

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 February 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 previous versions of a statement on "Freedom of Religion and Belief and Gender Equality" issued in July 2022 following an international conference hosted by the UK. The FCDO confirmed that it held information falling within the scope of the request but considered this to be exempt from disclosure on the basis of sections 35(1)(a) (formulation or development of government policy), 27(1)(a), (c) and (d) (international relations) and 40(2) (personal data) of FOIA.
2. The Commissioner's decision is that sections 27(1)(a), (c) and (d) and section 40(2) do not provide a basis to withhold the requested information and that, whilst section 35(1)(a) is engaged, the public interest favours disclosing the information caught by this exemption.
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 relied on the above exemptions to withhold.
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. On 5 and 6 July 2022 the UK government hosted a human rights conference to urge increased global action on Freedom of Religion or Belief (FoRB) for all.
6. The conference brought together governments, parliamentarians, faith and belief representatives and civil society. National governments represented at the conference were invited to co-sign one or more of a set of written statements. The set includes an overarching statement on the conference itself and thematic statements covering freedom of religion or belief issues.¹ Each statement includes a list of government co-signatories.
7. This request concerns the statement that was published on freedom of religion or belief and gender equality. An original version of this statement prepared by the UK, and signed up to by 21 other countries, was published on GOV.UK. The statement was taken down shortly after the conference and a revised version was published on 15 July 2022.² This statement was signed by 8 countries.

Request and response

8. The complainant submitted the following request to the FCDO on 3 May 2023:

'This request is tailored following your refusal to issue information from request FOI2022/31110. I have removed from this request any reference to individual civil servants' identity.

Please would you send me any revisions to the Statement on Freedom of Religion and Belief and Gender Equality, produced between 8 and 18 July 2022 that was issued following the international conference in

¹ Information taken from <https://www.gov.uk/government/topical-events/international-ministerial-conference-on-freedom-of-religion-or-belief-london-2022>

² <https://www.gov.uk/government/publications/freedom-of-religion-or-belief-and-gender-equality-statement-at-the-international-ministerial-conference-2022/statement-on-freedom-of-religion-or-belief-and-gender-equality>

early July 2022 that was chaired by the UK. Please include any tracked changes or highlighted amendments.

Where an individual is named as making the tracked change, please remove their name and simply confirm if the change was made by someone working in the Office of the Special Envoy on Freedom of Religion or Belief or was working at that time on behalf of MP Fiona Bruce in her role as co Chair of the conference.'

9. The FCDO responded on 24 May 2023 and confirmed that it held information falling within the scope of the request. However, it was seeking to withhold the revisions to the statement on the basis of section 35(1)(a) of FOIA. The FCDO also explained that it was withholding further details relating to the changes made under section 40(2) as it believed that disclosure of such information could allow individuals to be identified.
10. The complainant contacted the FCDO on 25 May 2023 and asked it to conduct an internal review of the decision to cite both exemptions.
11. The FCDO informed the complainant of the outcome of the internal review on 4 September 2023. The review upheld the application of the exemptions cited. However, the FCDO explained that the versions of the statement it held did not contain tracked changes/edits made by politicians, either MPs or members of the House of Lords. The FCDO also explained that the changes were made and authorised by FCDO ministers, in line with all government policy and that further information about the changes to the statement could be found in response to a Parliamentary Question.³

Scope of the case

12. The complainant contacted the Commissioner on 12 September 2023 in order to complain about the FCDO's decision to withhold the information falling within the scope of his request. His grounds of complaint to support his position are set out below.
13. During the course of the Commissioner's investigation of this case the FCDO explained that it also considered some of the information falling

³ <https://questions-statements.parliament.uk/written-questions/detail/2022-07-21/HL1992>

within the scope of the request to be exempt from disclosure on the basis of sections 27(1)(a), (c) and (d) (international relations).

14. The Commissioner considers that the scope of his investigation is to consider whether the various exemptions cited by the FCDO provide a basis upon which to withhold the information.

Reasons for decision

Section 35(1)(a) – formulation or development of government policy

15. The FCDO withheld some of the requested information on the basis of section 35(1)(a) of FOIA which states that:

“Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to-

(a) the formulation or development of government policy”

16. Section 35 is a class based exemption, therefore if information falls within the description of a particular sub-section of 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes.
17. The Commissioner takes the view that the ‘formulation’ of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations or submissions are put to a minister or decision makers.
18. ‘Development’ may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
19. Ultimately the key point is that policymaking can take place in various ways; there is no uniform process. Whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case by case basis, focussing on the precise context and timing of the information in question.
20. The Commissioner’s guidance on section 35 includes the following examples of different processes that might involve policy:
 - White Papers, bills and the legislative process;
 - initiatives to review and improve existing policies;
 - Ministerial speeches;
 - press releases;

- responding to unexpected events;
 - responding to questions put to Ministers; and
 - unusually sensitive or high-profile operational decisions.
21. Furthermore, the Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:
- the final decision will be made either by the Cabinet or the relevant minister;
 - the Government intends to achieve a particular outcome or change in the real world; and
 - the consequences of the decision will be wide-ranging.⁴
22. The FCDO argued that the withheld information related to policy discussions around the editing of the statement. It noted that policy discussions followed the decision to remove the original statement and focused on ways to ensure that a revised statement could be agreed and re-published. The FCDO explained that the responsible Minister approved the edits to the statement prior to it being published.
23. The Commissioner accepts that the withheld information relates to the development of government policy making on the issue of freedom of religion or belief, albeit in the context of an international conference. Furthermore, as noted above, policy making can relate to a range of different processes and the Commissioner accepts that the revisions to the statement in question are such a process. The Commissioner also notes that a Minister was involved in the approval of the revised statement. Section 35(1)(a) is therefore engaged.

Public interest test

24. Section 35 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 35(1)(a) outweighs the public interest in disclosing the information.

Public interest in favour of maintaining the exemption

25. The FCDO argued that good government and good decision making needs to be based on the best advice available and a full consideration

⁴ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-35-government-policy/#whatconstitutesformulation>

of all the options. The FCDO argued that advice should be broad based and there may be a deterrent effect on external experts or stakeholders who might be reluctant to provide advice because it might be disclosed.

26. It also argued that a further consideration was that the impartiality of the civil service might be undermined if advice was routinely made public as there is a risk that officials could come under political pressure not to challenge ideas in the formulation of policy, thus leading to poor decision making.
27. The FCDO further argued that there is a public interest in preserving a safe space for the government to discuss and debate live policy issues away from external interference and distraction, particularly when the issues involved are unusually sensitive and high-profile. It emphasised that Ministers must be able to discuss policy and exchange views on available options, freely and frankly in order to ensure the quality and robustness of collective decision-making processes. The FCDO argued that the candour of all involved would be affected by their assessment of whether the content of any decision making may be disclosed.
28. More specifically, the FCDO explained that the revision process to a statement such as the one which is the focus of this request is an integral part of government policy-making and it is important that a safe space is preserved for this kind of discussion.

Public interest arguments in favour of disclosing the information

29. The complainant provided detailed submissions to support his view that the public interest favoured disclosing the information he had requested. The Commissioner has summarised his position below:
30. In his view there was a significant public interest in knowing whether Fiona Bruce MP⁵, or someone working for her, had been involved in the changes in the statement following the conference.
31. This is because (in his view) the original statement was unambiguously pro abortion rights with its inclusion of the phrases 'sexual and reproductive rights' and about women's 'bodily autonomy'. The complainant noted that these statements were entirely in line with UK government policy. In his view the anonymous removal of these references from the latter version of the July 2022 conference statement

⁵ The Prime Minister's Special Envoy for Freedom of Religion or Belief.

was a move away from abortion rights (and indeed should not be seen as part of a government policy discussion.)

32. The complainant noted that Fiona Bruce MP is known for her anti abortion views. He argued that if she used her position as Co Chair of the Conference or as Special Envoy for Freedom of Religion and Belief to influence the anonymous change, then there would be large public interest in this.
33. As evidence of the significant interest in this issue the complainant explained that once the change in the statement had come to light, there were at least four articles in the Guardian, three in The i, and one in the Independent. He noted that it featured on the BBC Sunday programme and appeared on the front page of a Danish newspaper. The complainant also noted that on 22 July 2022 more than 20 human rights, pro-choice, and international aid groups, plus the Norwegian and Danish Governments, called on the UK Government to reverse its decision to arbitrarily strip 'sexual and reproductive health and rights' and 'bodily autonomy' from the statement it and 22 other countries had signed only two weeks before.⁶
34. In response to the specific arguments advanced by the FCDO, the complainant argued that it was not 'good government' to make a unilateral and anonymous change to an internationally agreed statement without consulting all of the signatories.
35. He disputed that disclosure of the information would deter 'external experts or stakeholders'. In his view, what he was asking for would not reveal what such parties had done, rather he was seeking to establish what was done by someone working for Fiona Bruce MP. In any case, he suggested that it is not possible for an external expert or stakeholder to actually make a change to a Government document.

Balance of the public interest arguments

36. The Commissioner accepts that significant weight should be given to safe space arguments - ie the concept that the government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction - where the policy making

⁶ <https://humanists.uk/2022/07/22/norway-denmark-and-human-rights-groups-challenge-uk-over-abortion-rollback/#:~:text=Over%2020%20human%20rights%2C%20pro,statement%20it%20%E2%80%93%20and%2022%20other>

process is live and the requested information relates to that policy making.

37. However, in the circumstances of this case the Commissioner does not consider that safe space arguments are relevant to his request. The request was submitted on 3 May 2023 and the statements, both the original and revised versions, were published the previous July. Consequently in the Commissioner's view any policymaking in respect of the statements, and revisions to them, was complete by the point of the request.
38. The Commissioner appreciates that although not explicitly described as such, the FCDO's arguments are relevant to the concept of a chilling effect, ie the concept that disclosure of previous discussions inhibits free and frank discussions in the future, and that the loss of frankness and candour damages the quality of advice, leading to poorer decision making.
39. With regard to attributing weight to the chilling effect arguments, as a general approach the Commissioner recognises that civil servants are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. Nonetheless, chilling effect arguments cannot be dismissed out of hand and are likely to carry some weight in most section 35 cases. If the policy in question is still live, the Commissioner accepts that arguments about a chilling effect on those ongoing policy discussions are likely to carry significant weight. Arguments about the effect on closely related live policies may also carry weight. However, once the policy in question is finalised, the arguments become more and more speculative as time passes. It will be difficult to make convincing arguments about a generalised chilling effect on all future discussions.
40. The Commissioner accepts that there is potentially some risk that disclosure of the material withheld on the basis of this exemption may lead to those called upon to draft and revise similar statements to be less candid in their contributions. However, in the Commissioner's view the risk is a low one. He has reached this view given that, in the particular circumstances of this case, the original and then revised statements were placed in the public domain and therefore the content of withheld information – ie the changes between the two published statements is arguably unlikely to be particularly revelatory. Furthermore, disclosure of the information would also, as noted above, not result in information about live policy making being disclosed. Therefore, in the Commissioner's view the chilling effect arguments should only be accorded limit weight.

41. In contrast, the Commissioner considers there to be a significant public interest in the disclosure of the withheld information. As noted by the complainant, the decision to revise the statement attracted press attention, and calls from governments and NGOs to reverse this decision. In view of this the Commissioner considers there to be a strong public interest in the disclosure of the information to provide transparency and insight into how these revisions to the statement were made. Given the controversial nature of these changes, allied to the limited public interest in maintaining the exemption, the Commissioner has therefore concluded that the public interest favours disclosure of the information caught by this exemption.

Section 27 – international relations

42. The FCDO withheld some of the requested information on the basis of sections 27(1)(a), (c) and (d) of FOIA which state that:

“(1) 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...
- (c) the interests of the United Kingdom abroad, or
- (d) the promotion or protection by the United Kingdom of its interests abroad.”

43. In order for a prejudice based exemption, such as section 27(1), 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.

The FCDO's position

44. The FCDO argued that the effective conduct of international relations depends upon maintaining trust and confidence between governments. This relationship of trust allows for the free and frank exchange of information on the understanding that it will be treated in confidence. It argued that if the UK does not respect such confidences, its ability to protect and promote UK interests through international relations will be hampered. It also argued that disclosure of some of the information would harm the UK's relations with individual countries and UK interests abroad more widely.
45. The FCDO provided the Commissioner with further specific submissions to support its application of section 27(1), some of which it considered to be confidential, and therefore only some of these are set out below: The FCDO argued that ultimately, the revised statement removed references to a number of gender related issues, including sexual and reproductive health and rights. It also argued that it was important to note that the original statement had been agreed by 21 countries and, when it was edited and a revised version shared, many of those countries did not respond by the requested deadline to add their support to the revised statement.

The complainant's position

46. The complainant argued that the damage had already been done to the UK's reputation by the decision to issue a revised version of the statement given that some countries had objected to this revised statement. He argued that disclosure of the withheld information revealing how these changes were made would be unlikely to result in any further damage to the UK's international relations.

The Commissioner's position

47. In terms of the first criterion set out above, the Commissioner accepts that the type of harm that the FCDO believes would occur if the information was disclosed is applicable to the interests protected by sections 27(1)(a), (c) and (d) of FOIA.
48. In terms of the second criterion, the Commissioner is prepared (just) to accept that there is a causal relationship between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. However, the Commissioner is not persuaded that the risk of any such prejudice occurring is one that is anything more than hypothetical. In reaching this conclusion the Commissioner has carefully considered the nature of the confidential submissions provided to him by the FCDO. However, the Commissioner

is conscious that the amount of information withheld by the FCDO on the basis of this exemption is very limited, and arguably devoid of the some of the wider context and factors set out in the FCDO's submissions. As a result, in the Commissioner's view there is only a remote possibility of prejudice occurring if this specific information was disclosed. Therefore, the Commissioner does not accept that the threshold of "would be likely to prejudice" is met and sections 27(1)(a), (c) and (d) are therefore not engaged.

Section 40 – personal data

49. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
50. In this case the relevant condition is contained in section 40(3A)(a)⁷. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
51. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
52. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

53. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

54. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
55. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or

⁷ As amended by Schedule 19 Paragraph 58(3) DPA.

more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

56. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
57. The complainant explained that he had specially designed his request to exclude personal information of individuals but rather only sought confirmation as to where the individual(s) that made any changes worked. In his view provision of such information would not result in any individuals being identified As it would not be possible to identify any individuals concerned by simply confirming their workplace.
58. The FCDO confirmed that several different individuals tracked changes on the various versions of the statements. The FCDO set out in confidential submissions to the Commissioner how disclosure simply of where such individuals worked could still lead to their identification.
59. The ICO's guidance on section 40 explains that in determining whether information is personal data in scenarios such as this, a "motivated interest test" should be applied.⁸ That is to say, public authorities need to consider how the actual identification could take place. This will involve any practical steps and the means reasonably likely to be used by someone who is motivated to identify the people to whom the information relates to.
60. Having considered the FCDO's submissions, and considered the nature of the material withheld on the basis of section 40(2), the Commissioner is not persuaded that disclosure of the information would be likely to result in the identification of any individual. It is not clear to the Commissioner the practical steps that an individual would need to take to do so, and how reasonably likely identification therefore is. The Commissioner has elaborated on his reasoning for reaching this conclusion in a brief confidential annex which will be provided to the FCDO only.
61. In light of the above, the Commissioner does not accept that revealing location (or locations) where the individuals in question worked is personal data and therefore such information is not exempt from disclosure on the basis of section 40(2) of FOIA.

⁸ <https://ico.org.uk/for-organisations/foi/section-40-and-regulation-13-personal-information/part-one-is-the-request-for-personal-data/>

Right of appeal

62. 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

63. 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.
64. 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