

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 June 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 reports made or received regarding the inauguration of President Trump. The FCO provided the complainant with some information but sought to withhold the remainder on the basis of sections 27(1)(a), (c) and (d), 27(2) (international relations) and section 40(2) (personal data) of FOIA. The Commissioner is satisfied that the withheld information has been correctly withheld on the basis of sections 27(1)(a), (c) and (d) and section 40(2).

Request and response

2. The complainant submitted the following request to the FCO on 22 January 2017:

'Please provide me with copies of all reports which the Foreign and Commonwealth Office has made or received, regarding the Inauguration Day of the 45th President of the United States of America, Donald J. Trump, on 20th January 2017, especially with regard to the size of the crowd who attended on Washington DC's National Mall to watch Mr Trump take his oath of office.'

3. The FCO responded on 20 February 2017 and provided the complainant with a digest of the information that it was prepared to disclose. However, the FCO explained that the remaining information was exempt from disclosure on the basis of sections 27(1)(a), (c) and (d) (international relations) and 40(2) (personal data) of FOIA.

4. The complainant contacted the FCO on the same day in order to request an internal review of this decision, arguing that the public interest favoured disclosing the withheld information.
5. The FCO informed him of the outcome of the internal review on 21 March 2017. The review upheld the application of the exemptions cited in the refusal notice.
6. During the course of the Commissioner's investigation the FCO provided the complainant with further information falling within the scope of his request. However, the FCO confirmed that it was of the view that the remaining information was exempt from disclosure on the basis of the sections cited in the refusal notice. In addition, the FCO argued that section 27(2) also applied to this remaining information.

Scope of the case

7. The complainant contacted the Commissioner on 27 March 2017 to complain about the FCO's decision to withhold information falling within the scope of his request. Following the FCO's disclosure of further information, for the purposes of this decision notice the Commissioner has simply considered whether the remaining withheld information is exempt from disclosure on the basis of exemptions cited by the FCO. The FCO withheld the majority of this information on the basis of sections 27(1)(a), (c) and (d), and section 27(2) of FOIA. The remaining information, consisting of names and contact details of junior staff, was withheld on the basis of section 40(2) of FOIA.

Reasons for decision

Section 27 – international relations

8. Sections 27(1)(a), (c) and (d) of FOIA state 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

(d) the promotion or protection by the United Kingdom of its interests abroad'

9. In order for a prejudice based exemption, such as 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.
10. 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

The FCO's position

11. In its responses to the complainant the FCO explained that the effective conduct of international relations depends upon maintaining trust and confidence with other governments. It emphasised that 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 if the UK does not maintain this trust and confidence its ability to act as a significant player in the international arena, and protect and promote UK interests through international relations, will be harmed. Furthermore, other governments and international organisations may be

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

more reluctant to share information with the UK government in the 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.

12. The FCO's submissions to the Commissioner included more detailed arguments to support its position that the particular information that it was seeking to withhold was exempt from disclosure. These submissions made specific reference to the content of the withheld information itself and therefore the Commissioner has not referred in detail to these submissions in this notice. Instead, she has summarised them below.
13. The FCO explained that the withheld information contains internal correspondence from within the FCO which captures immediate reactions to the inauguration of President Trump and includes candid assessments not intended for wider distribution. Furthermore, the FCO explained that in part discussions were drawn from information provided to it, in confidence, by US sources. The FCO argued that if this sensitive information was disclosed immediately after President Trump's inauguration then the FCO would be unlikely to receive similar information again in the future. Consequently, the FCO argued that in its view disclosure of such information *would* damage the UK's bilateral relationship with the US, *would* prejudice the interests of the UK and *would* harm the protection and or protection of UK interests in the US.

The Commissioner's position

14. 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), (c) and (d) are designed to protect. With regard to the second criterion the Commissioner is satisfied that disclosure of the information also has the potential to result in prejudice to the UK's relationship with the US in the ways envisaged by the FCO. 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, the Commissioner is satisfied that if this information was disclosed there is a real and significant risk of the UK's relations with US being harmed. The Commissioner has reached this conclusion for a number of reasons: firstly, the content of the withheld information does contain, as the FCO has suggested, candid comments regarding the inauguration of President Trump and the Commissioner has little hesitation in accepting that disclosure of such information would clearly impair UK-US relations. Secondly, the timing of the request – which was submitted only two days after the inauguration took place - means that the information was still current and therefore still of considerable sensitivity. Thirdly, again the timing of the request means that disclosure of the information would

risk undermining the UK's relationship with a new US Administration. The Commissioner is therefore satisfied that the exemptions contained at sections 27(1)(a), (c) and (d) are engaged and furthermore that the higher threshold of likelihood is met.

Public interest test

15. 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.
16. The FCO argued that there was a strong public interest in ensuring that the FCO is able to conduct the UK's international relations effectively and protect UK interests abroad and that in order to do so there must be good working relationships with other governments based on confidence and trust. In the particular circumstances of this case the FCO emphasised that disclosure of the withheld information would undermine the UK's relationship with the US at a pivotal stage and across a range of issues and that such an outcome was firmly against the public interest.
17. The complainant argued that perceived collusion by the UK government with the mendacity of President Trump, and his administration, as evinced by the FCO's refusal to publish information which the complainant presumed contradicted either fully or in part President Trump's claims regarding the size of the crowd on inauguration day, is not in the public interest.
18. With regard to the public interest in disclosing the information the Commissioner recognises that the inauguration of President Trump was clearly an event which attracted international attention and the controversy regarding the alleged size of the crowd at the event only heightened such interest. Disclosure of the withheld information would provide a detailed insight into the initial reactions of senior FCO staff to the events of the inauguration day and the Commissioner accepts that there is a genuine public interest in the disclosure of this information. However, the Commissioner also believes that there is very strong public interest in ensuring that the UK's relationship with the US is not harmed given that the US is one the UK's key allies. In the circumstances of this request the Commissioner believes that the public interest in maintaining the exemption attracts additional weight given that disclosure *would* result in the prejudicial effects envisaged by the FCO rather than such effects only being likely to occur if the information was disclosed. The Commissioner believes that it is also relevant to note that the FCO has disclosed some information to the complainant which provides a genuine, if only partial, insight into details of the inauguration day identified as being issues of interest by the FCO. 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), (c) and (d) in respect of the remaining withheld information.

19. In light of this conclusion the Commissioner has not considered whether the same information would also be exempt from disclosure on the basis of section 27(2) of FOIA.

Section 40(2) – personal data

20. 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).

21. 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.'

22. The FCO withheld the names of junior FCO staff and their contact details. The Commissioner accepts that such information constitutes personal data within the meaning of section 1 of the DPA as they clearly relate to identifiable individuals.

23. 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.'

24. 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?
25. 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.
26. 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.
27. The FCO explained that it had a clear policy that the names of junior officials and their contact details would not be released under FOIA and therefore the individuals in question had a reasonable expectation that

their names and contact details would not be released into the public domain.

28. The Commissioner is satisfied that the junior officials would have a reasonable expectation in the circumstances of this case, based upon established custom and practice, of their names and contact details 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.

Right of appeal

29. 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

30. 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.

31. 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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