

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 31 March 2020

**Public Authority:** The National Archives  
**Address:** Kew  
Richmond  
Surrey  
TW9 4DU

### Decision (including any steps ordered)

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1. The complainant has requested access to the closed document FCO 37/3978. The National Archives (TNA) cited the exemptions provided by section 27 – international relations, section 40(2) third party personal data and section 41(1) information that was given in confidence to refuse the withheld information. During the investigation, TNA considered that section 23 or 24 (security matters) of the FOIA also applied to some of the information in the file.
2. The Commissioner's decision is that TNA is entitled to rely on the exemption provided by section 27(1) to withhold the information. Her full position is set out in a confidential annex which will be provided to TNA only.

### Request and response

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3. On 8 June 2018 the complainant requested access to 3 files including the following:

*'Under the FOIA 2000, please provide a copy of:*

*FCO 37/3978 Closed file: Involvement of UK companies training Sri Lankan security forces. 1985*

*Please acknowledge receipt promptly and respond substantively within 20 working days as required by the Act.*

*Please further ensure that any members of the ACNRA who have conflicts of interests with regard to these files (e.g. [redacted name]) recuse themselves.'*

4. TNA treated the request as three separate requests. TNA provided a response for the other 2 files (FCO 37/3935/1 and FCO 99/372/1) and the complainant did not request an internal review or complain to the Commissioner about these responses.
5. On 16 November 2018 TNA refused to disclose the requested information for file FCO 37/3978 citing section 27(1) (a-d) international relations, section 40(2) third party personal data and section 41(1) information that was given in confidence.
6. The complainant requested an internal review on 28 November 2018 for file FCO 37/3978. He provided considerable arguments to show that this information should be released as similar information was already in the public domain.
7. TNA sought further clarification to compare the closed information with information already within the public domain on 15 April 2019 and this was provided on 21 April 2019.
8. TNA sent the outcome of its internal review on 7 May 2019 upholding the decision to cite sections 27, 40 and 41. It explained section 27(1)(b), which covers relations between the UK and any international organisation or international court, was cited in error and no longer relied on.
9. TNA also considered the complainant's view that similar information was already in the public domain:

*'you ...highlighted a lack of consistency between open and closed information. I would like to reassure you that we endeavour to take into account publicly available information where it is necessary to understand the background and sensitivities to particular high profile or significant subjects, and where it can be identified or provided to us. On this occasion, The National Archives acknowledges and appreciates the pdf documents that you have helpfully provided in support of your appeal. In consultation with the Foreign and Commonwealth Office, who are the subject matter experts, it has been concluded that these documents do not contain any sensitivities; therefore the documents you have provided are different in nature from the information contained in FCO 37/3978, which is a small file containing sensitive correspondence relating to the very early part of 1985.'*

## Scope of the case

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10. The complainant contacted the Commissioner on 2 August 2019 to complain about the way his request for information had been handled. He argued that the information should be released and provided a copy of a book which focused on a security company involved in Sri Lanka in 1985 as necessary context.
11. The Commissioner contacted both parties that the focus of her investigation is to determine whether TNA handled the request in accordance with the FOIA. Specifically, whether TNA is entitled to rely on sections 27(1)(a)(c)(d), 40(2) and 41(1) as a basis for refusing to provide the requested file FCO 37/3978.
12. During the course of the investigation, TNA carried out a further consultation with the Foreign and Commonwealth Office (FCO) and the Ministry of Defence (MOD) and concluded that section 23 or 24 of the FOIA also applied to some of the information in the file. Whilst sections 40 and 41 were originally engaged for the whole file, TNA had determined that Colonel [name redacted] is deceased so the exemptions apply now to only some of the file. Section 27 remains engaged for the whole file.
13. The Commissioner considers that the matter to be decided is whether the information in question can be withheld under any of the exemptions cited above. The Commissioner will first consider the exemption at section 27(1)(a)(c)(d) as it applies to the whole file.

## Reasons for decision

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### Section 27 – international relations

14. Sections 27(1)(a), (c) and (d) of FOIA 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'

### TNA's position

15. In its internal review response TNA, after consulting with the transferring department FCO, explained that the exemption applies because:

*'the file contains correspondence from UK officials on international matters. UK ministers and officials need to be able to comment on, and discuss frankly, international issues and policies and if this open communication is not protected, the UK's ability to conduct its international relations and to maintain good relations, will be jeopardised. It has been determined that the release of the information described, would prejudice international relations by harming the UK's relations with the country or countries concerned, and the UK's ability to promote and protect its interests there.'*

16. TNA provided the Commissioner with further detailed arguments to support its reliance on the exemptions within section 27(1), which she has set out in a confidential annex available to TNA only. This is because the arguments submitted by TNA would reveal details about the withheld information that TNA is seeking to withhold in this case. Therefore, the Commissioner is limited as to how much of these submissions she can include in this decision notice to avoid inadvertent disclosure of the withheld information.
17. However, having viewed the 15 pages of the withheld information the Commissioner can confirm that the content of the withheld information contained detailed comments on the situation in Sri Lanka in early 1985. The Commissioner can also confirm that TNA's submissions built upon the logic of its arguments set out in the internal review. In particular TNA emphasised that disclosure of these comments on the situation in Sri Lanka would prejudice relations between the UK and the country/countries concerned.

### The complainant's position

18. The complainant argued that TNA's arguments in its responses to him were very general statements and *'there is no evidence that the decision makers understood the particular historical context and significance of this file'*. He also argued that TNA had not properly considered the passage of time since 1985.
19. He argued that there is considerable information in the public domain *'about UK training of Sri Lanka security forces. For instance, there are files open to the public at TNA which show the British SAS provided training to the Sri Lankan army commando unit in 1980. This is the same army commando unit that [name redacted] retrained in 1985'*.

The Commissioner's position

20. 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.
21. 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'.
22. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by TNA clearly relates to the interests which the exemptions contained at sections 27(1)(a), (c) and (d) are designed to protect.
23. With regard to the second criterion, having considered the submissions set out in the confidential annex, the Commissioner is satisfied that there is a causal relationship between disclosure of this information and harm occurring to the UK's relationship with the country/countries concerned.
24. With respect to the third criterion, the likelihood of prejudice occurring, TNA stated that disclosure in this case 'would' prejudice future relations between the UK and the country/countries concerned. This is the higher level of prejudice. The Commissioner's view is that this places an

evidential burden on the public authority to show that the risk of prejudice is more probable than not to occur (i.e. a more than a 50% chance of the disclosure causing the prejudice, even though it is not absolutely certain that it would do so).

25. Given the submissions provided and taking into account the content of the withheld information the Commissioner is satisfied that there is a more than 50% hypothetical risk of prejudice occurring to the interests which sections 27(1)(a), (c) and (d) are designed to protect. In reaching this conclusion the Commissioner considers it logical and reasonable for TNA to argue that disclosure of the withheld information would lead to an erosion of trust and confidence by the country/countries concerned in the UK and this in turn would be likely to have a negative impact on the UK's interests in the country/countries.
26. The Commissioner is mindful of the difficulty in identifying what the "revelatory nature of information" might be. Those who do not have a detailed knowledge of the disputed information and the wider context to which it is said to relate, may not be able to identify what disclosure would reveal. What may appear to be trivial or uninformative and lacking in interest may in fact be the one missing piece in the jigsaw. Therefore, the Commissioner is satisfied that this exemption is engaged in relation to the whole of the file, FCO 37/3978.
27. In reaching this conclusion, the Commissioner has taken into account the complainant's argument that the availability of information in the public domain about this topic undermines TNA's reliance on section 27(1). However, the complainant's submissions on this point do not alter her decision. Based on the submissions provided to her by TNA, including an assessment of the withheld information itself, the Commissioner is satisfied that the information referred to by the complainant as being in the public domain is different to the information withheld in response to this request.
28. The Commissioner has therefore concluded that sections 27(1)(a), (c) and (d) of FOIA are therefore engaged.

### **Public interest test**

29. 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.

#### Public interest arguments in favour of disclosing the information

30. TNA considered that there is a strong public interest in having access to, and being able to understand, the historical record as this makes for

greater accountability, increases public confidence in government decision-making, and helps to encourage greater public engagement with political life. *'More specifically there is clear public interest in being able to understand and evaluate the assistance given by UK companies to the Sri Lanka security authorities.'*

31. The complainant argued that there is no evidence that the decision makers understood the particular historical context and significance of the file. He stated *'all of the units trained by KMS were involved in war crimes. These include the killing of nine Tamil civilians by the Sri Lankan police Special Task Force (STF) at Lake Road in Batticaloa Town on 13 November 1985, and the killing of 16 (mostly Tamil) civilians at Piramantharu on 2 October 1985 by Sri Lankan soldiers who disembarked from a helicopter that was allegedly flown by a KMS pilot.'*
32. He said that some information was already in the public domain. He referred to an open FCO record at TNA in which a transcript from the end of December 1984 indicated a follow up meeting which he anticipated was detailed within the withheld information.
33. He argued: *'there is strong evidence that KMS pilots were involved in war crimes in Sri Lanka (see Tim Smith, The Reluctant Mercenary, Book Guild, 2002), and therefore this warrants a very specific public interest in disclosing all available evidence of the UK government's contact with a company accused of war crimes.'*
34. The complainant provided the Commissioner with a copy of a book which focused on a security company involved in Sri Lanka in 1985. He believes that the withheld file contains further information about the company and it is in the public interest to disclose this information. This book was read by the Commissioner during the investigation.
35. He also argued that *'some of the perpetrators/enablers of the attacks are still alive and there is no statute of limitation on prosecuting people for murder and war crimes...Tamil survivors have been waiting patiently for decades in the expectation that the British government would honour the Public Records Act and the 30-year-rule...'*
36. He also argued that TNA had not properly considered the passage of time or the death of the Sri Lankan President of the time in 1996. He referred to the First Tier Tribunal's decision in the case of EA/2016/0223 concerning a request for files on India from 1979-1985: *'the fact 30 years has gone by is bound to have reduced any prejudice that may have resulted from release of the withheld material'*.

#### Public interest in maintaining the exemption

37. In its internal review response TNA considered the following factors in favour of maintaining the exemption:

- An important consideration under Section 27 is the need for HMG to be able to communicate in confidence with its representatives abroad, and with other governments and the representatives of international organisations, about sensitive international issues. UK ministers and officials need to be able to comment on, and discuss frankly, international issues and the policies of other governments and organisations. Officials of foreign governments and international organisations would be inhibited in communicating with British representatives if they felt their views on sensitive issues might be released into the public domain.
  - If this ability to communicate in confidence, and to comment frankly on issues and the policies of other governments, is not protected, the UK's ability to conduct its international relations and to maintain good relations with and influence foreign governments, and thereby to protect and promote UK interests, will be jeopardised.
  - In this instance we believe the release of the information in this file would harm UK relations with the countries concerned, and UK interests there. This would be detrimental to the operation of government and not be in the UK's interest.
38. TNA referred to a previous decision notice (case reference FS50785066 see <https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2614854/fs50785066.pdf>) which considered the application of section 27 where the Commissioner ruled that *'there is a very strong public interest in ensuring that the UK's relationship with Sri Lanka is not harmed in order to ensure that the UK is in a position not only to promote stability, security and human rights in the region but also to protect and promote its own interests'*.
39. In the confidential annex to this decision notice, the Commissioner has detailed the further arguments from TNA to support the public interest in maintaining the exemption in this case.
40. In considering the complainant's comments in paragraph 31 above, the Commissioner is satisfied that the decision makers including TNA do understand *'the particular historical context and significance of the file'*.

#### Balance of the public interest arguments

41. In seeking to balance the public interest arguments, the Commissioner has considered the complainant's allegations to link the KMS employees and the massacres of the Tamil population by the Sri Lankan forces. She accepts that there is considerable public interest in a greater understanding of the situation at the time. However, she considers that there is a stronger public interest to protect the ability of the UK to communicate with or about other countries in confidence. Therefore, in



considering these broader consequences the Commissioner has concluded that the public interest favours maintaining the exemptions contained at section 27(1)(a), (c) and (d). TNA is entitled to withhold this information.

42. In light of this decision the Commissioner has not considered TNA's reliance on sections 23 or 24, 40 and 41 to withhold parts of the withheld information.

## **Other Matters**

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43. Although the Commissioner understands and accepts that the TNA occupies a unique position within FOIA as it is required to consult with other government departments before processing requests for access to closed information held within the archives, there were severe and repeated delays of 114 and 107 days for the response and internal review. TNA apologised to the complainant. The Commissioner does not consider this to be satisfactory and would expect TNA to deal with responses to complainants more promptly in the future.
44. In the same way there was a considerable delay of 70 days in the response provided by the TNA to the Commissioner during the investigation and again TNA apologised. However, the Commissioner does not consider this to be satisfactory and would expect TNA to deal with reviews within the suggested deadlines in the future.
45. As part of his complaint to the Commissioner, the complainant commented on the membership structure of the Advisory Committee on National Records and Archives (ACNRA) panels and the TNA report which discussed how FOIA requests had been handled by ACNRA. In particular he was concerned that a member of the panel was intimately connected to the requested material. He wanted to make the Commissioner aware of this potential conflict of interest. The Commissioner informed the complainant that it is not within the remit of the Commissioner to consider the membership structure of ACNRA panels.

## Right of appeal

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46. 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](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

47. 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.
48. 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 .....**

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**