

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 14 March 2011

Public Authority: The Foreign and Commonwealth Office
Address: Old Admiralty Building
London
SW1A 2PA

Summary

The complainant requested documents held by the Foreign and Commonwealth Office (FCO) which are authored or owned by a named individual and contain the word "Iraq". The FCO released five documents in redacted form and withheld one in full, citing the exemptions in sections 27 (international relations), 40 (personal information) and 43 (commercial interests). Having investigated, the Commissioner has decided that the information withheld under section 43 was not within the scope of the request. He also found that the information to which sections 27 and 40 was applied was correctly withheld. However, he identified a series of procedural shortcomings on the part of the public authority relating to delay and failure adequately to specify exemptions. He requires no steps to be taken.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. The complainant wrote to the Foreign and Commonwealth Office (FCO) on 18 December 2009 with the following request:

"This is a request for information under the Freedom of Information Act 2000 and the Environmental Information Regulations 2004.

Please send me all documents authored or 'owned' by Robert (Rob) Sherwin, dated between 1 October 2005 and 31 March 2008, which contain the word 'Iraq'.

During that period, Mr Sherwin was Middle East Energy Adviser, in the FCO's Climate Change and Energy Group."

3. The FCO's reply of 15 February 2010 confirmed it held information within the scope of the request, namely:
 - a report of two conferences and an FCO meeting, reporting views on Iraq's energy sector, dated 06 June 2006 (document 1);
 - an email exchange entitled "Iraq: readout of meeting with IRMO on Environment", dated 11 April 2006 (document 2);
 - a document entitled "Comments on Draft Iraq hydrocarbons Law", dated 17 December 2006 (document 3);
 - an email exchange entitled "Recent report about all-in-one oil contracts" dated 23 May 2006 (document 4);
 - a document entitled "Notes on CWC's 'NOC_IOC Retreat 2006'" (document 5).
4. The FCO disclosed some information to the complainant. However, it withheld some other information in documents 1, 2, 3 and 5 under section 27(1) of the Freedom of Information Act 2000 ('the Act'). It also withheld some information in document 4 citing section 43(2) of the Act. It explained that minor redactions had also been undertaken where the information was the personal data of junior officials and not relevant to the request.
5. The FCO told the complainant that it held one other document containing information relevant to his request (document 6) in which two bullet points refer to Iraq. It withheld this information in full citing section 27(1) of the Act.
6. The complainant requested an internal review on 23 March 2010. In this correspondence, he requested a review of all the redactions in documents 1 and 3, and some of the redactions in documents 4 and 5. He confirmed he was not challenging the redactions in document 2 or the withholding of document 6.
7. The complainant asked the FCO to explain why it had redacted the names of individuals in the documents it had disclosed to him. He argued that he was requesting only the names of British and Iraqi public officials who:

"substantively participated in debates on Iraqi oil policy, and thus not those who would have a reasonable expectation of privacy in regard to their expectation".

8. The FCO upheld its decision in an internal review which was sent to the complainant on 27 May 2010. At that stage, it clarified that personal information in the released documents was withheld under section 40(2) of the Act.

The Investigation

Scope of the case

9. The complainant contacted the Commissioner on 27 May 2010 to complain about the way his request for information had been handled. He asked the Commissioner whether his request has been considered under the correct regime. He noted that, in his original request, he had stated that it was being made under both the Freedom of Information Act and the Environmental Information Regulations.
10. The complainant confirmed that the scope of his complaint was only with respect to specific redactions within documents 1, 3, 4 and 5. He clarified this further on 8 February 2011.
11. Having viewed the withheld information in the document described as Document 4, the Commissioner considers this information is not relevant to the request as it does not concern Iraq.
12. The FCO confirmed during the course of the Commissioner's investigation that it was no longer withholding information within document 5. Accordingly it released an un-redacted copy of document 5 to the complainant.
13. The Commissioner has viewed the redacted information in dispute and applied the test as to whether the withheld information itself falls within the definition of environmental information. The Commissioner has concluded that the withheld information is not in itself environmental albeit the context relates to environmental matters. In any event, given the exemptions applied, which have direct equivalent exceptions in EIR, the Commissioner does not consider this has any impact on the outcome.
14. The Commissioner therefore considers the scope of his investigation to be with respect to the specified redactions in documents 1 and 3. The FCO has cited sections 27(1) and 40 with respect to these redactions.

Chronology

15. The Commissioner wrote to the FCO on 7 January 2011 asking it for further explanation of its reasons for citing sections 27 and 40 in relation to the request, including its reasons for concluding that the public interest in maintaining the exemptions outweighed the public interest in disclosure of the information requested.
16. The FCO responded on 8 February 2011. In this correspondence, it clarified which subsections of the exemption in section 27(1) it was relying on, citing both (a) and (d). It confirmed that it was withholding the personal information of junior officials under section 40.

Analysis

Exemptions

Section 27 International relations

17. Section 27(1) focuses on the effect of disclosure and provides that information is exempt if its disclosure would, or would be likely to prejudice:
 - (a) relations between the United Kingdom and any other State;
 - (b) relations between the United Kingdom and any other international organisation or international court;
 - (c) the interests of the United Kingdom abroad; and
 - (d) the promotion or protection by the United Kingdom of its interests abroad.

Engagement of the exemption

The applicable interests

18. In order for section 27(1) to be engaged, the FCO must show that the disclosure would, or would be likely to, prejudice the stated interest. As the FCO is relying on subsections (a) and (d), the Commissioner has only considered as relevant those arguments about whether or not disclosure of the withheld information could be prejudicial either to relations between the United Kingdom and any other State, or to the promotion or protection by the United Kingdom of its interests abroad.

The nature of the prejudice

19. The Information Tribunal in *Hogan* (EA/2005/0026 and EA/2005/0030) commented:

"An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and the prejudice is, as Lord Falconer of Thoroton has stated "real, actual or of substance" (Hansard HL (VOL. 162, April 20, 2000, col. 827))".

20. When making his assessment regarding the prejudice test, the Commissioner must consider not only whether the prejudice identified can be said to have a real, detrimental or prejudicial effect but also whether or not the nature of the prejudice can be adequately linked back to the disclosure of the information in question.
21. In this case, the FCO has argued that releasing the withheld information is likely to harm *"the UK's relationships with at least one other state"* and UK interests abroad. It provided the Commissioner with further details in support of its arguments.

The likelihood of prejudice

22. With regard to the likelihood of prejudice, the FCO told the complainant that release, in this case, *"would be likely to prejudice"* relations between the UK and at least one other State. During the Commissioner's investigation, it provided its arguments with respect to the harm to the promotion or protection by the UK of its interests abroad.
23. Although restricted in what he is able to say because of the nature of the withheld information, having duly considered the arguments put forward by the FCO, the Commissioner's view is that the level of 'likelihood' has been demonstrated. It follows that he finds the exemption engaged and he has carried this lower level of 'likelihood' through to the public interest test.

Public interest test

Public interest arguments in favour of disclosing the requested information

24. The FCO acknowledged the general public interest in greater transparency in how Government operates and in demonstrating the methods and types of communication it conducts with other States. It also told the complainant that open policy making:

"may lead to increased trust and engagement between citizens and government."

25. In correspondence with the FCO, the complainant expressed concern that these were generic public interest issues.

26. Arguing in favour of disclosure, the complainant expressed the view that there is considerable public interest in releasing information relating to the war in Iraq and specifically to the issue of oil in Iraq. He provided the FCO with comprehensive arguments in support of this view, including with respect to the public interest in knowing the extent and content of the UK government's discussions regarding Iraqi oil.

27. The complainant also brought to the FCO's attention the argument that changing events may cause international relationships to vary over time. In particular, he argued that:

"the fact that the UK no longer now has military forces in Iraq makes a fundamental difference to how the Iraqi government sees Britain, from occupation power, to simply another nation with which it has relations."

28. In the complainant's view, compared with other issues affecting UK-Iraq relations, damage to the relationship of trust, as a result of releasing the requested information, *"would be at most slight"*.

Public interest arguments in favour of maintaining the exemption

29. The FCO argued that, in the course of international relations with other States:

"the Government receives information on an informal and often confidential basis from a range of sources. It is in the government's interests to maintain these relationships".

30. Accordingly, the FCO told the complainant that, in its view, it was in the public interest to maintain the exemption. The complainant

challenged this view, describing the public interest in maintaining the exemption as "modest".

31. In support of its decision not to disclose the withheld information, the FCO told the Commissioner that the effect of disclosure in this case would be likely to impact on the willingness of others to share their thinking with HM Government.
32. In correspondence with the Commissioner, the FCO also addressed the issue raised by the complainant about the passage of time. It acknowledged the argument that the passage of time may reduce the sensitivity of information held by HM Government, such as information relating to policy development by foreign governments. However, the FCO told the Commissioner that, in this case, the information remained of a sensitive nature.

Balance of the public interest arguments – relations between the United Kingdom and any other State

33. As the FCO is citing multiple limbs of the exemption, the Commissioner has considered separately, in the case of each limb, whether the public interest in maintaining the exemption outweighs the public interest in disclosure. In doing so, he notes that, in this case, the public interest arguments put forward by the FCO in relation to section 27(1)(a) are broadly similar to those cited in relation to section 27(1)(d).
34. The Commissioner has considered, firstly, the public interest arguments in respect of relations between the United Kingdom and any other State.
35. The Commissioner considers that, when applying the public interest test to information withheld under section 27(1), the content of the information is likely to have a significant bearing on the decision of whether to disclose. There must be some detriment to the public interest arising from disclosure for the balance of the test to justify maintaining the exemption.
36. The Commissioner gives significant weight to the consideration that releasing the information would inform public debate and promote understanding of international affairs. However, he is also conscious that he has already accepted that the nature of the prejudice is not "trivial or insignificant".
37. The Commissioner accepts that it is strongly in the public interest that the UK enjoys effective relations with foreign States. The public interest would obviously be harmed if these relationships were negatively impacted, through either information ceasing to be provided or the nature of discussions becoming less candid. He considers this to

be especially true given the issues involved in this case and the likely harm if disclosure compromises foreign policy issues or makes international relations more difficult.

38. In conclusion, the Commissioner recognises the strength of the arguments on both sides of the public interest test; however, he has concluded that the public interest favours maintaining the exemption.
39. In reaching this decision, he has noted, in particular, the strength of the public interest in avoiding unnecessary prejudice to the relations between the UK and any other State and he considers that the public interest is ultimately best served by ensuring the UK can openly discuss and freely receive information on this and other matters in the future.

Balance of the public interest arguments – the promotion or protection by the United Kingdom of its interests abroad

40. The FCO is citing section 27(1)(d) in relation to the same information for which it is citing section 27(1)(a). As he has found the section 27(1)(a) arguments in favour of maintaining the exemption persuasive, the Commissioner has not gone on to consider the public interest arguments in relation to section 27(1)(d).
41. However, in the Commissioner's opinion the public interest in maintaining section 27(1)(a) cannot be seen in isolation. The public interest in the UK having strong relations with other States is in reality a means to an end, the end being the ability of the UK to protect and promote its interests abroad.

Section 40 Personal information

42. In correspondence with the Commissioner, the FCO clarified that it was citing section 40 only in relation to the names of junior officials. It told him that it considered that the names of junior officials are not relevant to the request and had therefore been redacted. It confirmed that the name of their department / post had not been redacted.
43. The Commissioner has issued guidance on the question of when the names of staff, officials, elected representatives or third parties acting in a professional capacity should be released in response to an access request.

http://www.ico.gov.uk/~media/documents/library/Freedom_of_Information/Practical_application/WHENSHOULDNAMESBEDISCLOSED.ashx

44. In his view, the main consideration is whether it would be fair in all the circumstances to identify an individual. When considering whether an

individual would expect their role to be subject to public scrutiny, the Commissioner considers it appropriate to take account of the following factors:

- how senior they are;
 - whether they have a public profile; and
 - whether their role requires a significant level of personal judgement and individual responsibility.
45. With respect to the names of junior officials being withheld by the FCO in this case, the Commissioner has decided, in line with his guidance, that it would be not be fair for the personal information of those individuals to be disclosed as there is no evidence that their role requires a significant level of personal judgement and individual responsibility or that they have a public profile. He therefore finds the information was correctly withheld.

Procedural Requirements

Section 10 - Time for compliance

46. Section 10(1) of the Act provides that:

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

47. In this case, the complainant made his request for information on 18 December 2009 but the FCO did not issue its refusal notice until 15 February 2010. In failing to confirm to the complainant that it held information falling within the request within the statutory timescale, the Commissioner finds the FCO in breach of section 10(1) of the Act.

Section 17 Refusal of request

48. In failing to issue its refusal notice within the statutory timescale, the FCO also breached section 17(1) of the Act.
49. Section 17(1)(b) places an obligation upon the public authority that its refusal notice *"specifies the exemption in question"*. The Commissioner's view is that the public authority is thereby required to refer to the specific part(s) of the relevant exemption(s). In not specifying the subsections of section 27 it was relying on, the FCO failed to comply with the requirement of section 17(1)(b).

The Decision

50. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- it correctly withheld information in accordance with section 27(1);
 - it correctly withheld information in accordance with section 40(2).
51. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- the public authority failed to comply with the requirement of section 10(1) in failing to provide confirmation or denial within 20 working days of receipt of the request, and sections 17(1) and 17(1)(b) in issuing an inadequate and late refusal notice.

Steps Required

52. The Commissioner requires no steps to be taken.

Other matters

53. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern. Part VI of the Act's section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his 'Good Practice Guidance No 5', the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days, and as a matter of good practice the public authority should explain to the requester why more time is needed.
54. In this case the complainant's internal review request was made on 23 March 2010 and the FCO issued its decision on 27 May 2010. The Commissioner does not believe that any exceptional circumstances

existed in this case to justify that delay, and he therefore wishes to register his view that the FCO fell short of the standards of good practice in failing to complete its internal review within a reasonable timescale. He would like to take this opportunity to remind the FCO of the expected standards in this regard.

Right of Appeal

55. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

56. 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.

57. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 14th day of March 2011

Signed

**Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

General Right of Access

Section 1(1) provides 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."

Time for Compliance

Section 10(1) provides that –

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

International Relations

Section 27(1) provides 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,
- (b) relations between the United Kingdom and any international organisation or international court,
- (c) the interests of the United Kingdom abroad, or
- (d) the promotion or protection by the United Kingdom of its interests abroad."

Personal information.

Section 40(1) provides that –

"Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject."

Section 40(2) provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

Section 40(3) provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”