

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 November 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 information about US border controls. The FCO provided the complainant with a substantive response to that request, albeit nearly a year later, and sought to withhold the information falling within the scope of the request on the basis of a number of exemptions. During the FCO's processing of that request, the complainant submitted a 'meta-request' seeking internal email correspondence regarding the processing of his original request. The FCO confirmed that it held information falling within the scope of this meta-request but explained that 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. To date, the FCO has failed to complete its public interest test deliberations in relation to the meta-request.
2. The Commissioner's decision is that by failing to complete these deliberations within a reasonable timeframe the FCO has breached section 17(3) of FOIA in respect of its handling of this request.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with a substantive response to his information request of 9 May 2019. If the FCO decides to withhold any information in response to this request then the complainant should be provided with a refusal notice giving a full explanation as to why

information will not be disclosed, including details of any public interest test considerations.

4. 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

The original request

5. 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.'

6. 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.
7. 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.'

8. 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.
9. 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.
10. 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.

The meta-request

11. On 4 May 2019 the complainant had also contacted the FCO in the following terms:

'I have waited months upon months for you to reply to this in full. Every month you reply with a delay.

This is unacceptable .

Please explain why this is taking so long and provide me internal email correspondence relating to the reasons for this delay.'

12. The FCO responded on 9 May 2019 and explained that it would undertake an internal review of its handling of request 0738-18, ie a review into the delays regarding its response.

13. The complainant replied on the same day as follows:

'Thank you for this. In addition to an internal review, as you have put this forward for, I would also like to read the internal correspondence relating to this FOI request as it has been delayed so many times.

Please can this be sent to me as a separate addition to my request (i.e. a new FOI)?'

14. The FCO acknowledged receipt of this further request, under its reference number 0427-19, on 10 May 2019.

15. The FCO contacted the complainant on 7 June 2019 and confirmed that it held information falling within the scope of this further request but it considered this to be exempt from disclosure on the basis of section 27 of FOIA and it needed additional time to consider the balance of the public interest test. The FCO continued to send the complainant additional public interest test extension letters at approximately intervals until its latest letter of 28 October 2019 in which it explained that it hoped to provide the complainant with a substantive response to his request by 25 November 2019.

Scope of the case

16. The complainant contacted the Commissioner on 23 October 2019 in order to complain about the FCO's failure to provide him with a substantive response to the request he had submitted on 9 May 2019, ie the meta-request with the FCO's reference 0427-19.¹

¹ The complainant had previously contacted the Commissioner on 18 July 2019 to complain about the FCO's handling of his original request, ie FCO reference 0738-18. The Commissioner is conducting a separate investigation into the FCO's handling of that request under her reference number FS50859393.

Reasons for decision

17. 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.'

18. 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.

19. 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.

20. To date the FCO has taken more than 120 working days to consider the balance of the public interest and the Commissioner does not consider that there are any exceptional reasons to justify this delay. Taking the above into account in the Commissioner's opinion the FCO has therefore failed to complete its public interest test considerations within a reasonable timeframe and therefore she has concluded that it has not complied with section 17(3) of FOIA in respect of its handling of the complainant's request.

21. The Commissioner therefore requires the FCO to provide the complainant with a substantive response to his request of 9 May 2019.

Right of appeal

22. 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

23. 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.
24. 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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