

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 June 2022

Public Authority: Foreign, Commonwealth and Development Office

Address: King Charles Street
London
SW1A 2AH

Decision (including any steps ordered)

1. The complainant requested details of meetings with representatives of the Premier League regarding a proposed takeover of Newcastle United FC. The Foreign, Commonwealth and Development Office ("the FCDO") relied on section 27 (international relations), section 41 (breach of confidence) and section 40 (personal data) of FOIA to withhold information.
2. The Commissioner's decision is that the FCDO has correctly relied on section 27(1)(a) of FOIA and the public interest favours maintaining the exemption. The FCDO was also entitled to rely on sections 40(2) and 41 in the manner that it has done.
3. The Commissioner does not require further steps.

Request and response

4. On 13 January 2021 the complainant requested information of the following description:

"The department has previously disclosed two virtual meetings between FCDO officials and the Premier League regarding a proposed takeover of Newcastle United. <https://questions-statements.parliament.uk/written-questions/detail/2020-12-17/131239>

"It has also disclosed a meeting between Officials from the Middle East and North Africa Directorate, and the British Embassy Riyadh with the Premier League regarding a proposed takeover of Newcastle United. <https://questions-statements.parliament.uk/written-questions/detail/2020-12-17/131238>

"I understand this to be the same two meetings disclosed in separate answers. If you could clarify this would be appreciated. If they are four separate meetings, please consider the request below for all four. For each of the meetings, I request:

- The full list of attendees of both meetings, including full names and titles of each attendee, as well as whom each attendee represents.
 - The exact date, time and duration of each meeting
 - A copy of the agenda of each of the meetings
 - Any materials which were circulated, handed out or received, including presentation slides, brochures, reports or leaflets at the meetings
 - Minutes which were taken during the meetings, and any accompanying briefing notes or papers
 - Any video or audio recordings of the virtual meetings"
5. On 2 March 2021, the FCDO responded. It provided some information within the scope of the request but refused to provide the remainder. It relied on sections 27, 41 and 40(2) of FOIA in order to do so.
6. The complainant requested an internal review on the same day. The FCDO sent the outcome of its internal review on 8 April 2021. It upheld its original position.

Scope of complaint

7. The complainant contacted the Commissioner on 20 April 2021 to complain about the way his request had been responded to.
8. During the course of the investigation, the FCDO agreed to disclose a small quantity of additional information, but maintained that the exemptions applied to the remainder.
9. The Commissioner considers that the scope of his investigation is to determine whether the FCDO is entitled to rely on the cited exemptions in the manner it has done.

Reasons for decision

Section 27 – international relations

10. Section 27(1) of FOIA states that:

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

- (a) relations between the United Kingdom and any other State,
- (b) relations between the United Kingdom and any international organisation or international court,
- (c) the interests of the United Kingdom abroad, or
- (d) the promotion or protection by the United Kingdom of its interests abroad.”

11. Like with any prejudice-based exemption, the Commissioner follows the three step test set out in *Hogan and Oxford City Council v Information Commissioner* (EA/2005/0026 and 0030). First, the public authority must identify an applicable interest, then it must demonstrate a causal link between disclosure and a harm to that interest that is “real, actual and of substance”, finally, it must decide on the likelihood of that harm occurring.

12. The disputed information in this case comprises an agenda for a meeting held on 14 May 2020 and minutes of a second meeting held on 10 June 2020. At the beginning of the investigation, the FCDO was relying on section 27 to withhold a passage from the minutes and two out of the five agenda items. During the course of the investigation it disclosed one of the agenda items but continued to withhold the other.

13. In this case, some parts of the withheld information discuss matters relating to the UK’s relationship with the Kingdom of Saudi Arabia. The FCDO has informed the Commissioner that it considers that disclosure of these parts of the withheld information could harm the UK’s relationship with Saudi Arabia. The Commissioner accepts that this is an applicable interest.

14. The FCDO provided the Commissioner with a submission explaining the causal link between disclosure and the prejudice. It explained that the Kingdom’s general approach was to diplomacy was to place strong emphasis on private diplomatic engagement. Disclosure would, the FCDO argued, present a significant risk that the government of Saudi

Arabia would not engage openly with the UK on important matters such as defence, energy and economic matters.

15. The FCDO also provided the Commissioner with more detailed submissions which explained why particular elements of the withheld information would be particularly sensitive to this particular diplomatic relationship. The Commissioner cannot reproduce those arguments here without undermining the exemption, but he considers that the FCDO has amply demonstrated that there is a causal link to be drawn between disclosure and a harm that is "real, actual and of substance."
16. In relation to the second agenda item, the Commissioner noted that this item was relatively generic and asked the FCDO why it could not be disclosed. The FCDO explained that this item was specific enough to cause prejudice and outlined why that might be the case. The Commissioner remains slightly sceptical, but is also aware that diplomacy is a delicate art and that seemingly innocuous information can be sufficient to cause harm. Given that it has been willing to compromise in other areas, the Commissioner considers that he should not lightly disregard the FCDO's advice – given its obvious expertise in diplomacy. He has therefore given the FCDO the benefit of the doubt and accepted that there is a likelihood of harm arising from disclosure of the agenda item.
17. Finally, the FCDO explained to the Commissioner that, in its view, disclosure "would" cause prejudice – that is, the prejudice it envisaged would be more likely than not to occur. It noted that it could not predict the exact nature of the Kingdom's response, but was satisfied that harm was more likely than not to occur. It also provided some further more specific arguments to support this view, but the Commissioner is again unable to reproduce them here without causing the very harm the exemption is supposed to protect against.
18. The Commissioner accepts that the FCDO has demonstrated that it is more likely than not that the UK's relations with the Kingdom of Saudi Arabia would be harmed by disclosure of this particular information.

Public interest test

19. The FCDO accepted that there was always a general interest in openness and transparency in government. More particularly, it recognised that there was a specific interest in understanding the UK's relationship with Saudi Arabia.
20. However, on the other hand, the FCDO argued that there was also a strong public interest in pursuing good diplomatic relations with a country that the UK has historically had trade links with.

21. Having accepted that there is a high chance of prejudice occurring, the Commissioner considers that there will always be an inherent public interest in preventing that harm from coming about in the first place.
22. The Commissioner recognises that the UK's relationship with Saudi Arabia has previously attracted controversy. He also notes that Newcastle United is a football club with a large fanbase and there will therefore be an interest in understanding the role the UK government was playing in the prospective takeover of the club.¹
23. However, on balance, the Commissioner's view is that the public interest favours maintaining the exemption. There is a strong public interest in allowing the UK to maintain effective relations with the Kingdom of Saudi Arabia and, whilst the withheld information might make a small contribution to public debate, the additional contribution it might make would not justify the harm caused to diplomatic relations. The FCDO has also highlighted some specific matters of sensitivity which the Commissioner is unable to discuss without referring to the content of the withheld information, but which weigh heavily in favour of maintaining the exemption.
24. The Commissioner is therefore satisfied that section 27 of FOIA has been correctly applied.

Section 41 – actionable breach of confidence

25. Section 41(1) of the FOIA states that:

“Information is exempt information if—

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

26. The Commissioner's guidance states that, in order for this particular exemption to apply, four criteria must be met:

¹ The Commissioner notes that at the time the request was made, the original takeover bid had collapsed. However, there were ongoing legal proceedings relating to the bid – which was subsequently resurrected in October 2021.

- the public authority must have obtained the information from another person,
 - its disclosure must constitute a breach of confidence,
 - a legal person must be able to bring an action for the breach of confidence to court,
 - that court action must be likely to succeed.
27. In respect of the first criterion, whilst the minutes of the meeting are likely to have been created by an FCDO official, they record information that was imparted, during that meeting, by the representatives of the Premier League. Therefore the information that the FCDO is relying on this exemption to withhold is information that has been obtained, by the FCDO, from another person.
28. Turning next to the second criterion, in determining whether a breach of confidence would occur, the Commissioner applies the three step test for establishing a breach of confidence set out in 1968 by Judge Megarry in *Coco v A N Clark (Engineers) Limited* [1968] FSR 415:
- the information must have the necessary quality of confidence,
 - it must have been imparted in circumstances importing an obligation of confidence, and
 - there must have been an unauthorised use of the information to the detriment of the confider.
29. Information will have the necessary quality of confidence if it is not already in the public domain and it is not trivial. The Commissioner recognises that the matter in question is not trivial in nature as it relates to a multi-million pound deal to take ownership of one of the UK's largest football clubs. However, the actual information being withheld here is rather generic and, whilst it does describe certain actions or processes, it does so in relatively broad terms.
30. Whilst it is a relatively finely balanced decision, the Commissioner does consider that the information in question would not have been trivial in nature at the time the request was responded to. Whilst the takeover deal appears to have been, at best, dormant in March 2021, it was resurrected later in the year. Furthermore, the Commissioner notes that Newcastle United's then-owners were, at the point the request was responded to, publicly contemplating legal action against the Premier

League.² Formal proceedings before the Competition Appeal Tribunal were filed just two weeks after the FCDO completed its internal review of this request.³

31. Therefore the Commissioner is persuaded that, at the time the request was responded to, any matters relating to the Premier League's involvement with the takeover bid were highly sensitive. Even relatively vague references to the Premier League's own internal processes would take on an importance, given that the process itself was under scrutiny.⁴
32. The Commissioner is thus satisfied that at the time the request was responded, the withheld information would have had the necessary quality of confidence. Whether that would remain the case today, now that legal proceedings have been withdrawn and the takeover complete, is a matter for another request.
33. Having determined that the information does have the necessary quality of confidence, the Commissioner must next consider whether it was imparted in circumstances which would imply a duty of confidence.
34. The FCDO argued that such circumstances existed because:

"PL counterparts underlined significant commercial sensitivity in their conversations with FCDO officials. FCDO officials made clear that they respected PL confidentiality."
35. The Commissioner approaches such arguments with care. Third parties, particularly commercial entities, usually only approach the Government because there is something that they want or need the government to do that will benefit their interests. There is nothing intrinsically wrong them doing so, but such actions warrant a considerable degree of transparency. The public has a right to know which organisations are attempting to influence government policy. Public authorities should therefore be mindful of their responsibilities under information rights

² See for example:

<https://www.skysports.com/amp/football/news/11678/12071622/newcastle-hire-lawyers-in-dispute-with-premier-league-over-failed-saudi-led-takeover>;
<https://www.bt.com/sport/news/2021/may/newcastle-take-premier-league-to-competition-tribunal-over-takeover-collapse>;

³ <https://www.catribunal.org.uk/cases/14025721-st-james-holdings-limited>

⁴ The eventual summary of claim filed in the Tribunal alleged that the Premier League had "prevented, or hindered, the Proposed Takeover and knew that its actions would prevent and/or delay the Proposed Takeover."

legislation and should be clear that confidence cannot and will not attach to every piece of information that is imparted.

36. Given the nature of the meetings (which had been requested by the Premier League) and the relatively generic nature of the information being withheld (compared to the specifics that were likely to have been discussed in the meeting), the Commissioner has some doubts about whether the summary information (which has presumably been sanitised) still carries the same assurances of confidence.
37. Once again, by a narrow margin, the Commissioner concludes that, at least at the time of the request, the information could still carry its assurance of confidence. At the time the withheld information was created, the bid was ongoing and there would have been a commercial sensitivity around details of the bid process – even if the information concerned was not particularly specific. That assurance of confidence would still have been in place at the time of the request for the same reasons as outlined in paragraphs 30-32.
38. Finally, the Commissioner must consider whether disclosure would cause detriment to the Premier League. He is satisfied that it would have done at the time of the request because of the ongoing commercial and legal processes involving the Premier League.
39. The Premier League is a legal person and would be able to bring a confidence action against the FCDO in the event that it considered that the FCDO had caused harm by breaching its confidence.
40. However, although the Commissioner is satisfied that sufficient grounds exist for the Premier League to bring a theoretical confidence action against the FCDO in the event of disclosure, in order for the exemption to apply he must be satisfied that such an action would likely be successful.
41. As Lord Falconer (the promoter of the FOIA as it was passing through Parliament) said during the debate on FOIA

“...the word "actionable" does not mean arguable...It means something that would be upheld by the courts; for example, an action that is taken and won. Plainly, it would not be enough to say, 'I have an arguable breach of confidence claim at common law and, therefore, that is enough to prevent disclosure'. That is not the position. The word used in the Bill is 'actionable' which means that one can take action and win.”
42. In order to establish whether such an action would be likely to succeed, the Commissioner must consider whether the FCDO would be able to mount a public interest defence.

43. Being able to mount a public interest defence is not the same as the public interest test that would be applied to a qualified exemption. The English courts have historically recognised the importance of respecting duties of confidence as and when they arise. For a public interest defence to succeed, there must be clear and compelling public interest reasons that would override the duty of confidence – especially when breaching that confidence could have significant legal and commercial implications for the person whose confidence has been breached.
44. The Commissioner has already recognised that there is a public interest in understanding which individuals or organisations are attempting to influence government policy – particularly if that might affect the UK's relationships with other countries. However, he considers that that interest is largely satisfied by the information about the meetings that the FCDO has already placed into the public domain.
45. The withheld information does not reveal any evidence of malpractice, undue influence or any other form of wrongdoing. The Commissioner is therefore not satisfied that, at least at the time of the request, the FCDO would have been able to mount a successful public interest defence. Therefore any action brought by the Premier League would have been likely to succeed.
46. It thus follows that section 41 is engaged.

Section 40 – third party personal data

47. The FCDO has relied on section 40(2) of FOIA to withhold the names of two civil servants whose names appear in the minutes and on the agenda.
48. Section 40(2) of FOIA allows a public authority to withhold the personal data of third parties if disclosure of that data, to the world at large, would not be lawful under data protection legislation. In order to be lawful, there must be a specific legal basis for the personal data to be processed in this manner.
49. As the parties involved do not appear to have consented (and the FCDO was under no obligation to seek their consent), the only lawful basis on which this information could be disclosed would be if it was necessary to achieve a legitimate interest.
50. The complainant argued that there was a legitimate interest. He noted that the FCDO had argued that the withheld information was so sensitive it could undermine relations with a foreign country therefore, in his view, it was incongruous that the individuals in question were both senior enough to have access to such information, yet junior enough to escape scrutiny.

51. The Commissioner recognises that there is a legitimate interest in knowing whether discussions or decisions have involved the FCDOs leadership. This would include both ministers and the most senior civil servants.
52. However, he considers that the FCDO meets this legitimate interest by disclosing the names of ministers and senior civil servants when those names appear. The FCDO has explained that no ministers or senior civil servants were present during either meeting. Disclosing names of more junior officers would therefore not be necessary to achieve the legitimate interest and thus the FCDO would have no lawful basis for processing their personal data in this manner.
53. As no lawful basis for disclosure exists, disclosure would be unlawful under data protection legislation and therefore section 40(2) of FOIA would be engaged.

Right of appeal

54. 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

55. 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.
56. 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

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