

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 12 December 2017

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

#### Decision (including any steps ordered)

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1. The complainant submitted a request to the Foreign and Commonwealth Office (FCO) seeking the names of the individuals who received five particular diplomatic telegrams 'diptels'. The FCO initially refused to comply with this request on the basis of section 14(1) (vexatious) because it considered that the process of doing so would be excessively burdensome. However, the FCO amended this position during the course of the Commissioner's investigation and suggested that it could be argued that it did not in fact hold the requested information. The Commissioner has concluded that the requested information is not in fact held and that the FCO should have informed the complainant of this when it initially responded to his request. Its failure to do so represents a breach of section 1(1)(a) of FOIA. The complainant also argued that the FCO had failed to respond to all aspects of an earlier related request he had submitted to it. The Commissioner agrees that the FCO did not respond to all aspects of this request, and in doing so breached section 1(1)(a) of FOIA, but the information in question has, in effect, been provided to the complainant during the course of the Commissioner's investigation. Therefore, no steps are required by the FCO in response to this decision notice in order to fulfil this request.

#### Request and response

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2. On 13 June 2016 the complainant sent the following email to the FCO:

*'I'm gravely concerned about the leak of diptels to journalists. There is no purpose for this except to substantiate one side or the other in what has been an awful referendum campaign.'*

*Diptels include confidential correspondence which can often be quite personal and sensitive. They come from the hard work of diplomats based abroad who I feel need to be spared from behaviour like this to ensure there is free and frank advice to Minister.*

*I would be grateful if you can confirm there is an inquiry to establish the source of the leak. I'd be most assured if you can let me know the circulation list of the diptels from the Ankara mission before the EU referendum campaign and the current one. The Latter should be much tighter.*

*The Ankara mission is the one I am most concerned about because their advice includes that about the situation for refugees. Another situation where local politicians in my area are just prone to lying. Our diplomatic assets in Turkey are crucial.*

*I've shared this article from The Sunday Times for you to read for yourself. To press the point, i wish to make a freedom of information request for the papers mentioned in this article. I want to invite you to use the section 36 exemption.'*

3. The FCO responded to this request on 26 October 2016 under its reference number 0578-16. It provided the complainant with a digest of the five diptels referred to in The Sunday Times article and explained that further information from the diptels had had been withheld on the basis of the following sections of FOIA: section 27(1)(a) (international relations), section 35(1)(a) (formulation and development of government policy) and section 40(2) (personal data) of FOIA. The parts of the diptels that were disclosed did not include the distribution lists or indeed the individual recipients to which the emails had been sent. Nor did the response make any reference as to whether there was an inquiry to establish the cause of the leak. However, the FCO's response also explained that 'In relation to your wider queries and the circulation of telegrams from our Embassy in Ankara, I should clarify that there is no standard circulation list for telegrams.'

4. The complainant contacted the FCO again on 22 March 2017:

*'I write in respect of FOI Request 0578-16 which i submitted last June in respect of the Diptels leaked to Tim Shipman of the Sunday Times.*

*May I ask for your response to the request to be published. I hope you will understand it has been quite a while. If I have missed it then i sincerely apologise.*

*If not, then I welcome an explanation as to the delay. There is simply no way the leak of sensitive Diptels should be allowed. I don't really care if its part and parcel of an election campaign.'*

5. The FCO responded on the same day and confirmed that the response had been published since November 2016 and was available at the following link <https://www.gov.uk/government/publications/foi-release-telegrams-from-ankara-1>

6. In response, the complainant submitted the following requests to the FCO on 22 March 2017:

*'1) which of the exemptions was specifically applied to prevent the disclosure of the circulation list for those diptels? [which were the subject of an earlier request, 0578-16]  
2) may i submit a seperate request for disclosure of the circulation lists of those diptels?'*

7. The FCO responded on 21 April 2017, under its reference number 0288-17, and explained that in relation to point 1, the circulation lists of the diptels were considered to be out of scope, so no exemptions were applied. In relation to point 2, the FCO explained that:

*'The diptels relating to your request were circulated to a number of separate distribution lists, many of which are not owned by the FCO. To compile a list of individual recipients on all of those distribution lists at the time the diptels were sent would require us to consult extensively with a large number of other stakeholders within the FCO and other Departments to retrieve and confirm the recipients. To respond to your request we would also need to establish the position and grade of each individual at the time the diptels were sent to enable us to establish whether or not their names might be released, and make redactions accordingly. We consider that this would impose a significant burden on the FCO and we are therefore refusing your request under section 14 (1) of the Act.'*

8. The complainant contacted the FCO on 21 April 2017 in order to ask for an internal review of this decision. The complainant explained that he was content for the names of civil servants below the level of senior civil servants (SCS) to be redacted; he only wanted to be provided with the names of '*senior civil servants, spads and ministers and the inboxes they use*'.
9. The FCO informed him of the outcome of the review on 19 June 2017. The review upheld the application of section 14(1) of FOIA.

## Scope of the case

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10. The complainant contacted the Commissioner on 19 June 2017 in order to complain about the FCO's handling of request 0288-17. The complainant provided the Commissioner with detailed submissions to support his complaint, including a suggestion that if a leak inquiry had been conducted then as part of this inquiry the FCO may have compiled a list of individuals who received the five diptels in question. If this case then such a list could be used to fulfil the request without any burden being imposed on the FCO. The Commissioner agreed with the complainant the scope of her investigation would to be consider:
  - a) Whether the FCO already holds a list (full or partial) of the individuals who received the diptels in question because such a list would already have been compiled to assist with any leak investigation; and
  - b) If such a list was not compiled, whether it would prove so burdensome for the FCO to compile such a list that it would be entitled to refuse the request on the basis of section 14(1) of FOIA.
11. With regard to this latter point, the Commissioner highlighted to the complainant that the FCO's refusal notice had explained that the process of compiling a list of individual recipients on the distribution lists on the five diptels in question would involve the FCO '*consult[ing] extensively with a large number of other stakeholders within the FCO and other Departments to retrieve and confirm the recipients.*'
12. However, the Commissioner explained to the complainant that under FOIA when responding to a request public authorities are only under a duty to disclose recorded information that they hold, subject of course to a number of exemptions, or the provisions of section 12 (the cost limit) and section 14. Public authorities are not under an obligation to create information in order to answer a request. Nor are public authorities under an obligation to search and retrieve information held by other public authorities in order to answer a request.
13. Consequently, the Commissioner explained to the complainant that it appeared that the FCO only held the names of some of the individuals who received the five diptels in question. The names of individuals in other government departments who received the diptels are not held by the FCO and FOIA did not oblige the FCO to collect these names from other public authorities in order to consider them for disclosure.
14. In any event, during the course of the Commissioner's investigation, for the reasons discussed below, the FCO explained that it could be argued that it did not in fact hold *any* of the information the complainant requested in March 2017. The Commissioner, again for the reasons

discussed below, agreed with this assessment and informed the complainant accordingly. She asked the complainant whether he was prepared to withdraw his complaint in light of this development or whether he wanted a decision notice to be issued.

15. In response the complainant confirmed that he wanted a decision notice to be issued. He noted that part of the FCO's basis for suggesting that it did not hold the information sought by request 0288-17 was because of the passage of time between that request being submitted in March 2017 and the date of the diptels in question, ie May 2016. However, the complainant emphasised that his original request of 13 June 2016, 0578-16, had also sought the following *'I would be grateful if you can confirm there is an inquiry to establish the source of the leak. I'd be most assured if you can let me know the circulation list of the diptels from the Ankara mission before the EU referendum campaign and the current one. The Latter should be much tighter'*. However, the complainant noted that the FCO had ignored this aspect of that request in its response issued in October 2016.
16. In light of the above developments since the complainant first contacted the Commissioner, this decision notice therefore focuses on:
  - a) Whether the FCO holds the information sought by request 0288-17, and
  - b) Whether the FCO responded to all parts of request 0578-16.

## **Reasons for decision**

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### **Request 0578-16**

#### The FCO's position

17. Firstly, the FCO explained to the Commissioner that although an investigation was undertaken following the leaks of the diptels in question, this investigation did not involve compiling a list of every individual who may have received the diptels.
18. Secondly, the FCO explained that diptels have a wide distribution. Overarching distribution lists (DLs) are compiled and maintained by individual FCO posts and FCO departments, as well as other government departments. The DLs are named accordingly using acronymic titles. When a diptel is drafted the drafting officer will select the appropriate DLs to receive it according to its subject matter/theme.
19. In addition, the FCO explained that an official Diptels Summary is prepared twice a day. This provides an overview of, and links to, all the

latest diptels that have been issued. The FCO explained that staff who are interested in seeing all diptels, irrespective of whether their department or post was part of the original distribution, can sign up to receive this summary via a further DL.

20. Furthermore, the FCO explained that DL are updated as staff move between departments and posts. This happens fairly frequently in the FCO: standard tour lengths for jobs in the UK are 2-3 years with tour lengths overseas varying between 1-4 years. In addition, DLs may change due to departmental restructuring.
21. The FCO explained that diptels are automatically saved into its electronic record system. This archived record shows the content of the diptel and the lists of overarching acronymic DLs to which it was sent. However, the FCO explained that it is not possible to expand the DLs in the archived versions of the diptels in order to provide a more detailed list of individuals who were members of the DL at the time the diptel was sent.
22. Consequently, the FCO explained that as the diptels in question were issued in May 2016 and the complainant submitted his request in March 2017, it would on reflection be more accurate to say that the FCO no longer held an exact list of the individuals on FCO DLs who received the diptels in question.
23. As an alternative position, the FCO explained that if the view were taken that the contents of the DLs had arguably not changed that significantly over that ten month period, and it should have processed the request on the basis of current list of DLs which it could expand to identify the individuals currently listed, then it remained of the view that to do so would prove sufficiently burdensome that section 14(1) of FOIA would apply.<sup>1</sup> The FCO noted that the diptels had been sent to 15 different DLs.

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<sup>1</sup> The FCO provided the Commissioner with detailed submissions to support its reliance on section 14(1) based on this approach to the request. However, as the Commissioner has concluded that the FCO did not in fact hold the requested information when the request was submitted she has not had to consider the FCO's submissions on section 14(1). Nevertheless, for the reasons previously provided to the complainant, the Commissioner is satisfied that if the request was processed on the basis that it sought the names of individuals currently listed on the basis of DLs to which the diptels were sent, then the FCO would have a compelling case on which to rely on section 14(1) of FOIA in respect of the names of any FCO staff.

The Commissioner's position

24. Having considered the FCO's submissions to her carefully, the Commissioner has concluded that at the time of the complainant's request in March 2017 it did not actually hold the names of the individuals within the FCO who received the five diptels which were the subject of the complainant's previous request.
25. The Commissioner accepts that given the way in which the archived versions of the diptels are stored it is not possible to expand the DLs on an archived version of a diptel in order to reveal the names of the individuals listed on each DL. Furthermore, given the time that has elapsed between the date of these diptels and the date of the request the Commissioner accepts that the only version of the diptels that the FCO is likely to hold are the copies that had been archived.
26. Furthermore, the Commissioner agrees with the FCO that given the changes to the content of the DLs due to staff movements within the organisation it is clear that simply providing the complainant with the names of the recipients on the current DLs would not fulfil his request. This is because the diptels in question were sent to the recipients on previous versions of the 15 DLs. The versions of the 15 DLs as at May 2016 are no longer held by the FCO because the content of these DLs has been amended over time to reflect staff movements.
27. The Commissioner accepts that there is likely to be some significant crossover between the recipients on the DLs at the date of the diptels and the date of the request given that only 10 months had elapsed. However, for the purposes of FOIA the request clearly sought the names of the individuals who received the diptels and for the reasons set out above the Commissioner is satisfied that the FCO no longer held this information at the point the complainant submitted his request.
28. In terms of the requirements of FOIA, section 1(1) states that:  
  
*'Any person making a request for information to a public authority is entitled—*  
  
*(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*  
  
*(b) if that is the case, to have that information communicated to him.'*
29. In light of her findings set out above, the Commissioner has concluded that the FCO failed to comply with section 1(1)(a) when it responded to this request. This is because it confirmed that it held the requested information, albeit it could not provide it on the basis of section 14(1) of FOIA. In fact, in order to correctly comply with section 1(1)(a) the FCO

should have informed the complainant that it did hold the requested information.

Request 0578-16

30. As explained above, during the course of her investigation the complainant also raised with the Commissioner his concerns that the FCO had failed to respond to the parts of his request of 13 June 2016 which read *'I would be grateful if you can confirm there is an inquiry to establish the source of the leak. I'd be most assured if you can let me know the circulation list of the diptels from the Ankara mission before the EU referendum campaign and the current one. The Latter should be much tighter'*.
31. However, the Commissioner notes that the FCO's response to this request did address the part of the request which sought details of the changes to the circulation list of diptels from the Ankara mission by explaining that there is no standard circulation list for telegrams, the implication being that no 'before' and 'after' list could be provided. Nevertheless, the Commissioner recognises that the FCO's response did not address whether there was an inquiry into the leak and the FCO's failure to respond to this aspect of the request constituted a breach of section 1(1)(a) of FOIA. However, during the course of this investigation the FCO confirmed to the Commissioner that an inquiry did take place, and the Commissioner has informed the complainant of this.
32. For completeness, the Commissioner notes that the FCO's response of 21 April 2017 to request 0288-17 explained that the circulation list of the diptels were considered to be out of scope of the earlier request 0578-16. Given the way in which the diptels only include acronymic DLs and not the names of the individuals to whom the diptels were sent, then the Commissioner would be prepared to accept that a request for a copy of the diptels, which was the information sought by the request of 13 June 2016, did not arguably extend to the names of the individual recipients of the diptels. However, the Commissioner believes that the FCO should have made this position clearer in its response to the complainant.



## Right of appeal

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33. 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](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

34. 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.
35. 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**  
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