

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 November 2022

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, Commonwealth & Development Office (FCDO) seeking information about the details and funding amounts it had provided to a program of the Norwegian Refugee Council in occupied Palestinian territory for the years 2018-2020. The FCDO provided the complainant with some of the information falling within the scope of his request but sought to withhold the names of the subcontractors receiving funding on the basis of sections 38(1)(a) and (b).
2. The Commissioner's decision is that this information is exempt from disclosure on the basis of sections 38(1)(a) and (b) and that in all the circumstances of the case the public interest favours maintaining the exemptions.
3. No steps are required.

Request and response

4. The complainant submitted the following request to the FCDO on 25 March 2021:

'Details and funding amounts of Foreign, Commonwealth & Development Office funding to the: Information Counselling and Legal

Assistance (ICLA) program of the Norwegian refugee council in occupied Palestinian territory for the years 2018-2020.

Specifically, I am requesting:

- 1) Amount of funding allocated by the FCDCO (FCO and DFID) to the Norwegian Refugee Council.
 - 2) Names of subcontractors receiving FCDCO funding for this project.
 - 3) An explanation as to why this project and funding does not appear on the website <https://devtracker.fcdo.gov.uk/>
5. The FCDO contacted the complainant on 26 April 2021 and confirmed that it held information falling within the scope of his request but it considered this information to be exempt from disclosure on the basis of sections 27 (international relations) and 38 (health and safety) of FOIA and needed additional time to consider the balance of the public interest test.
 6. The FCDO issued a further public interest test extension letter on 25 May 2021.
 7. The FCDO provided the complainant with a substantive response on 23 June 2021. In relation to questions 1 and 2 the FCDO explained that it considered such information to be exempt from disclosure on the basis of sections 27(1)(c) and (d) and section 38(1)(a) of FOIA and that the public interest favoured maintaining the exemptions. In relation to question 3, the FCDO provided a link for the 'CSSF MEPP programme' that does appear on 'devtracker'.
 8. The complainant contacted the FCDO on 7 July 2021 and explained that he disagreed with its reliance on the exemptions to withhold the information falling within the scope of requests 1 and 2. He also explained that he was dissatisfied with the time it took the FCDO to provide him with a response to his request.
 9. The FCDO informed him of the outcome of the internal review on 27 August 2021. With regard to the time taken to respond to the request, the FCDO explained that under FOIA it could take longer than 20 working days to consider the application of qualified exemptions. In terms of the requested information, the FCDO provided the details of amounts of funding it had provided to the Norwegian Refugee Council ICLA project from 2018-2020, broken down by financial year. The FCDO explained that the remaining information sought by the request was exempt on the basis of sections 38(1)(a) and (b) of FOIA. In support of this position the internal review noted that:

'we have to weigh up the dangers of publicly disclosing information about individuals, particularly in light of the difficult security

environment in which they are working. Their safety is of paramount importance to both the FCDO and the Norwegian Refugee Council's subcontractors.'

Scope of the case

10. The complainant contacted the Commissioner on 5 September 2021. He complained about the FCDO's decision to withhold the information falling within the scope of question 2 of his request, ie the names of subcontractors receiving FCDO funding for the project in question.

Reasons for decision

Section 38 – health and safety

11. The FCDO has relied on sections 38(1)(a) and (b) of FOIA which state that:

'(1) Information is exempt information if its disclosure under this Act would, or would be likely to-

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

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

13. In order for a prejudice based exemption, such as section 38(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.

The complainant's position

14. The complainant disputed the FCDO's position that disclosure of the withheld information would be likely to result in the harm which the exemptions contained at sections 38(1)(a) and (b) were designed to protect. In support of his position he made the following points:
15. Firstly, he argued that the FCDO's assertion was wholly generic and unsubstantiated. It did not specify whether the physical health, mental health or safety of any individual would be endangered. Nor did the FCDO provide any evidence of the risk or how it was identified or assessed.
16. Secondly, he emphasised that the request specifies the names of NGOs, not the disclosure of any information about individuals. Therefore he argued that the claim that disclosure would be likely to endanger the physical or mental health of any individual cannot be reasonably justified.
17. Thirdly, the complainant argued that the activities financed by this aid are public and the identities of the NGOs conducting them are available in the areas where these NGOs are active. As result the complainant argued that it was highly implausible that the disclosure of support by the FCDO would add any risk.
18. Fourthly, the complainant noted that under Israeli law, Israeli NGOs receiving funding from entities such as the Norwegian Refugee Council and FCDO are required to regularly publish information on the amounts they receive.

The FCDO's position

19. The FCDO provided the Commissioner with submissions to support its reliance on these exemptions, and at the Commissioner's request, provided its views on some of the complainant's grounds of complaint. The FCDO explained that it considered some of its submissions to be confidential and should not be included in the decision notice. Therefore such parts of the FCDO's submissions are not set out below.
20. The FCDO explained that the operating context in Jerusalem and Area C of the Occupied Palestinian Territories (OPTs) is critical to this issue. The FCDO noted HM Government (HMG) believes that this land has been illegally occupied by Israel since 1967, and in the case of East

Jerusalem, subsequently illegally annexed by Israel. HMG believes the continued presence of Palestinians on their land in the OPTs is crucial to the viability of an eventual two state solution. The FCDO explained that this makes the operating context for HMG and its partners very sensitive. The FCDO noted that ethnic tension, harassment, physical and mental abuse, protests and violence are part of everyday life in Jerusalem, as this struggle plays out between those supporting an ongoing Palestinian presence in Jerusalem, and those working against this goal. By way of example, the FCDO explained its partner organisations have suffered attacks on their physical person and property because of their work.

21. The FCDO explained that it had made a conscious effort not to release detailed information about the project which is the focus of the request due to the difficulties its partners had experienced whilst working in such a highly complex and politicised environment.
22. The FCDO also argued that the space in which civil society organisations operate is becoming increasingly restricted. By way of example, it explained that individuals working for the UN and international NGOs have been targeted e.g. by travel bans or placed under administrative detention while the activities of the Office of the High Commissioner for Human Rights (the leading UN entity on human rights) have been seriously constrained by the refusal of Israeli authorities to grant international staff visas. Therefore, the FCDO concluded that disclosure of the withheld information would be distressing for those concerned and would also be likely to risk their physical safety.
23. With regard to the complainant's view that Israeli NGOs receiving funding from entities such as the Norwegian Refugee Council and FCDO are required to regularly publish information on the amounts they receive, the FCDO responded as follows: It noted that Israeli NGOs report their income received on a quarterly basis to the Registrar of NGOs (part of the Israeli Ministry of Justice). Any income received over a certain amount received from the FCDO is shown as being received from 'foreign entities'; it does not state that the funds came from the FCDO. The FCDO also noted that this information is not public. In addition, on a yearly basis, the organisations submit their audit report to the same Ministry and this information is publicly available, but as stated above they are not required to say where exactly the funds came but will list it as from 'foreign entities'.

The Commissioner's position

24. With regard to the three criteria set out above at paragraph 13, the Commissioner is satisfied that the FCDO's arguments relate directly to the interests which the exemptions at sections 38(1)(a) and (b) are designed to protect. The first criterion of the test is therefore met.

25. With regard to the second criterion, the Commissioner does not accept that there is a causal link between the disclosure of the withheld information and endangerment to the mental health of individuals. The FCDO argues that such a risk arises because of the distress that would be likely to be caused to individuals if the withheld information was disclosed. However, the Commissioner's guidance makes clear that 'Endangering mental health implies that the disclosure of information might lead to a psychological disorder or make mental illness worse. This means that it must have a greater impact than causing upset and distress.'¹
26. In contrast the Commissioner is satisfied that there is a causal link between disclosure of the information and endangerment to an individual's safety, and as a result, their physical health. The Commissioner has reached this finding on the basis that the FCDO's partner organisations have suffered from attacks on their persons and property because of their work. (The Commissioner notes that as part of its confidential submissions to him the FCDO provided further details of such incidents.) The Commissioner acknowledges the complainant's point that the information sought by question 2 of the request consists of the names of NGOs rather than individuals. However, the Commissioner is satisfied that it is logical to argue that disclosure of the names of the NGOs could easily lead to individuals working for them to be attacked. Consequently, in the Commissioner's view is not necessary in order to successfully engage this exemption to identify specific individuals whose safety or physical health may be harmed.
27. With regard to the third criterion, taking into account the sensitive context within which the NGOs in question work, and the history of previous attacks as evidenced by the FCDO, the Commissioner is satisfied that there is a more than hypothetical chance of individuals' safety or physical health being endangered if this information was disclosed. Rather the Commissioner is satisfied that this presents a real and significant risk. The third criterion is therefore met and the Commissioner accepts that the information is exempt from disclosure on the basis of sections 38(1)(a) and (b).
28. In reaching this conclusion the Commissioner wishes to emphasise that he has carefully considered the complainant's specific grounds of complaint. However, on the basis of the FCDO's submissions, both those set out above and those provided to him in confidence, he is not

¹ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-38-health-and-safety/>

persuaded that such grounds undermine the FCDO's case for relying on these exemptions.

Public interest test

29. Section 38 is a qualified exemption and therefore subject to the public interest test set out in section 2(2)(b) of FOIA. The Commissioner has therefore considered whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.
30. The FCDO acknowledged that there was a public interest in favour of disclosing the information in order to demonstrate openness and transparency in respect of its dealing with private sector companies. More specifically the FCDO acknowledged that there was a public interest in knowing more information on which organisations the UK was funding through the ICLA program.
31. However, the FCDO argued that in its view such interests were outweighed by the very strong public interest in protecting the health and safety of those who are working such those organisations in what is a difficult security environment. The FCDO explained that the safety of these individuals was of paramount importance both to it and the Norwegian Refugee Council's subcontractors.
32. The Commissioner agrees that there is public interest in government departments being open and transparent about which organisations receive UK government funding. In the circumstances of this case the Commissioner also appreciates that there is a particular interest in the funding provided through the ICLA program. However, the Commissioner agrees with the FCDO's view that there is a very significant public interest in ensuring that the safety, and in turn physical health, of individuals is not endangered through the disclosure of information under FOIA. In the Commissioner's view this is a more compelling argument than the case for disclosure in this case, and therefore he has concluded that the public interest favours maintaining the exemptions contained at sections 38(1)(a) and (b).

Right of appeal

33. 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

34. 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.
35. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Jonathan Slee
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