

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 July 2023

Public Authority: Foreign, Commonwealth & Development Office
Address: Kind Charles Street
London
SW1A 2AH

Decision (including any steps ordered)

1. The complainant has requested from the Foreign, Commonwealth & Development Office (FCDO) information about transcripts of the flight recordings of the Malaysian Airlines flight MH17 that was brought down over eastern Ukraine in July 2014, and whether copies of transcripts were passed to the Dutch investigating authorities.
2. The FCDO provided some of the requested information to the complainant but confirmed that it did not hold any information in relation to other parts of the request.
3. The Commissioner's decision is that, on balance of probabilities, the public authority did not hold any more information falling within the scope of the request beyond that disclosed to the complainant.
4. Consequently, the Commissioner does not require any further steps from the public authority in relation to this complaint.

Request and response

5. On 25 May 2022, the complainant wrote to the FCDO and requested information in the following terms:

"I am requesting under the terms of the Freedom of Information act (FOI) any documentation which would indicate:

1) whether air accident investigators at Farnborough or anywhere else in the UK examined the flight recorder (black box) of the Malaysian Airlines flight MH17 that was brought down over eastern Ukraine in July 2014, and, if so:

2) whether transcripts were made of all communications of MH17's pilots and Ukrainian air traffic control, and, if so:

3) copies of those transcripts and

4) documentation confirming that any transcripts of communication between MH17s pilots and Ukrainian Air traffic control were passed to the Dutch investigators who were investigating on behalf o [sic] the Ukrainian government the circumstances of the crash?"

6. On 24 June 2022 the FCDO responded to the complainant confirming that it held information falling within the terms of the request but explained that it needed more time to consider the public interest test (PIT) under the section 27 exemption of FOIA. The FCDO indicated that it would provide the response to the complainant by 22 July 2022.
7. On 22 July 2022 the FCDO wrote to the complainant to advise him that it needed more time to consider the balance of PIT to decide whether the information can be disclosed.
8. The FCDO provided the complainant with its substantive response to his request on 19 August 2022, where it confirmed that it did hold information relating to question 1 of the request which it provided to the complainant, but stated that it did not hold any information relating to questions 2, 3 and 4 of the request.
9. The complainant requested an internal review on 31 August 2022 and following no response from the FCDO, he complained to the Commissioner on 10 January 2023.
10. The FCDO provided an internal review on 15 February 2023, following an intervention from the Commissioner asking the FCDO to provide a response to the complainant.

11. In its internal review response the FCDO maintained its original position confirming that it did not hold information within the scope of questions 2, 3 and 4.

Scope of the case

12. The complainant contacted the Commissioner on 28 February 2023 to complain about the way his request for information had been handled.
13. Specifically, the complainant disputed that the information sought by questions 2, 3 and 4 was not held by the FCDO. He contended that the response, which he received in relation to question 1, contradicted the response relating to the questions 2, 3 and 4 that the information is not held.
14. The Commissioner has considered whether, on the balance of probabilities, the FCDO holds or held at the time the request was made, recorded information within scope of questions 2, 3 and 4 and whether it has complied with section 1(1) of FOIA.

Reasons for decision

Section 1 of FOIA – Information held / not held

15. Section 1 of FOIA states that:

'Any person making a request for information to a public authority is entitled –

- a. to be informed in writing by the public authority whether it holds information of the description specified in the request, and
 - b. if that is the case, to have that information communicated to him.'
16. If a public authority does not hold recorded information that falls within the scope of the request, the Commissioner cannot require the authority to take any further action.
 17. Where there is some dispute between the amount of information identified by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions, and the civil standard of proof based on the balance of probabilities, must decide whether the public authority holds any information which falls within the scope of the request (or was held at the time the request was made).

18. In this case the complainant contended that the FCDO held further information within the scope of the request. The complainant believes that the response he received in relation to question 1 would suggest that the information related to questions 2, 3 and 4 must have been held.
19. Specifically, he pointed out the following:

'The FCDO admits in answer to Q.1 that it has information indicating investigators from Air Accident Investigation Branch (AAIB) based at Farnborough examined the black box of Malaysian Flight MH17 that went down in Eastern Ukraine in July, 2014. According to an answer given by the then Europe Minister at 22.34 on 27 July 2014, contained in an attachment sent to me by the FCDO on 19 August, 2022 in answer to my FoI request referenced above, the 'downloading of the data from the Cockpit Voice Recorder and the Flight Data Recorder has been completed and the results handed to the Dutch investigation leads who will now be carrying out further investigation'.
20. As part of his investigation, the Commissioner asked the FCDO to explain what searches had been carried out, including paper and electronic forms, as well as any staff consultation for the FCDO to conclude that information was not held.
21. The FCDO explained that, following the initial request from the complainant, the Information Rights Unit (IRU) carried out searches across the FCDO's main IT system, e-Discovery and the electronic archive, iRecords, given that the incident happened in 2014. The specific terms used in the search were "after 30 June 2014", "MH17+Activity+Recorder" and "MH17+ "Transcripts". As these searches covered the whole IT system, including employees' individual accounts, the FCDO considered that they would be likely to retrieve any information in the scope of the request.
22. Following the Commissioner's further inquiry regarding the depth of the searches conducted, the FCDO confirmed that, although it did consider that adequate searches were made at the time, it has subsequently carried searches on higher tier systems, including paper archives, all of which were a nil return.
23. The Commissioner asked whether, prior to receiving the request, any recorded information was ever held relevant to the scope of the complainant's request but deleted/destroyed, to which the FCDO confirmed that it did not.
24. In light of the complainant's assertion that the response to question 1 contradicts the response to questions 2, 3 and 4, the Commissioner

further asked the FCDO to provide reasons as to why it responded that it did not hold the information in relation to questions 2, 3 and 4.

25. The FCDO confirmed that it responded in such a way as it did not hold any information related to questions 2, 3 and 4. To clarify it further, the FCDO explained that the downloading and transferring of material from the MH17 flight recorders was conducted by air accident experts under strict international oversight, including in the presence of the International Civil Aviation Organisation/ICAO. The lead Dutch investigators then took the material and the flight recorders back to the Netherlands themselves. The FCDO confirmed that it was not involved in the process, and had no sight of the results.
26. For completeness, and to fully address the complainant's concerns, the Commissioner asked whether it is possible that the information within the scope of the request is held in another location, i.e. another government department, known to FCDO. In response to which, the FCDO confirmed that it was not aware of another government department to be in possession of the requested information.
27. The Commissioner has considered carefully the information received from the complainant and the FCDO, and concluded that, on balance of probabilities the FCDO did not hold information related to questions 2, 3 and 4 at the time the request was received.
28. This is because the Commissioner is satisfied that the searches conducted to locate the relevant information were reasonable and sufficiently thorough to conclude that the information was not held.
29. The Commissioner is also persuaded that the FCDO was not involved in the process nor had the sight of the materials from the MH17 flight recorders and the Commissioner has had no sight of any evidence to the contrary.

Other matters

Internal review

30. Although internal reviews are not subject to statutory time limits, the Commissioner's well established guidance is very clear in that he expects public authorities to complete most internal reviews within 20 working days, with a maximum of 40 working days in exceptional cases.
31. The complainant asked for an internal review on 31 August 2022. However, the FCDO did not provide the internal review response until 15

February 2023, following an intervention from the Commissioner asking it to provide a response to the complainant.

Right of appeal

32. 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

33. 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.
34. 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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