

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 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 information about audits and evaluations into projects carried out in Iraq by the company Aktis. The FCO initially withheld all of the information in the scope of the request before disclosing some of this information to the complainant. The FCO sought to withhold the remaining information on the basis of the following sections of FOIA: 27(1)(a) (international relations), 38(1)(a) and (b) (health and safety), 40(2) (personal data) and 43(2) (commercial interests). The Commissioner has concluded that the FCO is entitled to rely on sections 27(1)(a), 38(1)(a) and (b) and 40(2) and for qualified exemptions the balance of the public interest test favours maintaining the exemptions. However, the Commissioner has also concluded that the FCO is not entitled to rely on section 43(2) to withhold information. Furthermore, she has concluded that the FCO breached section 10(1) of FOIA by failing to disclose the information which it accepted was not exempt from disclosure within 20 working days of the request.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with a copy of the audit report conducted by Deloitte and a copy of the 'Annual Review – Summary Sheet' for the programme 'CSSF Iraq – Governance and Resilience' covering the period April 2017 to March 2018 with the information previously withheld on the basis of section 43(2) unredacted.

3. 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

4. The complainant submitted the following request for information to the FCO on 11 February 2019:

'I would like all of the audits and evaluations that were conducted for projects implemented by Aktis (<https://aktisstrategy.com>) in Iraq since 01/01/2014.

This includes the projects:

- *"Iraq Governance and Resilience Programme" with the unique ID: CSSF-06-000014 since April 2018.*
- *The Sub-national governance implemented by Aktis since June 2017*
- *Any other projects implemented by Aktis in Irak [sic] since 01/01/2014'*

5. The FCO contacted the complainant on 8 April 2019 and explained that it held information falling within the scope of his request but it considered it to be exempt from disclosure on the basis of sections 27 (international relations) and 43 (commercial interests) of FOIA and it needed additional time to consider the balance of the public interest test.
6. The FCO provided him with a substantive response to his request on 12 April 2019. In relation to the first part of the request, which sought information on the *"Iraq Governance and Resilience Programme" with the unique ID: CSSF-06-000014 since April 2018'*, the FCO explained that no information was held. In relation to parts two and three of the request, ie those that sought information on *'The Sub-national governance implemented by Aktis since June 2017'* and *'Any other projects implemented by Aktis in Iraq since 01/01/2014'* the FCO explained that it considered this information to be exempt from disclosure on the basis of sections 27(1)(a) and 43(2) of FOIA and that in all of the circumstances of the case the public interest favoured maintaining the exemptions. The FCO also explained that the 2017/18 annual summaries covering *'The Sub-national governance implemented by Aktis since June 2017'* have been published online and such information was therefore considered to be exempt from disclosure on the basis of section 21 (information reasonably accessible to the applicant) of FOIA.

7. The complainant contacted the FCO on 13 April 2019 and asked it to conduct an internal review of this decision. In particular he asked the FCO to clarify what documents it held which fell within the scope of his request and which exemptions had been applied to them. He also argued that it was likely that at least some of the documents could be disclosed.
8. The FCO informed the complainant of the outcome of the internal review on 15 June 2019. The review explained that:

'I should clarify that we had taken the phrase "audits and evaluations" in your original request to mean any documents which contained a review of any aspects of the projects concerned. I note from your IR request, however, that you were specifically referring to audits pertaining to the financial aspects of those projects.

On review, therefore, I can confirm that we do not hold any information in scope of your request that relates to either:

a) the Iraq Governance and Resilience Programme with the unique ID: CSSF-06-000014 since April 2018, or

b) the Sub-national Governance Project implemented by Aktis since June 2017

I can also confirm that we are no longer relying on s43(2) of the FOIA to withhold any information.'

9. The FCO also explained that it was refusing to confirm or deny whether it held any further information falling within the scope of the request on the basis of sections 27(4) and 38(2) (health and safety) of FOIA.
10. The complainant contacted the FCO on 18 June 2019 and sought clarification of its decision to amend the original response.
11. The FCO responded on 21 June 2019 and explained its revised position as follows: *'Our earlier response was based on a broad definition of "audits and evaluations". Your IR request indicated that you were specifically referring to audits pertaining to the financial aspects of the projects concerned.'*
12. In a subsequent exchange of emails, the FCO explained to the complainant that it had revised its interpretation of his request based on comments he had made in his request for an internal review. The complainant explained that in his view such comments did not request the FCO to narrow the scope of his request by excluding evaluations from consideration and nor did he want it to do so. The complainant asked the FCO to consider re-doing the internal review in light of this

misunderstanding. The FCO explained that if he was dissatisfied with the outcome of the internal review response he should make a complaint to the ICO.

Scope of the case

13. The complainant contacted the Commissioner on 18 June 2019 in order to complain about the FCO's handling of his request.
14. Following receipt of this complaint, the Commissioner contacted the complainant and asked him to clarify what information he intended his request to be seeking given the FCO's different approaches to how the request should be interpreted first at the refusal notice and then in the internal review. That is to say, did the request intend the request to include *any* audits and evaluations conducted for projects implemented in Iraq by Aktis *or* only audits relating to the financial aspects of these projects.
15. In response the complainant explained to the Commissioner that the documents he was seeking were those set out in his initial request 'I would like **all of the audits and evaluations** that were conducted for projects implemented by Aktis (<https://aktisstrategy.com>) in Iraq since 01/01/2014.' (emphasis added). He noted that he then listed a few projects which this request would include. Given this the complainant argued that he was clearly requesting *all* audits and *all* evaluations. The complainant also noted that the FCO did not check its interpretation of his request with him at any point.
16. At this stage the Commissioner contacted the FCO and explained that in her view an objective interpretation of the request would include both audits and evaluations. She also explained that she did not consider it appropriate for the FCO to revise its interpretation of the request based on the comments made by the complainant, particularly in light of his further comments following the completion of the internal review.
17. The Commissioner therefore confirmed to the FCO that her investigation would proceed on the basis that this request should be interpreted to include:
 - All audits and all evaluations conducted for projects implemented by Aktis in Iraq since 1 January 2014.
 - This would include, but is not limited to, the three specific projects named in the original request.
18. In light of this, the Commissioner asked the FCO to provide her with a copy of all of the information falling within the scope of the request and clarification as to which exemptions applied to this information.

19. In response, the FCO confirmed that:

- It did not hold any information falling within the scope of part 1 of the request;
- It held two documents falling within the scope of part 2 of the request, the first being an audit by Deloitte of work undertaken by Aktis in relation to a particular contract, and the second an 'Annual Review – Summary Sheet' for the programme 'CSSF Iraq – Governance and Resilience' covering the period 1 April 2017 to 30 March 2018; and
- That it held two further documents falling within the scope of the third part of the request.

20. The FCO explained that it was prepared to disclose the Deloitte report to the complainant, albeit with a number of redactions on the basis of sections 43(2), 27(1)(a), (c) and (d) and 38(1)(a) and (b) of FOIA. In relation to the 'Annual Summary Sheet' for the programme 'CSSF Iraq – Governance and Resilience' the FCO considered the parts of this that related to Aktis to be exempt from disclosure on the basis of sections 27 and 38. It also considered the reports falling within the scope of the third part of the request to be exempt from disclosure on the basis of the same exemptions.¹

21. Following further discussions between the Commissioner and FCO, the FCO subsequently agreed to disclose a less redacted version of the Deloitte report to the complainant and also a redacted version of the 'Annual Summary Sheet' for the programme 'CSSF Iraq – Governance and Resilience'.²

22. Therefore, at the point that this decision notice is being issued, the Commissioner has considered whether the FCO is entitled to withhold:

- a) The material redacted from the latest release of the Deloitte report. The FCO continues to rely on a combination of the exemptions contained at sections 43(2), 27(1)(a), (c) and (d) and 38(1)(a) and (b) to justify these redactions.
- b) The material redacted from the 'Annual Summary Sheet' for the programme 'CSSF Iraq – Governance and Resilience'. Again, such redactions have been made on a combination of the exemptions

¹ The FCO provided the complainant with the redacted version of Deloitte report on 4 December 2019.

² These documents were provided to the complainant on 20 January 2020.

contained at sections 43(2), 27(1)(a), (c) and (d) and 38(1)(a) and (b) of FOIA. The FCO also redacted the names of certain officials on the basis of section 40(2) of FOIA.

- c) The two documents falling within the scope of the third part of request on the basis of sections 27(1)(a), (c) and (d) and 38(1)(a) and (b) of FOIA.
23. The complainant also indicated that he was unhappy with the FCO's initial handling of his request, ie the manner in which it had interpreted this, and its disclosure of the information falling within the scope of his request in stages. The Commissioner has therefore also considered these points as well as part of her investigation. However, the Commissioner does not seek to challenge the FCO's position that it did not hold any information falling within the scope of first part of the request.

Reasons for decision

Section 27 – international relations

24. As noted above the FCO has explained to the Commissioner that it considers parts of the withheld information to be exempt from disclosure on the basis of sections 27(1)(a), (c) and (d) of FOIA. These sections 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'*

The FCO's position

25. In its refusal notice the FCO argued that the effective conduct of international relations depends upon maintaining the trust and confidence between governments. Furthermore, the FCO argued that if the UK does not maintain this trust and confidence, its ability to protect and promote UK interests through international relations will be hampered. More specifically, the FCO argued that disclosure of the information which had been withheld would detail the UK's relationship with the Iraqi government and disclosure of this could potentially damage the bilateral relationship between the UK and Iraq.

26. The FCO provided the Commissioner with more detailed submissions to support its view that disclosure of the information withheld on the basis of sections 27(1)(a), (c) and (d) would be likely to harm the UK's relations with Iraq. Such submissions made direct reference to the content of the withheld information itself and therefore the Commissioner cannot include these submissions in this notice. The Commissioner appreciates that this approach is likely to prove frustrating to the complainant; however in the circumstances of this case she considers that such an approach is necessary in order to protect the content of the withheld information.

The complainant's position

27. The complainant argued that section 27 could not provide a basis upon which to withhold entire audits. In support of this he noted that the audit deals with checking that the funds spent by Aktis, a private company, were used according to the FCO rules. The conclusion of audits and evaluations are routinely disclosed by development agencies (e.g. DFID <https://devtracker.dfid.gov.uk/>). The complainant argued that while evaluations might go look at the details on the 'soft' and social aspects of a project (which might have political implications), an audit only deals with financial considerations. In particular, the complainant argued that any overall conclusions of the audit regarding the funds spent by Aktis would not implicate another state and so they would not jeopardise international relations. The complainant also argued that the FCO's reasoning to support its reliance on section 27 had been extremely vague and did not stand up to close scrutiny.

The Commissioner's position

28. 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.

29. 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'*.³
30. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the FCO clearly relates to the interests which the exemptions contained at sections 27(1)(a), (c) and (d) are designed to protect. With regard to the second criterion having considered the content of the withheld information and taking into account the FCO's submissions to her, the Commissioner is satisfied that there is a causal link between disclosure of this information and prejudice occurring to the UK's relations with the Iraq. Furthermore, she is satisfied that the resultant prejudice would be real and of substance. Moreover, the Commissioner is satisfied that there is a more than a hypothetical risk of prejudice occurring and therefore the third criterion is met. For the reasons discussed above, the Commissioner cannot expand upon why she has reached this conclusion without revealing details of the withheld information itself, and/or parts of the FCO's sensitive submissions to her. The Commissioner accepts that this is likely to prove frustrating for the complainant. However, she can assure the complainant she has given careful consideration to the points he has raised in respect of section 27 and she is satisfied that disclosure of the information withheld on the basis of this exemption would be likely to prejudice the UK's relations with Iraq. For the avoidance of doubt, such information consists of the two documents falling within the scope of the third part of the request, and majority of the redactions made to the disclosed document 'Annual Summary Sheet' for the programme 'CSSF Iraq – Governance and Resilience' and some of the redactions made to the latest disclosed version of the Deloitte report.

³ 4 Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence (EA/2006/0040), paragraph 81

Public interest test

31. 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 in disclosure of the information

32. The complainant argued that Aktis did not have a strong track record but was tasked by the FCO with very tricky governance and peace-building projects in countries with longstanding conflicts and high levels of corruption. The complainant suggested that the contracts first became controversial in 2015 because the company's effectiveness was questioned and its directors were close to the FCO.⁴ The complainant also suggested that many of Aktis' staff also reported mismanagement within the company.⁵ The complainant explained it was his understanding that the FCO audited a project (or projects) of Aktis in Iraq in 2018 and soon after, the FCO suspended all of Aktis' contracts and the company went bankrupt in March 2019.
33. In light of this context the complainant argued that there was a public interest in the disclosure of the information he requested in order to increase transparency in relation to the FCO's decision making, ie awarding large contracts to Aktis as well as suspending them, as well as promoting accountability and transparency in public expenditure.
34. The complainant also argued that disclosure would further the understanding and participation in the public debate of issues of the day because the decision to award Aktis with contracts was not without controversy as noted in the media articles cited above.
35. Furthermore, the complainant emphasised that disclosure of the withheld information would be to the benefit of the citizens of the UK, Iraq and other conflict zones where he argued that Aktis had operated with opacity.

⁴ <https://www.dailymail.co.uk/news/article-3149735/What-did-firm-paid-1-4million-UK-fight-terrorism-Tunisia-money-Foreign-Office-facing-question-1-4m-payment-security-firm-run-former-advisers.html>

⁵ <https://www.devex.com/news/exclusive-major-uk-aid-contractor-aktis-strategy-goes-bust-94465>

36. The complainant also argued that the partial disclosure of information painted a rather negative picture of Aktis' financial management with substantial amounts of public money being questioned by auditors. He also suggested that disclosure would contribute to better and more transparent decision making in the future.

Public interest in maintaining the exemption

37. The FCO argued that it would be firmly against the public interest if its relations with Iraq were harmed because this would undermine the UK's ability to support long-term stability and peace-building in Iraq which is vital to protecting UK and wider security interests in the region.

Balance of the public interest test arguments

38. The Commissioner accepts that given the background identified by the complainant there is a genuine public interest in the disclosure of information that would add further to the public's understanding of the FCO's contracts with Aktis. The Commissioner accepts that the disclosure of the information withheld on the basis of section 27 would provide some further insight into the nature of the work undertaken and how this work was performed, albeit that the disclosure of the information withheld on this exemption focuses more on the operational oversight of this work rather than the financial management of it. Nevertheless, the Commissioner accepts that the public interest in disclosure should not be underestimated.
39. Turning to the public interest in the disclosure of the information, the Commissioner considers there to be a very significant public interest in ensuring that the UK can enjoy effective international relations. In the context of this case she agrees that there is a particularly strong public interest in ensuring that the UK's relations with Iraq are not compromised so that the UK can continue to support long-term stability and peace-building in the country.
40. In light of this, the Commissioner has therefore concluded that the public interest favours maintaining the exemptions contained at 27(1)(a), (c) and (d) of FOIA.

Section 38 – health and safety

41. In addition to the information withheld on the basis of section 27(1), the FCO has also withheld a small amount of information on the basis of sections 38(1)(a) and (b) of FOIA. These exemptions state that

'Information is exempt information if its disclosure under this Act would, or would be likely to—

*(a) endanger the physical or mental health of any individual, or
(b) endanger the safety of any individual.'*

42. In section 38 the word 'endanger' is used rather than the word 'prejudice' which is the term used in other similar exemptions in FOIA. However, in the Commissioner's view the term endanger equates to prejudice.

The FCO's position

43. The FCO argued that disclosure of the material withheld on the basis of this exemption would be likely to endanger the health and safety of those implementing projects in Iraq. In support of this position the FCO made specific reference to the content of the withheld information – submissions which of course the Commissioner cannot refer to in this notice – but also emphasised the unstable and unpredictable working environment in Iraq.

The Commissioner's position

44. With regard to the three limb test set out above, the Commissioner is satisfied that the FCO's arguments relate directly to the interests which both exemptions are designed to protect, namely the physical health or safety of an individual. With regard to the second criterion the Commissioner appreciates that the working environment in Iraq is unstable one and thus disclosure of logistical arrangements of staff based there could realistically cause a risk to the safety or physical health to other individuals working there. Furthermore, the Commissioner is satisfied that there is a more than hypothetical risk of this harm occurring if the information was disclosed and therefore the third criteria is met.

Public interest test

45. However, section 38(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.

46. The FCO argued that it was clearly against the public interest to disclose information which would harm the health and safety of individuals implementing projects in Iraq. For the reasons discussed above, the Commissioner accepts that there is a public interest in the disclosure of information regarding the work Aktis undertook for the FCO. However, disclosure of the information that has been withheld on the basis of section 38 (and which is not also exempt on the basis of section 27) would in the Commissioner's opinion only provide a very limited insight into this work and thus the public interest in disclosure of this information is itself limited. In contrast, the Commissioner agrees that there is a very strong public interest in ensuring that the health and safety of individuals is not undermined. She has therefore concluded that the public interest favours maintaining the exemption.

Section 43(2) – commercial interests

47. Section 43(2) states that:

'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).'

48. As section 43(2) is prejudice based exemption, in order for it to be engaged, the three criteria set out above at paragraph 28 have to be met.

The FCO's position

49. The FCO argued that certain parts of the external audit report, and the information redacted from pages 14 and 15 of the Annual Review were exempt on the basis of section 43(2) of FOIA as disclosure would be likely to prejudice the FCO's commercial interests. In support of this position the FCO explained that the information redacted related to the details of the fees paid to Aktis as the project implementer. The FCO argued that disclosure of such information would provide competitors in the market with the knowledge of how much the FCO is prepared to pay for such services. The FCO argued that this would give service providers an upper hand in future negotiations, and in turn, prejudice the FCO's position in the market by reducing its bargaining power when procuring services. The FCO argued that as well as prejudicing its commercial interests across the broader procurement market, disclosure would have a direct and significant impact on the contract which the information relates. The FCO explained that it was highly likely that the FCO will be retendering for these services in the future, in Iraq or in a similar region.

The complainant's position

50. The complainant disputed the argument that disclosure of the information redacted on the basis of section 43(2) would be likely to harm the FCO's commercial interests. In support of this position he noted that redacting the amounts for such development contracts is highly unusual; rather details of such spending is usually proactively disclosed with further information released upon request. For example Worldwide register of aid funding, with amounts for each project: <https://d-portal.org/ctrack.html#view=search> and DFID projects in Iraq: <https://devtracker.dfid.gov.uk/countries/IQ/projects>. Furthermore, the complainant noted that DFID and other agencies routinely publish the public funds paid to various companies for the services for which they are hired. If this affected their commercial interests', the whole aid industry would be jeopardised.
51. Consequently, the complainant argued that disclosure of the information withheld on the basis of section 43(2) would not be likely to harm the FCO's commercial interests.

The Commissioner's position

52. With regard to first criterion, the Commissioner accepts that the potential prejudice described by the FCO clearly relates to the interests which the exemption contained at section 43(2) is designed to protect.
53. With regard to the second criterion, the Commissioner can understand the rationale of the FCO's argument that if it disclosed information about the fees it paid to Aktis for this project then, in theory, such information would be likely to undermine its negotiating position with third parties when it comes to retendering for this project. On this basis the Commissioner accepts that there is a causal link between disclosure of the withheld information and prejudice to the FCO's commercial interests. The Commissioner is less persuaded that disclosure of the withheld information, which focuses as it does on this specific project, risks undermining the FCO's negotiating position in the broader procurement market.
54. With regard to the third criterion, the Commissioner has considered the sources of information in the public domain cited by the complainant and also considered other information in the public domain about the FCO's spending with Aktis. The Commissioner notes that the level of detail contained in the withheld information about the analysis of various payments is clearly more detailed than that published about other contracts on the spending tracker cited by the complainant. However, the Commissioner notes that this source does include the details of total amounts paid by other government agencies to companies for carrying out particular development contracts. The total figures the FCO paid to

Aktis for this contract is part of the information which has been redacted on the basis of section 43(2) of FOIA. Furthermore, the Commissioner understands that as part of Contract Finder, government departments regularly, and proactively, publish the value of awarded contracts. The FCO has also, as part of its transparency disclosures, published details of some individual payments made to Aktis. This leads the Commissioner to question how genuinely prejudicial disclosure of the details of the overall amounts to Aktis would be. Moreover, the Commissioner is not persuaded that disclosure of the more specific and detailed costs charged by Aktis would be genuinely prejudicial given that they are specific to its implementation of this particular contract. Therefore, although the Commissioner accepts that there is, in theory, some risk in the prejudicing the FCO's negotiating position with third parties in relation to the re-procurement of this, or a similar contract, if the information was disclosed, she is not persuaded that this is more than a hypothetical possibility.

55. Therefore, the Commissioner has concluded that section 43(2) is not engaged.

Section 40 - personal information

56. The FCO redacted the names of junior staff from the Annual Review on the basis of section 40(2) of FOIA. This 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.
57. In this case the relevant condition is contained in section 40(3A)(a)⁶. 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').
58. 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.
59. 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.

⁶ As amended by Schedule 19 Paragraph 58(3) DPA.

Is the information personal data?

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

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

61. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
62. 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.
63. 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.
64. In the circumstances of this case, the Commissioner is satisfied that the names of the officials both relate to and identify the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
65. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
66. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

67. 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'.

68. 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.
69. 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.

Lawful processing: Article 6(1)(f) of the GDPR

70. 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'⁷.

71. 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.
72. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

⁷ 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 (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

Legitimate interests

73. 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.
74. 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.
75. In the circumstances of this case, for the reasons discussed above, the Commissioner accepts that there is a legitimate interest in the disclosure of information about the how Aktis undertook the work which the FCO contracted it to do. However, she is not persuaded that there is a particularly strong or compelling interest in the disclosure of the names of officials named in the withheld information in order to inform the public about the content of this analysis.

Is disclosure necessary?

76. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so a measure would not be necessary if the legitimate aim could be achieved by something less. Disclosure under FOIA must therefore be the least restrictive means of achieving the legitimate aim in question.
77. In the Commissioner's view it is not sustainable to argue that disclosure of the names of the officials is necessary; disclosure of such information would not add to the public's understanding of this subject matter.
78. Given this finding the Commissioner has concluded that disclosure of the names would not be lawful and therefore article 6(1)(f) of the GDPR is not met. Disclosure of the names would therefore breach the first data protection principle and thus such information is exempt from disclosure on the basis of section 40(2) of FOIA.

Handling of the request

79. 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.'

80. 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.
81. As is clear from the preceding paragraphs of this decision notice, the FCO disclosed some of the information to the complainant, albeit it clearly failed to do so within 20 working days of his request. This represents a breach of section 10(1) of FOIA.
82. Furthermore, the Commissioner appreciates that the complainant is dissatisfied with the FCO's re-interpretation of his request at the internal review stage. The Commissioner can understand the complainant's frustration. She would like to take this opportunity to remind the FCO that if a public authority finds there is more than one objective reading of the request then it must go back to the requester to ask for further clarification rather than guessing or assuming what the correct interpretation is.

Right of appeal

83. 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

84. 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.

85. 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
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF