

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 February 2019

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) seeking communications between the High Commissioners of various Caribbean countries and FCO Ministers about the 'Windrush Generation'. The FCO confirmed that it held information falling within the scope of the request but sought to withhold this on the basis of sections 27(1)(a), (c) and 27(2) (international relations) of FOIA. The Commissioner has concluded that the information is exempt from disclosure on the basis of sections 27(1)(a) and (c) and that in all of the circumstances of the request the public interest favours maintaining these exemptions. However, she has also concluded that the FCO breached section 17(3) of FOIA by failing to complete its public interest test considerations in a reasonable timeframe.

Request and response

2. The complainant submitted the following request to the FCO on 22 April 2018:

'Please note that I am only interested in information which was generated between 1 January 2017 and the present day.'

Please redact the names and personal details of any members of the public mentioned in the documents.

1...During the aforementioned period did The High Commissioners of any of the following countries/territories listed below write to the Foreign Secretary and or Foreign Office Minister with specific

responsibility for those areas to raise concerns about the plight of British citizens previously resident in those countries but who came to Britain after the war as part of what is now called The Windrush Generation. The correspondence could be about citizens in the UK who have recently been made unemployed or have been denied access to work, housing, pensions, benefits and NHS health care because of the impact of new immigration rules. But it could also relate to individuals who have either been deported or face deportation as a result of those rules. It could also related to individuals who have visited the territories but now find themselves unable to return to the UK because of the new rules.

Jamaica

Bahamas

Barbados

Dominica

Grenada

Trinidad and Tobago.

2...If the answer to question one is yes can you please provide copies of this correspondence and communication including emails.

3...Did the Foreign Secretary or relevant government Minister with responsibility for those areas reply to those concerns.

4...If the answer to question three is yes can you please provide copies of this correspondence and communication including emails.

5...If any relevant documentation has been subsequently destroyed can you please provide the following details. In the case of each destroyed document can you provide its title and a brief outline of its concerns. In the case of each destroyed document can you state when it was destroyed and why. In the case of each destroyed document can you provide a copy if it continues to be held in another form.'

3. The FCO contacted the complainant on 20 June 2018 and confirmed that it held information falling within the scope of the request but it considered this to be exempt from disclosure on the basis of section 27 (international relations) of FOIA and it needed additional time to consider the balance of the public interest test.

4. In response the complainant contacted the FCO on 21 June 2018 and asked it to conduct an internal review of the time it was taking to respond to his request.
5. The FCO replied on 18 July 2018 and explained that it could not conduct an internal review until a substantive response had been issued in relation to the request; it also further extended the time it needed to consider the balance of the public interest test. A similar further public interest extension letter was sent to the complainant on 15 August 2018.
6. The FCO provided the complainant with a substantive response to his request on 29 August 2018. It concluded that all of the information falling within the scope of the request was exempt from disclosure on the basis of section 27(1)(c) of FOIA and that the public interest favoured maintaining the exemption.
7. The complainant contacted the FCO on 13 September 2018 in order to ask for an internal review of this decision.

Scope of the case

8. The complainant contacted the Commissioner on 17 August 2018 in order to complain about the FCO's handling of his information request. More specifically, he has complained about:
 - The FCO's delays in completing its public interest considerations;
 - The FCO's failure to complete an internal review in response to his email of 18 July 2018 regarding the delays in processing the request; and,
 - The FCO's refusal to provide him with the information falling within the scope of his request.
9. During the course of the Commissioner's investigation, the FCO explained that in addition to section 27(1)(c), it was also seeking to withhold the information falling within the scope of the request on the basis of sections 27(1)(a) and 27(2) of FOIA.

Reasons for decision

Section 27(1) – international relations

10. Section 27(1) of FOIA states that

'Information is exempt information if its disclosure under this Act 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'*

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 between governments. It argued that if the UK does not maintain this trust and confidence, its ability to protect and promote UK interests through international relations will be hampered. The FCO argued that disclosure of information relating to any discussions on the sensitive issues relating to those of the Windrush generation and their descendants could prejudice and potentially damage the relationship between the UK and those Caribbean countries. The FCO argued that release of any confidential correspondence at this time, whilst the issue is a live one, could adversely affect the UK's relations and be taken into account by those countries. The FCO argued that this would reduce the UK Government's ability to protect and promote UK interests which would not be in the public interest. However, the FCO did note that it was trying to seek agreement with another country to release correspondence with them.
12. In its submissions to the Commissioner the FCO provided some additional evidence, which referenced the content of the withheld information, to explain why it considered that disclosure of it would be likely to prejudice the UK's interests with Caribbean countries. Due to the sensitivities of these submissions the Commissioner has not reproduced them in this decision notice although she can confirm that they follow the FCO's line of argument as set out in its correspondence with the complainant.

The complainant's position

13. The complainant stated that he did not accept that disclosure of the withheld information would be likely to prejudice the interests of the United Kingdom. Indeed he argued that there are strong grounds for believing that Caribbean countries would welcome disclosure given their own concerns about the way the Windrush generation had been treated. He also suggested that it was possible that the FCO was seeking to withhold the information in an attempt to avoid any further negative publicity.

The Commissioner's position

14. 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. The anticipated prejudice must be more likely than not.
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*'.
16. 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 having considered the content of the withheld information the Commissioner notes that part of it was provided to the UK in confidence by another state and the remaining parts of the information, if disclosed, would reveal the content of the information originally received by the UK. In this context, the Commissioner is satisfied that there is a causal link between disclosure of this information and prejudice occurring to the UK's relations with Caribbean countries. Furthermore, she is satisfied that the resultant prejudice would be real and of substance. Moreover, the Commissioner is satisfied that there is

more than a hypothetical risk of prejudice occurring and therefore the third criterion is met. In reaching this conclusion, she has taken in to account both the sensitivity and ongoing nature of the Windrush issue which in her view adds weight to the likelihood of prejudice occurring of the withheld information was disclosed. The Commissioner has also taken into account the complainant's submissions. However, she is satisfied that the FCO has genuine and legitimate grounds in the circumstances of this case for arguing that disclosure would be likely to prejudice the UK's international relations rather than seeking to withhold the information because of a desire to avoid further negative publicity about the issue.

16. Sections 27(1)(a) and (c) and are therefore engaged.

Public interest test

17. However, section 27(1) is a qualified exemption and therefore subject to the public interest test set out in section 2(2)(b) of FOIA. The Commissioner has therefore considered whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.
18. The complainant argued that there were very strong public interest grounds for disclosure given the overwhelming public concern about the government's treatment of the Windrush generation and its subsequent handling of the scandal. He also suggested that the withheld information may shed some light on whether the British government chose to ignore concerns, including those offered by some Caribbean countries, that the UK's recent immigration policies were penalising those who had a right to stay in the UK. For its part, the FCO acknowledged that disclosure of the withheld information could help to contribute towards transparency and awareness on this subject. However, it argued that there was a very strong public interest in the UK being able to enjoy effective international relations in order to protect and promote UK interests.
19. With regard to the public interest in disclosing the information the Commissioner acknowledges that the issue of the Windrush immigration, and the government's handling of it, has attracted considerable public attention. The Commissioner therefore accepts, as the complainant suggests, that there is a considerable particular public interest in understanding the nature of the communications the FCO had with Caribbean countries about this issue. Disclosure of the withheld information would provide some, albeit a relatively limited, insight into the nature of such communications. However, the Commissioner also believes that there is very strong public interest in ensuring that the UK's relationship with Caribbean countries is not being harmed, especially given that the discussion about issues relating to Windrush

immigration remain live and thus the need for the UK to be able to enjoy effective relations with the countries in question is particularly great. In view of these factors, and given the relatively limited insight disclosure of the withheld information would provide, the Commissioner has concluded that the public interest favours maintaining the exemptions contained at sections 27(1)(a) and (c) in respect of the withheld information.

20. In light of this conclusion the Commissioner has not considered the FCO's reliance on section 27(2) of FOIA.

Time taken to consider the balance of the public interest test

21. Section 1(1) of FOIA provides 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.'*

22. Section 10(1) of FOIA provides that a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.

23. Under section 17(3) a public authority can, where it is citing a qualified exemption, have a 'reasonable' extension of time to consider the balance of the public interest. The Commissioner considers it reasonable to extend the time to provide a full response, including public interest considerations, by up to a further 20 working days, which would allow a public authority 40 working days in total. The Commissioner considers that any extension beyond 40 working days should be exceptional and requires the public authority to fully justify the time taken.

24. In this case the FCO took 90 working days to consider the balance of the public interest. The Commissioner understands that the primary reason for these delays was due to the FCO consulting stakeholders in relation to the requested information. The Commissioner is not unsympathetic to the need, in such circumstances, for the FCO potentially needing more than 40 working days to consider the balance of the public interest test. However, despite these circumstances she is not persuaded such a lengthy period of time can still be considered to be reasonable. She has therefore concluded that the FCO breached section 17(3) of FOIA.

Other matters

25. The complainant raised concerns about the FCO's refusal to conduct an internal review in response to his correspondence of 21 June 2018 in which he expressed dissatisfaction with the time it was taking to respond to his request. FOIA does not specify how a public authority should conduct internal reviews; rather the section 45 Code of Practice (the Code) sets out how such reviews should be conducted. Taking into account the Code, the Commissioner shares the FCO's view that the purpose of an internal review is to review a substantive response which a public authority has previously provided to a request. Therefore, she agrees with the FCO that it was not under an obligation to conduct an internal review in response to the complainant's correspondence of 21 June 2018. However, the Commissioner recognises that the complainant sent that correspondence because he was concerned with the length of time it was taking the FCO to complete its public interest considerations. In circumstances where requesters are concerned that a public authority is failing to adhere to the timelines for completing public interest considerations as set out in her guidance she would encourage them to contact the Commissioner rather than ask a public authority to conduct an internal review.

Right of appeal

26. 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

27. 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.
28. 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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