

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 June 2022

Public Authority: The National Archives
Address: Kew
Richmond
Surrey
TW9 4DU

Decision (including any steps ordered)

1. The complainant has requested a closed extract contained within the file FCO 8/2693/1, 'Allegations of war crimes and atrocities in Oman'.
2. The National Archives refused to disclose the requested information, citing section 27(2) (International Relations) of FOIA.
3. The Commissioner's decision is that the requested information engages section 27(2) and the public interest lies in maintaining the exemption.
4. The Commissioner does not require the public authority to take any further steps.

Request and response

5. On 2 April 2021 the complainant submitted a request for information via The National Archives' (TNA) online portal. The request was titled 'CO 8/2693/1 - Closed extracts: Attachments to folio 5 (from open parent piece FCO 8/2693 - Allegations of war crimes and atrocities in Oman)'.
6. When making their request, the complainant explained:

"I would like to request this information pertaining to the allegations of war crimes during the Dhofar War be made publicly available. Having taken note of the exemptions I believe they fail to substantiate the claimed need to extend the closure of these documents for two main reasons.

Under exemption 27(1)(a) information is allowed to be withheld if it is deemed to harm the UK's relations with another country. However, given that exemption 27(1)(b) states the same in relation to international organisations and courts I argue the withholding of the information that would be pertinent to a war crimes investigation is equally prejudicial to the UK's relationship with international organisations and courts.

The second exemption cited, 'Information Provided in Confidence', equally is inapplicable by the light of 27(3) which states the information can be withheld if "the terms on which it was obtained require it to be held in confidence" or "the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held". I argue that given the Sultan under whose confidence this information was given is no longer alive, and the 'circumstances' of the Dhofar War are no longer applicable, it is an undue extension of any reasonable interpretation of the exemption to keep this information withheld."

7. TNA responded on 15 June 2022. It refused to provide the requested information citing section 27(2) (international relations) of FOIA.
8. Following an internal review TNA wrote to the complainant on 8 October 2021. It upheld its original position.

Scope of the case

9. The complainant contacted the Commissioner on 24 September 2021 to complain about the way that their request had been handled.
10. The Commissioner therefore considers the scope of his request to be to determine if the withheld information engages section 27(2) and, if so, whether the public interest lies in disclosure or in maintaining the exemption.
11. TNA has explained to the Commissioner that the complainant has requested an extract which has been redacted from the open parent record. The parent record discusses allegations of war crimes committed by British soldiers in Oman.
12. For the purposes of this investigation, TNA provided the Commissioner with a copy of both the open parent record and the extract ('the withheld information').

Reasons for decision

Section 27 – International Relations

13. Section 27(2) of FOIA states:

“Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.”

14. Section 27(3) goes onto say:

“For the purposes of this section, any information obtained from a State, organisation or court is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.”

15. So in order for section 27(2) to be engaged, the authority must have been given the requested information by another state, organisation or court. The information must also be confidential.

16. Section 27(2) is a class-based exemption. This means that if information falls within the definition above, there is no requirement for the public authority to go onto consider whether its disclosure would prejudice international relations in order for section 27(2) to be engaged.

Was the information obtained from another state, organisation or court?

17. Yes. TNA has confirmed that the withheld information was originally held by the Foreign, Commonwealth and Development Office (FCDO) who received it from the Omani government.

Is the information confidential?

18. TNA has confirmed that, as part of this investigation, it liaised with the FCDO who confirmed that the withheld information ‘was received in conditions of confidence from the Omani government, and that releasing it would be a breach of this confidence with Oman.’

19. TNA has explained that the information was provided ‘in conditions of confidence which the government supplying the information would expect to be maintained.’ The Commissioner notes that the information is classified as ‘secret.’

20. It is important for the Commissioner to consider if the duty of confidence in relation to the withheld information has elapsed over time. The Commissioner acknowledges that the withheld information was written in 1976. To the Commissioner, in order for information to be confidential, and remain confidential, one has to consider both the content of the information itself and the context in which it was provided.
21. The complainant is concerned that section 27(2) 'is suited to exempt information on current security, military, or diplomatic engagements that require confidentiality. But, historical documents in reference to war crimes do not reasonably fall under such an exemption not least documents that relate to breaches of international humanitarian law.'
22. The Commissioner does not regulate international humanitarian law. His only concern in this notice is TNA's application of FOIA and the Commissioner notes that section 27(2) does not stipulate that information needs to relate to current security, military or diplomatic engagements in order to be captured by the exemption.
23. TNA has explained to the complainant that 'we are unable to provide a definitive description of what the material pertains to as to do so would jeopardise the confidence which the section 27(2) exemption has been engaged to protect.' However, TNA has confirmed to the complainant that the withheld information does not concern the commission of war crimes.
24. The Commissioner acknowledges the complainant's view that the Sultan under whose confidence this information was given is no longer alive, and the 'circumstances' of the Dhofar War are no longer applicable.
25. TNA has explained that 'Whilst it is not expected that the exemption will be maintained indefinitely, and that the duty of confidence will eventually lapse, it should be considered that the extract contains information dating from 1976. This is relatively recent history and within living memory.'
26. Like TNA, the Commissioner does not consider it appropriate to discuss, or summarise, the information contained within the withheld information. However, he notes it does not discuss trivial matters, or matters within the public domain.
27. It is clear to the Commissioner that the withheld information was provided to the FCDO in strict confidence. To the Commissioner this sensitivity has not diminished over time, to the point where the Omani government would now expect the information to be disclosed.
28. TNA has explained that the 'the government of the current Omani sultan, Sultan Haitham, would still expect that confidentiality be

maintained in the same manner as it had been during the former sultan's reign.'

Is the exemption engaged?

29. Yes. It is clear to the Commissioner that the withheld information was provided to the FCDO, from the Oman government, in strict confidence and discusses matters of political and military sensitivity and importance.
30. The Commissioner is satisfied that, since the Omani government would still expect the withheld information would be held in confidence, that it remains confidential despite the passage of time.
31. Whilst section 27(2) is a class-based exemption it is also a qualified exemption. This means that the authority is required to go onto consider whether the public interest lies in maintaining the exemption or in disclosure.

The public interest test

Public interest arguments in favour of disclosure

32. TNA acknowledges that 'there is strong public interest in having access to, and being able to understand, the historical record.' The Commissioner notes that, as information redacted from the open parent record, the withheld information would increase public understanding surrounding the record as a whole.
33. TNA has also acknowledged the importance of transparency and accountability, the principles that underpin FOIA. Disclosure of the requested information would demonstrate such principles.
34. TNA concludes by saying there is a clear public interest in allowing the public to understand and evaluate the foreign policy of the government, specifically the UK's historical and current relationship with Oman.

Public interest arguments in favour of maintaining the exemption

35. TNA is concerned that disclosure, and the breach of the obligation of confidence imposed upon it by the Oman government, would have a direct and detrimental impact on the UK's relationship with Oman.
36. TNA is concerned with not just the effects disclosure would have on the UK's relationship with Oman but other foreign governments. TNA has explained 'If such information is not protected, the UK's ability to discuss sensitive issues in confidence with foreign governments, and thereby protect and promote UK interests, will be jeopardised.' Clearly this would not be in the public interest.

The balance of the public interest

37. In this instance the Commissioner has decided that the public interest lies in maintaining the exemption.
38. When considering where the public interest lies, the Commissioner must consider the likelihood and severity of any harm that disclosure would cause, the age of the information, how far the requested information will help public understanding and whether similar information is already in the public domain.
39. The complainant's arguments in favour of disclosure appear to rest on the government's legal obligation to publish information relating to war crimes. The Commissioner agrees, there is certainly a public interest in holding the UK accountable for its past behaviour.
40. However, to reiterate, TNA has confirmed to the complainant that the withheld information does not concern the commission of war crimes. Having viewed the withheld information the Commissioner agrees.
41. TNA is concerned that disclosure would harm its relationship with both the Omani government and other states. The Commissioner must take into account the likelihood of such harm occurring and the severity of such harm. The Commissioner is mindful that the withheld information is almost 50 years old and the Dhofar war also ended 50 years ago.
42. However, TNA has explained that 'Whilst the historical dates of the information are noted, the passage of time in this instance is not seen as a factor in favour of release. A release now could be as damaging to the United Kingdom's relations with Oman as if made at the time the information was recorded.'
43. TNA has explained that the information has been received, in confidence, from the Omani state and not the Omani Head of State. Therefore, if the withheld information were disclosed, the current Sultan would be likely to regard it as an affront.
44. The Commissioner can't reproduce the exact reasons why the current Sultan is likely to be so affronted by disclosure as to do so would mean essentially divulging the withheld information. However, TNA has provided the Commissioner with a logical explanation which he accepts. Clearly, the public interest in protecting the UK's relationship with Oman is assigned considerable weight.
45. The Commissioner also recognises that the withheld information continues to hold relevance for the Oman government today. Again, the Commissioner can't reproduce why in this decision notice but recognises the need to withhold information that both remains relevant to the democracy of Oman today and which was provided in confidence.

46. Finally, the Commissioner notes that TNA has published the majority of the file on allegations of war crimes and atrocities in Oman. Having compared the withheld information to the information within the open parent file, the Commissioner does not consider that it would sufficiently contribute to public understanding around this topic to justify undermining the confidence in which it was provided and the democratic relations that rely on such confidence.

Right of appeal

47. 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

48. 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.
49. 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

Alice Gradwell
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Wycliffe House
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