

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 May 2023

Public Authority: Foreign, Commonwealth & Development Office

Address: King Charles Street
London
SW1A 2AH

Decision (including any steps ordered)

1. The complainant requested from the Foreign, Commonwealth & Development Office (FCDO) information relating to staff employed by the FCDO based in the British Embassy Beijing and British Consulates General in Hong Kong, Shanghai, Wuhan and Guangzhou. The FCDO withheld information to part 1 of the request under section 24(1) (national security) of FOIA. It also refused to confirm or deny whether it holds any additional information in scope of the request and cited section 23(5) (security bodies) of FOIA. With regard to parts 2 and 3 of the request, the FCDO confirmed the information is not held.
2. The Commissioner's decision is the FCDO was entitled to rely on section 24(1) of FOIA to some of the withheld information, and that the public interest favours maintaining the exemption. The Commissioner also finds that the FCDO was entitled to refuse to confirm or deny whether it holds any additional information in scope of the request and correctly relied on section 23(5) of FOIA. However, the FCDO breached section 10(1) (time limits for compliance) of FOIA as it failed to provide its response to the request within 20 working days.
3. The Commissioner does not require the FCDO to take any steps as a result of this decision.

Request and response

4. On 8 July 2022 the complainant wrote to the FCDO and requested information in the following terms:

"1. The number of staff employed by the FCDO (either directly or indirectly) based in the British Embassy Beijing and British Consulates General in Hong Kong, Shanghai, Wuhan and Guangzhou, who are (1) Chinese (PRC) Nationals and (2) British Nationals.

2. Of Chinese National staff employed by the FCDO (either directly or indirectly) in China, how many of those staff are (a) members of the Chinese Communist Party (b) have immediate family members (i.e. parents, grandparents, siblings) who are members of the Chinese Communist Party (NB: in the interests of privacy, this information does not need to be broken-down by location, and can be presented as totals, or as a percentage of total Chinese National staff).

3. If this information is not collected by the FCDO, please can you provide a rationale for the non-collection of this personnel data."

5. On 20 September 2022 the FCDO provided its response and confirmed that it does hold some information relevant to the request. The FCDO withheld information to part 1 of the request (specific number of staff) under section 24(1) of FOIA. It also stated it could neither confirm nor deny whether it holds any 'additional' information in scope of the request and cited section 23(5) of FOIA. With regard to part 2 of the request, the FCDO confirmed the information is not held. In response to part 3 of the request, the FCDO said that collection of such data as mentioned in part 2, is not part of its standard procedures.
6. On 23 September 2022 the complainant asked for an internal review. He disputed the FCDO's assessment that it is not in the public interest to disclose the requested information. The complainant also argued its concern of national security implications if the information was released.
7. On 8 February 2023 the FCDO provided its review response. It maintained its original position to withhold information to the first part of the request (figures relating to staff nationalities) under section 24(1) of FOIA. It also upheld its response to neither confirm or deny that it holds any 'additional' information and continued to rely on section 23(5) of FOIA. With regard to parts 2 and 3 of the request, the FCDO maintained its position that it does not hold this information.

8. The complainant contacted the Commissioner on 14 February 2023 to complain about the way his request for information had been handled. He disagreed with the FCDO's reasons for refusal, specifically its use of the national security exemption.
9. During the Commissioner's investigation, the FCDO was asked a question about its response to part 1 of this request. The FCDO provided its response and confirmed that it is not applying section 24(1) and section 23(5) of FOIA to the same information. The information withheld under section 24(1) does not relate to that which section 23(5) is applied. The FCDO confirmed it does hold some information in scope of part 1 but considered this information exempt under section 24(1) of FOIA. Separately, the FCDO stated it is neither confirming nor denying it holds or does not hold any 'additional' information in scope of part 1 under section 23(5) of FOIA.

Reasons for decision

10. This reasoning covers whether the FCDO is entitled to rely on section 24(1) of FOIA to refuse to provide information to part 1, and also its refusal to confirm or deny whether it holds any 'additional' information in scope of this part of the request under section 23(5) of FOIA.

Section 24(1) – Safeguarding national security

11. Section 24(1) provides that information which does not fall within section 23(1) of FOIA is exempt information, if exemption from section 1(1)(b) is required for purposes of safeguarding national security.
12. In broad terms, section 24(1) allows a public authority not to disclose information if it considers that the release of the information would make the United Kingdom or its citizens vulnerable to a national security threat. The Commissioner's guidance¹ provides a detailed definition.
13. The FCDO informed the complainant that disclosing information about the exact number of staff in the UK and overseas could threaten its operations. Therefore, the FCDO is withholding this information as it considers disclosure would not be in the interest of the UK's national security.

¹ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-24-safeguarding-national-security/>

14. The complainant is of the view his request is not particularly complex or sensitive, and that it is basic management information which he believes should be readily available. He said, as a publicly-funded organisation, it should be shared in a transparent and open manner on request. The complainant disputed the FCDO's reliance on section 24(1) of FOIA to refuse his request, and said "the requested information is not something which is sensitive or routinely withheld by other countries." He further argued the FCDO's use of the national security exemption and said "...to withhold basic management information about tax-payer funded roles in tax-payer funded missions overseas – none of whom are doing work which is national security relevant (particularly as 80-90% are Chinese nationals)."
15. The FCDO provided the Commissioner with submissions explaining reasons why it considered disclosure of the information, would pose a threat to the FCDO's operations in the UK and overseas. It stated, "the effective functioning of the UK's overseas network of posts is an essential element of the UK's national security objectives, enabling the UK to forge and maintain close relationships with the governments of other countries. Such relationships are vital, particularly in periods of heightened global tension, and the ever present threats from terrorism."
16. The FCDO said it considers there would be clear risks to national security if the requested information were to be released into the public domain.
17. The FCDO provided the Commissioner with further detailed reasons for withholding information to part 1 of the request. However, as these refer to the content of the withheld information, the Commissioner cannot include these submissions within this notice, and he acknowledges this is likely to prove frustrating for the complainant. The Commissioner notes that such a scenario is anticipated in FOIA by the provision contained at section 17(4) which provides that when issuing a refusal notice, a public authority does not have to explain why the exemption applies, if to do so, would reveal information that is itself exempt.
18. Having considered the FCDO's submissions, the Commissioner is satisfied that the information falls within the territory of national security. He is unable to elaborate on the rationale for his decision without either revealing the information which has been withheld or undermining the manner in which the FCDO has applied the exemption. The Commissioner finds that section 24(1) is engaged.

Public interest test

19. Section 24 is a qualified exemption. This means that even where its provisions are engaged, the Commissioner must consider whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing that information.
20. The FCDO recognises the public interest in knowing more about the UK's diplomatic network overseas. However, it considers the damage to national security that would be caused by releasing the requested information, would be significant and wide ranging.
21. The Commissioner considers that in this case, the public interest is outweighed by the importance of safeguarding national security.

Section 23(5) – Security bodies

22. Section 23(5) of FOIA provides an exemption from the duty to confirm or deny whether information is held if doing so would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied by, or relates to, any of the bodies specified in section 23(3). The list includes the Security Service, the Secret Intelligence Service and other similar bodies. This is a class-based exemption, which means if confirmation or denial would have the result described in section 23(5) of FOIA, the exemption is engaged.
23. The FCDO stated it can neither confirm or deny it holds any additional information within scope of part of the request – the UK's diplomatic network overseas. It considered to confirm or deny any additional information is held, would on the balance of probabilities, reveal information relating to one or more of the security bodies listed in section 23(3) of FOIA.
24. The Commissioner considers it is clear that the subject matter of the request – Chinese National staff, is within the area of the work of security bodies.

Conclusion

25. The Commissioner accepts that, on the balance of probabilities, if any additional information as described in the request did exist, this would reveal information relating to one or more of the security bodies listed in section 23(3). The Commissioner's conclusion is that section 23(5) is engaged, and the FCDO was entitled to refuse to confirm or deny whether the requested information is held.

Procedural matters

Section 10 – time limits for compliance

26. Section 10(1) of FOIA says that a public authority should comply with section 1(1) promptly and no later than the twentieth working day following the date of receipt of the request.
27. In this case, the FCDO provided its response to the request of 8 July 2022 on 20 September 2022, which is outside the 20 working day time limit. Therefore, the FCDO breached section 10(1) of FOIA.
28. The FCDO informed the Commissioner that the deadline date for replying to the request had been extended twice “in order for us to fully consider the public interest test under section 24(1) of FOIA...”. The FCDO said this required consultation with a number of FCDO colleagues, as well as relevant stakeholders in other government departments.

Other matters

29. The Commissioner notes the time taken for the FCDO to respond to the complainant’s internal review request of 23 September 2022 exceeded 40 working days. Although there is no statutory time limit for carrying out a review, it is best practice² to do so within 20 working days, or in exceptional circumstances, 40 working days.
30. The Commissioner is aware from its submissions, that the FCDO recognises it did not meet ICO best practice guidance regarding timelines for response to internal review requests. The FCDO explained to the Commissioner the reasons for the delay in this case, which was due to unforeseen circumstances. The Commissioner acknowledges that the FCDO has been actively pursuing options to remedy this, and he notes the apology to the complainant for the inconvenience caused.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

Right of appeal

31. 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: 0300 1234504

Fax: 0870 739 5836

Email: grc@justice.gov.uk.

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

32. 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.
33. 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

Joanna Marshall
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Wycliffe House
Water Lane
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SK9 5AF