's position regarding the submission of amicus briefs to the US Supreme Court. In her submissions, the complainant argued that it was not clear on what basis legal advice in the context of an amicus brief in which the UK is not a party to the litigation is in fact covered by LPP. However, in the

circumstances of this case the Commissioner accepts that whilst the UK was not a party to the litigation itself, it was, by the submissions of the amicus briefs, clearly an interested party to the proceedings. Moreover, although perhaps not overtly stated by the UK government, the purpose of the amicus briefs was essentially to influence or persuade the US Supreme Court as to the validity of the UK's position in respect of the issues it was considering as part of the litigation. In this context, the Commissioner is satisfied that the litigation privilege is applicable and clearly applies to documents 12, 14 and 18 given that their dominant purpose is, as the FCO argues, the provision of legal advice regarding the *Kiobel* case.

69. The Commissioner notes that the FCO has also withheld certain parts of other documents on the basis of section 42(1), namely, 4, 5 and 17. The information that has been redacted from these documents on the basis of section 42(1) includes legal advice provided in respect of the litigation or directly reflects the nature of that advice. Therefore, the Commissioner accepts that such information is also exempt from disclosure on the basis of section 42(1).

Public interest test

70. Section 42 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest in favour maintaining the exemption

71. The FCO argued that FOIA recognised that the validity of withholding information subject to legal professional privilege, which exists in order to encourage clients to be frank and open with their legal adviser, secure in their knowledge that those communications will not be disclosed without their consent. It is important the government is able to seek advice so that it can make decisions in the correct legal context. The legal adviser must be in possession of all material facts in order to provide sound advice. The government, must, therefore, feel free that it can disclose all relevant facts to its legal adviser. It must be able to do so without fearing that this information will be disclosed to the public. In turn, the legal adviser will consider the issues and arguments and weigh up their relative merit.

Public interest in favour of disclosing the information

72. The complainant noted that notwithstanding the 'in built' weight of legal professional privilege, the public interest in disclosure can outweigh the public interest in upholding the exemption if there is a clear, compelling

and specific justification that at least equals protecting the information in question.

73. In addition to the four 'common' public interest arguments set out above, the complainant advanced the following specific arguments in favour of disclosing the information withheld under section 42(1):
74. Firstly, the complainant emphasised the large amount of money involved; the financial stakes in *Kiobel* were very high given the significant level of financial settlements brought under previous ATS cases and the potential for the *Kiobel* case to determine the future of the ATS.
75. Secondly, wherever public funds have been spent on legal advice there is a public interest in transparency and accountability, in particular whether or not the legal advice was followed is a relevant consideration. The complainant noted that the *Kiobel* case had involved the use of considerable government time and resources.
76. In response to the inherent public interest arguments for upholding section 42(1), the complainant argued that when the authority is not a party to the litigation the force of legal professional privilege arguments are weakened. The complainant noted that the UK could not face any legal challenge in this case. It followed that disclosure of this particular information would not inhibit officials or Ministers from seeking legal advice more generally given that this case only concerned a very narrow pattern of amicus briefs in foreign legal proceedings where no legal challenges could apply. The complainant emphasised that the facts of each case must be considered on its merits and the intervention is distinct from what normally constitutes adversarial litigation for the purposes of legal professional privilege.
77. The complainant also argued that the legal advice had served its immediate purpose given that both amicus briefs had been submitted at the time of the request. Alternatively, should the information still be considered live given the UK's developing agenda on ATS and business and human rights, this factor cuts both ways and makes the public interest in disclosure more urgent and necessary in order to ensure a greater degree of transparency given the controversial nature of the UK's intervention in *Kiobel*.

Balance of the public interest

78. In considering the balance of the public interest under section 42, although the Commissioner accepts that there is a strong element of public interest inbuilt into legal professional privilege, he does not accept, as previously argued by some public authorities that the factors

in favour of disclosure need to be exceptional for the public interest to favour disclosure. The Information Tribunal in *Pugh v Information Commissioner* (EA/2007/0055) were clear:

'The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty than those in favour of maintaining the exemption'. (Para 41).

79. Consequently, although there will always be an initial weighting in terms of maintaining the exemption, the Commissioner recognises that there are circumstances where the public interest will favour disclosing the information. In order to determine whether this is the case, the Commissioner has considered the likelihood and severity of the harm that would be suffered if the advice were disclosed by reference to the following criteria:

- how recent the advice is; and
- whether it is still live.

80. In order to determine the weight that should be attributed to the factors in favour of disclosure the Commissioner will consider the following criteria:

- the number of people affected by the decision to which the advice relates;
- the amount of money involved; and
- the transparency of the public authority's actions.

81. With regard to the age of the advice the Commissioner accepts the argument advanced on a number of occasions by the Tribunal that as time passes the principle of legal professional privilege diminishes. This is based on the concept that if advice is recently obtained it is likely to be used in a variety of decision making processes and that these processes are likely to be harmed by disclosure. However, the older the advice the more likely it is to have served its purpose and the less likely it is to be used as part of any future decision making process.

82. In many cases the age of the advice is closely linked to whether the advice is still live. Advice is said to be live if it is still being implemented or relied upon and therefore may continue to give rise to legal challenges by those unhappy with the course of action adopted on that basis.

83. In the circumstances of this case, the Commissioner believes that the legal advice can certainly be described as recent given that it was only a

number of months before the request was submitted in July 2012 with the oldest piece of advice dating from December 2011. With regard to whether the advice could be considered as live, whilst the Commissioner accepts that it could be argued that at the time of the request the advice had served its immediate purpose given that the two amicus briefs had been submitted, in the Commissioner's opinion given that the advice relates not simply to the UK's position in *Kiobel*, but also ATS more broadly, the advice could still be correctly described as live at the time of the request. Furthermore, the Commissioner is not persuaded that simply because the advice focuses on one narrow issue, its disclosure would not inhibit officials or Ministers from seeking advice more generally. Whilst each case must be considered on its merits, the information withheld on the basis of section 42(1) although focusing on matters of ATS, is both detailed and candid and the Commissioner does not believe that it is realistic to assume that disclosure of such information would not in some way inhibit the provision of advice by FCO lawyers in the future, even on unrelated topics. In light of these findings the Commissioner considers that there is a significant and weighty public interest in upholding the exemption.

84. With regard to the public interest in disclosing the information withheld under section 42(1), as with his comments in relation to the public interest test under section 35(1)(a), the Commissioner recognises that they represent a strong case for disclosure of the withheld information. Furthermore, in terms of the specifics of this case the Commissioner accepts that given the wide-ranging implications of the *Kiobel* decision on the future of the ATS, further weight is attributable to the public interest in disclosure given the amount of money and number of individuals potentially involved in ATS cases in the future. The Commissioner also accepts that, given the UK's position in respect of the ATS focused, as the FCO noted, on a relatively complex and contentious point of law, disclosure of the UK's legal advice on this subject could prove particularly informative in terms of the legal basis for the UK's policy in terms of *Kiobel* and ATS.
85. In light of the weight that can be attributed to the public interest in disclosure of the withheld legal advice, the Commissioner believes that the balance of the public interest in this case is finely balanced. However, he is satisfied that the public interest favours maintaining the exemption given that the advice is both recent and live and is sufficiently detailed in nature that its disclosure would be likely to significantly inhibit the provision of future legal advice both in relation to ATS and on unrelated matters. Such a consequence is firmly not in the public interest.

Section 27 – international relations

86. The FCO has withheld documents 10, 11, 13 and 15 in their entirety and parts of documents 4, 5, 7 and 17 on the basis of section 27(2).

87. Section 27(2) states 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'

88. Section 27(3) clarifies that:

'For the purposes of this section, any information obtained from a State, organisation or court is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.'

89. The FCO explained that the information withheld on the basis of section 27(2) reported on discussions which took place between the UK and other States to determine their position on intervention in the *Kiobel* case. Such discussions took place in a presumed atmosphere of confidence and such confidence would be breached if the information was disclosed.

90. The complainant noted that the Information Tribunal has previously found that section 27(2) will not apply to information that has been jointly created within another state. She suggested that given that the UK submitted joint amicus briefs with the Dutch government and appears to have engaged the US in discussions during the development of the briefs, it is unclear to what extent the information withheld under section 27(2) had been jointly or separately created.

91. Having examined the information withheld under section 27(2), the Commissioner is of the view that some, albeit not all, of the information withheld in documents 10 and 11 cannot be said to have been received by the UK in confidence from a third party. Rather such information can be more accurately described as having been jointly created and thus cannot be exempt from disclosure on the basis of section 27(2). The Commissioner has identified this text in the confidential annex which accompanies this notice. For obvious reasons, this annex is only being sent to the FCO.

92. With regard to the remaining information that has been on the basis of section 27(2), the Commissioner is satisfied that this information was indeed provided to the UK by another State or international organisation. Furthermore, given the forums within which such

information was provided, the Commissioner is satisfied that this information was clearly provided with the expectation that it would be treated confidentially. Therefore the Commissioner is satisfied that this information is exempt from disclosure on the basis of section 27(2).

Public interest test

93. Section 27(2) is a qualified exemption and thus subject to the public interest test.

Public interest arguments in favour of maintaining the exemption

94. The FCO argued that if it disclosed details of conversations it had with other States then it would make these nations more reluctant to share sensitive information in the future. In this specific instance, for example, it may lead to them not wanting to discuss their intentions with regard to next steps in the *Kiobel* case or another ATS case. This would have a significant impact on the UK's ability to meet its own objectives in the interests of the UK.

Public interest arguments in favour of disclosing the information

95. The complainant referred the Commissioner to her four common public interest arguments.

Balance of the public interest

96. Again, for the reasons discussed under section 35(1)(a), the Commissioner believes that significant weight should be attributed to the public interest in disclosing the withheld information. In terms of the information that has been withheld under section 27(2), its disclosure would shed considerable light on the nature of the UK's discussions with other States in relation to the *Kiobel* case.
97. However, the Commissioner believes that considerable weight should be attributed to the public interest in favour of maintaining the exemption given the inherent disservice to the public interest in flouting international confidences which this exemption is designed to protect. In the particular circumstances of this case, the Commissioner considers that the public interest in maintaining the exemption attracts particular and notable weight given that the UK received information from a number of States and thus disclosure of withheld information would therefore undermine the UK's relations with a range of States in the international community. For this reason, in addition to the inherent important need to protect such confidences, the Commissioner has concluded that in the circumstances of this case the public interest favours maintaining the exemption.

98. The FCO also withheld further information on the basis of section 27(1)(a). This exemption states:

'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'

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

- 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;
- 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; and
- 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 Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather 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. The anticipated prejudice must be more likely than not.

100. 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'.²

² [Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence \(EA/2006/0040\)](#), paragraph 81.

101. The FCO's arguments to support the application of section 27(1)(a) effectively mirrored its submissions in relation to section 27(2), i.e. disclosure of information regarding its confidential discussions with other States regarding the *Kiobel* case and ATS would be likely to prejudice its relations with these States by making them less willing to share information in the future.
102. The complainant noted that the FCO had argued that disclosure would lead to other nations being reluctant to discuss their intentions with regard to the next steps in *Kiobel* or ATS. However, at the point at which the request was submitted, depending upon the outcome of *Kiobel*, there may be not be any further action in relation to other ATS cases. Furthermore, the complainant did not accept that *Kiobel* was a 'delicate' matter as the FCO has suggested; the UK and Netherlands filed public amicus briefs when they had the alternative of making more discrete representations to the US via diplomatic routes. *Kiobel* had been the subject of robust public, legal debate in which the UK had intervened. Although the issue is hotly contested, 'delicate' mis-described the situation, where dissent and legal argument is par for the course.
103. With regard to the first criterion of the three limb test described above, the Commissioner accepts that potential prejudice to the UK's relations with other States clearly relates to the interests which the exemption contained at section 27(1)(a) is designed to protect.
104. With regard to the second criterion, having considered the content of the withheld information the Commissioner is satisfied that disclosure of this information clearly has the potential to harm the UK's relationships with other States. This is because it reflects the nature of information provided to the UK by such States and the UK's views or intentions based upon the potential actions of these other States. The Commissioner is therefore satisfied that there is a causal link between the potential disclosure of the withheld information and the interests which section 27(1)(a) is designed to protect. Moreover, the Commissioner is satisfied that the resultant prejudice which the FCO believes would be likely to occur is one that can be correctly categorised, in light of the Tribunal's comments above, as real and of substance. In other words, subject to meeting the likelihood test at the third criterion, disclosure could result in making relations more difficult and/or demand a particular diplomatic response.
105. In relation to the third criterion, the Commissioner has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Tribunal decisions. He believes that for the lower level of likelihood, i.e. 'likely', to be met the chance of prejudice occurring should be more than a hypothetical possibility; there must have been a real and significant risk.

106. Having considered the content of the withheld information, the Commissioner is satisfied that disclosure of this information represents a real and substantial risk of prejudice occurring to the interest set out at sections 27(1)(a). As with the second criterion, the Commissioner believes that this is because of the content and nature of the information itself and also because, for the reasons discussed in relation to section 27(2), he accepts that disclosure of this information is likely to make the UK's relations with such States more difficult not just in relation to matters concerning *Kiobel* and ATS, but also potentially on other unrelated issues.
107. For these reasons the Commissioner is satisfied that the FCO has correctly relied on section 27(1)(a). As with section 27(2), this exemption is also qualified. However, given the clear overlap between the public interest arguments underpinning the two exemptions, the Commissioner has not carried out a separate public interest test in relation to section 27(1)(a). Rather, for the reasons discussed above in relation to the public interest under section 27(2), the Commissioner finds that the public interest favours maintaining section 27(1)(a).

Section 43 – commercial interests

108. The FCO withheld some information from documents 5 and 17 on the basis of section 43(2). This exemption states that:

'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).'

109. The information withheld under this exemption related exclusively to the pricing of legal services provided to the FCO by external counsel. The FCO argued that disclosure of the information that was withheld would be likely to prejudice its commercial interests by adversely affecting its bargaining position during contractual negotiations in the future. The FCO elaborated on this position in its submissions to the Commissioner but as such submissions reflect the content of the withheld information itself they have not been replicated here.
110. As this exemption, like that in section 27(1)(a) is prejudice based, the Commissioner has considered the three criteria set out above in paragraph 99.
111. With regard to the first criterion, the Commissioner accepts that prejudice to the commercial interests of the FCO in future negotiations in securing external legal services relates to the interests which section 43(2) is designed to protect.

112. In terms of the second criterion, the Commissioner accepts that in theory it is plausible for the FCO to argue that disclosure of information which reveals the basis upon which it has previously negotiated fees for external counsel risks prejudicing its position in future negotiations. Furthermore, given that the resultant prejudice risks undermining the FCO's ability to secure value for public money, the Commissioner accepts that this prejudice can be correctly described as real.
113. However, in terms of the third criterion, the Commissioner does not accept that the likelihood of this prejudice occurring is anything more than hypothetical and speculative. He has elaborated on his reasons for reaching this conclusion in the confidential annex.
114. The Commissioner therefore concluded that section 43(2) is not engaged.

Section 36 – effective conduct of public affairs

115. The FCO argued that the part of document 5 which contained draft press lines regarding the submission of the first amicus brief was exempt from disclosure on the basis of 'section 36(2)' of FOIA.
116. Section 36(2), which actually contains six quite different exemptions, states that:

'Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—

(a) would, or would be likely to, prejudice—

- (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or*
- (ii) the work of the Executive Committee of the Northern Ireland Assembly, or*
- (iii) the work of the Cabinet of the Welsh Assembly Government.*

(b) would, or would be likely to, inhibit—

- (i) the free and frank provision of advice, or*
- (ii) the free and frank exchange of views for the purposes of deliberation, or*

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.'

117. In this case, the then Parliamentary Under Secretary of State, Alistair Burt, provided the opinion in relation to the application of section 36(2). The Commissioner is satisfied that Alistair Burt is a qualified person as section 36(5) of FOIA provides that the qualified person for a government department is any Minister of the Crown. Mr Burt's opinion was sought on 6 June 2013 and this was given on 10 June 2013.
118. In determining whether this exemption is engaged the Commissioner must determine whether the qualified person's opinion was a reasonable one. In doing so the Commissioner has considered all relevant factors, including:
- Whether the prejudice relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection the opinion is unlikely to be reasonable.
 - The nature of the information and the timing of the request, for example, whether the request concerns an important ongoing issue on which there needs to be a free and frank exchange of views or provision of advice.
 - The qualified person's knowledge of, or involvement in, the issue.
119. Further, in determining whether the opinion is a reasonable one, the Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable for these purposes. This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only not reasonable for these purposes if it is an opinion that no reasonable person in the qualified person's position could hold. Similarly the qualified person's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.
120. The qualified person who gave their opinion did not specify which particular exemption(s) he believed the information should be withheld under. Nor did the submission which was provided to the qualified person. (In accordance with the practice within government departments, the qualified person was provided with a submission asking for an opinion confirming the use of a section 36 exemption to be agreed, and the qualified person's opinion simply confirmed that the submissions had been agreed to).
121. Neither the submission to the qualified person nor the opinion itself make it clear which specific exemption within section 36(2) the qualified person considered to apply. Nevertheless, the Commissioner notes that

the submission explained that the draft press lines needed to be withheld in order for the FCO to protect its position with regard to the press by not revealing its strategy for managing the press in the different scenarios envisaged. Disclosing the FCO's strategy could therefore make it more difficult to handle the press in the future. Such a line of argument relates most directly to the 'otherwise prejudice limb' of section 36(2)(c). In contrast, the Commissioner notes that when the FCO informed the complainant that it was seeking to rely on section 36(2) it explained that it considered this exemption to be necessary in order to protect the free and frank provision of advice, ie it implied that section 36(2)(b)(i) was considered to be engaged.

122. In the circumstances of this case the Commissioner is not prepared to accept that the opinion was a reasonable one. This is primarily because the qualified person failed to specify the particular exemption that he considered to apply. Whilst the Commissioner could potentially infer the exemption that the qualified person considered relevant, i.e. section 36(2)(c), it is not his role to do so. Moreover, the FCO's letter to the complainant to explain why section 36(2) had been applied suggested a different reason as to why one of the exemptions within section 36(2) had been engaged. Although the Commissioner's consideration as to whether an opinion is a reasonable one is generally limited to considering the submissions and opinion itself, the FCO's contradictory comments to the complainant only question, in the Commissioner view, the rationale and thus the reasonableness of the opinion itself.
123. Therefore the Commissioner has found that section 36(2) is not engaged.

Section 41 – information provided in confidence

124. The FCO withheld a small portion of information from document 4 and 17 on the basis of section 41(1).

125. Section 41(1) 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.’

126. Therefore for this exemption to be engaged two criteria have to be met; the public authority has to have obtained the information from a third party **and** the disclosure of that information has to constitute an actionable breach of confidence.

127. With regard to section 41(1)(b), in most cases the approach adopted by the Commissioner in assessing whether disclosure would constitute an actionable breach of confidence is to follow the test of confidence set out in *Coco v A N Clark (Engineering) Ltd* [1968] FSR 415. This judgment suggested that the following three limbed test should be considered in order to determine if information was confidential:

- Whether the information had the necessary quality of confidence;
- Whether the information was imparted in circumstances importing an obligation of confidence; and
- Whether an unauthorised use of the information would result in detriment to the confider.

128. However, further case law has argued that where the information is of a personal nature it is not necessary to establish whether the confider will suffer a detriment as a result of disclosure.

Was the information obtained from a third party?

129. The Commissioner has reviewed the information redacted on the basis of section 41(1) and is satisfied that the majority of it constitutes information provided to the FCO by two third parties, party A and party B. The only exception to this is one portion of information redacted in document 17 which in the Commissioner’s view consists instead of the FCO’s own analysis of the position regarding the amicus briefs. As the information was not obtained from a third party it cannot be exempt

from disclosure on the basis of section 41(1). This information is identified in the confidential annex.

Does the information have the necessary quality of confidence?

130. 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; information which is of importance to the confider should not be considered trivial.

131. The Commissioner accepts that the information that was provided to the FCO by both third parties is not trivial and is clearly of importance to the confider.

Was the information obtained in circumstances importing an obligation of confidence?

132. The FCO's submissions to the Commissioner which explained why this criterion (and indeed the next criterion) was met only referenced party A. For party A, the FCO explained that as the information related to an ongoing legal case, i.e. *Kiobel*, party A had provided the FCO with information on the assumption that such information would be kept confidential. The FCO explained that that assumption has subsequently been confirmed as correct by a representative of party A. For this particular third party, the Commissioner accepts that this criterion is met.

133. However, in the absence of submissions from the FCO to explain why party B considered its information to have been imported in circumstances importing an obligation of confidence, the Commissioner is not prepared to conclude that this criterion is met for information received from that particular party. (In any event, even if he did, in the absence of any submissions from the FCO regarding the nature of the detriment to party B, the Commissioner would only conclude that the next criterion was not met). Information received from party B is therefore not exempt from disclosure on the basis of section 41(1) and this information is identified in the confidential annex. The consequence of this finding is that the Commissioner considers none of the information redacted from document 17 to be exempt from disclosure.

Would disclosure be detrimental to the confider?

134. The FCO's submissions as to why disclosure of the material redacted from document 4 would be detrimental to party A cannot be referred to in detail in the decision notice, as to do so would reveal the content of the information itself. Having considered these submissions, and the content of the remaining information that has been withheld on the

basis of section 41(1), the Commissioner is not sufficiently persuaded that disclosure would be detrimental.. The Commissioner therefore finds that the third criterion is not met and thus the information redacted under section 41(1) is not exempt from disclosure. The Commissioner has provided further reasoning in the confidential annex to explain this finding.

Section 17 – refusal notices

135. Section 17 of FOIA requires that:

'(1)A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which—

- (a)states that fact,*
- (b)specifies the exemption in question, and*
- (c)states (if that would not otherwise be apparent) why the exemption applies.'*

136. In the circumstances of this case, as noted above the FCO withheld some documents in their entirety, but provided other documents in digest form. That is to say, it removed any information it considered to be exempt and noted that material had been 'redacted' rather than providing the complainant with a copy of the document with the exempt sections blacked out. In order to clarify which exemptions had been applied to which documents, the FCO provided the complainant with a table explaining which exemptions had been applied to each document but did not indicate to which parts of each document a particular exemption had been applied. The Commissioner provided the complainant with an updated version of this table to take into account the application of further exemptions which the FCO had introduced. The FCO's refusal notice and internal review, along with its further communication to the complainant dated 19 July 2013, explained why it considered the various exemptions applied.

137. The complainant is dissatisfied with the FCO's failure to specify which exemption had been applied to which redaction. She also asked to be provided with a description of the character of the redacted information (eg 'communication with a third party state/company'; 'political commentary about any EU member state' etc).

138. In the circumstances of this case, given the number of redactions made to the documents that have been partially disclosed and the number of

exemptions applied to each document, the Commissioner does not consider that for these documents the FCO has met the requirements of section 17(1)(b). That is to say, the complainant has not been provided with a sufficiently clear indication as to why a particular piece of information has been redacted from a particular document.

139. Consequently, in order to comply with the requirements of section 17(1)(b), the FCO needs to provide the complainant with a copy of the information it disclosed to her on 19 July 2013 but this time annotating each redaction with the appropriate exemption.
140. In the Commissioner's view, FOIA does not require the FCO to meet the complainant's demand that she is given a description of the character of each piece of redacted information in the manner she suggested. Indeed, to do so would risk revealing the content of the withheld information itself, which would defeat the object of claiming that the information is exempt.

Other matters

141. In investigating this complaint the Commissioner encountered delays and problems with the FCO's responses which he believes merit reference here.
142. The Commissioner wrote to the FCO on 5 April 2013 and asked it to provide him with a copy of the requested information along with clarification as to which exemptions had been applied to which parts of the withheld information. The Commissioner also sought detailed submissions to support the application of the various exemptions, with the exception of section 42(1) which at that stage the complainant indicated she did not wish to challenge. The Commissioner asked for a response to be provided within 20 working days.
143. The complainant subsequently explained that she did intend to challenge the use of section 42(1) and the Commissioner therefore contacted the FCO again on 19 April 2013 and asked it to also provide him with submissions to support the application of this exemption. The Commissioner noted that his original letter had sought a response by 3 May and he asked that a response to his further letter was also provided within this timeframe.
144. The FCO contacted the Commissioner on 3 May asked for a further 10 working days (i.e. to 20 May 2013) to respond to the Commissioner's letters. The Commissioner agreed to this extension.

145. During a telephone call on 6 June 2013 the FCO informed the Commissioner that further information potentially relevant to the request had been located and it was considering the application of section 36 to this material.
146. On 21 June 2013, having still not received a substantive response to his letters of 5 and 19 April, the Commissioner served the FCO with an Information Notice under section 51 of FOIA requiring it to provide him with a response to both letters within 30 calendar days.
147. The FCO responded to the Information Notice on 19 July 2013. In addition to providing submissions to support the application of the exemptions sighted in the refusal notice and internal review, the FCO also explained that it now sought to rely on sections 41 and 43 to withhold some information. Although the Commissioner was provided with a complete version of the requested information, the parts that were redacted were simply highlighted in a single colour.
148. On the basis of this response it was not clear to the Commissioner which particular parts of the requested information the FCO was seeking to withhold on the basis of these new exemptions. Nor did the FCO's submissions provide any real detail as to why it considered these new exemptions to apply. The Commissioner therefore wrote to the FCO on 24 July 2013 and asked it to address these points.
149. The FCO responded on 1 August 2013 and provided submissions to support the application sections 41 and 43. It also, helpfully, provided the Commissioner with a further version of the requested information this time with each piece of redacted/withheld material highlighted in a particular colour depending upon which exemption was being relied upon. However, the FCO explained that where entire documents had been withheld in full under one exemption, it considered significant parts of such documents to also be exempt under alternative exemptions, but it was not possible to set out the use of these alternative exemptions easily given the use of colour marking.
150. The Commissioner contacted the FCO on 2 August 2013 and explained that he needed to understand the FCO's exact position with regard to how each exemption was being relied upon. The Commissioner suggested that for the documents that had been withheld in full the FCO removed the single colour marking that has been applied and then annotated/colour marked the specific parts of each document that further additional exemptions are considered to apply.
151. The FCO responded on 14 August 2013 and provided the Commissioner with a further annotated version of the documents which finally provided the necessary clarification that the Commissioner had sought.

152. It is disappointing that the Commissioner had to use an Information Notice in order to compel the FCO to provide him with a response to his letters of 5 and 19 April 2013; the use of such an Information Notice reflects the FCO's failure to provide the ICO with a timely response to his inquiries in relation to the complainant. However, what is of particular concern to the Commissioner is that when responding to the Information Notice the FCO failed to provide an adequately clear indication as to which exemptions it was seeking to rely on and why. Furthermore, in order for the Commissioner to eventually receive such submissions, he had to contact the FCO not once (24 July 2013) but twice (2 August 2013) and in doing so had to provide the FCO with what he would consider to be some relatively elementary guidance on how to annotate documents in order to explain how particular exemptions had been applied. The Commissioner would not expect a public authority of the FCO's experience of dealing with FOI requests, and in particular section 50 complaints, to need such assistance.

Right of appeal

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

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

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

154. 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.

155. 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

Document number	Name	FCO position regarding document	Commissioner's findings regarding application of exemptions
1	RE: REST - US - KIOBEL - PARLIAMENTARY AND NGO ENGAGEMENT	Redacted version disclosed. Redactions only applied to names and contact details on basis of s40(2).	Section 40(2) not in scope of complaint - no finding made.
2	REST - US - UPDATE ON KIOBEL (SUPREME COURT CASE CONCERNING EXTRATERRITORIALITY)	Duplicate of doc 4.	N/A
3	REST - US - KIOBEL - PARLIAMENTARY AND NGO ENGAGEMENT	Redacted version disclosed. Redactions only applied to names and contact details on basis of s40(2).	Section 40(2) not in scope of complaint - no finding made.
4	REST - US - UPDATE ON KIOBEL (SUPREME COURT CASE CONCERNING EXTRATERRITORIALITY)	Redacted version disclosed. Redactions made on the basis of s42(1) s41(1) and s27(2).	Sections 42(1) and 27(2) both engaged and public interest favours maintain exemptions. Section 41(1) not engaged.

		Names/contact details withheld on basis of s40(2).	Section 40(2) not in scope of complaint - no finding made.
5	REST - US - Supreme Court - Kiobel - Extraterritoriality	Redacted version disclosed. Further redactions made on the basis of s27(1)(a); s27(2); s35(1)(a); s36(2); s42(1); and s43(2). Names/contact details also withheld on basis of s40(2).	Sections 27(1)(a), 27(2) and 42(1) engaged and public interest favours maintaining each exemption. Section 35(1)(a) engaged, but the public interest favours disclosing the withheld information. Sections 36(2) and 43(2) not engaged. Section 40(2) not in scope of complaint - no finding made.
6	RESTRICTED: US - KIOBEL - PARLIAMENTARY AND NGO ENGAGEMENT	Redacted version disclosed. Redactions only applied to names and contact details on basis of s40(2).	Section 40(2) not in scope of complaint - no finding made.

7	RE: REST - US - Supreme Court - Kiobel - Extraterritoriality	<p>Redacted version disclosed.</p> <p>Redactions made on the basis of s27(2).</p> <p>Names/contact details also withheld on basis of s40(2).</p>	<p>Section 27(2) engaged and public interest favours maintaining the exemption.</p> <p>Section 40(2) not in scope of complaint - no finding made.</p>
8	RE: SUBJECT: US - AMICUS CURIAE BRIEF - KIOBEL	<p>Redacted version disclosed.</p> <p>Redactions only applied to names and contact details on basis of s40(2).</p>	<p>Section 40(2) not in scope of complaint - no finding made.</p>
9	20120313 US ATS Follow up Submission	<p>Duplicate of doc 5.</p>	
10	COJUR COACD - COJUR* COACD - Report - Meeting of the Public; eGram CFSP/SEC/0195/12	<p>Withheld in full under s27(2).</p> <p>Certain parts of the document are also 'out of scope'.</p>	<p>All of the document is in scope of the request.</p> <p>With the exemption of the text identified in the confidential annex, section 27(2) engaged and public interest favours</p>

			maintaining the exemption.
11	COJUR COACD - Report - Meeting of the Public International; eGram CFSP/SEC/0129/12	Withheld in full under s27(2). Certain parts of the document are also 'out of scope'	All of the document is in scope of the request. With the exemption of the text identified in the confidential annex, section 27(2) engaged and public interest favours maintaining the exemption.
12	RE: US - AMICUS CURIAE BRIEF - KIOBEL	Withheld in full under s42(1). Names/contact details withheld under s40(2).	Section 42(1) engaged and the public interest favours maintaining the exemption. Section 40(2) not in scope of complaint - no finding made.
13	COJUR COACD - Meeting of the Public International Law Working; eGram CFSP/SEC/0074/12	Withheld in full under s27(2). Certain parts of the document are also 'out	All of the document is in scope of the request. Section 27(2) engaged and

		of scope'	public interest favours maintaining the exemption.
14	RE: US - AMICUS CURIAE BRIEF - KIOBEL	Withheld in full under s42(1). Certain parts also withheld under s27(1)(a). Names/contact details also withheld on basis of s40(2).	Sections 42(1) and 27(1)(a) engaged and public interest favours maintaining the exemption. Section 40(2) not in scope of complaint - no finding made.
15	COJUR COACD - Draft Agenda - Meeting of the Public; eGram CFSP/SEC/0054/12	Withheld in full under s27(2). Certain parts of the document are also 'out of scope'	All of the document is in scope of the request. Section 27(2) engaged and public interest favours maintaining the exemption.
16	RE: SUBJECT: US - AMICUS CURIAE BRIEF - KIOBEL	Withheld in full under 35(1)(a). Names/contact details withheld under	Section 35(1)(a) engaged, but the public interest favours disclosing the withheld information.

		s40(2).	Section 40(2) not in scope of complaint - no finding made.
17	SUBJECT: US - AMICUS CURIAE BRIEF - KIOBEL	<p>Withheld in full under 35(1)(a).</p> <p>Certain parts also withheld under s42(1); 27(1)(a); 27(2); 41(1) and 43(2)</p> <p>Names/contact details also withheld under s40(2).</p>	<p>Sections 27(1)(a), 27(2) and 42(1) engaged and public interest favours maintaining each exemption.</p> <p>Section 35(1)(a) engaged, but the public interest favours disclosing the withheld information.</p> <p>Section 41(1) and 43(2) not engaged.</p> <p>Section 40(2) not in scope of complaint - no finding made.</p>
18	RE: State responsibility for human rights REST	Withheld in full under s35(1)(a) & s42(1).	Section 35(1)(a) engaged and public interest favours disclosing the information. However, section 42(1) engaged and public interest favours maintaining the exemption.

Reference: FS50487115



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