

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 14 December 2021

**Public Authority:** Foreign, Commonwealth & Development Office

**Address:** King Charles Street

London

SW1A 2AH

#### **Decision (including any steps ordered)**

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1. The complainant submitted a two part request to the Foreign and Commonwealth Office (FCO) (now the Foreign, Commonwealth & Development Office, FCDO) seeking firstly information from 2004 about the 'involvement in rendition of Sami al- Saadi' and secondly details of which individuals had agreed the UK government's settlement with Mr al-Saadi.
2. The FCO refused to confirm or deny whether it held any information falling within the scope of the first part of the request on the basis of sections 23(5) (security bodies), 24(2) (national security), 27(4) (international relations) and section 40(5) (personal data). It confirmed that it held information falling within the second part of the request, but it considered this to be exempt from disclosure on the basis of sections 23(1), 27(1)(a), 36(2) (effective conduct of public affairs), 40(2) and 42(1) (legal professional privilege) of FOIA.
3. The Commissioner's decision is that the FCO was entitled to rely on sections 23(5) and 24(2) to refuse to confirm or deny whether it holds any information falling within the scope of part 1 of the request. The Commissioner has also concluded that the information falling within the scope of part 2 of the request is exempt from disclosure on the basis of sections 23(1), 36(2)(a)(i) and 40(2) of FOIA.
4. No steps are required.

## Request and response

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5. The complainant submitted the following request to the FCO<sup>1</sup> on 22 May 2019:

*'I would like year 2004 data relating to (broad scope, please) involvement in rendition of Sami al- Saadi/family.*

*Which persons (including civil servants, politicians and others) agreed to the settlement -*

<https://www.bbc.co.uk/news/uk-20715507>

*"In a statement, a spokesman for the Foreign Office said: "We can confirm that the government and the other defendants have reached a settlement with the claimants. There has been no admission of liability and no finding by any court of liability."*

6. The FCO contacted the complainant on 20 June 2019 and explained that it considered a qualified exemption within FOIA to apply to his request and it needed additional time to consider the balance of the public interest. It did not state what this qualified exemption was considered to be.
7. The FCO provided him with a substantive response to his request on 18 July 2019. In relation to the first part of the request which sought information from 2004, the FCO refused to confirm or deny whether it held any information on the basis of the following sections FOIA: 23(5) (security bodies), 24(2) (national security), 27(4) (international relations), 40(5) (personal data) and 42(2) (legal professional privilege). The FCO explained that in relation to the qualified exemptions, section 17(4) of FOIA applied and therefore it could not explain why it had concluded that the public interest favoured maintaining the exemptions without revealing information that is itself exempt from disclosure.<sup>2</sup> In relation to the second part of the request, ie which persons agreed the settlement, the FCO explained that this information was exempt from

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<sup>1</sup> The FCO merged with the Department for International Development on 2 September 2020 to form the FCDO. This decision notice is therefore served on the FCDO but refers to the FCO where it was the body that took certain actions in relation to the request.

<sup>2</sup> Section 17(4) of FOIA states that a public authority does not have to explain why a particular exemption applies if to do would result in the disclosure of information which itself would be exempt.

disclosure on the basis of sections 23(1), 27(1)(a), 32 (court records), 40(2) and 42(1) of FOIA.

8. The complainant contacted the FCO on 18 July 2019 and asked it to conduct an internal review of this refusal.
9. The FCO informed him of the outcome of the internal review on 14 August 2019. The internal review upheld the application of the various exemptions cited in the refusal notice.

### **Scope of the case**

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10. The complainant contacted the Commissioner on 14 August 2019 in order to complain about the FCO's handling of his request. He disagreed with its refusal to provide information falling within the scope of both parts 1 and 2 of his request.
11. During the course of the Commissioner's investigation, the FCDO explained that it no longer sought to rely on 42(2) of FOIA in relation to part 1 of the request. Furthermore, the FCDO did not provide the Commissioner with any submissions to support its previous position that information falling within the scope of part 2 of the request was exempt from disclosure on the basis of section 32(1) of FOIA.
12. However, the FCDO explained to the Commissioner that in addition to the previous exemptions it had cited, now it considered information falling within the scope of that part 2 of the request to be exempt from disclosure on the basis of the following exemptions sections 36(2)(a)(i), 36(2)(b)(i) and (ii), and 36(2)(c) (effective conduct of public affairs).

## Reasons for decision

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### Part 1 of the request

#### Section 23 – security bodies

13. Section 23(1) of FOIA states that:

*'Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in sub-section (3).'*

14. Section 23(5) of FOIA states that:

*'The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).'*

15. The full list of bodies specified in section 23(3) can be viewed online.<sup>3</sup>

16. In the Commissioner's opinion the exemption contained at section 23(5) should be interpreted so that it is only necessary for a public authority to show that **either** a confirmation **or** denial of whether requested information is held would involve the disclosure of information relating to a security body. It is not necessary for a public authority to demonstrate that both responses would disclose such information. Furthermore, the Commissioner considers that the phrase 'relates to' should be interpreted broadly. Such an interpretation has been accepted by the First-Tier Tribunal (Information Rights) in a number of different decisions.<sup>4</sup>

17. Consequently, whether or not a security body is interested or involved in a particular issue is in itself information relating to a security body. Therefore, in the Commissioner's opinion section 23(5) could be used by a public authority to avoid issuing a response to a request which revealed either that a security body was involved in an issue or that it was not involved in an issue.

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<sup>3</sup> <http://www.legislation.gov.uk/ukpga/2000/36/section/23>

<sup>4</sup> See for example *Dowling v Information Commissioner and The Police Service for Northern Ireland*, EA/2011/0118, paras 17 to 22.

18. The test of whether a disclosure would relate to a security body is decided on the normal civil standard of proof, that is, the balance of probabilities. In other words, if it is more likely than not that the disclosure would relate to a security body then the exemption would be engaged.
19. From the above it can be seen that section 23(5) has a very wide application. If the information requested is within what could be described as the ambit of security bodies' operations, section 23(5) is likely to apply. Factors indicating whether a request is of this nature will include the functions of the public authority receiving the request, the subject area to which the request relates and the actual wording of the request.
20. The Commissioner is satisfied that on the balance of probabilities, confirming whether or not the FCDO holds information falling within the scope of part 1 of the request would reveal something about the security bodies. Given the FCDO's reliance on section 17(4) of FOIA, the Commissioner has not set out why he has reached this conclusion in this notice.

#### **Section 24 – national security**

21. In light of his finding in relation to section 23(5), there is no need – in terms of the outcome of this decision notice – for the Commissioner to also consider the FCDO's reliance on section 24(2) of FOIA. This is because, even if the Commissioner rejected the FCDO's reliance on section 24(2), the FCDO would not have to comply with the requirements of section 1(1)(a) in respect of part 1 of the request in light of the Commissioner's finding in relation to section 23(5).
22. However, as the Commissioner has made clear in his guidance on the use of these exemptions, he recognises that some public authorities are concerned that inferences would be drawn if they were to rely on only section 23(5) or section 24(2) of FOIA. As a consequence some public authorities consider it prudent to apply both NCND provisions and in such scenarios the Commissioner will consider the application of both exemptions in a decision notice.
23. Section 24(2) provides an exemption from the duty to confirm or deny where this is required for the purpose of safeguarding national security. The approach that the Commissioner takes to the term 'required' as it is used in this exemption is that this means 'reasonably necessary'. In effect this means that there has to be a risk of harm to national security for the exemption to be relied upon, but there is no need for a public authority to prove that there is a specific, direct or imminent threat.

24. Therefore, section 24(2) is engaged if the exemption from the duty to confirm or deny is reasonably necessary for the purpose of safeguarding national security. Moreover, as with section 23(5), the Commissioner considers that section 24(2) should be interpreted so that it is only necessary for a public authority to show either a confirmation or a denial of whether requested information is held would be likely to harm national security.
25. In the context of section 24, the Commissioner accepts that withholding information in order to ensure the protection of national security can extend to ensuring that matters which are of interest to the security bodies are not revealed. Moreover, it is not simply the consequences of revealing whether such information is held in respect of a particular request that is relevant to the assessment as to whether the application of the exemption is required for the purposes of safeguarding national security, but the need to maintain a consistent approach to the application of section 24(2).
26. The FCDO provided the Commissioner with submissions to support its view that adopting a NCND approach was necessary in this case in order to protect national security. On the basis of these submissions the Commissioner is satisfied that the FCDO is entitled to rely on section 24(2). Again, given the effect of section 17(4) of FOIA the Commissioner has not reproduced the content of the submissions in this notice (or explained why he agrees with them) as the submissions comprise information which is itself exempt from disclosure.

*Public interest test*

27. Section 24(2) is a qualified exemption. Therefore, the Commissioner is required to consider whether, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in confirming whether the FCDO holds requested information falling within part one of the request.
28. The Commissioner acknowledges that allegations that the UK has been involved in rendition are serious ones and as a result there is a public interest in the disclosure of information which could allow the public to be better informed about such matters. However, in his opinion there is a significant, and ultimately compelling, public interest in protecting information required for the purposes of safeguarding national security. He has therefore concluded that the public interest in maintaining section 24(2) outweighs the public interest in the FCDO confirming whether or not it holds information falling within the scope of part one of the request.

29. In light of the Commissioner's findings in relation to section 23(5) and 24(2) he has not considered the FCDO's reliance on section 27(4) or 40(5) of FOIA.

## **Part 2 of the request**

30. The FCDO relied on a number of exemptions to withhold the information it held falling within part 2 of the request which sought information on '*Which persons (including civil servants, politicians and others) agreed to the settlement*', ie the settlement between the UK government and Mr al-Saadi. The Commissioner has considered each of these exemptions in turn.

## **Section 23 – security bodies**

31. The FCDO sought to withhold some of the information falling within the scope of part 2 of the request on the basis of section 23(1) of FOIA. As noted above, this states that:

*'Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in sub-section (3).'*

32. Having examined the information in question, the Commissioner is satisfied that it falls within the scope of this exemption and is therefore exempt from disclosure on the basis of section 23(1). The Commissioner cannot elaborate on why he has reached this finding without referring to the content of the information itself.

## **Section 36 – effective conduct of public affairs**

33. The FCDO sought to withhold some of the information falling within the scope of this part of the request on the basis of section 36(2)(a)(i). This states that:

*'(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—*

*(a) would, or would be likely to, prejudice-*

*(i) the maintenance of the convention of the collective responsibility of Ministers of the Crown*

34. In determining whether section 36(2)(a)(i) is engaged the Commissioner must determine whether the qualified person's opinion was a reasonable one. In doing so the Commissioner has considered all of the relevant factors including:

- Whether the prejudice relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection the opinion is unlikely to be reasonable.
  - The nature of the information and the timing of the request, for example, whether the request concerns an important ongoing issue on which there needs to be a free and frank exchange of views or provision of advice.
  - The qualified person's knowledge of, or involvement in, the issue.
35. Further, in determining whether the opinion is a reasonable one, the Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only not reasonable if it is an opinion that no reasonable person in the qualified person's position could hold. The qualified person's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.
36. With regard to the process of seeking this opinion, the FCDO sought the opinion of the qualified person, namely a FCDO Minister, on 25 October 2021 with regard to whether section 36(2)(a)(i) of FOIA was engaged. The qualified person was provided with a rationale as to why the exemption could apply and copies of the withheld information. The qualified person provided their opinion that section 36(2)(a)(i) was engaged on 4 November 2021. Whilst the rationale as to why the exemption applies is contained in the recommendation to the qualified person, to which the latter's opinion simply agreed, the Commissioner is satisfied that this is an appropriate process to follow (and is in line with the approach taken by other central government departments).
37. Turning to the substance of the opinion, parts of the recommendation to the qualified person (to which, as explained above, the latter agreed) refer to the contents of withheld information itself. As a result the Commissioner cannot detail all aspects of the qualified person's opinion in this decision notice. However, in summary, the qualified person concluded that disclosure of information falling within part 2 of the request would damage the principle of collective responsibility if individual ministers were identified (albeit erroneously) as being responsible for individual decisions.



38. Having considered the content of the withheld information and taking into account the qualified person's opinion, the Commissioner is satisfied that this was a reasonable opinion to come to. Section 36(2)(a)(i) is therefore engaged.
39. As is clear from the dates in the previous paragraph, the FCDO sought to apply section 36 a significant period of time after it initially received the request. However, it is entitled to apply this (or any other exemption) during the course of the Commissioner's investigation and therefore the FCDO's late reliance on section 36 does not undermine its application.

*Public interest test*

40. Section 36 is a qualified exemption and in line with the requirements of section 2 of FOIA the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption cited outweighs the public interest in disclosing the information.
41. In considering complaints regarding section 36, where the Commissioner finds that the qualified person's opinion was reasonable, he will consider the weight of that opinion in applying the public interest test. This means that the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would, or would be likely to, occur but he will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming his own assessment of whether the public interest test dictates disclosure.
42. The FCDO acknowledged that releasing the information withheld on the basis of this exemption would increase public knowledge about this subject. However, it argued that there is a stronger public interest in protecting the ability of ministers to work together collectively to make decisions on individual litigation cases.
43. The Commissioner agrees that there is significant public interest in the disclosure of information which would inform the public about the case of Mr al-Saadi. It was clearly a high profile and controversial case and the Commissioner accepts that there is a public interest in the disclosure of information which could increase transparency in relation to the UK government's decision to agree the settlement.
44. However, the Commissioner agrees with the FCDO that if information was disclosed which revealed which Minister or Ministers had taken responsibility for agreeing the settlement that this could lead to an erosion of the principle of collective responsibility. This is because disclosure would, as the qualified person argued, suggest that a particular Minister or Ministers had been responsible for a decision when in fact such a decision had been taken on behalf of the entire

government. In the Commissioner's view there is a significant public interest in ensuring that this principle is not undermined as it is a central feature of our constitutional system of government.

45. Furthermore, in terms of furthering the public's understanding of this issue, the Commissioner is not persuaded that identifying the particular Minister or Ministers who was responsible for agreeing the settlement would provide any particular insight into the matter, especially when such a Minister or Ministers had, for the reasons discussed above, only done so on behalf of the government as a whole.
46. Taking the above into account, the Commissioner is satisfied that the public interest favours maintaining the exemption contained at section 36(2)(a)(i).

### **Section 40 – personal data**

47. The FCDO withheld the names of officials 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.
48. In this case the relevant condition is contained in section 40(3A)(a)<sup>5</sup>. 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').
49. 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.
50. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

*Is the information personal data?*

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

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

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<sup>5</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

52. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
53. 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.
54. 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.
55. 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.
56. As noted above, 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.
57. The most relevant DP principle in this case is principle (a).

*Would disclosure contravene principle (a)?*

58. 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'.*

59. 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.
60. 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*

61. 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*<sup>6</sup>.

62. 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.
63. 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*

64. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that 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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader

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<sup>6</sup> 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".*

public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

65. 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 this subject. However, he 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 further inform the public about this matter.

*Is disclosure necessary?*

66. '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.
67. 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 fundamentally to the public's understanding of this subject matter. Furthermore, for the reasons discussed above, the decision to agree the settlement for Mr al-Saadi was ultimately one taken by a Minister or Ministers collectively on behalf of the government as a whole.
68. 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 of officials 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.
69. The Commissioner is satisfied that all of the information falling within the scope of part 2 of the request is exempt from disclosure on the basis of sections 23(1), 36(2)(a)(i) or 40(2) of FOIA. Therefore, in light of these findings the Commissioner has not considered the FCDO's reliance on the other exemptions contained in section 36, section 27(1)(a) or section 42(1) in relation to part 2 of the request.

## Right of appeal

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70. 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: 0203 936 8963  
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)

71. 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.

72. 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 .....**

**Gerrard Tracey  
Principal Adviser  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**