Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **14 February 2020**

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 a copy of a particular letter dating from 1997 between the British High Commissioner in Wellington and the Cook Islands Deputy Prime Minister and Minister of Foreign Affairs. The FCO explained that it could not locate the requested letter. The complainant argued that it was likely that the document in question would still be held by the FCO. The Commissioner is satisfied that on the balance of probabilities the FCO does not hold the requested letter.

2. The Commissioner does not require the FCO to take any steps.

Request and response

3. Following the FCO's response to an earlier request for information (its reference, 0355-19) the complainant submitted the following request to the FCO on 16 June 2019:

   *'Sorry for the misunderstanding. I was initially seeking the **exchange** of letters between HE Mr Robert J Alston CMG QSO, British High Commissioner in Wellington, dated 4 December 1997 (which was not included in the files you sent me) and Hon Inatio Akaruru CBE, Cook Islands Deputy Prime Minister and Minister of Foreign Affairs and Immigration dated 9 February 1997 (which you kindly provided).*

   *I am now seeking an **electronic copy of the letter of Mr Robert Alston to Mr Inatio Akaruru dated 4 December 1997**, which is*

referred to in Mr Akaruru's reply of 9 February 1998. ***That single letter.*** *An exchange of letters between states regarding the appointment/ acceptance of a consular agent constitutes per se the establishment of consular relations in international law.' (emphasis in original)*

4. The FCO responded on 11 July 2019 and explained that following a search of its paper and electronic files it had established that it did not hold a copy of the requested letter. Rather, all of the material it held relevant to the request was disclosed in response to request 0355-19.

5. The complainant contacted the FCO on 16 July 2019 and asked it to conduct an internal review of this response. He argued that it was '*not comprehensible'* that the document was missing given the nature of the letter in question.

6. The FCO informed him of the outcome of the internal review on 15 August 2019. The FCO explained that it had carried out extensive searches of all relevant files both electronic and paper to find the requested letter but this could not be located. By way of background the FCO explained that:

'if the FCO held this information it would be held either electronically in our central filing repository or in paper files in our Archives. The information that we have already sent to you was located in our paper files. However we have been unable to find the letter that you requested. FCO's record policy advises that key documents should be retained. I am unable to offer an explanation as to why a copy of such a letter is not on file.'

Scope of the case

7. The complainant contacted the Commissioner on 26 August 2019 in order to complain about the FCO's failure to provide him with the letter he had requested.

Reasons for decision

Section 1 – Right of access to information

8. In cases such as this where there is some dispute as to whether information falling within the scope of the request is held, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.

9. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request.

10. In applying this test the Commissioner will consider the scope, quality, thoroughness and results of the searches, and/or other explanations offered as to why the information is not held.

The complainant's position

11. The complainant argued that it was difficult to believe that the letter he had requested had disappeared from the FCO's files completely and suggested that an investigation be initiated with the British High Commission in Wellington to establish if the letter could be found in its records.

The FCO's position

12. In its responses to the complainant, the FCO explained that it had searched both its electronic and hard copy records in order to locate the letter Robert Alston sent to Inatio Akaruru on 4 December 1997. As part her investigation of this complaint the Commissioner therefore asked the FCO to explain in more detail the nature of the searches it had undertaken and also to confirm whether searches had been conducted of the British High Commission in Wellington.

13. The Commissioner has summarised below the nature of her questions to the FCO and its responses to each below.

Question: Please describe the nature of the searches undertaken of the electronic files in the central filing repository, including the nature of the search terms used.

14. Electronic searches of the central filing repository were carried out using the terms:

- Robert Alston - date range of 1/1/1997-1/1/1999 and
- Inatio Akaruru - date range of 1/1/1997-1/1/1999

15. These searches resulted in nil returns.

16. The FCO explained that searches were also carried out of the electronic and paper records held in relevant departments in London. These searches included the Asia Pacific Directorate (the directorate covering New Zealand and the Cook Islands), the Treaty Section (which might hold information relating to the establishment of consular relations) and Research Analysts. (The FCO explained that Research Analysts is a cadre of geographical and thematic experts, who provide timely, high quality, evidence-based research and analysis to Ministers, Directorates, Posts and other government departments). The search terms used were:

- Robert Alston
- Inatio Akaruru

17. The FCO explained that the searches carried out by the Asia Pacific Directorate and Treaty Section resulted in nil returns. The Research Analysts did find one letter regarding diplomatic relations in the Cook Islands, however the letter was not relevant to the request.

Question: Please describe the nature of the searches undertaken of the papers files in the FCO's Archives

18. The FCO Archives produced a list of FCO departmental files for 1997 and 1998. These files covered information held by the FCO's Far Eastern and Pacific Department, Protocol Department and Consular Department.

19. The FCO searched the relevant files which included New Zealand Cook Islands 1997; New Zealand: post objectives, consular and departmental matters 1997; Visit by Derek Fatchett, Minister of State for FCO, to Australia, New Zealand, Cook Islands and the USA, September 1997; Honorary Consul Cook Islands 1998.

20. The FCO explained that the file titled Honorary Consul Cook Islands 1998 held the response to the letter in question, however it did not contain the initial letter dated 4 December 1997. The FCO explained that it is usual practice for letters and copies of their replies to be held together on the same file. In this instance, it stated that it had no explanation why the initial letter cannot be found on the same file as the reply and given the age of the letter it is difficult to ascertain what might have happened.

Question: Is it possible that that copies of correspondence from over 20 years ago would still be held at the High Commission in Wellington? If so, is it possible to conduct a search of these files?

21. The FCO explained that it has a policy on 'Posts', such as the High Commission in Wellington, transferring files to its Archive. This policy was follows:

22. For overseas posts, the FCO's policy is that posts can decide whether a file should be destroyed or sent to the Archives immediately after First Review (this normally takes place one year after the creation of the file) or destroy them immediately if they do not need to be preserved; or they may decide to retain them at Post for a further specified period before they are sent to the Archives (or destroyed).

23. The FCO explained that it would be highly unlikely that any High Commission would still hold correspondence from over 20 years ago. However, for completeness the FCO explained that it had contacted the British High Commission in Wellington at the internal review stage and asked them to carry out searches of their electronic and paper records using the search terms that it had used for searches in the FCO's offices in London. The searches conducted by the High Commission did not return any results.

The Commissioner's position

24. In the Commissioner's opinion the searches conducted by the FCO are sufficient to ensure that if the requested letter were held then it would have been found. She notes that the searches focused on areas of the FCO where such information was most likely to be found and that the search terms used were logical and focused. In particular, the Commissioner notes that the FCO had, as suggested by the complainant, conducted searches at the High Commission in Wellington. The Commissioner acknowledges that the FCO cannot provide any explanation for why the requested letter cannot be found on the same file as the reply to it. Nevertheless, given the steps that the FCO has taken to locate this letter – without success – the Commissioner is satisfied that on the balance of probabilities the FCO does not hold the letter in question.

Right of appeal

25. 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

26. 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.

27. 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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