

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 October 2020

Public Authority: The British-Russia Centre and East-West Centre

Address: 11 Belgrave Road
London
SW1V 1RB

Decision (including any steps ordered)

1. The complainant requested information about the appointment of election monitors. The British-Russia Centre and East-West Centre ("the Centre") stated that it did not hold the requested information but argued that it was no longer a public authority for the purposes of the FOIA.
2. The Commissioner's decision is that, whilst the Centre is indisputably listed in schedule 1 of the FOIA, it no longer satisfies the second condition set out in section 4(3) of the FOIA. Therefore, by virtue of section 4(4) of the FOIA, the Centre has ceased to be a public authority for the purposes of the FOIA and it was not obliged to comply with the request.
3. As the Centre is not a public authority, the Commissioner has no power to require it to take further steps.
4. Given the implications of her decision and her general duties under section 47 of the FOIA, the Commissioner considers it necessary to make recommendations to the Cabinet Office. These are discussed under the "Other Matters" section of this notice.

Request and response

5. On 21 April 2020, the complainant wrote to the Centre and requested information in the following terms:

"I am conducting research into the UK's support to international election observation. Do you produce an annual report that lists the numbers of STO and LTOs deployed for each year? Also, have you compiled information for the age and sex demographics of those deployed?"

6. When the Centre failed to respond, the complainant chased a response on 30 May 2020. This correspondence prompted a response from the Centre which directed the complainant towards published information about the Centre's previous monitoring missions. It also asked the complainant to explain why he wanted the information.
7. The complainant responded on 2 June 2020 and briefly described his research. He also noted that the Centre had not supplied all the information he had asked for.
8. On 21 July 2020, the complainant, having received no further response, made a further request, this time explicitly referencing the FOIA, in the following terms:

"Could you please provide me with a collation of the age and sex demographics of those deployed by BEWC as STO and LTOs for election observation missions held between 2015 to present. Could you please separate the figures for STOs and LTOs.

"For the age brackets, please use the following:

*16-19
20-29
30-39
40-49
50-59
60-64
65+ "*

9. The Centre responded the following day. It stated that it was not a public body and thus not subject to FOIA. It would therefore not provide the requested information.
10. The complainant replied on 22 July 2020. He drew attention to the Centre's listing in schedule 1 of the FOIA and asked for his request to be processed.

11. The Centre responded to say that it had ceased ties with the Foreign and Commonwealth Office (FCO) in 2002, no longer received grant-in-aid funding and thus did not consider itself to be a public authority. It stated that it would not engage in further correspondence.

Scope of the case

12. The complainant contacted the Commissioner on 24 July 2020 to complain about the way his request for information had been handled. He noted that the Centre was listed in schedule 1 of the FOIA and was thus obligated to respond to FOIA requests.
13. On 28 August 2020, the Commissioner wrote to the Centre. She drew attention to the fact that it had been designated as a public authority in the original version of the FOIA and that, in the intervening years, no legislation had been approved by Parliament that would alter this designation. She therefore noted that, unless the Centre was able to draw any relevant legislative provision to her attention, her provisional view was that the Centre remained a public authority for the purposes of the FOIA and was thus obligated to respond to the request.
14. The Centre replied, reiterating that it did not consider that it was a public authority for the purposes of the FOIA but that, in any case, it did not hold any relevant information.
15. The Commissioner wrote to the complainant on 1 September 2020, she noted that the Centre had confirmed it did not hold the requested information and therefore, regardless of whether the Centre ultimately was a public authority or not, it appeared unlikely that there was further information that could be disclosed. The complainant responded on 3 September 2020 to agree to his complaint being closed on the basis that it had been resolved informally.
16. However, the Centre continued to insist that, notwithstanding its listing in schedule 1, it was not a public authority for the purposes of the FOIA. The Commissioner therefore asked it to provide further details of its constitution and relationship with the FCO.
17. Whilst the complainant had indicated that he wished to withdraw his complaint without a decision notice, the Commissioner considers that, given the findings which will be set out below, she should nevertheless exercise her discretion and issue a decision notice. Whilst the Commissioner *may* refuse to issue a decision notice when a complaint has been withdrawn, she does not consider herself *obligated* to do so. In this particular case, she considers that her statutory obligation to

promote good practice requires her to give her view on this matter and a decision notice is the most appropriate format for doing so.

18. The questions for the decision notice to consider are therefore:
- a. Can an organisation be listed in schedule 1, yet not be a public authority for the purposes of the FOIA?
 - b. If so, on the basis of the available facts, is the Centre one such organisation? And, if it is;
 - c. What is the appropriate remedial action for the Commissioner to take?

Reasons for decision

A. Can an organisation be listed in schedule 1, yet not be a public authority for the purposes of the FOIA?

19. The FOIA and its obligations only apply to bodies which are public authorities. Section 3(1) of the FOIA defines such bodies as being:

- (a) subject to section 4(4), any body which, any other person who, or the holder of any office which—*
 - (i) is listed in Schedule 1, or*
 - (ii) is designated by order under section 5, or*
- (b) a publicly-owned company as defined by section 6*

20. Section 4 of the FOIA states that:

- (1) The Secretary of State or the Minister for the Cabinet Office may by order amend Schedule 1 by adding to that Schedule a reference to any body or the holder of any office which (in either case) is not for the time being listed in that Schedule but as respects which both the first and the second conditions below are satisfied.*
- (2) The first condition is that the body or office—*
 - (a) is established by virtue of Her Majesty's prerogative or by an enactment or by subordinate legislation, or*
 - (b) is established in any other way by a Minister of the Crown in his capacity as Minister, by a government*

department or by the Welsh Ministers, the First Minister for Wales or the Counsel General to the Welsh Assembly Government.

(3) *The second condition is—*

(a) in the case of a body, that the body is wholly or partly constituted by appointment made by the Crown, by a Minister of the Crown, by a government department or by the Welsh Ministers, the First Minister for Wales or the Counsel General to the Welsh Assembly Government, or

(b) in the case of an office, that appointments to the office are made by the Crown, by a Minister of the Crown, by a government department or by the Welsh Ministers, the First Minister for Wales or the Counsel General to the Welsh Assembly Government.

(4) If either the first or the second condition above ceases to be satisfied as respects any body or office which is listed in Part VI or VII of Schedule 1, that body or the holder of that office shall cease to be a public authority by virtue of the entry in question.

21. The Centre was one of the organisations listed in Part VI of schedule 1 of the original version of the FOIA that received Royal Assent¹ therefore section 5 of the FOIA is not relevant to this case. Its entry on Companies House shows that it is not wholly owned, either by the Crown or by the wider public sector, therefore section 6 of the FOIA is not relevant either. Thus the only way that the Centre could be a public authority would be if it satisfied the condition set out in section 3(1)(a)(i) by virtue of its listing in schedule 1 of the FOIA.
22. However, section 3(1)(a) of the FOIA also makes clear that an organisation cannot be a public authority for the purposes of the legislation by virtue of its inclusion in schedule 1 alone – it is subject to the application of section 4(4) of the FOIA.
23. Section 4(1) of the FOIA allows a Minister to add organisations to schedule 1 of the FOIA if the minister believes that the organisation meets two specific conditions. These two conditions are set out in sections 4(2) and 4(3). However, section 4(4) states that an

¹ <https://www.legislation.gov.uk/ukpga/2000/36/schedule/1/part/VI/enacted>

organisation which is listed in either Part VI or Part VII of schedule 1 (either because it was listed in the original legislation or because it has been added by a subsequent order) will cease to be a public authority if it no longer satisfies those conditions.

24. The Commissioner therefore considers that, if an organisation, which is listed in either Part VI or Part VII of schedule 1, can demonstrate that it is no longer constituted by appointments made by the UK Government (or the Welsh Government) it will have ceased to satisfy the relevant conditions and therefore ceased to be a public authority for the purposes of the FOIA.

B. On the basis of the available facts, has the Centre ceased to satisfy the condition in section 4(3)?

25. The Commissioner sought information from the Centre about its history and its present governance. Whilst the Commissioner has partly relied on the facts as provided by the Centre, she has also been able to corroborate many elements of the Centre's submission by reference to publicly available information.

26. The Centre explained that it was originally established in 1959 as the "GB-USSR Association" by the FCO. The Centre was a non-governmental organisation which was funded by the FCO with the object of promoting contacts and understanding between the citizens of the USSR and the United Kingdom. The Centre confirmed that it no longer receives core funding from the Government, but does bid for tenders from the FCO to carry out election monitoring. The Centre changed to its present name in the early 1990s to reflect the fact that the USSR no longer existed.

27. The historical accounts for the Centre, published on Companies House, verify that the FCO withdrew funding from the Centre during the financial year ending 31 March 2003. The accounts dated 6 August 2003 confirm that:

"the Foreign Commonwealth Office has (by mutual agreement) withdrawn the grant in aid funding of the British-Russia Centre and the British East-West Centre. Over the last two years the Centre has combined a range of prudent cost saving measures with a successful programme of attracting alternative finance in preparation for the change in GIA funding. The Executive Committee is confident that this fundamental reorganisation of the way the Centre operates has been timely and successful and that the Centre will be able to continue its activities and fulfil its objectives, hence these accounts have been prepared on an ongoing basis."

28. In addition, Centre's constitution is contained within its Articles of Association. The incorporating articles of association required that the Executive Council should consist of inter alia, *"not less than ten or more than twenty persons being Members of the United Kingdom Parliament for the time being."* The management of the Centre was vested in this Council. Consequently, at the point when Centre was legally incorporated into a company it was partly or wholly constituted *"by appointment made by the Crown, by a Minister of the Crown, by a government department."* In addition, the Centre have confirmed that an Interim Executive Council was established in 2000 and that an FCO officer was appointed by the FCO onto the Interim Executive Council prior to the withdrawal of FCO funding.
29. However, the Centre's current Articles of Association were adopted on 6 August 2003 and confirm that they substitute any past articles of association in their entirety. Article 16 confirms that the management of the Centre will be vested in the Board which shall have general control of all of the business of the Centres and general authority to exercise all the powers of the Centre. There is no requirement for members of the UK Parliament to be on the Board, nor any reference to a member of Parliament or government department throughout either the Memorandum of Understanding or the Articles of Association.
30. The Commissioner has considered the Centre's submissions and the information in the public domain via Companies House. Given the new articles of association and the withdrawal of the FCO grant-in-aid, the Commissioner considers that the Centre is not now constituted either partly or wholly, financially or managerially, by appointment made by the Crown, a Minister of the Crown or by a government department.
31. Accordingly, the Commissioner considers that the Centre no longer satisfies the second condition under section 4(3) and, as it no longer satisfies this condition, section 4(4) provides that the Centre has ceased to be a public authority for the purposes of the FOIA – even though it remains listed in schedule 1.
32. As the Centre is not a public authority for the purposes of the legislation it was therefore under no obligation to comply with the request.

Other matters

C. *What is the appropriate remedial action for the Commissioner to take?*

33. Given the Commissioner's findings above, she considers that the Centre is now in a position analogous to Schrödinger's famous cat. It is both contained on a list (passed by Parliament) of organisations which are deemed to be public authorities by virtue of being named on that list – yet simultaneously the legislation implies that it is not a public authority.

34. Section 47 of the FOIA states that:

(1) It shall be the duty of the Commissioner to promote the following of good practice by public authorities and, in particular, so to perform his functions under this Act as to promote the observance by public authorities of—

(a) the requirements of this Act, and

(b) the provisions of the codes of practice under sections 45 and 46.

(2) The Commissioner shall arrange for the dissemination in such form and manner as he considers appropriate of such information as it may appear to him expedient to give to the public—

(a) about the operation of this Act,

(b) about good practice, and

(c) about other matters within the scope of his functions under this Act,

and may give advice to any person as to any of those matters.

35. The Commissioner considers that, in issuing this decision notice, she has set out her view and clarified the Centre's status in respect of the FOIA. However, she considers that this is only a temporary solution and one that is likely to cause confusion and costs going forward.

36. The permanent solution to this problem would be for the Centre to be removed from schedule 1 of the FOIA. Unfortunately that power does not lie with the Commissioner – Parliament has delegated the power to amend schedule 1 to the Minister for the Cabinet Office.

37. The Commissioner will therefore be providing copies of this notice to the Minister for the Cabinet Office, the Secretary of State for Digital,

Culture, Media and Sport and the Secretary of State for the Foreign, Commonwealth and Development Office.

38. The Commissioner's recommendation is that, as soon as Parliamentary time allows, an Order should be laid, removing the Centre from schedule 1 of the FOIA – thus placing its legal status beyond doubt.
39. Given her findings, Commissioner further recommends that the Minister for the Cabinet Office may wish to consider whether any other organisations listed in either Part VI or Part VII of schedule 1 have also ceased to satisfy the relevant conditions and should therefore also be removed from the face of the Act.

Right of appeal

40. 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

41. 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.
42. 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

Phillip Angell
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