

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 January 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 correspondence between FCO offices in London and FCO offices in four other countries about whether FCO buildings should or should not fly the gay pride flag at any stage. The FCO withheld the requested information on the basis of section 35(1)(a) (formulation and development of government policy) of FOIA. The Commissioner is satisfied that the exemption is engaged but has concluded that in all the circumstances of the case the public interest favours disclosing the requested information. However, in disclosing this information the FCO can redact the names of any junior staff on the basis of section 40(2) (personal data) of FOIA.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with the information which the FCO identified as falling within the scope of the request. In providing this information the FCO can redact the names of any junior staff on the basis of section 40(2) of FOIA.
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 3 November 2015:

'Please could you provide me with all exchanges of correspondence that has been sent between FCO offices in London and FCO offices in (i) Russia, (ii) Uganda, (iii) Ireland and (iv) the Netherlands dated 7.5.2015 to the current data [sic] about whether FCO buildings should or should not fly the gay pride flag at any stage.'
5. The FCO responded on 29 December 2015 and confirmed that it held information falling within the scope of the request. However, it considered this information to be exempt from disclosure on the basis of section 35(1)(a) (formulation and development of government policy) of FOIA.
6. The complainant contacted the FCO on 19 January 2016 in order to ask for an internal review of this response.
7. The FCO contacted the complainant on 24 February 2016 and explained that his request for an internal review had been allocated to the wrong department. The FCO apologised for this error and explained that it now intended to respond within 20 working days.
8. The FCO contacted the complainant again on 23 March 2016 and explained that it needed further time to complete its internal review response.
9. The FCO informed the complainant of the outcome of the internal review on 6 September 2016. The review upheld the application of section 35(1)(a) of FOIA as a basis to withhold the information falling within the scope of his request.

Scope of the case

10. The complainant contacted the Commissioner on 16 September 2016 to complain about the way his request for information had been handled. The complainant questioned whether the exemption contained at section 35(1)(a) was engaged and even if it was, he argued that the public interest favoured disclosure of the withheld information. The complainant explained that he also wished to complain about the time it took the FCO to complete the internal review.

Reasons for decision

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

11. The FCO withheld the requested information on the basis of section 35(1)(a) of FOIA. This exemption 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'

12. 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.

13. 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.

14. 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 content of the information in question and its context.

15. 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.

16. The complainant noted that in its refusal notice the FCO explained that:

'It is the FCO's long-standing policy to fly the Union flag, national flags and the flags of Overseas Territories. The Union flag always takes priority and is flown from the FCO's main flag pole at all times. Another flag is never substituted. At our overseas posts the Union flag always takes precedence but in certain cases the EU flag may also be flown. No other flags may be flown on FCO buildings in the UK or overseas. (emphasis added by the complainant).

17. Consequently, the complainant argued that the policy regarding the flying of flags is firmly set and he questioned how the withheld information, which must be dated 7 May to 3 November 2015 given the parameters of the request, could relate to the *formulation or development* of that policy.
18. In its response to the Commissioner, the FCO argued that the fact that a policy is long standing does not prevent it being under consideration or review and that as a result, for the purposes of section 35(1)(a), a policy can continue to be developed even when it is well established. Furthermore, the FCO clarified that the policy in question which was under active consideration and discussion at the time of the request concerned its general approach to flying flags on the government estate, not specifically the rainbow flag.
19. Having considered the FCO's submissions, and considered the content of the withheld information, the Commissioner is satisfied that this falls within the scope of section 35(1)(a). As noted above, the Commissioner recognises that the development of policy can include the review of an existing policy. In the circumstances of this case, the Commissioner is satisfied that the FCO's policy in respect in flag flying was under active review at the time of this request and moreover that the withheld information relates to this review. Furthermore, the Commissioner is satisfied that the final decision in respect of this review would be taken by a Minister and the outcome of the review would result in a particular outcome with potentially wide-ranging consequences.

Public interest test

20. 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.
21. The complainant questioned whether disclosure of the withheld information – which he presumed would simply state that the gay pride flag should not be flown because of a long standing policy – would have a detrimental impact on the formulation and development of government policy.

22. The FCO argued that there is a strong public interest in the government being able to formulate and develop policy away from public pressure so that efficient and effective decision making can take place. It emphasised that in certain circumstances the process of policy formulation can involve advice, analysis and exchanges of information within government that are not made public. In the circumstances of this case, the FCO explained that it had concluded that the public interest favoured maintaining the exemption because the policy review in question was still active at the time of the request.
23. In considering the balance of the public interest arguments outlined above, the Commissioner has taken into account the comments made in a key Information Tribunal decision involving the application of section 35(1)(a).¹ 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.
24. The Commissioner recognises that, at the time of the request, the policy making in question was still active. Therefore, the Commissioner accepts that that it could potentially be argued that both the safe space arguments (ie the need for a space to debate live policy issues away from external interference and distraction) and chilling effect arguments (ie an impact on the free and frank debate of future contributions) could be said to attract considerable weight in favour of maintaining the exemption. However, in the Commissioner's opinion, the FCO's submissions in respect of the public interest test fail to provide any evidence, or demonstrate why, the disclosure of the particular information in this case would have a detrimental impact on policy making. Rather, the FCO's position appears to rely simply on the fact that as the policy making was ongoing at the time of the request then the public interest, by default, favours withholding the requested information. In the Commissioner's opinion, this is too simplistic and generic an approach to take and as a result fails to make a compelling case for maintaining the exemption. Moreover, the Commissioner is conscious of the press interest the issue of FCO buildings flying, or not flying, the Rainbow flag has attracted.² Consequently when balanced against the weak case the FCO has made for maintaining the exemption, the Commissioner has concluded that the public interest in maintaining

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

² <http://www.telegraph.co.uk/news/politics/11677362/Dont-fly-gay-pride-flag-Philip-Hammond-tells-British-embassies.html>

the exemption does not outweigh the public interest in disclosing the information.

Section 40 – personal data

25. The Commissioner is conscious that the FCO has not argued that any parts of the withheld information attract section 40(2) of FOIA, the personal data exemption.
26. However, public authorities, including the FCO, generally argue that the names of junior staff are exempt from disclosure under FOIA on the basis of section 40(2) on the basis that such information constitutes personal data and its disclosure would breach the first data protection principle of the Data Protection Act (DPA).³
27. 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.'

28. The first data protection principle requires 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.'

29. The Commissioner is satisfied that the names of the junior officials identified in the withheld information constitute personal data as defined by the DPA given that they are identifiable from this information and it is of biographical significance to them. Furthermore, the Commissioner is satisfied that based upon established custom and practice, the junior officials in question would have a reasonable expectation that their names would be redacted from any disclosures made under FOIA. Therefore, the Commissioner is satisfied that disclosure of the names of

³ See for example decision notices [FS50635070](#) paragraphs 29 and 31 and [FS50641445](#) paragraphs 40 and 42.

any junior officials contained in the withheld information in this case would be unfair and would breach the first data protection principle.

30. In light of the Commissioner's findings in respect of section 35(1)(a) the FCO must disclose the information falling within the scope the complainant's request. However, in light of her findings in respect of section 40(2), the FCO can redact from this information the names of any junior staff.

Other matters

31. 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.
32. The Commissioner recognises that due to an administrative error the complainant's internal review request of 19 January 2016 was not allocated to the correct department until 24 February 2016. However, it still took the FCO 135 working days to complete the internal review. The Commissioner asked the FCO to explain why it took so long to complete the internal review in this case. In response, the FCO acknowledged the delays in this case were significantly longer than the time period recommended in the Commissioner's guidance, however it noted that had a good track record for responding to FOI requests and internal reviews and it deeply regretted the delays in this case.
33. Whilst the Commissioner recognises the points the FCO has made, she notes that the time taken to complete this internal review significantly exceeded the timelines set out in her guidance. Moreover, the Commissioner has sympathy with the complainant's comment that, given the amount of time the FCO took to complete the internal review, it was considerably lacking in substance. In the future, she expects the FCO to ensure that internal reviews are completed within the timeframes set out within her guidance.

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
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