

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 April 2017

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 described as '*Annual reports, diplomatic reports; leading personalities*' concerning Saudi Arabia. The FCO provided the complainant with some of the information falling within the scope of her request and explained that other documents falling within the scope could be viewed at The National Archives. However, the FCO sought to withhold the remaining information on the basis of the following sections of FOIA: 27(1)(a) and (c) (international relations), 40(2) (personal data) and 41 (information provided in confidence). The Commissioner is satisfied that the withheld information is exempt from disclosure on the basis of exemptions cited by the FCO.

Request and response

2. The complainant submitted a request to the FCO on 17 July 2015 which sought the following information which had been listed on the 'Transparency data: Latest FCO inventory':

'Confidential Print; Saudi Arabia, described as: "Annual reports, diplomatic reports; leading personalities" 3 ring binders, from 1970-1996'.

3. The FCO contacted the complainant on 14 August 2015 and explained that it considered some of the information to be exempt from disclosure under section 27 of FOIA and it needed further time to consider the

balance of the public interest test. Further public interest text extension letters were sent in the following months.

4. The Commissioner issued a decision notice, reference FS50612787, on 17 February 2016 which required the FCO to provide the complainant with a substantive response to her request.
5. The FCO issued such a response on 22 March 2016. The FCO disclosed some information to the complainant but withheld the remaining information citing the exemptions contained at sections 27(1)(a) and (c), 27(2) and 40(2) of FOIA.
6. The complainant contacted the FCO on 16 April 2016 and asked it to conduct an internal review of its decision to withhold some of the requested information.
7. The FCO informed her of the outcome of the internal review on 14 June 2016. The review upheld the application of the exemptions contained at sections 27(1)(a) and (c) and section 40(2). No reference was made in the review to the exemption contained at section 27(2).

Scope of the case

8. The complainant contacted the Commissioner on 12 September 2016 to complain about the FCO's decision to withhold information falling within the scope her request.
9. During the Commissioner's investigation of this complainant, the FCO amended its position. The FCO contacted the complainant in December 2016 and explained that of the 85 documents falling within the scope of her request, it had established that 33 of these were open and publicly available at The National Archives (TNA). Consequently, the FCO did not intend to maintain any further redactions in relation to these 33 files but provided the complainant with the reference numbers of these documents so that she could access them at TNA.¹
10. The FCO contacted the complainant again in January 2017 and explained that following a further review of the remaining withheld

¹ Although the FCO did not cite on section 21 of FOIA in respect of these 33 documents, it was in essence refusing to provide the complainant with copies of them on the basis that they were reasonably available to her at TNA given that they were now open records. The complainant has not sought to challenge this position and therefore the Commissioner has not considered the status of these 33 documents any further in this notice.

information it was prepared to disclose more of this to her and subsequently did so.

11. In light of these developments, at the point this decision notice is being issued the FCO is seeking to withhold four documents in their entirety. The remaining information it is seeking to withhold has been redacted from the documents previously provided to the complainant.
12. In terms of the exemptions upon which the FCO is relying, virtually all of the non-disclosed information has been withheld on the basis of sections 27(1)(a) and (c) of FOIA. A small portion of information from one document has been withheld on the basis of section 40(2) of FOIA and two small redactions have been made to a different document on the basis of section 41(1) of FOIA. The FCO is no longer seeking to rely on section 27(2) of FOIA.

Reasons for decision

Section 27 – international relations

13. Sections 27(1)(a) and (c) states that:

'Information is exempt information if its disclosure 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'

14. In order for a prejudice based exemption, such section 27(1), to be engaged the Commissioner considers 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 to discharge.

15. 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

The FCO's position

16. In its responses to the complainant, the FCO explained that the effective conduct of international relations depends upon maintaining trust and confidence between governments. This relationship of trust allows for the free and frank exchange of information on the understanding that it will be treated in confidence. If the UK does not respect such confidences, its ability to protect and promote UK interests through international relations will be hampered. The States concerned may be reluctant to share sensitive information with the UK Government in future and may be less likely to respect the confidentiality of information supplied by the UK Government to them, to the detriment of UK interests. The FCO argued that disclosure of information concerning the UK's relationships with Saudi Arabia, even information dating back some time, could potentially be damaging as the relationships are ongoing. The disclosure of such information could potentially damage the bilateral relationship between the UK and Saudi Arabia.
17. In its submissions to the Commissioner, the FCO set out in further detail why it believed that disclosure of the remaining information would be likely to, or in some instances would, prejudice the UK's relations with Saudi Arabia. The FCO's submissions referred directly to the withheld information itself and therefore the Commissioner cannot reproduce such submissions in this notice. However, the FCO did address why, despite the passage of time and the age of the withheld information, its disclosure would be prejudicial.

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

The complainant's position

18. The complainant questioned whether disclosure of the withheld information would present a real risk to the UK's relations with Saudi Arabia on the basis that the sensitivity of these documents would presumably have waned over time. She argued that it was difficult to understand how information produced many years ago would be likely to prejudice relations today.

The Commissioner's position

19. 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. With regard to the second criterion, the Commissioner is satisfied that disclosure of the withheld information has the potential to harm the UK's relations with Saudi Arabia. Furthermore, in respect of the third criterion the Commissioner is satisfied that if this information was disclosed there is a more than a hypothetical chance of prejudice occurring. Rather, for such information the Commissioner is satisfied that if this information was disclosed there is a real and significant risk of the UK's relations with Saudi Arabia being harmed. She is therefore satisfied that sections 27(1)(a) and (c) are engaged.
20. Without referring being able to refer directly to the withheld information, or indeed the FCO's submissions which reference this information, it is difficult for the Commissioner to fully explain why she has reached this conclusion. However, she would emphasise that as is clear from the content of the information that has been disclosed, the documents falling within the scope of the request were intended for circulation within the FCO and between UK government departments only. Consequently, the documents contain a candid and frank analysis of the UK-Saudi relationship. The Commissioner is satisfied that the candid nature of the withheld information means creates a real risk of harm to the UK's relations with the Saudis if this information was disclosed. Furthermore, the Commissioner recognises that the withheld information is now some decades old. However, she is satisfied that despite this passage of time its disclosure still presents a genuine risk of prejudice occurring given that as Saudi Arabia is an absolute monarchy and powers of state are, and were, very much maintained within the Royal family, particularly in the hands of the King and the senior princes. Consequently, the disclosure of information under FOIA about Saudi Arabia that dates from several decades ago still has the potential to harm the UK's relations with Saudi Arabia given the dynastic nature of Saudi society. The Commissioner is therefore satisfied that sections 27(1)(a) and (c) are engaged.

Public interest test

21. 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.
22. The FCO emphasised that the UK's relationship with Saudi Arabia was a close, extensive and long standing one. Consequently, there was considerable public interest in ensuring that the UK's relationship with Saudi Arabia was not damaged.
23. The complainant argued that the release of the information would further the understanding of UK-Saudi relations, allowing the public – especially historians – to properly scrutinise these documents and piece together what took place in the past. The complainant also argued that a release would also promote accountability and transparency, where the public can hold to account those who fostered such relations between the UK and Saudi Arabia. In particular, the complainant suggested that in relation to arms deals throughout the decade, the release of withheld information associated with the defence sector would bring about further accountability and transparency.
24. With regard to the public interest in maintaining these exemptions, the Commissioner acknowledges that disclosure of the withheld information would contribute to the public's understanding of the UK's relations with Saudi Arabia for the period 1970 to 1996. The Commissioner does not seek to underestimate the weight that should be attributed to this argument given the importance of the UK's relationship with Saudi Arabia over this period, particularly as the complainant noted in her submissions of the number of arms deals between the two countries throughout this period. However, when considering the balance of the public interest in respect of the remaining information the Commissioner considers it important to recognise the significant amount of information falling within the scope of this request that has now been disclosed by the FCO (or is available to view at TNA). In the Commissioner's opinion the availability of this information goes a considerable way to aiding transparency on this subject. Furthermore, in the Commissioner's view it is important to recognise that Saudi Arabia is key ally of the UK and this relationship is, as the FCO suggests, one that is close, extensive and long-standing. Taking all of these factors into account, the Commissioner has concluded that the public interest favours maintaining the exemptions contained at sections 27(1)(a) and (c) in respect of the remaining withheld information.

Section 41 – information provided in confidence

25. Section 41 of FOIA states that:

'(1) 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.'

26. 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.

27. With regard to whether disclosure would constitute an actionable breach of confidence the Commissioner follows 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.

28. 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.

29. The Commissioner is satisfied that the information which has been redacted on the basis of section 41(1) was provided to the FCO by a third party. Section 41(1)(a) is therefore met. Furthermore, the Commissioner is satisfied that the information was provided with the clear expectation that it would be treated confidentially and moreover that disclosure of the information would be detrimental to the confider. The Commissioner cannot explain at any greater length why she has concluded that this information engages the exemption contained at section 41(1) without referring directly to the content of the withheld information. However, in reaching this conclusion she wishes to emphasise that despite the passage of time she is satisfied that the disclosure would still constitute a breach of confidence.

30. Although section 41 is an absolute exemption, the law of confidence contains its own built in public interest test with one defence to an action being that disclosure is in the public interest. For the reasons discussed above, the Commissioner accepts that there is a public interest in the disclosure of information detailing the UK's relationship with Saudi Arabia. However, the amount of information withheld on the basis of section 41(1) is small and the degree to which it would increase the public's knowledge of this subject is very limited especially in comparison to the broader and wider nature of information withheld on the basis of section 27. Furthermore, in the Commissioner's view it is clear that disclosure of such information would clearly have detrimental consequences for the third party in question, but also it is likely that such parties would be unwilling to share similar information with the FCO as they may consider it likely that such information would be released. Such an outcome would be firmly against the public interest as it would impact on the FCO's ability to maintain effective relations with the countries in the region. The Commissioner has therefore concluded that the public interest in disclosing the information does not outweigh the public interest in maintaining the confidence.

Section 40(2) – personal data

31. The FCO relied on section 40(2) of FOIA to redact information from one document which contained comments about two particular individuals.
32. Section 40(2) 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).
33. 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.'

34. The Commissioner is satisfied that the redacted information clearly constitutes personal data given that it consists of expressions of opinion about two particular individuals. Furthermore, the Commissioner is satisfied that the two individuals are still alive.
35. 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.'*

36. 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?

37. 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.

38. 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.

39. The Commissioner is satisfied that disclosure would breach first data protection principle as the individuals in question would have a clear expectation that this particular information about them would not be disclosed into the public domain and moreover to do so be likely to cause them harm or distress. Furthermore, given the content of the information that has been redacted, in the Commissioner's opinion there is no compelling legitimate interest in the disclosure of this information. Consequently in the Commissioner's opinion, the FCO is therefore correct to withhold this information on the basis of section 40(2) of FOIA.

Right of appeal

40. 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

41. 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.
42. 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 Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF