

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 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) containing five questions about rendition to Libya. The FCDO refused to confirm or deny whether it held any information falling within the scope of questions 1 to 4 on the basis of sections 23(5) (security bodies), 24(2) (national security), 27(4) (international relations) and 40(5) (personal data) of FOIA. It refused to comply with question 5 on the basis of section 14(1) (vexatious).
2. The Commissioner's decision is that the FCDO can refuse to confirm or deny whether it holds any information falling within the scope of questions 1 to 4 on the basis of sections 23(5) and 24(2) of FOIA and that it can refuse to comply with request 5 on the basis of section 14(1) of FOIA.
3. No steps are required.

Request and response

4. The complainant submitted the following request to the FCDO on 9 July 2021:

'According to the BBC News website <https://www.bbc.co.uk/news/uk-16804656>

A letter was found in Libya from Sir Mark Allen the text of which says:-

"I congratulate you on the safe arrival of Abu Abd Allah Sadiq [Mr Belhadj]," says the letter.

"This was the least we could do for you and for Libya to demonstrate the remarkable relationship we have built over the years. I am so glad. The intelligence on Abu Abd Allah was British. I know I did not pay for the air cargo. But I feel I have the right to deal with you direct on this."

REQUESTS

1. Provide the date of the letter.
 2. Provide the letter.
 3. Provide names of all persons who approved the letter before sending.
 4. Provide any reply(s) to the letter.
 5. In relation to years 2004-5, provide all letters/comms sent to Libya or received from Libya relating to, in any way, all persons who had been, or were to be, made subject to ('extraordinary') rendition to Libya under the regime of Colonel Gaddafi.'
5. The FCDO responded on 6 August 2021 and explained that it was considering the application of section 24 (national security) of FOIA to the request and it needed additional time to consider the balance of the public interest. The FCDO issued a similar letter on 6 September 2021.
6. The FCDO issued the complainant with a substantive response to his request on 13 September 2021. It explained that it was refusing to confirm or deny whether it held any information falling within the scope of questions 1 to 4 on the basis of sections 23(5) (security services), 24(2), 27(4) (international relations) and 40(5) (personal data) of FOIA. The FCDO explained that it had concluded that the public interest favoured maintaining the qualified exemptions. However, it noted that

section 17(4)¹ of FOIA applied and therefore it was limited in the explanations it could provide to support this conclusion. The FCDO explained that it was refusing to respond to question 5 on the basis of sections 14(1) (vexatious) and 14(2) (repeated requests) of FOIA.

7. The complainant contacted the FCDO on the same day and asked it to conduct an internal review of this response.
8. The FCDO informed him of the outcome of the internal review on 25 October 2021. The review upheld the position adopted in the refusal notice in relation to questions 1 to 4. In relation to question 5 the FCDO explained that it was no longer seeking to rely on section 14(2) but still considered section 14(1) to apply to that question.

Scope of the case

9. The complainant contacted the Commissioner on 25 October 2021 to complain about the FCDO's handling of all parts of his request. This notice therefore considers the FCDO's refusal to confirm or deny whether it holds any information falling within the scope of questions 1 to 4 of the request and its refusal to comply with question 5 on the basis of section 14(1).

Reasons for decision

Questions 1 to 4

Section 23 – security bodies

10. Section 23(1) of FOIA 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 sub-section (3).'

11. Section 23(5) of FOIA states that:

'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

¹ Section 17(4) of FOIA provides that a public authority does not have to explain why an exemption applies if to do so would involve the disclosure of information which is itself considered to be exempt.

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 subsection (3).'

12. The full list of bodies specified in section 23(3) can be viewed online.²
13. In the Commissioner's opinion the exemption contained at section 23(5) should be interpreted so that it is only necessary for a public authority to show that **either** a confirmation **or** denial of whether requested information is held would involve the disclosure of information relating to a security body. It is not necessary for a public authority to demonstrate that both responses would disclose such information. Furthermore, the Commissioner considers that the phrase 'relates to' should be interpreted broadly. Such an interpretation has been accepted by the First-Tier Tribunal (Information Rights) in a number of different decisions.³
14. Consequently, whether or not a security body is interested or involved in a particular issue is in itself information relating to a security body. Therefore, in the Commissioner's opinion section 23(5) could be used by a public authority to avoid issuing a response to a request which revealed either that a security body was involved in an issue or that it was not involved in an issue.
15. The test of whether a disclosure would relate to a security body is decided on the normal civil 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.
16. 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. 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.
17. The Commissioner is satisfied that on the balance of probabilities, confirming whether or not the FCDO holds information falling within the

² <http://www.legislation.gov.uk/ukpga/2000/36/section/23>

³ See for example *Dowling v Information Commissioner and The Police Service for Northern Ireland*, EA/2011/0118, paras 17 to 22.

scope of questions 1 to 4 would reveal something about the security bodies. Given the FCDO's reliance on section 17(4) of FOIA, the Commissioner has not set out why he has reached this conclusion in this notice.

Section 24 – national security

18. In light of his finding in relation to section 23(5), there is no need – in terms of the outcome of this decision notice – for the Commissioner to also consider the FCDO's reliance on section 24(2) of FOIA. This is because, even if the Commissioner rejected the FCDO's reliance on section 24(2), the FCDO would not have to comply with the requirements of section 1(1)(a) in light of the Commissioner's finding in relation to section 23(5).
19. However, as the Commissioner has made clear in his guidance on the use of these exemptions, he recognises that some public authorities are concerned that inferences would be drawn if they were to rely on only section 23(5) or section 24(2) of FOIA. As a consequence some public authorities consider it prudent to apply both NCND provisions and in such scenarios the Commissioner will consider the application of both exemptions in a decision notice.
20. Section 24(2) provides an exemption from the duty to confirm or deny where this is required for the purpose of safeguarding national security. The approach that the Commissioner takes to the term 'required' as it is used in this exemption is that this means 'reasonably necessary'. In effect this means that there has to be a risk of harm to national security for the exemption to be relied upon, but there is no need for a public authority to prove that there is a specific, direct or imminent threat.
21. Therefore, section 24(2) is engaged if the exemption from the duty to confirm or deny is reasonably necessary for the purpose of safeguarding national security. Moreover, as with section 23(5), the Commissioner considers that section 24(2) 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.
22. In the context of section 24, the 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).

23. The FCDO provided the Commissioner with submissions to support its view that adopting a NCND approach was necessary in order to protect national security. On the basis of these submissions the Commissioner is satisfied that the FCDO is entitled to rely on section 24(2). Again, given the effect of section 17(4) of FOIA the Commissioner has not reproduced the content of the submissions in this notice or explained why he agrees with them.

Public interest test

24. Section 24(2) is a qualified exemption. Therefore, the Commissioner is required to consider whether, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in confirming whether the FCDO holds the requested information.
25. The Commissioner acknowledges that allegations that the UK has been involved in rendition are serious ones and as a result there is a public interest in the disclosure of information which could allow the public to be better informed about such matters. However, in his view there is a significant, and ultimately stronger, public interest in protecting information required for the purposes of safeguarding national security. He has therefore concluded that the public interest in maintaining section 24(2) outweighs the public interest in the FCDO confirming whether or not it holds information falling within the scope of this request.
26. In light of the Commissioner's findings in relation to section 23(5) and 24(2) he has not considered the FCDO's reliance on sections 27(4) and 40(5) of FOIA.

Question 5

Section 14(1) – vexatious

27. Section 14(1) of FOIA allows a public authority to refuse to comply with a request if it is considered to be vexatious.
28. Whilst the term 'vexatious' is not defined in FOIA, in the case of the Information Commissioner v Devon CC and Dransfield the Upper Tribunal commented that the term could be defined as the 'manifestly unjustified, inappropriate or improper use of a formal procedure'.⁴ The

⁴ [2016] UKUT 0273 (AAC)
https://assets.publishing.service.gov.uk/media/578f2b5aed915d3cfd000179/GIA_0246_2015-00.pdf

Tribunal's definition clearly established that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.

29. In the Dransfield case, the Upper Tribunal also found it instructive to assess the question of whether a request is truly vexatious by considering four broad issues; (1) the burden imposed by the request (on the public authority and its staff), (2) the motive of the requester, (3) the value or serious purpose of the request, and (4) harassment or distress of, and to, staff.
30. However, the Upper Tribunal did also caution that these considerations were not meant to be exhaustive. Rather, it stressed the importance of:

`adopting a holistic and broad approach to the determination of whether a request is vexatious or not, emphasising the attributes of manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests.' (paragraph 45).
31. The Commissioner's guidance on dealing with vexatious requests notes that the circumstances of the case will need to be considered in reaching a judgement as to whether a request is vexatious, including the context of the request and the history of the public authority's relationship with the requester, when this is relevant.⁵

The FCDO's position

32. The FCDO explained that the complainant had submitted over 30 requests on the subject of Libya and rendition, including five concurrent requests in July 2019. It explained that each response has been through multiple reviews, including in some instances at appeal stage in relation to decision notices which the complainant appealed to the First tier Tribunal. Furthermore, the FCDO explained that it considered question 5 of this request to overlap with requests made previously (FOI-0579-19, FOI-0667-19 and FOI-21451-20). The FCDO noted that it also appears to be tangentially related to a request (FOI-0484-19) which is subject of an ongoing appeal.⁶

⁵ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/dealing-with-vexatious-requests-section-14/>

⁶ Details of these requests, along with others submitted by the complainant to the FCO (Foreign and Commonwealth Office, the FCDO's predecessor department) and the FCDO are listed in the annex.

33. The FCDO argued that in its view there is a vexatious pattern in these requests, meeting the bar set in Dransfield, which stated that a vexatious request is defined as the '...manifestly unjustified, inappropriate or improper use of a formal procedure'.
34. Furthermore the FCDO noted that the Commissioner had issued a decision notice in January 2020⁷ which upheld the FCO's use of section 14(1) to refuse a previous request from the same complainant on the subject of Libya and rendition. The FCDO noted that the Commissioner had accepted that to ask for information on the same/substantially similar subjects displays unreasonable persistence, and that the Commissioner's decision notice had also acknowledged the limited value of the request made under such circumstances.
35. The FCDO argued that repeatedly asking similar questions and using the appeals process to contest almost all responses for no gain to public understanding severely strains a team that, due to the sensitive nature of the work, is relatively small and specialised. The FCDO argued that this impinges on the fullness of answers it can give other requests, and related disclosure/transparency work, for example for public inquiries with national security interests.

The Commissioner's position

36. With regard to the burden of complying with question 4 of the request, the Commissioner recognises that responsibility for dealing with this falls to a small team within the FCDO given the subject matter of the request, a burden that is arguably amplified by the complex and sensitive nature of the material being sought. In the Commissioner's opinion it is reasonable to conclude that from the pattern of the complainant's requests to the FCO (and now FCDO) on this subject that he is likely to submit further FOI requests seeking information about Libya and rendition. Furthermore, it seems equally apparent to the Commissioner that such requests will be refused by the FCDO. Therefore, taking into account the FCDO's submissions above, the history of the complainant's requests on this subject, and the findings of the previous decision notice at paragraphs 19 to 23, the Commissioner is satisfied that the burden placed on the FCDO in complying with question 5 cannot be justified. It can therefore rely on section 14(1) of FOIA to refuse to answer this part of the request.

⁷ FS50864742 <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2617152/fs50864742.pdf>

Right of appeal

37. 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

38. 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.
39. 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
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex

Request number	FCO/FCDO request reference	Request	Date received	Date of response	Exemptions applied	Internal review?
1	0520-18	I would like a list of all records held by fco relating to Mr Belhaj and Ms Boudchar. where possible, the list should contain:- a) the date of the record b) the type of record - i.e. letter, email, phone record, image c) a summary/gist of what the record is if the request exceeds costs threshold, please restrict request to year 2004.	11/05/2018	06/07/2018	s23/24 alt s40(2) s42(1)	Yes 03/08/2018
2	0742-18	Provide a list of all data held relating to the Al-Saadi family. the list should bet set out if possible as follows: 1.type of data, i.e. email, image, letter. 2.date. 3.summary or gist of data.	06/07/2018	06/08/2018	s12	Yes 04/09/2018
3	0834-18	Provide a similar list of all data held relating to Moussa Muhammad Koussa, former Libyan political figure. the list should bet set out if possible as follows:	06/07/2018	06/08/2018	s12	Yes 04/09/2018

		1.type of data, i.e. email, image, letter. 2.date. 3.summary or gist of data.				
4	0293-19	I would like all data held relating to the decision whether or not to hold an inquiry led by a judge. I would like all legal advice given in the last 5 years as to whether the UK has committed human rights abuses that took place in the context of an international armed conflict could have amounted to war crimes.	22/03/2019	19/06/2019	s.21 s.24(1) s.35(1)(a) s.42(1) s.42(1)	Yes 19/06/2019
5	0399-19	1.provide all information held regarding torture or other forms of ill-treatment of Yunus Rahmatullah, Amanatullah Ali, XYZ, HTF, ZMS: - a)at the time of their capture and while in british custody b)by us forces 2.when is this case scheduled for trial? if you have settled any claims provide full details including, damages, costs and consent orders. 3.if you have settled any claims provide full details including, damages, costs and consent orders.	23/04/2019	02/07/2019	s.40(2) s.40(3A)(a) s.32 s.42(1) S.23(5) s.24(2)	Yes 29/07/2019

6	0454-19	I would like to see all the 'general warrants' and/or thematic warrants. these are ones which are not based on reasonable individual suspicion	16/05/2019	14/06/2019	s.23(1) s.40(2) s.40(3A)(a) s.42(1)	Yes 12/07/2019
7	0455-19	I would like a dated list of all the 'general warrants' and/or thematic warrants. These are ones which are not based on reasonable individual suspicion. please state the start and end date of the warrant's duration	16/05/2019	14/06/2019	s.23(1) s.40(2) s.40(3A)(a) s.42(1)	Yes 12/07/2019
8	0456-19	Request: I would like a list, in date order, newest first, of all data held on the following persons: (1) Sami Al Saadi (2) Karima Ait Baaziz (3) Khadija Saadi (4) Mustafa Al Saadi (5) Anas Al Saadi (6) Arwa Al Saadi	16/05/2019	14/06/2019	s.12	No
9	0476-19	I would like all year 2004 data relating to (broad scope, please) involvement in rendition of Sami Al-Saadi/family. Which persons (including civil servants, politicians and others) agreed to the settlement.	22/05/2019	18/07/2019	23(5) 24(2) 27(4) 40(5)(B)(a)(i) (42)(2)	Yes 14/08/2019

10	0477-19	I would like a list of all information/records/data etc. relating to Sami Al-Saadi (and family) litigation.	22/05/2019	20/06/2019	23(1) 27(1)(d) 32 40(2) 40(3A)(a) 42(1)	Yes 19/07/2019
11	0484-19	Provide a list of all persons who you/HM Govt. has been involved with as regards rendition to Libya when Colonel Gaddafi was in power. On the list state if the U.S. CIA was involved.	24/05/2019	19/07/2019	23(5) 24(2) 27(4) 40(5)(B)(a)(i) 42(2)	Yes 13/08/2019
12	0551-19	Further separate request: I would like to know which politicians ordered the settlement, so provide all data regarding the settlement to Sami Al Saddi (and family etc.) also, how much were both sides legal costs, set them out pls. I would like to resubmit the request for Mr Sami Al Saddi only.	17/06/2019	12/07/2019	23(1) 27(1)(a) 32 40(2) 40(3A)(a) 42(1)	Yes 14/08/2019
13	0579-19	I want all data relating to what information you sought from Mr Belhaj and partner a) what information did you get? b) with whom did you share the	21/06/2019	19/07/2019	14(1) 14(2)	Yes 08/08/2019

		<p>information?</p> <p>c) i would like all recordings/transcripts of Mr Belhaj or his partner being questioned or tortured.</p> <p>d) i would like all image data of the questioning or torture</p> <p>e) name of all persons who ordered or agreed to Belhaj being subject to rendition to Libya and associated paperwork etc for example arrest warrant, consent of UK PM</p> <p>f) provide rules, guidance etc for how you or your agents should use torture in 2004. i am particularly interested in images or drawings for example where you think the best place to put electrodes before passing a current of electricity through the person being tortured.</p> <p>i would like to amend my request to exclude any data which is exempt due to s.23 FOIA</p>				
14	0580-19	<p>i would like information held by FCO relating to Mr Belhaj and Ms Boudchar being subject to rendition to Libya where Jack Straw was the author or co-author of the information. If the request exceeds the cost threshold, please restrict to year 2004/5. I would like to amend the request to exclude</p>	21/06/2019	19/07/2019	14(1) 14(2)	Yes 08/08/2019

		any information to which s.23 FOIA exemption applies.				
15	0581-19	i would like a list of all records held by FCO relating to Mr Belhaj and Ms Boudchar except information to which s.23 FOIA (information supplied by or relating to bodies dealing with security matters) applies. If the request exceeds cost threshold please restrict request to year 2004. Please amend the request to information held on 10 May 2018.	23/06/2019	19/07/2019	14(1) 14(2)	Yes 08/08/2019
16	0582-19	I would like a list of all records held by FCO relating to Mr Belhaj and Ms Boudchar except information to which s.23 FOIA (information supplied by or relating to bodies dealing with security matters) applies which contains the wording "Jack Straw" or his signature.	24/06/2019	19/07/2019	14(1) 14(2)	Yes 08/08/2019
17	0667-19	<ol style="list-style-type: none"> 1. I would like all information created in year 2004 relating to rendition to Libya, and treatment in Libya, of Mr Belhaj and Ms Boudchar. 2. I would like all information except information covered by s.23 FOIA exemption created in year 2004 relating to rendition to Libya, and 	19/07/2019	19/07/2019	14(1) 14(2)	Yes 08/08/2019

		<p>treatment in Libya, of Mr Belhaj and Ms Boudchar.</p> <p>3. i would like all information except information covered by s.24 FOIA exemption created in year 2004 relating to rendition to Libya, and treatment in Libya, of Mr Belhaj and Ms Boudchar.</p>				
18	0788-19	<p>From a BBC News article of 13 December 2012, "UK pays £2.2m to settle Libyan rendition claim" [...]</p> <p>In 2010, ministers authorized 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. [...]</p> <p>Request</p> <p>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</p>	20/08/2019	10/09/2019	23(5) 24(2) 27(1)(a) 40(2) 40(3A)a 42(1)	Yes 08/10/2019

		2. Who authorised the deal, provide all data such as internal memos etc.				
19	0890-19	<p>Provide the names and dates of all persons with whom you/UK Govt. have been involved with rendition in the last 20 years. Say where they were collected and where was there intended destination - for example collect Hong Kong deliver to Colonel Gaddafi torture chamber, Libya.</p> <p>What is the total amount paid out by you/UK Govt. in the last 10 years for being involved in rendition with the United States? State damages and legal costs - yours and theirs.</p>	17/09/2019	15/10/2019	23(5) 24(2) 27(1)(a) 40(2) 40(3A)a 42(1)	No
20	1057-19	<p>Extraordinary rendition, also called irregular rendition or forced rendition, is the government-sponsored abduction and extrajudicial transfer of a person from one country to another with the purpose of circumventing the former country's laws on interrogation, detention and torture.</p> <p>Request 1. Provide a schedule showing how</p>	24/10/2019	19/11/2019	14(2)	Yes 30/12/2019

		<p>many people were subject to extraordinary rendition between years 2000 to year 2018 where UK Government was involved.</p> <p>2. On the schedule state which foreign states UK Government worked with for the particular extraordinary rendition.</p> <p>3.State the final destination - i.e. Guantanamo Bay, Tripoli.”</p>				
21	00003-20	<p>Extraordinary rendition, also called irregular or forced rendition, is the government-sponsored abduction and extrajudicial transfer of a person from one country to another with the purpose of circumventing the former country’s laws on interrogation, detention and torture.</p> <p>Request</p> <p>1.Provide a schedule showing how many people were subject to extraordinary rendition between years 2000 to year 2018 where UK Government was involved.</p> <p>2. On the schedule state which foreign states UK Government worked with for</p>	31/12/2019	30/01/2020	23(5) 24(2) 27(1)(a)	Yes 20/02/2020

		<p>the particular extraordinary rendition.</p> <p>3.State the final destination – i.e. Guantanamo Bay, Tripoli.</p> <p><u>Refined Request:</u></p> <p>Please check for year 2004. Please tell me how long it took when you have finished. I may make further similar requests in the future, so need a time guide.</p>				
22	21451-20	<p>I would like all information which constitutes communications (either direction) between Jack Straw/FCO (now FCDO) and Sir Mark Allen which relate to: -</p> <p>1. Abdul Hakim Belhaj</p> <p>and/or</p> <p>Fatima Boudchar</p> <p>If the request exceeds the time/cost, please restrict the request to year 2004.</p> <p>Information is not included in this request if it was directly or indirectly</p>	12/10/2020	16/11/2020	14(1) 14(2)	No

		<p>supplied to you, or relates to, any of the bodies specified below:</p> <p>-</p> <ol style="list-style-type: none"> 1.the Security Service, 2.the Government Communications Headquarters,* 3.the special forces, 4.the Tribunal established under section 65 of the Regulation of Investigatory Powers Act 2000, 5.the Tribunal established under section 7 of the Interception of Communications Act 1985, 6.the Tribunal established under section 5 of the Security Service Act 1989, 7.the Tribunal established under section 9 of the Intelligence Services Act 1994, 8.the Security Vetting Appeals Panel, 9.the Security Commission, 				
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		<p>10.the National Criminal Intelligence Service,</p> <p>11.the Service Authority for the National Criminal Intelligence Service.</p>				
23	11131-21	Provide any information held showing how many people were subject to extraordinary rendition to Libya in 2004 where UK Government was involved in anyway.	30/04/2021	25/05/2021	14(1) 14(2)	Yes 24/06/2021