

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 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 access to four files concerning Sri Lankan in the 1980s. The FCO disclosed some parts of the files to the complainant but sought to withhold other parts on the basis of the following exemptions within FOIA: section 23(1) (security bodies), section 24(1) (national security), sections 26(1)(a) and (b) (defence), sections 27(1)(a), section 40(2) (personal data) and section 41(1) (information provided in confidence).
2. The complainant disputed the FCO's reliance on these exemptions and also argued that the FCO should have provided him with a schedule of how it was applying the exemptions to the specific redactions.
3. The Commissioner's decision is that FCO is entitled to withhold the remaining information on the basis of the exemptions it has cited. The Commissioner has also concluded that the FCO was not obliged to provide the complainant with a schedule setting out how the exemptions had been applied. However, the FCO breached section 17(3) by failing to complete its public interest test considerations in a reasonable time.
4. No steps are required.

Request and response

5. The complainant submitted the following request to the FCO¹ on 19 June 2018:
- 'a) FCO 37/3977 Retained file: Involvement of UK companies training Sri Lankan security forces. 1985*
 - b) FCO 37/3979 Retained file: Training of the Sri Lankan military in the UK. 1985*
 - c) Folio 6 of FCO 37/3548, UK security firms' interest in Sri Lanka, 1984 (Former reference in its original department: FSC 071/2) – the copy at the UK National Archives is redacted and stamped as having been retained*
 - d) Folios 1, 4, 5, 10, 12, 23, 27, 30, 34, 36, 37, 43 of FCO 37/3150, UK training for Sri Lankan armed forces, 1983 (Former reference in its original department: FSC 71/1) – the copy at the UK National Archives contains multiple redactions and is repeatedly stamped as having been retained.*
 - e) Folio 1 of FCO 31/2699, Training of Ugandan personnel by UK personnel: police rehabilitation aid, 1979 (Former reference in its original department: JEU 71/1 PART A) – the copy at the UK National Archives is redacted and stamped as having been retained*
 - f) FCO 99/370, UK diplomatic representation in El Salvador, 1979 (Former reference in its original department: ACS 400/1 PART A) – the copy at the UK National Archives contains multiple redactions and is repeatedly stamped as having been retained.'*
6. The FCO contacted the complainant on 27 June 2018 and explained that it was splitting the request into two. The first request would cover the information sought at points a) to d) and the second request would cover the information sought by points e) and f).
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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.

7. The FCO contacted him again on 17 July 2018 and confirmed that it held information falling within the scope of parts a) to d) but it considered this to be exempt from disclosure on the basis of section 27 (international relations) of FOIA and it needed more time to consider the balance of the public interest test.
8. The FCO provided him with a substantive response to this request on 20 October 2018. The FCO explained that it had concluded that some of the information could be disclosed and that this would be sent to him in hard copy. However, the FCO explained that it considered that the remainder of the information was exempt from disclosure on the basis of section 23(1) or section 24(1) citing these two exemptions in the alternative², section 26(1) (defence), section 27(1)(a), section 40(2) (personal data) and section 41(1) (information provided in confidence) of FOIA.
9. The FCO provided the complainant with a copy of the disclosable information on 8 January 2019.
10. The complainant contacted the FCO on 28 January 2019 in order to ask for an internal review into the decision to withhold information falling within the scope of his request. In doing so he explained that:

'I was deeply disappointed that the FCO has not bothered to provide a schedule of setting out which material it had release and what was still being retained. Furthermore it was unclear in many cases which exemptions had been applied to each redaction, making it harder for me to effectively challenge such decisions. In one case, folios were disclosed without any label to their parent file, leaving me to deduce this by process of elimination.

I have set out a schedule below to record what information I have received and what remains retained, redacted or even missing. There are notable numerical gaps in the folios which the FCO must now account for.'

11. The FCO informed him of the outcome of the internal review on 2 August 2019. The review concluded that the various exemptions cited in the

² Citing these two exemptions in the alternative means that although only one exemption is engaged the other one is also cited so as to disguise which exemption is in fact being relied upon. This approach may be necessary in instances where citing one exemption would in itself be harmful. Further information on this issue is contained in guidance issued by the Commissioner: <https://ico.org.uk/for-organisations/foi-guidance/how-sections-23-and-24-interact/#text4>

refusal notice had been applied correctly (subject to the exceptions referred to below). With regard to the complainant's comments about a schedule, the FCO responded as follows:

'You expressed dissatisfaction that we had not provided a schedule setting out which material had been released and which was retained and it was unclear to you which exemptions applied to each redaction. Our assessment is we are not required to provide this level of detail under the Freedom of Information Act. We can however confirm that in relation to file number 37/3977, folio 7 has been released with redactions (copy enclosed) and folio 55 is the last folio on that file. In relation to file number 37/3979, we can confirm that folios 5, 8, 9,10, 14, and 16 have been withheld in full and folio 34 is the last folio on that file. All have been withheld under the exemptions outlined in our letter of 30 October 2018.'

12. The FCO also noted that:

'In paragraphs 3-5 of your letter under the heading 'Excessive Secrecy' you drew our attention to an unredacted document at TNA on file FCO 37/3973 at folio 24 where the same document released to you on file FCO 37/3979 at folio 12 was redacted. As detailed on Discovery, as part of a recent reconsideration of this this piece, it is deemed that it can now be released. An unredacted copy is now enclosed.'

Scope of the case

13. The complainant contacted the Commissioner on 29 October 2019 to complain about the way his request for information had been handled. He raised the following grounds of complaint:

- the FCO's decision to withhold information falling within the scope of the request;
- the FCO's failure to clarify which exemption(s) apply to specific documents/redactions; and,
- the time it took the FCO to process the request.

14. During the course of the Commissioner's investigation of this complaint, and following a further review of the withheld information, in February 2021 the FCDO provided the complainant with copies of two folios from file FCO27/3977 and two folios from file FCO27/3979. All but one of these folios was released in redacted form.

Reasons for decision

Section 23(1) – information supplied by or relating to bodies dealing with security matters

Section 24 – national security

15. Section 23(1) of FOIA provides an exemption which 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 subsection (3).'

16. To successfully engage the exemption at section 23(1), a public authority needs only to demonstrate that the relevant information was directly or indirectly supplied to it by, or relates to, any of the bodies listed at section 23(3).³

17. Section 24(1) states that:

'Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security'.

18. FOIA does not define the term 'national security'. However, in *Norman Baker v the Information Commissioner and the Cabinet Office* (EA/2006/0045 4 April 2007) the Information Tribunal was guided by a House of Lords case, *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, concerning whether the risk posed by a foreign national provided grounds for his deportation. The Information Tribunal summarised the Lords' observations as follows:

- 'national security' means the security of the United Kingdom and its people;
- the interests of national security are not limited to actions by an individual which are targeted at the UK, its system of government or its people;

³ A list of the bodies included in section 23(3) of FOIA is available here: <http://www.legislation.gov.uk/ukpga/2000/36/section/23>

- the protection of democracy and the legal and constitutional systems of the state are part of national security as well as military defence;
 - action against a foreign state may be capable indirectly of affecting the security of the UK; and,
 - reciprocal co-operation between the UK and other states in combating international terrorism is capable of promoting the United Kingdom's national security.
19. Furthermore, in this context the Commissioner interprets 'required for the purposes of' to mean 'reasonably necessary'. Although there has to be a real possibility that the disclosure of requested information would undermine national security, the impact does not need to be direct or immediate.
20. As is clear from the wording of section 24(1), the exemptions provided by sections 23(1) and 24(1) are mutually exclusive. This means they cannot be applied to the same request.
21. However, the Commissioner recognises that the fact that section 24(1) can only be applied to information that is not protected by section 23(1) can present a problem if a public authority does not want to reveal whether or not a section 23 security body is involved in an issue. To overcome this problem, as referred to above at footnote 2, the Commissioner will allow public authorities to cite both exemptions 'in the alternative' when necessary. This means that although only one of the two exemptions can actually be engaged, the public authority may refer to both exemptions in its refusal notice.
22. As the Commissioner's guidance on this issue explains, a decision notice which upholds the public authority's position will not allude to which exemption has actually been engaged. It will simply say that the Commissioner is satisfied that one of the two exemptions cited is engaged and that, if the exemption is section 24(1), the public interest favours withholding the information.

The complainant's position

23. In relation to section 23(1), the complainant argued that this did not cover foreign special forces, foreign intelligence agencies, nor British 'mercenaries such as KMS'⁴. He noted that the fact that Sri Lanka's army

⁴ KMS refers to Keenie Meenie Services, a private British military contractor.

commando unit was trained by the SAS is a matter of public record which has been disclosed in the Ministry of Defence (MOD) in files at The National Archives. The complainant argued that public bodies must act in a proportionate and rational fashion, and it was neither proportionate nor rational for the FCDO to withhold information of a similar nature to which the MOD had already released.

24. In relation to section 24(1), the complainant noted that it was already in the public domain that the SAS trained Sri Lankan army commandos in 1980. As a result he argued that subsequent references to this in the FCO files cannot be said to jeopardise national security.

The Commissioner's position

25. Based on submissions provided to him by the FCDO during the course of his investigation the Commissioner is satisfied that the parts of the withheld information either fall within the scope of the exemption provided by section 23(1) of FOIA or fall within the scope of the exemption provided by section 24(1) of FOIA, and that if the exemption engaged is section 24(1) then the public interest favours maintaining the exemption.
26. The Commissioner cannot elaborate on his rationale behind this finding without compromising the content of the withheld information itself or by revealing which of these two exemptions is actually engaged.

Section 26 - defence

27. The FCDO withheld some of the information on the basis of sections 26(1)(a) and (b) of FOIA. These state that:

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

(a) the defence of the British Islands or of any colony, or

(b) the capability, effectiveness or security of any relevant forces.'

The FCDO's position

28. The FCDO's submissions to the Commissioner to support the application of the section 26(1) refer directly to the content of the withheld information itself and therefore are not included in this decision notice. However, in summary the FCDO argued that disclosure of the information withheld on the basis of this exemption would be likely to prejudice the reputation and effectiveness of the UK's Defence Attachés, not only in Sri Lanka but also more widely.

The Commissioner's position

29. In order for a prejudice based exemption, such as section 26(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.
30. 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 sections 26(1)(a) and (b) are 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 defence of the British islands and to the capability, effectiveness or security of any relevant forces. 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 sections 26(1)(a) and (b) are engaged.

Public interest test

31. Section 26(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 information.

Public interest in disclosure of the information

32. In his submissions to the Commissioner the complainant emphasised that the FCDO's failure to explain which exemptions had been applied to which parts of the withheld information significantly limited his ability to make focused and meaningful submissions to challenge each of the specific exemptions.
33. Nevertheless, the complainant set out why he considered there to be a significant public interest in disclosure of information on this topic. He explained that the four files sought by his request contain detail of British involvement with the Sri Lankan security forces between 1983 and 1985, during a period of intense repression of the Tamil liberation movement. He noted that the repression involved torture, disappearances, sexual violence and massacres of Tamil civilians on a grand scale and in a systematic fashion.
34. The complainant suggested that the UK's role in this period appeared to have shifted from providing advice on police special branch matters in 1983 to a British mercenary company training a Sri Lankan police para-military unit by 1984, and that same company then taking responsibility during 1985 for flying helicopter gunships on combat missions and forming an army commando unit. The complainant argued that the disclosures of information indicated that senior company officials were even responsible for planning Sri Lankan military operations at the highest level, thus raising concerns about whether they had command responsibility for war crimes.
35. The complainant noted that several key figures from that company are still alive today. He also noted that some British diplomats who were involved in the UK-Sri Lanka relations in the period in question either continue to work for the FCO in a censorship capacity or for the 'TNA's censorship watchdog' (the Commissioner understands this to be a reference to the 'The Advisory Council on National Records and Archive'). He argued that it was therefore clear that the four files are of the greatest public interest to ensure accountability for war crimes, and to reassure the public that the FCDO is not covering up British culpability for such grave offences.
36. Finally, the complainant also noted that it emerged in August 2020 that Metropolitan Police's police war crimes team had opened an investigation into alleged war crimes by British mercenaries in Sri Lanka

in the 1980s.⁵ The complainant emphasised that as noted in the article, the UN Working Group on Mercenaries has also raised concerns about the conduct of British mercenaries in Sri Lanka and the lack of accountability. He argued that this further demonstrated the significant public interest in disclosure, which he did not feel the FDCO gave adequate consideration to.

Public interest in maintaining the exemption

37. The FCDO argued that it would be firmly against the public interest to disclose information that would undermine the effectiveness of Defence Attaches and in turn cause the prejudice which the exemption was designed to protect.

Balance of the public interest arguments

38. The Commissioner agrees that there is a significant public interest in the disclosure of information which would better inform the public about how the British government has conducted international relations. In the particular circumstances of this request the Commissioner recognises the significance and seriousness of the arguments advanced by the complainant. In such circumstances, the Commissioner considers there to be a particularly strong public interest in the disclosure of the withheld information.
39. However, the Commissioner is also conscious that disclosure of the information risks undermining the capability and effectiveness of Defence Attaches, and in turn the interests which the exemptions contained at section 26(1) are designed to protect. Such outcome, in the Commissioner's view, would be firmly against the public interest. Furthermore, in his view the fact that the prejudicial effects of disclosure are not limited to Sri Lanka but apply to Defence Attaches in other states adds considerable weight to the public interest in maintaining the exemption. The Commissioner notes that the FCDO has disclosed other parts of the files, and that wider further disclosures from the period have resulted in additional information on this subject being in the public domain. In the Commissioner's opinion the availability of this information reduces, slightly, the weight that should be attributed to the public interest arguments in favour of disclosure.

⁵ <https://www.dailymaverick.co.za/article/2020-08-13-exclusive-met-police-open-war-crimes-investigation-into-british-mercenaries/>

40. On balance, and taking the above into account, the Commissioner has concluded that the balance of the public interest favours maintaining the exemptions contained at section 26(1) of FOIA.

Section 27 – international relations

41. 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

42. The FCDO argued that that the effective conduct of international relations depends upon maintaining trust and confidence between governments. If the UK does not maintain this trust and confidence, its ability to protect and promote its interests through international relations will be hampered.
43. In the circumstances of this case, the FCDO provided the Commissioner with specific submissions to support its view that the information withheld on the basis of section 27(1)(a) would be likely to prejudice relations with a number of states. As these submissions refer to the content of the withheld information itself the Commissioner has not included these in this decision notice.

The complainant's position

44. The complainant argued that the FCDO had already released various files as open at TNA on this subject and he therefore questioned whether disclosure of the information redacted on the basis of this exemption would actually result in harm occurring to the UK's relations with other states. For example, the complainant explained that his book on this subject demonstrated that the FCDO had already released various files as open at TNA which make disparaging references to both Sri Lanka and India. He also noted that previous disclosures made clear that India was not particularly concerned about the activities of the British security company KMS in Sri Lanka. As a result the complainant argued that there was nothing in the closed file that is more likely to prejudice international relations than that which is already open to the public at TNA.

The Commissioner's position

45. In considering whether section 27(1)(a) applies the Commissioner needs to consider whether the three criteria set out above at paragraph 29 are met.
46. 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'*.⁶
47. In relation to the criteria referred to above at paragraph 29, the Commissioner is satisfied that the first criterion is met as the prejudice envisaged by the FCDO is clearly one that is protected by the exemption contained at section 27(1)(a) of FOIA. Given the content of the withheld information the Commissioner also accepts that there is causal link between disclosure of the information withheld under this exemption and prejudice occurring. The second criterion is therefore met. Furthermore, the Commissioner accepts that there is a more than a hypothetical chance of the UK's relations with the states in question being harmed if the information was disclosed. The Commissioner cannot elaborate on these findings without referring to the content of the withheld information itself.

Public interest test

48. 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 information.

Public interest in disclosure of the information

49. The complainant's submissions in support of his view that the public interest favours disclosing the information are set out at paragraphs 32 to 36 above.

⁶ Campaign against Arms Trade v the Information Commissioner and Ministry of Defence EA/2007/0040 (26 August 2008)

Public interest in maintaining the exemption

50. The FCDO argued that it would be firmly against the public interest to disclose information which would make it harder for the UK to maintain effective relations with other states.

Balance of the public interest arguments

51. For the reasons set out above, the Commissioner accepts that there is a significant public interest in the disclosure of information on this subject, and therefore the weight that should be attributed to disclosing the withheld information should not be underestimated.
52. However, the Commissioner agrees with the FCDO that it would be firmly against the public interest to disclose information which would make the UK's relations with another state more difficult. Having considered the content of the withheld information, and taken into account the availability of information already disclosed by the FCDO in relation to this subject, the Commissioner has concluded that the public interest favours maintaining the exemption.

Section 40 – personal data

53. The FCDO withheld the names of some individuals 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.
54. In this case the relevant condition is contained in section 40(3A)(a)⁷. 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').
55. 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.
56. 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.

⁷ As amended by Schedule 19 Paragraph 58(3) DPA.

Is the information personal data?

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

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

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

59. 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.

60. 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.

61. In the circumstances of this case, the Commissioner is satisfied that the names redacted by the FCDO 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.

62. 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.

63. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

64. 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'.

65. 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.

66. 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

67. 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'⁸.

68. 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.

69. 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

70. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a

⁸ 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".

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.

71. In his submissions the complainant outlined why he did not consider it appropriate for the FCDO to rely on section 40(2) to redact the names of certain KMS staff.
72. 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 particular names that have been withheld in order to inform the public about this issue.

Is disclosure necessary?

73. '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.
74. In the Commissioner's view it is not sustainable to argue that disclosure of the names in question is necessary; disclosure of such information would not materially add to the public's understanding of this subject matter, and in particular would not further the legitimate interests in disclosure identified by the complainant elsewhere in this decision notice, including those set out at paragraphs 33 to 36. In reaching this conclusion the Commissioner notes that none of the names withheld on the basis of section 40(2) are of the nature envisaged by the complainant (see paragraph 71).
75. 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.

Section 41

76. The Commissioner is satisfied that all of the withheld information is exempt from disclosure on the basis of the exemptions already considered in this decision notice. Therefore, he has not considered the FCDO's reliance on section 41 of FOIA.

Refusal notice

77. The complainant argued that although the FCDO has relied on six exemptions, it had not clarified which exemption applied to each document/redaction. The complainant argued that this position was unreasonable and unacceptable and hampered his ability to understand the FCDO's position, and in turn, make submissions to support his complaint.

78. Section 17 of FOIA states that:

'A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which—

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.'

79. In its submissions to the Commissioner the FCDO noted that the Commissioner's guidance on refusing requests stated that *'If possible, indicate which sections you removed using which exemption.'*⁹ The FCDO explained that its position remained that it was not obliged under FOIA to provide a schedule of redactions. Rather, as the Commissioner's guidance made clear, it is optional for a public authority to provide such a schedule when responding to a request. The FCDO emphasised that section 17 sets out what needs to be done when relying on exemptions and notably does not include a requirement to provide such a schedule. Furthermore, the FCDO argued that highlighting which redactions relate

⁹ <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/refusing-a-request/#19>

to which exemptions may lead to deductions being made about those redactions which reveal sensitive information.

80. The Commissioner appreciates that when a requester submits a multi-part or broad request such as the one which is the focus of this decision notice, and the public authority relies on multiple exemptions to refuse a request, it cannot always be straightforward for the requester to understand how exemptions have been relied on.
81. Nevertheless, the Commissioner accepts that the provision, or completion of a schedule does not form part of a public authority's statutory obligations under FOIA. Furthermore, he also accepts that nor does the requirement to label individual redactions that are applied to disclosed documents.

Time taken to respond to the request

82. Section 10(1) of FOIA provides that a public authority must comply with section 1(1), ie the right to access information, promptly and in any event not later than the twentieth working day following the date of receipt.
83. Under section 17(3) a public authority can, where it is citing a qualified exemption, have a 'reasonable' extension of time to consider the balance of the public interest. The Commissioner considers it reasonable to extend the time to provide a full response, including public interest considerations, by up to a further 20 working days, which would allow a public authority 40 working days in total. The Commissioner considers that any extension beyond 40 working days should be exceptional and requires the public authority to fully justify the time taken.
84. In this case the complainant submitted his request on 19 June 2018 but the FCO did not provide him with a substantive response to his request until 20 October 2018. The FCDO explained to the Commissioner that the complex nature of the sensitivity review and the need for detailed consultation with multiple external stakeholders and an internal FCO stakeholder delayed its response to this request.
85. Despite these factors, the Commissioner does not accept that it was reasonable for the FCO to have taken the time it did to provide the complainant with a substantive response to his request. The FCO therefore breached section 17(3) in its handling of this request.

Other matters

86. The FOIA does not impose a statutory time within which internal reviews must be completed, albeit that the section 45 Code of Practice¹⁰ explains that such reviews should be completed within a reasonable timeframe. The Commissioner expects that most internal reviews should be completed within 20 working days, and even for more complicated requests, reviews should be completed within a total of 40 working days.
87. In this case the FCO took 131 calendar days to complete the internal review. In its response to the Commissioner, the FCDO explained that as with its public interest test considerations, the internal review was delayed due to consultations with stakeholders and the complex nature of the review process, including the need to consult material at TNA.
88. The Commissioner appreciates that this request required extensive consultation and consultation of material at TNA. However, he would strongly encourage that even in such cases, the internal reviews are completed as swiftly as possible.

¹⁰ <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

Right of appeal

89. 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

90. 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.
91. 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
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