

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 March 2024

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 copies of audit reports concerning the 'Palestinian Recovery and Development Program', a World Bank multi donor trust fund for the period 2015 to 2022. The FCDO confirmed it held information falling within the scope of the request but withheld this on the basis of section 27(1)(a) (international relations) and section 40(2) (personal data) of FOIA.
2. The Commissioner's decision is that the withheld information is exempt from disclosure on the basis of section 27(1)(a) but that in all the circumstances of the case the public interest favours disclosure of the information. However, the Commissioner accepts that the names and signatures contained in the information are exempt from disclosure on the basis of section 40(2) of FOIA.
3. The Commissioner requires the FCDO to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with the information it has sought to withhold on the basis of section 27(1)(a) of FOIA. The FCDO can redact any names and signatures contained in the information.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court

pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

5. In 2018 a requester - a different party to the complainant in this case - submitted the following request to the Department for International Development (DFID):

"Please provide the following documents in accordance with the Freedom of Information Act ("the Act"):

1. Audit reports of independent, external auditors in respect of the Palestinian Recovery and Development Program - Multi-Donor Trust Fund (PRDP-MDTF) and/or of any accounts into which its funds were disbursed between 2010 and 2015.
 2. The terms of engagement of the auditors under which these audit reports were prepared."
6. DFID refused to disclose the information falling within the scope of this request on the basis of sections 27(1)(a), (b), (c) and (d), 27(2) (international relations) and 40(2) (personal data) of FOIA.
7. The Commissioner subsequently issued a decision notice which found that sections 27(1)(a) and 27(2) were not engaged on the basis that the Palestinian Authority (PA) was a not "State" for the purposes of section 27(5) of FOIA.¹ Whilst the Commissioner accepted that sections 27(1)(c) and (d) were engaged, she² found that the public interest favoured disclosing the withheld information. The Commissioner accepted that the names and signatures of the individuals engaged in the audits were exempt from disclosure on the basis of section 40(2) of FOIA.
8. The Commissioner therefore required DFID to provide the requester with a copy of the information falling within the scope of the request, with the names and signatures of the individuals involved in conducting the reports redacted.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2615493/fs50782553.pdf>

² The Commissioner at this point was Elizabeth Denham, hence the reference to Commissioner as "she" rather than "he".

9. DFID appealed the decision notice to the First-tier Tribunal.³ However, DFID did comply with the steps in the notice. As a result, the appeal before the Tribunal was essentially an academic one in terms of any steps required of DFID, and instead focused on the interpretation of section 27(5) of FOIA and the definition of a "State". The appeal was concluded by way of a consent order with the Commissioner accepting that she had made an error of law in the decision notice in the interpretation of the word "State" of FOIA. The consent order is not available online.

Request and response

10. The complainant submitted the following request to the FCDO on 2 May 2023:

"In 2018, [requester's name] submitted the following FOI request to DFID: 'Please provide the following documents in accordance with the Freedom of Information Act ("the Act"):

1. Audit reports of independent, external auditors in respect of the Palestinian Recovery and Development Program - Multi-Donor Trust Fund (PRDP-MDTF) and/or of any accounts into which its funds were disbursed between 2010 and 2015.
2. The terms of engagement of the auditors under which these audit reports were prepared.'

Please can you provide updated disclosure, but from the newly specified period of 2015 to 2022."

11. The FCDO responded on 13 July 2023 and confirmed that it held information falling within the scope of this request but explained that it considered this information to be exempt from disclosure on the basis of section 27(1)(a) (international relations) as disclosure would be likely to prejudice the UK's relations with the PA and 40(2) (personal data) of FOIA.
12. The complainant subsequently contacted the FCDO and asked it to conduct an internal review of this decision.

³ EA/2019/0293

13. The FCDO informed him of the outcome of the internal review on 4 August 2023. This upheld the application of the exemptions cited in the refusal notice.

Scope of the case

14. The complainant contacted the Commissioner on 2 September 2023 to complain about the FCDO's decision to withhold the information falling within the scope of his request. He has disputed the FCDO's position that disclosure of the requested information would be likely to prejudice relations with the PA or that the information is confidential to the PA. Furthermore, he argued that in any case in his view the public interest in disclosure outweighs the public interest in withholding the information.
15. The complainant also argued that the Commissioner's previous decision notice in relation to the 2018 request cited in his request provided a precedent which should be followed in this case.
16. During the course of the Commissioner's investigation he established the only information held by the FCDO in the scope of this request are the audit reports covering 2015. This is because the UK's contribution to the Palestinian Recovery and Development Program - Multi-Donor Trust Fund ceased at the end of 2015.⁴ As such no audit reports exist for the period 2016 to 2022. Therefore, the only information which the FCDO holds falling within the scope of this request is information which the Commissioner has previously considered as part of the previous decision notice, and which DFID disclosed (along with other information) in response to that decision notice.
17. In view of this the Commissioner sought clarification from the complainant as to whether he wished to continue with his complaint. This was on the basis that the wording of his request suggested that he was intending to access more recent, and therefore different, information to that sought by the previous requester.
18. The complainant informed the Commissioner that he did wish to continue with his complaint. He also argued that the FCDO should have informed him that the only information it held dated from 2015.

⁴ This is confirmed here <https://www.worldbank.org/en/programs/palestinian-recovery-and-development-program-trust-fund#3>

Reasons for decision

Section 27(1)(a) – international relations

19. Section 27(1)(a) of FOIA states that:

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

(a) relations between the United Kingdom and any other State”.

20. Section 27(5) of FOIA defines a “State” as follows:

“‘State’ includes the government of any State and any organ of its government, and references to a State other than the United Kingdom include references to any territory outside the United Kingdom”.

The FCDO’s position

21. The FCDO argued that disclosure of the withheld information would be likely to damage the bilateral relationship between the UK and the PA. In support of this position the FCDO explained that the information had been provided to it by the PA. Furthermore, FCDO explained that it had consulted the PA about the request and the PA had made it clear that it did not consent to this information being disclosed under FOIA. As result, the FCDO argued that disclosure of the withheld information, against the express wishes of the PA, would be likely to cause a breakdown of trust and confidence which would affect not just its relations with the PA but would be likely to prejudice wider UK-PA relations. The FCDO provided the Commissioner with additional, and confidential submissions, to support this position which have not been replicated here.

The complainant’s position

22. The complainant disputed the position that the information in question was confidential to the PA or that it would be likely to prejudice relations with the PA.

The Commissioner’s position

23. In order for a prejudice based exemption, such as section 27, to be engaged the Commissioner believes 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.
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e., disclosure would be likely to result in prejudice or disclosure would result in prejudice. If the likelihood of prejudice occurring is one that is only hypothetical or remote the exemption will not be engaged.
24. Furthermore, the Commissioner has been guided by the comments of the Information Tribunal which suggested that in the context of section 27(1), prejudice can be real and of substance 'if it makes relations more difficult or calls for a particular damage limitation response to contain or limit damage which would not have otherwise have been necessary'.⁵
25. With regard to the first limb of the test, in the previous decision notice the Commissioner concluded that section 27(1)(a) was not engaged as the PA did not meet the definition of a "State" for the purposes of section 27(5). The Commissioner's position since that decision notice was issued in 2018 has been refined. He now accepts that, as set out in his guidance, under section 27(5) the term "state" also includes "any territory", outside the UK and this includes territories which are not recognised as states in international law but which may be the subject of international law or international agreements.⁶ On this basis the Commissioner therefore accepts that the PA is a state for the purposes of section 27(5). As a result the Commissioner accepts that the first limb of the test above is met.
26. With regard to the second and third limbs, the Commissioner is conscious that when consulted the PA were clear that it did not want the withheld information to be disclosed. In light of this the Commissioner accepts that to do so would be against the express wishes of the PA and that such a position presents a clear and real risk of undermining relations between the PA and UK. It is difficult to see, given such circumstances, how disclosure of the information would not have a negative impact on the trust and confidence between the UK and PA. The Commissioner does not consider this to simply be a hypothetical

⁵ Campaign against Arms Trade v the Information Commissioner and Ministry of Defence EA/2007/0040

⁶ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-27-international-relations/>

risk. The Commissioner is therefore satisfied that the second and third limbs are met and that section 27(1)(a) is engaged.

Public interest test

27. Section 27 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption contained at section 27(1)(a) outweighs the public interest in disclosing the information.

Public interest in disclosing the information

28. The FCDO accepted that there is a public interest argument that decisions taken by public bodies should be transparent and accountable where possible. In the particular circumstances of this case, the FCDO acknowledged that releasing information on this issue would increase public knowledge about its relations with the PA.
29. The complainant cited the previous decision notice issued by the Commissioner and the public interest arguments advanced by the complainant in that case (see paragraphs 41 to 53) and argued that this decision notice provided a precedent for the disclosure of the information falling within the scope of his request.

Public interest in withholding the information

30. The FCDO argued that damage caused by the disclosure of the information to the UK-PA's relationship would in its view undermine its ability to carry out HM Government's foreign policy. The FCDO cited the then Foreign Secretary, James Cleverly's statement of 30 June 2023 that the UK supports:

"...a comprehensive, just, and lasting peace in the Middle East, including the creation of a Palestinian state living side by side in peace and security with Israel."⁷

31. The FCDO argued that the public interest argument for disclosure must be balanced against the FCDO's pursuance of lasting peace in the Middle East and a secure Palestinian state. The FCDO argued that damage to the UK's relationship with the PA hinders its ability to pursue these objectives, an outcome which was firmly against the public interest.

⁷ <https://www.gov.uk/government/news/joint-international-statement-following-recent-events-in-israel-and-the-west-bank>

Balance of the public interest arguments

32. The Commissioner's previous notice concluded, by a narrow margin, that the public interest favoured disclosure of the information that fell within the scope of the previous request. That included, but was not limited to, the information falling within the scope of this present request.
33. Nevertheless, each request needs to be considered on its own merits. This includes taking into account the time at which a request was submitted and acknowledging that the sensitivity of information and/or the prejudicial consequences of disclosing information, can both decrease and increase over time.
34. In the previous decision notice the Commissioner accepted that there was a clear public interest in the disclosure of information which would contribute to the public's understanding of how taxpayers' money has been used to fund overseas aid, and in particular to provide reassurance that such money had been used appropriately particularly in view of the allegations made by the complainant in that case (paragraph 60). This remains the Commissioner's position.
35. In the previous case, the Commissioner also accepted that very significant weight should be given to the public interest in maintaining sections 27(1)(c) and (d). In the circumstances of this case he also considers that the very significant weight should be given to the public interest in maintaining section 27(1)(a). It is very clearly in the public interest to protect the UK's relationship with the PA for the reasons set out by the FCDO.
36. Nevertheless, the Commissioner remains of the view that by a narrow margin the public interest favours disclosure of this information. In reaching this decision he accepts that disclosure of this information would be likely to have a prejudicial impact on the UK's relations with PA at the time this request was submitted, but this is outweighed by the continuing public interest in the UK being open and transparent about how it ensures that aid funds – even those from some time ago - have been used appropriately.
37. The Commissioner has provided the FCDO with a brief confidential annex which outlines further his findings in this case.

Section 40(2) – personal data

38. In line with his findings at paragraph 87 of the previous decision notice, the Commissioner accepts that the names and signatures contained in the withheld information are exempt from disclosure on the basis of section 40(2).

Procedural matters

39. With regard to the complainant's concerns at paragraph 18 above, section 1(1)(a) of FOIA requires a public authority to confirm to a complaint whether it holds information falling within the scope of the request.
40. The Commissioner is satisfied that it complied with this obligation in its response of 13 July 2023. However, the Commissioner can understand the complainant's frustration that it only became apparent during the course of his investigation that the only information held was that relating to the year 2015 given the particular wording of his request. As a matter of good practice, and given the particular circumstances of this case, in the Commissioner's view the FCDO could have considered advising the complainant that this was the only information that was held in scope, and indeed why this was the case.

Right of appeal

41. 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

42. 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.
43. 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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