

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 October 2020

Public Authority: Foreign, Commonwealth & Development 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 (FCDO) seeking copies of correspondence for the period August 2017 to August 2019 exchanged between Jack Straw, a previous Secretary of State of the Foreign and Commonwealth Office, and the Permanent Secretary of the department. The FCDO sought to withhold the information falling within the scope of the request on the basis of sections 40(2) (personal data), 41(1) (information provided in confidence) and 42(1) (legal professional privilege) of FOIA.
2. The Commissioner has concluded that the information falling within the scope of the request is exempt from disclosure on the basis of section 40(2) of FOIA.
3. She does not require the FCDO to take any steps.

Request and response

4. The complainant submitted the following request to the FCDO¹ on 15 August 2019:

'I would be grateful if you could provide copies of all communications (including emails and records of meetings) between Jack Straw and Sir Simon McDonald. Please restrict your searches to the period from August 1, 2017 to today.'

5. The FCDO responded on 6 November 2019 and confirmed that it held some information falling within the scope of the request but considered it exempt from disclosure on the basis of sections 40(2) (personal data) and 41(1) (information provided in confidence) of FOIA.
6. The complainant contacted the FCDO on 22 November 2019 and asked it to conduct an internal review of this refusal.
7. The FCDO informed him of the outcome of the internal review on 2 January 2020. The review upheld the application of sections 40(2) and 41(1).

Scope of the case

8. The complainant contacted the Commissioner on 27 February 2020 in order to complain about the FCDO's reliance on sections 40(2) and 41(1) of FOIA as a basis to withhold the information falling within the scope of his request. During the course of the Commissioner's investigation the FCDO also explained that it considered some of the withheld information to be exempt from disclosure on the basis of section 42(1) of FOIA.
9. The scope of the Commissioner's investigation has therefore been on determining whether the withheld information is exempt from disclosure on the basis of these exemptions.

¹ The complainant's request was submitted to the FCO but this decision notice is served on the FCDO a government which was created on 2 September 2020 following a merger between the FCO and the Department for International Development. The decision notice refers to the public authority handling the request as the FCDO albeit that the request was submitted to its predecessor organisation, the FCO.

Reasons for decision

Section 40 - personal information

10. Section 40(2) of FOIA 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.
11. In this case the relevant condition is contained in section 40(3A)(a)². 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').
12. 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.
13. 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.

Is the information personal data?

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

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

15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
16. 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.

² As amended by Schedule 19 Paragraph 58(3) DPA.

17. 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.
18. The FCDO explained that in its view all of the correspondence which forms the withheld information consists of the personal data of the two correspondents.
19. The Commissioner agrees with this view. The information in question clearly relates to either Jack Straw or Sir Simon McDonald and they are clearly identifiable from it.

Would disclosure contravene principle (a)?

20. 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'.

21. 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.
22. 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.
23. 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'³.

³ 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

24. 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.
25. 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

26. 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.
27. 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.
28. The complainant argued that there was a legitimate interest in the disclosure of the information in order to shed light on Mr Straw's dealings with the FCDO to ensure that the public can judge whether public officials are being asked to assist Mr Straw with his private business interests. The complainant noted Mr Straw had previously highlighted his work with firms such as ED&F Man and Senator.⁴

(dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

⁴ The complainant cited the following articles in support of this point:

<https://uk.reuters.com/article/uk-britain-politics-commodities/jack-strawhighlights-sugar-lobbying-in-cash-for-access-reportidUKKBN0LR1JP20150223>

29. The FCDO provided the Commissioner with detailed submissions to support its reliance on section 40(2). These submissions made direct reference to the withheld information itself and therefore the Commissioner is limited as to the extent to which she can include these submissions in this decision notice. However, the Commissioner can confirm that the FCDO considers the withheld information to cover a number of topics and issues all of which relate to matters of a personal and private nature.
30. In relation to the legitimate interests in disclosure of the information, the FCDO suggested that the complainant's argument was entirely speculative and there was nothing to suggest a link between the matters referred to by the complainant from many years ago, and the information requested. The FCDO also argued that the scope of the request was disproportionate to the claimed legitimate interest. Whilst the alleged legitimate interest is about checking on Jack Straw's use of public finances, the request is broader in that it covers all communications with Sir Simon McDonald. Taking in account the fact that the information covered a range of topics and issues, the FCDO argued that for some of the information there was simply no legitimate interest in disclosure at all, and for topics where there was arguably a legitimate interest, it did not consider disclosure to be necessary.
31. The Commissioner accepts that the interests identified by the complainant would not be served or met by disclosure of the withheld information. Nevertheless, in the Commissioner's view there is broader legitimate interest in the public being able to understand the nature of the relationship between the Permanent Secretary of a department and a previous Secretary of State of that same department. She is therefore of the view that there is a legitimate interest in the disclosure of this type of correspondence. Furthermore, in the Commissioner's view she considers there to be specific legitimate interests in the disclosure of certain parts of the withheld information given its content, albeit she accepts that for certain parts of the information any specific legitimate interest is weaker.
32. In light of the above, the Commissioner is satisfied that there is a legitimate interest in the disclosure of all of the withheld information.

<https://www.telegraph.co.uk/news/investigations/11430777/Jack-Strawto-take-job-for-firm-he-lobbied-for-in-Commons.html>
<https://www.telegraph.co.uk/news/politics/11883017/Jack-Straw-used-Britains-consul-in-Hong-Kong-to-check-the-company-for-which-he-wasconsidering-working.html>

Is disclosure necessary?

33. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
34. As explained above, in the Commissioner's view there is a broad legitimate interest in the public being able to understand the nature of the relationship between the Permanent Secretary of a department and a previous Secretary of State of that same department. In the Commissioner's view disclosure of the withheld information is necessary in order to meet this aim.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

35. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
36. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
37. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
38. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
39. The complainant argued that Mr Straw would have had every expectation that his communications were covered by FOIA when he

entered into them and noted that newspaper articles had been published based on previous correspondence of his which had been disclosed under FOIA.⁵

40. The FCDO argued that neither party would have expected their correspondence to be disclosed. Rather, given its content and the context in which it was exchanged both Mr Straw and Sir Simon would have expected it to be kept confidential. The FCDO noted that whilst Mr Straw would have been aware that such correspondence would have been subject to FOIA, he would also have been aware that exemptions within the legislation could apply to that information. The FCDO also emphasised, as noted above, that the interests identified by the complainant would not be met or served by the disclosure of the withheld information.
41. The Commissioner acknowledges that, as the complainant identified, some of Mr Straw's correspondence has been disclosed in the past under FOIA. However, the Commissioner is firmly of the view that each request needs to be considered on its own merits. Taking into account the content and context of the information within the scope of this request she is satisfied that neither Mr Straw nor Sir Simon would have expected the correspondence to be disclosed under FOIA. Instead, as the FCDO suggested, if a request for this correspondence was received, it would be reasonable for the correspondents to assume that exemptions would have been cited to withhold this information. The Commissioner also accepts that disclosure of the correspondence would lead to an infringement of Mr Straw's privacy, particularly so in relation to the information which is of a more personal nature.
42. With regard to balancing this against the legitimate interests in disclosure, in the Commissioner's view release of the information would serve the general interest in transparency of such information which she identified above. Whilst she accepts that there is perhaps little of value to gained from disclosure of the information relating to strictly personal matters, in her view there is a greater interest in disclosure of the information that relates to more substantive matters. That said, the Commissioner concurs with the FCDO's assessment that disclosure of

⁵ <https://www.telegraph.co.uk/news/investigations/jack-straw-advised-client-how-to-avoid-release-of-emails-under-f/>

<https://www.gov.uk/government/publications/foi-release-jack-straw-and-senator-international>

the information would not meet the interests identified by the complainant.

43. Taking the above into account, and in particular the expectations of both parties, the Commissioner has concluded that there is an insufficient legitimate interest to outweigh Mr Straw's and Sir Simon's fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
44. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.
45. The Commissioner has therefore decided that the FCDO was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).
46. In light of this finding, the Commissioner has not gone on to consider the FCDO's reliance on sections 41(1) and 42(1) of FOIA.

Right of appeal

47. 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

48. 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.
49. 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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