

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)

1. The complainant submitted a request to the Foreign and Commonwealth Office (FCO) (now the Foreign, Commonwealth & Development Office, FCDO) seeking information about the settlement made to men from the UK who had been held in Guantanamo Bay. The FCO refused to provide the information in the scope of the request on the basis of sections 27(1)(a) (international relations), 36(2) (effective conduct of public affairs, 40(2) (personal data) and 42(1) (legal professional privilege) of FOIA. The FCO also refused to confirm or deny whether it held any further information falling within the scope of the request on the basis of sections 23(5) (security bodies) and 24(2) (national security) of FOIA.
2. The Commissioner's decision is that FCO was entitled to withhold the information it acknowledged it held on the basis of the exemptions cited above. The Commissioner is satisfied that the FCO was entitled to refuse to confirm or deny whether it held any further information in the scope of the request on the basis of sections 23(5) and 24(2) of FOIA.
3. No steps are required.

Request and response

4. The complainant submitted the following request to the FCO¹ on 20 June 2019:

'BACKGROUND:

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

"Inquiries continue

This is not the first settlement by the government in which the security and intelligence agencies have faced allegations relating to their alleged involvement in the treatment of detainees by foreign regimes.

In 2010, ministers authorised a multi-million pound pay-out to men from the UK who were held in Guantanamo Bay - a deal that avoided their evidence of alleged collusion with the US emerging in open court in what could have become a mammoth legal battle."

REQUEST

1. I want a schedule of the "pay-out to men" above. This should be set out in the following way

a) name of victim b) amount £ c) reason - for example torture in Guantanamo

2. Who authorised the deal, provide all data such as internal memos etc.'

5. The FCO responded on 10 September 2019 and confirmed that it held information falling within the scope of the request but it considered this to be exempt from disclosure on that basis of sections 27(1)(a) (international relations), 40(2) (personal data) and 42(1) (legal professional privilege) of FOIA. The FCO also refused to confirm or deny whether it held any further information falling within the scope of the request on the basis of sections 23(5) (security bodies) and 24(2) (national security). It explained that section 17(4) of FOIA applied and therefore it could not explain why the public interest was considered to favour maintaining the latter exemption.²

¹ 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.

² 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.

6. The complainant contacted the FCO on the same day and asked it to conduct an internal review of this refusal.
7. The FCO informed him of the outcome of the internal review on 8 October 2019. The review concluded that the various exemptions had been correctly applied.

Scope of the case

8. The complainant contacted the Commissioner on 9 October 2019 in order to complain about the way his request for information had been handled.
9. During the course of the Commissioner's investigation the FCDO contacted the complainant and explained that in relation to part 2 of the request it was now seeking to also rely on sections 36(2)(a)(i), 36(2)(b)(i) and (ii), and section 36(2)(c) (effective conduct of public affairs) of FOIA.
10. Furthermore, the FCDO explained to the complainant that in relation to request 1 c):

'some of the information you requested regarding the reason for the settlement is contained in the Secretary of State for Justice's speech to Parliament on 16 November 2010. A link to the speech can be accessed here:

[Guantanamo Civil Litigation Settlement - Tuesday 16 November 2010 - Hansard - UK Parliament \(HC Deb 16 November 2010, vol 518, cols 752-764\)](#)'

Reasons for decision

Request 1 parts a) and b)

Section 40 – personal data

11. The FCDO withheld the names of the individuals who reached the settlement with the UK government and the amounts that they received 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.
12. In this case the relevant condition is contained in section 40(3A)(a).³ 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').
13. 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.
14. 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?

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

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

16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
17. 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

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

more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

18. 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.
19. In the circumstances of this case, the Commissioner is satisfied that the names of the individuals who entered into the settlement with the UK government, as well as the amounts they received, is information that both relates to and identifies the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
20. 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.
21. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

22. 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'.

23. 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.
24. 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

25. 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'⁴.

⁴ Article 6(1) goes on to state that:-

26. 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.
27. 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

28. 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 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.
29. In the circumstances of this case, the Commissioner accepts that there is a legitimate interest in the disclosure of information about this

"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".

subject. The government's decision at the time to enter into this settlement attracted both parliamentary scrutiny (as evidenced by the debate at the link provided to the complainant by the FCDO in November 2021), as well as considerable wider public interest at the time. Disclosure of the information in the scope of these parts of the request would provide a direct insight in the terms of the settlement.

Is disclosure necessary?

30. '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.
31. The Commissioner accepts that disclosure of the information in question is necessary in order to meet the legitimate aim identified above of providing the public with a greater insight into the terms of the settlement.

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

32. 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 the 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.
33. 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.
34. 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.

35. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
36. The FCDO emphasised the settlement that the government had reached with the individuals in question was a confidential one. As a result, it argued that the disclosure of the information without their consent would be inherently unfair.
37. The Commissioner acknowledges that the settlement reached was a confidential one, a point confirmed by the Ministerial statement cited above. In light of this the Commissioner accepts that the individuals in question would have no expectation that their personal data regarding this matter would be disclosed. Furthermore, given that the information in question relates to the detention of the individuals in Guantanamo Bay, the Commissioner accepts that disclosure of information about this matter into the public domain nearly ten years after the settlement was reached could be distressing for the individuals in question. In any event, disclosure of the sums awarded to them would represent a significant invasion of their privacy.
38. Therefore, although for the reasons set out above the Commissioner considers there to be a legitimate interest in the disclosure of information falling within request 1 parts a) and b), he considers this to be insufficient to outweigh the data subjects' 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.
39. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.
40. The FCDO is therefore entitled to rely on section 40(2) of FOIA to withhold information falling within the scope of parts a) and b) of request 1.

Request 1 part c)

41. As explained above, during the course of the Commissioner's investigation the FCDO provided the complainant with a link to information in the public domain about reason for the settlement. The Commissioner is satisfied that this information answers this particular part of this request. The FCDO had not previously provided the complainant with this link and it should have done when it responded to the request. To the extent that the FCDO holds any information covered by this statement, it could have cited the exemption contained at section 21(1) (information reasonably accessible to the applicant) of FOIA to refuse to disclose it.

Request 2

42. The FCDO relied on a number of exemptions to withhold the information it held falling within request 2 which sought information on *'Who authorised the deal, provide all data such as internal memos etc'*. The Commissioner has considered each of these exemptions in turn.

Section 36 – effective conduct of public affairs

43. 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

44. 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.

45. 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.

46. 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).
47. 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 request 2 would damage the principle of collective responsibility if individual ministers were identified (albeit erroneously) as being responsible for individual decisions.
48. Having considered the content of the withheld information on the basis of this exemption, 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.
49. As is clear from the dates in the above 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

50. 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.
51. 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.

52. 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.
53. For the reasons discussed above, the Commissioner agrees that that there is significant public interest in the disclosure of information which would inform the public about the details behind settlement reached with former Guantanamo detainees.
54. 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 the UK's constitutional system of government.
55. 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 were responsible for agreeing the settlement would provide any particular insight into the matter, especially when any such Minister or Ministers had, for the reasons discussed above, only done so on behalf of the government as a whole.
56. 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 27 – international relations

57. Section 27(1)(a) of FOIA states that:

'(1) 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'

The FCDO's position

58. In its responses to the complainant the FCDO explained that information had been withheld on the basis of this exemption because its disclosure would harm the UK's relations with other states. The FCDO emphasised that the effective conduct of international relations depends upon maintaining trust and confidence between governments.
59. In its submissions to the Commissioner the FCDO provided more detailed arguments to support this position which were specific to the information that was being withheld.

The Commissioner's position

60. 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.
61. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the FCDO clearly relates to the interests which the exemption contained at section 27(1)(a) is designed to protect. With regard to the second criterion having considered the content of the withheld information and taking into account the FCDO's submissions, the Commissioner is satisfied that there is a causal link between disclosure of this information and prejudice potentially occurring both to the UK's relations with a particular state. Furthermore, he is satisfied that the resultant prejudice would be real and of substance and that there is a more than a hypothetical risk of prejudice occurring. The third criterion is therefore met and section 27(1)(a) is engaged.

Public interest test

62. Section 27 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.
63. The FCDO argued that there was a strong public interest in the UK being able to enjoy effective international partners as this allowed it to protect and promote the UK's interests. It argued that it would be against the public interest if its ability to do this was harmed.
64. For the reasons set out above, the Commissioner accepts that there is genuine and significant public interest in disclosure of information regarding this settlement and the background to it. In the Commissioner's view disclosure of the information withheld on the basis of this exemption would go some way to meeting such an interest. However, the Commissioner accepts that there is very significant public interest in the UK being able to enjoy effective international relations and in the circumstances of this case he has concluded that the balance of the public interest favours maintaining the exemption.

Section 42 – legal professional privilege

65. Section 42(1) of FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings.
66. There are two categories of legal professional privilege: advice privilege and litigation privilege.
67. In this case the FCDO has argued that part of the withheld information attracts litigation privilege and that part of it attracts advice privilege.
68. The former applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. There must be a real prospect or likelihood of litigation, rather than just a fear or possibility. For information to be covered by litigation privilege, it must have been created for the dominant (main) purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation. It can cover communications between lawyers and third parties so long as they are made for the purposes of the litigation.
69. The latter applies to records of communications that were confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice.

70. The Commissioner has examined the information withheld by the FCDO on the basis of section 42(1) and accepts that it attracts either litigation or advice privilege.

Public interest test

71. Section 42 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
72. The FCDO acknowledged that although there is a public interest in transparency in decision making, it maintained that that the public interest in safeguarding the ability of clients to speak freely to their lawyers and ensure that decision making is done with the correct legal advice outweighs that.
73. In considering the balance of the public interest under section 42, although the Commissioner accepts that there is a strong element of public interest inbuilt into legal professional privilege, he does not accept, as previously argued by some public authorities that the factors in favour of disclosure need to be exceptional for the public interest to favour disclosure. The Information Tribunal in *Pugh v Information Commissioner (EA/2007/0055)* were clear:

'The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty than those in favour of maintaining the exemption'. (Para 41).

74. Consequently, although there will always be an initial weighting in terms of maintaining the exemption, the Commissioner recognises that there are circumstances where the public interest will favour disclosing the information. In order to determine whether this is the case, the Commissioner has considered the likelihood and severity of the harm that would be suffered if the advice were disclosed by reference to the following criteria:

- how recent the advice is; and
- whether it is still live.

75. In order to determine the weight that should be attributed to the factors in favour of disclosure the Commissioner will consider the following criteria:

- the number of people affected by the decision to which the advice relates;
- the amount of money involved; and

- the transparency of the public authority's actions.
76. With regard to the age of the advice the Commissioner accepts the argument advanced on a number of occasions by the Tribunal that as time passes the principle of legal professional privilege diminishes. This is based on the concept that if advice is recently obtained it is likely to be used in a variety of decision making processes and that these processes are likely to be harmed by disclosure. However, the older the advice the more likely it is to have served its purpose and the less likely it is to be used as part of any future decision making process.
 77. In many cases the age of the advice is closely linked to whether the advice is still live. Advice is said to be live if it is still being implemented or relied upon and therefore may continue to give rise to legal challenges by those unhappy with the course of action adopted on that basis.
 78. In the circumstances of this case in the Commissioner's view the advice is clearly not recent as the settlement was reached nearly 10 years before the request was submitted. Furthermore, the Commissioner is not persuaded that the advice could be said to be live; again this is because the settlement has been made and the matter is for all intents and purposes concluded. Nevertheless, the Commissioner accepts disclosure of the legal advice could still potentially have a notable chilling effect on future discussions within government departments given the significance and magnitude of the matters under discussion.
 79. With regard to criteria above at paragraph 75 the number of people directly affected by the settlement is relatively small. However, the Commissioner acknowledges that there is a wider public interest in this issue. Furthermore, as discussed above the government has not confirmed how much money the settlement involves or the further details about the terms of it as it is considered to be confidential. The Commissioner therefore accepts that there is strong argument for disclosing the legal advice considered by government which led to this settlement.
 80. However, and by a relatively narrow margin, the Commissioner has concluded that the public interest favours maintaining the exemption.

Whether the FCDO holds any further information falling within the scope of request

Section 23 – security bodies

Section 24 – national security

81. The FCDO also explained that it was relying on sections 23(5) and 24(2) of FOIA as a basis to refuse to confirm or deny whether it held any

further information falling within the scope of the request other than that which it had already sought to withhold on the basis of the other exemptions cited in its correspondence with the complainant.

82. Sections 23(5) and 24(2) exclude the duty of a public authority to confirm or deny whether it holds information which, if held, would be exempt under section 23(1) or 24(1) respectively.
83. Information relating to security bodies specified in section 23(3) is exempt information by virtue of section 23(1). Information which does not fall under section 23(1) is exempt from disclosure under section 24(1), if it is required for the purpose of safeguarding national security.
84. By virtue of section 23(5) 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 section 23(3).
85. By virtue of section 24(2) the duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security.
86. The Commissioner does not consider the exemptions at sections 23(5) and 24(2) to be mutually exclusive and he accepts that they can be relied on independently or jointly in order to conceal whether or not one or more of the security bodies has been involved in an issue which might impact on national security. However, each exemption must be applied independently on its own merits. In addition, the section 24 exemption is qualified and is therefore subject to the public interest test.
87. The test as to whether a disclosure would relate to a security body is decided on the normal 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.
88. 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. This is consistent with the scheme of FOIA because the security bodies themselves are not subject to its provisions. 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.
89. The Commissioner finds that on the balance of probabilities, further information about this subject matter, if held, could be related to one or more bodies identified in section 23(3).

90. With regard to section 24(2), the Commissioner again considers that this exemption 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.
91. In relation to the application of section 24(2) the Commissioner notes that the First tier Tribunal has indicated that only a consistent use of a '*neither confirm nor deny*' (NCND) response on matters of national security can secure its proper purpose. Therefore, in considering whether the exemption is engaged, and the balance of the public interest, regard has to be given to the need to adopt a consistent NCND position and not simply to the consequences of confirming whether the specific requested information in this case is held or not.
92. In the context of section 24, 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).
93. On this occasion the Commissioner is satisfied that complying with the requirements of section 1(1)(a) would be likely to reveal whether or not the security bodies were in any way involved in the subject matter which is the focus of this request. The need for a public authority to adopt a position on a consistent basis is of vital importance in considering the application of an NCND exemption.
94. The Commissioner is satisfied that the public authority was entitled to rely on sections 23(5) and 24(2) in the circumstances of this case. He accepts that revealing whether or not further information, falling within the scope of the request, is held by the FCO would be likely to reveal whether information is held relating to the role of the security bodies. It would also undermine national security and for that reason section 24(2) also applies because neither confirming nor denying if additional information is held is required for the purpose of safeguarding national security.
95. As noted above section 24 is a qualified exemption. However, the Commissioner considers that there is a significant public interest in protecting information required for the purposes of safeguarding national security. Therefore, in the circumstances of this case the public interest in maintaining the exemption at section 24(2) outweighs the public interest in complying with the duty imposed by section 1(1)(a).

Reference: IC-46780-Y2B0



96. In light of the above findings the Commissioner has not considered the FCDO's reliance on sections 36(2)(b) and (c) of FOIA to withhold the information falling within the scope of request 2.

Right of appeal

97. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

98. 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.

99. 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**