

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 November 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 about any meetings and correspondence between the British High Commission in Nigeria and representatives of various organisations. The FCO disclosed the information it held which fell within the scope of the request but redacted certain parts of the information on the basis of sections 43(2) (commercial interests) and 40(2) (personal data) of FOIA. The Commissioner is satisfied that the FCO is entitled to rely on these exemptions, with the only exception being the name of particular third party which the Commissioner has concluded is not exempt from disclosure on the basis of section 40(2).
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with a further copy of the requested information this time with the name of the third party identified in the confidential annex to this notice unredacted.
3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. The complainant submitted the following request to the FCO on 15 March 2016:

'This is a request for information made under the Environmental Information Regulations (EIRs) for information relating to meetings between the British High Commission in Nigeria and representatives of various organisations.

For the period 2010-2011

1. *Any documentation from meetings/correspondence between UKTI [UK Trade & Investment] Nigeria Director Peter Stephenson and his office, and the following:*
 - a. *Shell and its subsidiaries*
 - b. *Representatives of the NNPC and Oil Ministry*
 - c. *Representatives of Aiteo*

For the period 2011 – 1 March 2015

2. *Any documentation from meetings/correspondence between the High Commission and*
 - a. *Peter Stephenson*
 - b. *Any representatives of Aiteo (or Aiteo Eastern)'*
5. Having received no response to the request, the complainant resubmitted it on 7 April 2016.¹
6. The FCO responded on 6 May 2016 and explained that it did not hold any information falling within the scope of request 1 but that it held five documents falling within the scope of request 2a and one document falling within the scope of request 2b. The FCO provided the complainant with copies of these documents albeit with some of the information redacted on the basis of sections 40(2) and 43(2) of FOIA.
7. The complainant submitted a request for an internal review on 21 May 2016 and queried the application of both exemptions.

¹ The FCO has explained to the Commissioner that the complainant's initial email was not received because it had only been sent to a member of staff who had left the organisation. The complainant's email of 7 April 2016 was sent to a different FCO email address.

8. The FCO responded on 21 June 2016. The review found that the exemptions had been correctly applied but the FCO did provide the complainant with a further version of the disclosed information indicating the domain name/organisation of the sender and recipient of the emails which formed part of the requested information.

Scope of the case

9. The complainant contacted the Commissioner on 23 June 2016 to complain about the way her request for information had been handled. She disputed the FCO's reliance on sections 40(2) and 43(2) to redact information from the documents disclosed to her.

Reasons for decision

Section 43 – commercial interests

10. The FCO explained that some of the requested information had been redacted on the basis of section 43(2) of FOIA. This section states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any party.

The FCO's position

11. The FCO explained that the requested information included exchanges of emails between Nigeria UK Business Ventures (NUBV) and the FCO. The FCO explained that NUBV was a private business development company. The FCO argued that disclosure of the information redacted on the basis of section 43(2) would be likely to prejudice the commercial interests of NUBV or its clients. In support of this the FCO explained that identifying NUBV's clients, and in particular their particular interests, would be likely to jeopardise the ability of NUBV's clients to carry out their plans and NUBV's ability to act on their behalf. Furthermore, the FCO argued that release of information about NUBV's clients would be likely to jeopardise the trust its clients place in it and risk losing clients to competitors, thereby putting NUBV at a disadvantage in a competitive market place. The FCO also provided some further submissions to the Commissioner to support the application of section 43(2) which made specific reference to the content of withheld information. Finally, the FCO confirmed to the Commissioner that in deciding to apply section 43(2) it had consulted with NUBV and the Commissioner was provided with copies of the relevant correspondence.

The Commissioner's position

12. In order for a prejudice based exemption, such as section 43(2) 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.
13. 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 exemption contained at section 43(2) is designed to protect.
14. With regard to the second criterion, the Commissioner is satisfied that disclosure of the information withheld on the basis of this exemption has the potential to harm both NUBV's commercial interests and those of its clients referred to the withheld information. This is because in the Commissioner's view, it is logical to argue that such disclosure of such information could lead to NUBV losing the confidence of its clients if sensitive information about their businesses was disclosed. Equally, having considered the particular redactions that have been made, the Commissioner accepts that it is plausible that the commercial interests of the NUBV's clients could be harmed if the information was disclosed. Moreover, any such prejudice would clearly be of substance. Furthermore, in relation to the third criterion, the Commissioner is satisfied that if the redacted information was disclosed there is a more than a hypothetical risk of prejudice occurring to both the NUBV's commercial interests and those of its clients.

Public interest test

15. Section 43 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 the disclosure of the information

16. The complainant argued that the information which had been disclosed clearly revealed a close relationship between a former UKTI Nigeria Director and FCO employees. The complainant noted that the information that had been disclosed also revealed that the individual in question clearly used his old contacts at the FCO and UKTI to further his and his clients' interests. The complainant argued that greatly increased the importance of transparency over this individual's actions. The complainant argued that whilst lobbying was perfectly legitimate activity, the UK has a lobbying register but NUBV was not a member of it. Furthermore, the complainant argued that there have been numerous decisions by the Information Tribunal which found that lobbying is something about which there should be transparency.

Public interest in maintaining the exemption

17. The FCO explained that it did not share the view that NUBV was a lobbyist. Rather, as noted above, it considered NUBV to be a private business development company which was in legitimate commercial contact with UKTI. The FCO argued that the redacted information does not refer to attempts to influence the position of Her Majesty's Government, but to arranging legitimate business links. The FCO argued that it is in the broader public interest for UKTI to be able to promote British business overseas and to identify opportunities to promote trade and, therefore, it is important they maintain the confidence of UK businesses. The FCO argued that if the redacted information regarding NUBV's clients was to be released, it would be likely to restrict the information businesses would be willing to share with the FCO and UKTI in future. The FCO also argued that there is a public interest in allowing business-people and commercial organisations the space to conduct their lawful business competitively and without fear of disclosure of sensitive commercial information.

Balance of the public interest test

18. The Commissioner agrees that there is a public interest in public authorities being transparent about how they interact with third parties. In the circumstances of this case disclosure of the redacted information would add to the public's understanding of the discussions between the FCO/UKTI in Nigeria and NUBV. The Commissioner also accepts that

given that an individual within NUBV used to be employed by the UKTI this arguably increases the need for transparency.

19. However, having considered the content and context of the withheld information the Commissioner agrees with the FCO's description of NUBV as an international business development company which has a legitimate commercial interest in contacting the UKTI, rather than one that could simply be categorised as a lobbyist. Furthermore, the Commissioner believes that there is an inherent public interest in ensuring fairness of competition and therefore it is firmly against the public interest for the commercial interests of NUBV, or its clients, to be undermined. Moreover, the Commissioner agrees that there is a public interest in the FCO and UKTI being able to assist British companies who wish to invest abroad, in this case in Nigeria, and indeed Nigerian companies to seek opportunities in the UK. The Commissioner also believes that it is important to recognise that the need for transparency in respect of NUBV's interactions with the FCO is to some extent already met in light of the redacted versions of the requested information which the FCO has already disclosed. Whilst disclosure of the redacted information would provide details of specific clients of NUBV, the information already disclosed by the FCO, in the Commissioner's opinion, provides a clear insight into the nature of the relationship between NUBV and the FCO/UKTI.
20. On balance, the Commissioner is therefore satisfied that the public interest favours maintaining the exemption contained at section 43(2) of FOIA.

Section 40 – personal data

21. 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).
22. 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.'
23. The FCO explained that the information redacted on the basis of section 40(2) fell into a number of different categories: names and contact details of FCO/UKTI staff; names and contact details of third parties; and a small amount of information concerning some of the third parties' private rather than professional lives.

24. The Commissioner is satisfied that all of the information withheld by the FCO on the basis of section 40(2) constitutes personal data within the meaning of section 1 of the DPA.

25. 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.'

26. 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?

27. 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.
28. 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.
29. In respect of the names of FCO/UKTI staff, the FCO explained that it had a clear policy that the names of junior officials would not be released and therefore the individuals in question had a reasonable expectation that their names and contact details would not be released into the public domain.
30. In respect of the personal information of third parties, the FCO argued that similarly these individuals would have no expectation that their names would be disclosed. Furthermore, the FCO explained that two of the third parties it was able to contact both requested that their names were withheld. The FCO also argued that there was no legitimate interest in the disclosure of information which related to the private lives of some of the third parties.
31. In relation to the names of junior FCO/UKTI staff, the Commissioner is satisfied that such officials would have a reasonable expectation in the circumstances of this case, based upon established custom and practice, of their names being redacted from any disclosures made under FOIA and thus the disclosure of their names would be unfair and breach the first data protection principle. This information is therefore exempt from disclosure on the basis of section 40(2) of FOIA.
32. Furthermore, the Commissioner is also satisfied that the third parties named in the withheld information would have a reasonable expectation that their names and contact details would not be released under FOIA and thus to do so would be unfair. The Commissioner is also satisfied that disclosure of the small amount of information about the private lives of some of the third parties would represent an unjustified infringement into their private lives. Such information is also exempt from disclosure on the basis of section 40(2) of FOIA.
33. However, the Commissioner has also concluded that the name of one of the third parties identified in the redacted information is not exempt from disclosure on the basis of section 40(2). The Commissioner has

explained why she has reached this decision in a confidential annex, a copy of which will be shared with the FCO only. The name of this particular individual cannot be redacted from the withheld information.

Right of appeal

34. 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

35. 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.
36. 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

Jonathan Slee
Senior Case Office
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF