

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 May 2016

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

Decision (including any steps ordered)

1. The complainant submitted a request to the Foreign and Commonwealth Office (FCO) for information concerning the negotiations between the UK and Faroes/Denmark during the 1990s that led to the Maritime Delimitation Agreement in 1999. The FCO provided the complainant with some of the information falling within the scope of his request but refused to provide the remainder citing the exemptions contained at the following sections of FOIA: 27(1)(a) and (c), 27(2) (international relations), 42(1) (legal professional privilege) and 40(2) (personal data). The Commissioner has found that the withheld information is exempt from disclosure on the basis of sections 27(1)(a), 27(1)(c) and section 40(2).

Request and response

2. The complainant submitted the following request to the FCO on 11 March 2015:

'The information I am seeking concerns the negotiations between the UK and Faroes/Denmark during the 1990s leading to the signing of the Maritime Delimitation Agreement in 1999.

There are two specific requests I would like to make. These are:

- 1) *for papers relating to the meeting between the two parties in London on 6-7 October 1993; and*

2) for papers relating to the invitation to visit the UK extended to Faroese Prime Minister, Edmund Joensen, The invitation was first received in a letter from Douglas Hogg in October 1994 and subsequently conveyed personally by Douglas Hurd at a meeting he had with the invitee in Copenhagen on 8 February 1995.'

3. The FCO responded on 30 April 2015 and provided a verbatim digest of all relevant information that it considered to be disclosable under FOIA along with a copy of a press release. The FCO explained that the remainder of the information was exempt from disclosure on the basis of sections 27(1) and 27(2) (international relations), 35(1)(a) (government policy) and 42(1) (legal professional privilege) of FOIA.
4. In response, the complainant exchanged a number of emails with the FCO between May and July 2015 in which he queried the paucity of information provided. In response the FCO provided him with some of the original documents (albeit in redacted form) and a copy of further information that had now been found.
5. The complainant remained dissatisfied and on 13 July 2015 he contacted the FCO and formally asked it to conduct an internal of its handling of his requests. In essence, whilst accepting the application of section 42(1), the complainant questioned the FCO's decision to rely on the other exemptions to withhold information.
6. The FCO informed him of the outcome of the internal review on 8 October 2015. The review concluded that some additional information could be disclosed and this was provided to the complainant at that stage. However, the review also concluded that the various exemptions had been correctly applied to withhold the remaining information.

Scope of the case

7. The complainant contacted the Commissioner on 3 November 2015 in order to complain about the FCO's handling of his request. He explained that whilst he accepted the FCO's application of section 42 of FOIA to withhold information, he disputed its reliance on sections 27 and 35. He was also dissatisfied with the time it took the FCO to process his request.
8. During the course of the Commissioner's investigation, the FCO explained that it was no longer seeking to rely on the exemption contained at section 35(1)(a) of FOIA. Furthermore, it was only seeking to withhold information on the basis of the other exemptions,

namely sections 27 and 42, and also section 40 (personal data) from two documents, namely:

- document 10 from request 1, ie the record of a meeting taking place in October 1993, and
 - the telegram disclosed to the complainant on 13 July 2015 concerning the Hurd/Joensen meeting.
9. The Commissioner's investigation has therefore focused on determining whether these exemptions provide a basis to withhold the information which has been redacted from these documents.

Reasons for decision

Section 27 – international relations

10. The FCO argued that the majority of the withheld information was exempt from disclosure on the basis of section 27(1)(a) and/or section 27(1)(c).

11. These exemptions provide 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...

... (c) the interests of the United Kingdom abroad'

The FCO's position

12. The FCO argued that disclosure of the information withheld on the basis of these exemptions would be likely to prejudice UK-Danish/Faroese relations. Furthermore, it argued that disclosure would be likely to prejudice future UK negotiations over maritime delimitation, both with Denmark/Faroes and with other States.

13. The FCO emphasised that the effective conduct of public affairs depends upon maintaining trust and confidence between governments and the officials who work for them. This relationship of trust allows for the free and frank exchange of information on the understanding that it will be treated in confidence. The FCO argued that this was particularly true for delimitation negotiations where both sides are often required to compromise their country's claims in order to reach agreement. The FCO argued that if the UK does not respect confidentiality, its ability to reach

agreement on this and other delimitation negotiations would be hampered. Moreover, other governments would also be less likely to respect the confidentiality of information supplied by the UK government to them, to the detriment of UK interests.

14. The FCO's submissions to the Commissioner also made specific references to the particular parts of the withheld information in order to demonstrate why such prejudice would arise; for obvious reasons the Commissioner has not referred to such submissions in the decision notice itself.
15. In terms of the time that has elapsed since the withheld information was created, the FCO explained that negotiations over the extended continental shelf between the UK, Denmark/Faroes and Iceland have not concluded. The FCO explained that there remain sensitivities between the UK and Denmark/Faroes over the Hatton Rock area, which both the UK and Denmark claim as part of their extended continental shelves. The FCO explained that discussions between the UK and Denmark on this issue arose last year when the UK proposed Hatton as a Site of (EU) Community Importance (SCI) under the Habitats Directive, to which Denmark objected.
16. Moreover, FCO argued that there are also ongoing delimitation issues with other States that could be prejudiced if it revealed the content of these confidential negotiations, because this would involve breaching trust and confidence, and also disclose the UK's negotiating position and tactics. These negotiations include discussions with France and Spain on adjoining continental shelves; UK/Guernsey and France; and between the UK on behalf of a number of UK Overseas Territories and neighbouring states in the Caribbean.

The complainant's position

17. The complainant argued that there was an unnecessary degree of secrecy about this information. He questioned why there was so much sensitivity about events which took place over 20 years ago and which on the face of it have no security implications. He argued that it was hard to envisage any revelation that would constitute anything more than a storm in a teacup that would be brushed aside, especially as the participants have long ceased to play any part in government.

The Commissioner's position

18. 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 – ie, 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.
19. 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'*.¹
20. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the FCO clearly relates to the interests which the exemptions contained at sections 27(1)(a) and (c) are designed to protect.
21. With regard to the second criterion, the Commissioner is satisfied that disclosure of the information redacted on the basis of these exemptions has the potential to harm the UK's relations with the Denmark and the Faroe Islands. The information includes detailed and frank information which was clearly exchanged during discussions that the parties in question considered to be confidential. In the Commissioner's view it is self-evident that if information provided in confidence by representatives of other States was disclosed by the UK then it would be logical to conclude that the UK's relations with the confider could be harmed.

¹ [Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence \(EA/2006/0040\)](#), paragraph 81.

Furthermore, the Commissioner agrees that it is logical to argue that if the UK does not respect the ability of such confidential information then other States may not respect the information the UK provided to them in confidence and in turn this could harm the UK's ability to reach agreement on other delimitation negotiations not simply with the Danes and Faroese but also with other States. Moreover, the Commissioner is satisfied that the resultant prejudice which the FCO believes would be likely to occur 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 damage limitation exercise.

22. With regard third criterion, the Commissioner is satisfied that the disclosure of the redacted information would be likely to have the prejudicial effects envisaged by the FCO. In reaching this conclusion the Commissioner is conscious of the arguments the complainant has made in respect of the time that has passed since the withheld information was created. On the face of it, the Commissioner accepts that such a line of argument is not without merit. However, he is persuaded by the FCO's submissions that explain why, despite this passage of time, the information remains both live and moreover could potentially have a negative effect on the UK's conduct of other delimitation negotiations. Consequently, the Commissioner is of the view that if the withheld information was disclosed there is more than a hypothetical risk of prejudice occurring both to the UK's relations with the Danes and Faroese and to the UK's interests in ongoing and future delimitation negotiations.

Public interest test

23. Section 27 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 disclosure of the information

24. The FCO acknowledged that disclosure of the information would promote transparency by public authorities in respect of the conduct of delimitation negotiations and would further public understanding of the conduct of international affairs.
25. The complainant argued that there is a legitimate public interest in the considerations that led to the UK government following the course of action it did in these negotiations and in the use of diplomacy as a tool in the process exemplified by the invitation to Prime Minister Joensen.

Public interest arguments in favour of maintaining the exemption

26. The FCO emphasised that section 27(1)(a) recognised that the effective conduct of international relations depends upon maintaining trust and confidence between governments. Disclosure of the withheld information would break that trust and could damage relations between the UK and Denmark and the UK and the Faroes. This would be against the public interest as it would reduce the UK government's ability to promote its interests through relations with these countries. Moreover, the FCO argued that disclosure would also be against the public interest as it would impair the UK's ability to conduct effective discussions with other states in respect of delimitation agreements.

Balance of the public interest

27. The Commissioner agrees that there is a public interest in the disclosure of information which would promote transparency in respect of how the UK government conducts delimitation negotiations. In the Commissioner's view disclosure of this information would clearly meet this aim, in particular the record of the meeting from October 1993, as this would provide a detailed insight into the matters discussed between the various parties concerning the delimitation of the continental shelf. However, in the Commissioner's view there is a very strong public interest in protecting the UK's relations with other States. In the Commissioner's opinion it would be against the public interest for the UK's relations with Denmark and the Faroe Islands to be impaired given the impact upon future delimitation negotiations with these parties. Moreover, the Commissioner accepts that it would be firmly against the public interest for the UK's ability to conduct effective delimitation negotiations with other States to be impacted. Consequently, the Commissioner has decided that the public interest favours maintaining the exemption. In reaching this conclusion the Commissioner wishes to emphasise that he is not seeking to dispute the public interest in disclosure of the withheld information; simply that he is of the view that there is a more compelling case for maintaining the exemption given the wide and broad ranging prejudicial consequences of disclosure.

Section 40 – personal data

28. Section 40(2) of FOIA states that personal data is exempt from disclosure if its disclosure would breach any of the data protection principles contained within the Data Protection Act 1998 (DPA).

29. Personal data is defined in section (1)(a) of the DPA as:

'.....data which relate to a living individual who can be identified from those data or from those data and other information which

is in the possession of, or likely to come into the possession of, the data controller; and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any person in respect of the individual.'

30. The FCO withheld the names and contacts details of junior FCO staff and the names of the Faroese delegation. The only exceptions to this were the name of one junior official at the FCO who was still working for the FCO and consented to her name being disclosed (the other junior staff members had left the FCO and were not contactable) and the name of the lead negotiator for the Faroes. As with the senior negotiator for the FCO, whose name was also disclosed, the FCO judged that their names were likely to be in the public domain. The Commissioner accepts that the names of the junior officials constitute personal data within the meaning of section 1 of the DPA as they clearly relate to identifiable individuals.

31. The FCO argued that disclosure of such information would breach the first data protection principle which states that:

'Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.'

32. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:

- The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
 - what the public authority may have told them about what would happen to their personal data;
 - their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights (ECHR);
 - the nature or content of the information itself;
 - the circumstances in which the personal data was obtained;
 - any particular circumstances of the case, eg established custom or practice within the public authority; and

- whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.
 - The consequences of disclosing the information, ie what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor the Commissioner may take into account:
 - whether information of the nature requested is already in the public domain;
 - if so the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?
33. Furthermore, notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling legitimate interest in disclosure to the public.
34. In considering 'legitimate interests', in order to establish if there is a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sake, as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to consider a proportionate approach.
35. As a general principle the Commissioner accepts that junior officials, particularly those without public facing roles, would have a reasonable expectation that their names would not be disclosed under FOIA. Clearly, in the circumstances of this case, the information predates the enactment of FOIA. However in the Commissioner's opinion this only reinforces the expectation of the individuals in question that their names would not be disclosed. The Commissioner recognises that the complainant has suggested that the names of the officials involved in the meeting of 6-7 October are available in the Faroese record of the meeting and thus it was illogical for the FCO to redact them. In relation to this point the FCO explained to the Commissioner that it had not seen a copy of this document and was unable to find it on the internet.
36. In view of the above, the Commissioner finds that it would have been unfair to disclose the names of the junior officials in question. Disclosure would have contravened the first data protection principle. The FCO was

therefore entitled to withhold the names of the officials on the basis of section 40(2).

37. In light of his findings in respect of sections 27(1)(a), 27(1)(c) and 40(2) the Commissioner has not considered the FCO's reliance on section 27(2).

Other matters

38. FOIA does not impose a statutory time within which such reviews must be completed albeit that the section 45 Code of Practice explains that internal reviews should be completed within a reasonable timeframe. In the Commissioner's view it is reasonable to expect most reviews to be completed within 20 working days and reviews in exceptional cases to be completed within 40 working days.
39. In the circumstances of this case the complainant requested an internal review on 13 July 2015. The FCO informed him of the outcome of the internal review on 8 October 2015. It therefore took the FCO 62 working days to complete its internal review.
40. The FCO explained that this was due to the need to consult with external stakeholders and the fact that the discussions took time given the complex nature of delimitation negotiations. The Commissioner is not unsympathetic to these points. Nevertheless, in the future he expects the FCO to ensure that internal reviews are completed within the timeframes set out within his guidance.

Right of appeal

41. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

42. 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.
43. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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