

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 December 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 internal FCO analysis about Mexican and Central American migrants crossing the US-Mexican border. The FCO confirmed that it held information falling within the scope of the request but it sought to withhold this on the basis of sections 27(1)(a), (c) and (d) (international relations), 35(1)(a) (formulation and development of government policy) and 40(2) (personal data) of FOIA.
2. The Commissioner has concluded that the requested information is exempt from disclosure on the basis of sections 27(1)(a), (c) and (d) and section 40(2). However, she has also concluded that the FCO breached section 17(3) of FOIA by failing to conclude its public interest test considerations and provide the complainant with a substantive response to his request within a reasonable timeframe.
3. The Commissioner does not require any steps to be taken.

Request and response

4. The complainant submitted the following request to the FCO on 6 July 2018:

'Good morning. I was wondering, please, if I could have access to any briefing notes to Ministers, any internal reports or any embassy summaries of the current US border crisis that is unfolding?

I would like, please, to read any formal or update report that has been compiled relating to the issue of the US government seeking to stem

the numbers of Mexican and Central American migrants crossing the border and, in particular, any briefing note, email or analysis of the current controversy relating to children being separated from their parents.

Given we in the UK are having a similar debate about stopping high levels of immigration and the upcoming trip of Donald Trump to the UK, I feel that this fits firmly into the box of public interest and to inform current debate.

I appreciate that there is plenty of correspondence daily from the US embassy to London, but any specific briefing, analysis or email that explicitly seeks to unpick the current or recent past situation with regard to US border control (with a focus on handling minors) is sought.'

5. The FCO responded on 9 July 2018 and explained that as drafted the request was too broad and burdensome and asked the complainant to refine his request.
6. The complainant responded on 10 July 2018 as follows:

'Thank you very much for your reply. I am sure you know under FOI regulation that one aspect of the law is that you are encouraged to help people like myself identify what information is available.

So - if my ambition is to try to find details on how the Foreign Office has reported internally and to ministers on the issue of US border control and its impact on minors caught up in this issue, what would you recommend?

Has there been a comprehensive document produced that investigates Trump's border policy? Has there been a specific note created by your US desk that addresses the issue of human rights and Mexican / Central American migrants and border control? I am not sure how you produce your reports and the process of internal reporting so perhaps you could call your US desk in London and ask them if they have produced any specific reports on this matter and then, based on that, either answer the first FOI or reply to me with details on how I can best find the information I am seeking - in particular what reports have been filed from British officials in the US or in London pertaining to the handling of minors on the Mexican / US border.'

7. The FCO responded on 12 July 2018 and explained that it would accept the request as it was now framed, under its reference number 0738-18.
8. The FCO contacted the complainant again on 7 August 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 but it needed additional time to consider the balance of the public interest test.

9. The FCO sent the complainant further public interest test extension letters at approximately monthly intervals until it issued its substantive response on 18 July 2019. This response explained that the information falling within the scope of the request was considered to be exempt from disclosure on the basis of sections 27(1)(a), (c) and (d), 35(1)(a) (formulation and development of government policy) and 40(2) (personal data) of FOIA.

Scope of the case

10. The complainant contacted the Commissioner on 18 July 2019 in order to complain about the FCO's handling of his information request. He was dissatisfied with the FCO's refusal to provide him with the information he had requested and its delays in providing him with a substantive response to his request. Although the FCO had not completed an internal review in relation to this request, the Commissioner exercised her discretion and took this complaint on at this stage given the time it had taken the FCO to complete its public interest test considerations.

Reasons for decision

11. The FCO has explained to the Commissioner that it considers all of the information falling within the scope of the request to be exempt from disclosure on the basis of sections 27(1)(a), (c) and (d) of FOIA.¹ These sections state 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, or

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

The FCO's position

¹ The only exception to this is a small amount of information which the FCO considers to be exempt instead on the basis of section 40(2) of FOIA only.

12. In its refusal notice, the FCO argued that the effective conduct of the UK's international relations depends upon maintaining trust and confidence with other governments and international organisations. It argued that to do this there must be good working relationships with other governments and international organisations based on confidence and trust. 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 it 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 hampered as other governments and international organisations may be more reluctant to share 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.
13. In its submissions to the Commissioner, the FCO provided more specific and detailed arguments to support its reliance on the exemptions contained at section 27(1) of FOIA. These submissions made direct reference to the content of the withheld information and therefore the Commissioner is limited in terms of how much of these submissions she can refer to in this notice. However, she is able to confirm that the FCO argued that disclosure of the withheld information would, or is very likely to, prejudice the UK's relations with the US. In support of this position the FCO emphasised that the information contained internal FCO discussions on a high profile and sensitive issue and it was clear that disclosure of this information would make relations with the US more difficult and could require a particular damage limitation response to contain and limit the damage which, without release, would not have otherwise been necessary.

The complainant's position

14. The complainant noted that the FCO previously released information under FOIA about its concerns in respect of human rights in Saudi Arabia and that this disclosure had set a precedent for the disclosure of information on this topic.²

² <https://aoav.org.uk/wp-content/uploads/2018/10/UK-Gulf-Team-Desk.pdf>

The Commissioner's position

15. 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.
16. 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*'.³
17. 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 having considered the content of the withheld information and taking into account the FCO's submissions to her, the Commissioner is satisfied that there is a causal link between disclosure of this information and prejudice occurring to the UK's relations with the US. Furthermore, she is satisfied that the resultant prejudice would be real and of substance. Moreover, the Commissioner is satisfied that

³ *Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence* (EA/2006/0040), paragraph 81.

there is a more than a hypothetical risk of prejudice occurring and therefore the third criterion is met. The Commissioner has reached this conclusion given the free and frank nature of the internal FCO discussions on a subject matter which remains a sensitive one. In reaching this conclusion the Commissioner acknowledges that the FCO has, as the complainant identified, disclosed information on its concerns about human rights in Saudi Arabia. However, in the Commissioner's opinion each request needs to be considered on its own merits and the disclosure of the information identified by the complainant does not set, in her view, a precedent for the disclosure of the withheld information in this case.

18. Sections 27(1)(a), (c) and (d) are therefore engaged.

Public interest test

19. 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 information.

Public interest in disclosing the withheld information

20. The FCO acknowledged that there was a strong public interest in government transparency and accountability and in the disclosure of information about the FCO's views on the Trump Administration.

21. As the complainant argued in his original request, there is currently a similar debate in the UK about stopping high levels of immigration and allied to the upcoming (at the time of his request) trip of President Trump to the UK, he argued that there was a clear public interest in the disclosure of this information in order to inform current debate.

Public interest in maintaining the exemption

22. The FCO argued that there is a strong public interest in ensuring that it is able to conduct the UK's international relations effectively and protect UK interests abroad. It argued that this is particularly the case at the present time given that UK's relationship with the US is at a pivotal stage in the light of Brexit and the corresponding opportunity for the UK to secure a trade deal with the US.

23. Moreover, the FCO argued that disclosure of the withheld information would also undermine the UK's ability to work with the US on a range of bilateral issues such as counter-terrorism, defence and security issues which remain fundamental to the UK's national security.

Balance of the public interest

24. With regard to the public interest in disclosing the information the Commissioner acknowledges that the issue of human rights of immigrants at the US-Mexico border, and President Trump's views on this issue, attracted particular public attention not only in the US but also in the UK. Furthermore, the Commissioner accepts that there is a particular public interest in understanding how the FCO assessed and understood such a situation given the (at the time of the request) forthcoming visit of President Trump to the UK. Disclosure of the withheld information would provide an insight into the reactions of FCO staff on this issue.
25. 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 of the UK's key allies. The Commissioner accepts that this is particularly the case at this present time as the FCO has argued. In view of these factors, 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 withheld information.

Section 40 personal information

26. The FCO withheld the names of junior officials on the basis of section 40(2) of FOIA. This provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
27. In this case the relevant condition is contained in section 40(3A)(a)⁴. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
28. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of FOIA cannot apply.
29. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

⁴ As amended by Schedule 19 Paragraph 58(3) DPA.

Is the information personal data?

30. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

31. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
32. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
33. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
34. In the circumstances of this case, the Commissioner is satisfied that the names of the officials both relate to and identify the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
35. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
36. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

37. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

38. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
39. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

40. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

'processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child'⁵.

41. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
42. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

43. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.

⁵ Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

44. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
45. In the circumstances of this case, for the reasons discussed above, the Commissioner accepts that there is a legitimate interest in the disclosure of information about the FCO's analysis of the immigration situation at the US-Mexico border. However, she is not persuaded that there is a particularly strong or compelling interest in the disclosure of the names of officials named in the withheld information in order to inform the public about the content of this analysis.

Is disclosure necessary?

46. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so a measure would not be necessary if the legitimate aim could be achieved by something less. Disclosure under FOIA must therefore be the least restrictive means of achieving the legitimate aim in question.
47. In the Commissioner's view it is not sustainable to argue that disclosure of the names of the junior officials is necessary; disclosure of such information would not add to the public's understanding of this subject matter.
48. Given this finding the Commissioner has concluded that disclosure of the names would not be lawful and therefore article 6(1)(f) of the GDPR is not met. Disclosure of the names would therefore breach the first data protection principle and thus such information is exempt from disclosure on the basis of section 40(2) of FOIA.
49. In light of the above findings the Commissioner has not considered the FCO's reliance on section 35(1)(a) of FOIA.

Time take to respond to the request

50. Section 1(1) of FOIA provides that any person making a request for information to a public authority is entitled, subject to the application of any exemptions,

'(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.'

51. 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.
52. 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.
53. In this case the complainant submitted his request on 10 July 2018 but the FCO did not provide him with a substantive response to his request under 18 July 2019. The FCO explained to the Commissioner that this request involved sensitive issues which required careful consideration by officials in a part of the FCO who were particularly busy, including the planned visit of President Trump. Despite these factors, the Commissioner does not accept that it was reasonable for the FCO to take over a year to provide the complainant with a substantive response to his request. The FCO has therefore breached section 17(3) in its handling of this request.

Right of appeal

54. 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@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

55. 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.

56. 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

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