

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 November 2017

Public Authority: Foreign and Commonwealth Office
Address: King Charles Street
London
SW1A 2AH

Decision (including any steps ordered)

1. The complainant submitted a request to the Foreign and Commonwealth Office (FCO) for information about two television programmes, 'BBC Panorama: Rescued from a Forced Marriage' and 'KEO Films for BBC3: Bangkok Airport'. The FCO disclosed some information falling within the scope of this request but withheld further information on the basis of sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) (effective conduct of public affairs) and section 40(2) (personal data) of FOIA. The Commissioner has concluded that the FCO is entitled to rely on all of these exemptions in the manner in which it has. However, the Commissioner has concluded that the FCO breached section 10(1) of FOIA by failing to disclose the non-exempt information within 20 working days.

Request and response

2. The complainant submitted the following to request to the FCO on 1 June 2016:
'I request that all available documents on the programs 'BBC Panorama: Rescued from a Forced Marriage' and 'KEO Films for BBC3: Bangkok Airport' be released to me.'
3. The FCO responded to this request on 29 June 2016 and refused to answer it on the basis of section 14(1) of FOIA (vexatious).

4. Following an internal review of this request, the FCO informed the complainant on 8 August 2016 that it remained of the view that section 14(1) applied.
5. The complainant subsequently complained to the Commissioner about the FCO's reliance on section 14(1) of FOIA. During the course of the Commissioner's investigation of this complaint the FCO withdrew its reliance on section 14(1). Instead on 22 March 2017 it contacted the complainant and confirmed that it held information falling within the scope of the request but it considered this to be exempt from disclosure on the basis of section 36 of FOIA and that it needed additional time to consider the balance of the public interest.¹
6. The FCO provided the complainant with a substantive response to his request on 17 July 2017. The FCO disclosed some information to the complainant but sought to withhold the remainder on the basis of the exemptions contained at sections 36(2)(b) and (c) (effective conduct of public affairs) and section 40(2) (personal data) of FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 17 July 2017 in order to complain about the FCO's decision to withhold information on the basis of sections 36 and 40 of FOIA.

Reasons for decision

Section 36 – effective conduct of public affairs

8. The FCO argued that parts of the withheld information were exempt from disclosure on the basis of sections 36(2)(b)(i), (ii) and (c) of FOIA. These sections state that:

'(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act...

(b) would, or would be likely to, inhibit-

(i) the free and frank provision of advice, or

¹ The Commissioner has previously issued a decision notice, [FS50641158](#), which ordered the FCO to provide the complainant with a substantive response to this request.

(ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs'

9. In this case the Secretary of State for Foreign and Commonwealth Affairs provided the opinion in relation to the application of sections 36(2)(b) and (c). The Commissioner is satisfied that the Secretary of State is a qualified person for the purposes of section 36.
10. In determining whether these exemptions are engaged the Commissioner must determine whether the qualified person's opinion was a reasonable one. In doing so the Commissioner has considered all of the relevant factors including:
 - Whether the prejudice relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection the opinion is unlikely to be reasonable.
 - The nature of the information and the timing of the request, for example, whether the request concerns an important ongoing issue on which there needs to be a free and frank exchange of views or provision of advice.
 - The qualified person's knowledge of, or involvement in, the issue.
11. Further, in determining whether the opinion is a reasonable one, the Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only not reasonable if it is an opinion that no reasonable person in the qualified person's position could hold. The qualified person's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.
12. In respect of the exemptions contained at section 36(2)(b) the qualified person argued that the withheld information contained details of frank discussions about the FCO's involvement with the two programmes referenced in the request. The qualified person argued that disclosure of this information would have an inhibiting effect on similar discussions in the future. In terms of section 36(2)(c), the qualified person argued that disclosure of parts of the withheld information would also undermine the work and effectiveness of Forced Marriage Unit (FMU) and its ability to help victims in the future.

13. The Commissioner accepts that the qualified person's opinion is a reasonable one. In terms of section 36(2)(b) the withheld information clearly contains free and frank discussions about the FCO's involvement in the two programmes cited in the request. The Commissioner accepts that it is reasonable to argue that disclosure of this information could potentially have an inhibiting effect on similar discussions in the future. In terms of section 36(2)(c) having reviewed the withheld information the Commissioner is satisfied it clearly contains significant details about how the FMU operates. The Commissioner accepts that given the specific nature of these details it is reasonable to argue that disclosure of this information could undermine the effectiveness of the FMU either by undermining its working methods and/or by discouraging vulnerable individuals to contact the unit. The Commissioner is therefore satisfied that the exemptions contained at sections 36(2)(b)(i) and (ii) and section 36(2)(c) are engaged.

Public interest test

14. Section 36 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemptions cited outweighs the public interest in disclosing the information.
15. The FCO argued that there was a strong public interest in protecting the space Ministers and officials have to consider and discuss options to ensure that full and proper consideration can be given when making decisions and agreeing policy. The FCO further argued that an impact on the candour of these discussions would have a negative impact on the quality of decision making, which is clearly not in the public interest. Furthermore, the FCO argued that it was very clearly against the public interest to undermine the effectiveness of the FMU and related work carried out by Consular staff overseas.
16. In considering complaints regarding section 36, where the Commissioner finds that the qualified person's opinion was reasonable, she will consider the weight of that opinion in applying the public interest test. This means that the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would, or would be likely to, occur but she will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming her own assessment of whether the public interest test dictates disclosure.
17. With regard to attributing weight to chilling effect arguments, the Commissioner recognises that civil servants are expected to be robust and impartial when giving advice. They should not easily be deterred from expressing their views by the possibility of future disclosure. Nonetheless, chilling effect arguments cannot be dismissed out of hand. If the decision making which is the subject of the requested information

is still live, the Commissioner accepts that arguments about a chilling effect on those ongoing discussions are likely to carry significant weight. Arguments about the effect on closely related decisions or policies may also carry weight. However, once the decision making 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.

18. In the circumstances of this case it is clear that the decision making in question, namely the FCO's involvement in the two BBC programmes quoted in the request, was completed at the point the complainant submitted his request given that the programmes had been broadcast. That said, the Commissioner accepts that the FCO could be approached by broadcasters in the future with propositions about other potential programmes. Therefore, the Commissioner accepts that the FCO may need to be engaged in similar discussions about being involved in television programmes in the future. Furthermore, the Commissioner accepts that the information withheld on the basis of section 36(2)(b) does genuinely contain frank assessments of some of the issues related to working with television production companies and as a result the risk of a chilling effect on similar discussions in the future should not be underestimated. Consequently, in the Commissioner's view the public interest in maintaining the exemptions contained at sections 36(2)(b)(i) and (ii) attracts some weight.
19. In terms of section 36(2)(c), in the Commissioner's view given the nature of the information withheld under this exemption and given the sensitive nature of the work the FMU undertakes, and indeed the vulnerable position of individuals who seek the unit's help, there is a real and significant risk of the FMU's work being harmed if this information was disclosed. As a result the Commissioner believes that there is a significant public interest in maintaining this exemption.
20. With regard to the public interest arguments in favour of disclosure the Commissioner recognises that disclosure of this information would provide a greater insight into the factors the FCO takes into account when deciding whether to engage with broadcasters making programmes which touch upon the FCO's area of work. The Commissioner accepts that there is a public interest in the disclosure of this information to aid transparency about the FCO's decision making processes. Furthermore, disclosure of the information withheld on the basis of section 36(2)(c) would provide the public with a greater insight into the FCO's work in relation to the issue of forced marriage which again the Commissioner accepts would be in the public interest.
21. Nevertheless, in relation to both exemptions the Commissioner has concluded that the public interest favours withholding the information. In relation to section 36(2)(b), she has concluded that the public

interest favours maintaining the exemption by a relatively narrowly margin. She accepts that there is a genuine public interest in the disclosure of this information in order to shed further light into the decision making process. The fact that the decision making in question covered by the information itself is no longer live, reduces to some extent the chilling effect risks, albeit that there remains some risk to the candour of similar discussions in the future if this information was disclosed. However, in relation to section 36(2)(c) the Commissioner believes that the public interest firmly favours maintaining this exemption given the genuine and real risk to the work of the FMU.

Section 40(2) – personal data

22. Section 40(2) of FOIA states that personal data is exempt from disclosure if its disclosure would breach any of the data protection principles contained within the Data Protection Act 1998 (DPA).

23. Personal data is defined in section (1)(a) of the DPA as:

'.....data which relate to a living individual who can be identified from those data or from those data and other information which is in the possession of, or likely to come into the possession of, the data controller; and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any person in respect of the individual.'

24. The FCO withheld the names of junior FCO staff and their contact details both within the UK and in posts abroad, and similar information about staff of other government departments. The Commissioner accepts that such information constitutes personal data within the meaning of section 1 of the DPA as they clearly relate to identifiable individuals.

25. The FCO argued that disclosure of such information would breach the first data protection principle which states that:

'Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.'

26. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:

- The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
 - what the public authority may have told them about what would happen to their personal data;
 - their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights (ECHR);
 - the nature or content of the information itself;
 - the circumstances in which the personal data was obtained;
 - any particular circumstances of the case, eg established custom or practice within the public authority; and
 - whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.
 - The consequences of disclosing the information, ie what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor the Commissioner may take into account:
 - whether information of the nature requested is already in the public domain;
 - if so the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?
27. Furthermore, notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling legitimate interest in disclosure to the public.
28. In considering 'legitimate interests', in order to establish if there is a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sake, as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to consider a proportionate approach.

29. The FCO explained that it had a clear policy, which mirrored that adopted by other government departments, that the names of junior officials and their contact details would not be released under FOIA and therefore the individuals in question had a reasonable expectation that their names and contact details would not be released into the public domain.
30. The Commissioner is satisfied that the junior officials would have a reasonable expectation in the circumstances of this case, based upon established custom and practice, of their names and contact details being redacted from any disclosures made under FOIA and thus the disclosure of such information would be unfair and breach the first data protection principle. This information is therefore exempt from disclosure on the basis of section 40(2) of FOIA.

Section 10 – time for compliance

31. Section 1(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.'

32. Section 10(1) of FOIA requires a public authority to comply with section 1(1) promptly and in any event within 20 working days.
33. In the circumstances of this case the complainant submitted his request on 1 June 2016. The FCO did not provide him with the information with it was prepared to disclose until 17 July 2017. The FCO's delay in disclosing this information represents a breach of section 10(1) of FOIA.

Right of appeal

34. 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@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

35. 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.
36. 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

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