

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 20 December 2010**

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

### Summary

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The complainant made an information request on 9 March 2009 for "all correspondence and documents regarding the meeting this February of the First Minister of Scotland, Alex Salmond, with the US Secretary of State, Hillary Clinton". The public authority provided most of the information it held but withheld the small remainder, relying on sections 27, 28 and 35 of the Act to do so. After considering the withheld information the Commissioner's decision is that the information was correctly withheld by virtue of sections 27 and 28 of the Act.

### The Commissioner's Role

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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.

### Background

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2. Under the Concordat<sup>1</sup> on International Relations between the Government in Westminster and the Scottish Government, the Secretary of State for Foreign and Commonwealth Affairs is responsible

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<sup>1</sup> <http://www.scotland.gov.uk/Publications/1999/10/MofU#D>

for the foreign policy of the United Kingdom. But the Foreign and Commonwealth Office (the public authority) is also tasked with the promotion of the international interests of the United Kingdom and all its constituent parts. Therefore the United Kingdom's embassies' work spans different government departments as well as the various Administrations in the UK (e.g. the Scottish Government) as well as the Westminster Government.

Alex Salmond, as First Minister of Scotland, met Hillary Clinton, the US Secretary of State, during his two-day visit to the United States of America in February 2009.

## **The Request**

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3. The complainant made an information request to the public authority", on 9 March 2009, for "all correspondence and documents regarding the meeting this February of the First Minister of Scotland, Alex Salmond, with the US Secretary of State, Hilary Clinton". The public authority, in a letter dated 6 May 2009, acknowledged receipt of the information request and informed the complainant that they required extra time (as permitted by the Act) to consider its application of the public interest test.
4. The public authority disclosed some information (on 2 July 2009) but withheld further information from the complainant by reference to sections 27, 28, 35 and 40 of the Act. The complainant requested (on 15 July 2009) the public authority to conduct a review of its decision. The undertaken review upheld the public authority's original decision. These findings were conveyed to the complainant under cover of a letter dated 11 March 2010.

## **The Investigation**

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### **Scope of the case**

5. On 10 June 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled by the public authority. He stated that though his request for information, made on 9 March 2009, had been acknowledged by the public authority it had yet to provide him with its substantive reply. As a consequence of this letter the Commissioner wrote to the public authority, on 17 June 2009, regarding its obligations under the Act

6. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

## **Chronology**

7. On the 17 September 2009, the Commissioner requested the public authority to provide him with a copy of the withheld information; this they did under cover of a letter dated the 19 October 2009. On 12 March 2010 the Commissioner wrote to the public authority to provide it with an opportunity to fully argue its reliance on the exemptions not to communicate the withheld information to the complainant. The public authority, in a letter dated 1 July 2010, provided its substantive response to the Commissioner. The public authority explained that the Commissioner's letter had prompted it to review the matter once again and that consequently it intended to release further information to the complainant. Additionally the public authority restated or clarified its reliance on the exemptions and, where appropriate, its consideration of the public interest test as required by section 2 of the Act. The public authority informed the Commissioner that on reconsidering the matter it no longer relied on section 40(2) to redact the names of officials from the emails it had released to the complainant. Under cover of a letter dated the 26 August 2010 the public authority released the further information to the complainant.

## **Analysis**

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### **Exemptions**

8. Ultimately the public authority withheld a relatively small amount of information in a number of emails that it had otherwise disclosed to the complainant. In doing so it relied on the exemptions provided by sections 27(1) (a), 28 (2), and 35 of the Act.

### **Section 27**

9. Section 27(1) of the Act 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,
- (d) the promotion or protection by the United Kingdom of its interests abroad."

10. The public authority describes the information withheld by reference to section 27(1)(a) as being open and frank conversations between FCO staff and their counterparts, a conversation between the Foreign Secretary's Private Office and a British Ambassador and a reference to a meeting of Alex Salmond which contained sensitive exchanges.
11. The public authority has failed to specify whether the prejudice specified in section 27 would or would be likely to occur. The Commissioner's view, having regard to the dicta of the Information Tribunal in *McIntyre v The Information Commissioner and the Ministry of Defence (EA/2007/0068)*, is that where a public authority has failed to specify the level of prejudice at which an exemption has been engaged the lower threshold of "likely to prejudice" should be applied, unless there is clear evidence that it should be the higher level. The Commissioner therefore next considered whether the releasing of information would be likely to prejudice the relations between the United Kingdom and any other State.
12. The Information Tribunal (*Hogan and Oxford City Council v Information Commissioner (EA/2005/0026)*) commented at paragraph 30 that "...the nature of the 'prejudice' being claimed must be considered. An evidential burden rests with the ... (public authority)... to be able to show that some causal relationship exists between the potential disclosure 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)*). If the public authority is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be rejected."
13. The Commissioner notes that a fuller extract of the quote from Lord Falconer of Thoroton is, "Finally, on the subject of exemptions, I want to emphasise the strength of the prejudice test. Prejudice is a term used in other legislation relating to the disclosure of information. It is a term well understood by the courts and the public. It is not a weak test. The commissioner will have the power to overrule an authority if she feels that any prejudice caused by a disclosure would be trivial or insignificant. She will ensure that an authority must point to prejudice which is 'real, actual or of substance'."
14. The Commissioner's view of this is that the choice of the term "prejudice" implies not just that the disclosure of information must have some effect on the applicable interest, but that this effect must be detrimental or damaging in some way. If a "trivial or insignificant" prejudice is claimed then it is questionable whether any detriment or actual prejudice to the interest being protected has truly been identified.

15. In considering the nature of prejudice which this exemption is designed to prevent, the Commissioner is also guided by the following comments of the Information Tribunal (Campaign against the Arms Trade v The Information Commissioner and Ministry of Defence [EA/2006/0040]) in respect of section 27:

"...we would make clear that in our judgement prejudice can be real and of substance if it makes relations more difficult or calls for particular diplomatic response to contain or limit damage which would not otherwise have been necessary. We do not consider that prejudice necessarily requires demonstration of actual harm to the relevant interests in terms of quantifiable loss or damage."

16. The public authority maintains that to release the withheld information would be likely to prejudice relations between the United Kingdom and another State, in this instance the United States of America. Having read and considered the withheld material the Commissioner finds that the information is of a sensitive nature and the United States of America would not expect it to be disclosed publicly. The Commissioner also accepts there would be a need for a diplomatic response to limit damage to the United Kingdom's relationship of trust with the United States of America if the information was disclosed. The Commissioner therefore finds that the exemption is engaged. Though the exemption is engaged it is subject to the public interest test; that is the public interest in maintaining the exemption must outweigh the public interest in disclosing the information to justify the public authority refusal to disclose it. The Commissioner therefore next considered the public interest arguments, for and against release, advanced by the public authority and the complainant.

17. **Public interest arguments in favour of disclosing the withheld information:**

- There is a presumption in favour of disclosure under the Act.
- Disclosure would increase public awareness of the breadth of work undertaken by the British Embassy on behalf of the UK and its taxpayers.
- Disclosure would provide an insight into some of the processes and negotiations that are involved in arranging ministerial visits.
- Disclosure would reveal how ministerial visits are handled and the effort that goes in to supporting them.

- Disclosure would increase the level of confidence of the public in government officials by showing their knowledge base of contacts within the United States administration.
- Disclosure would increase awareness of how diplomatic skills are applied to deal with sensitive issues of protocol in public affairs.
- Disclosure would provide added transparency about and relating to US/UK international relations which may inspire public confidence.

18. **Public interest arguments in favour of maintaining the exemption**

Disclosure would heighten sensitivities as to the UK's ability to protect confidential information.

- Disclosure would reduce the likelihood of being able to secure high-level calls on US interlocutors<sup>2</sup> due to their fear that confidentiality may not be respected and matters may not remain confidential.
- Releasing sensitive information about UK diplomatic activity would likely and unnecessarily compromise the reputation for discretion of the diplomats involved.

19. **Balance of Public Interest Arguments**

The Commissioner gives significant weight to the considerations that releasing the information would facilitate the public's appraisal as to role of the public authority in Alex Salmond's visit to the United States of America. However he is also conscious that the exemption has been engaged because he has already accepted that the nature of the prejudice is not "trivial or insignificant" (see paragraph 14 above). In addition the Commissioner finds particularly persuasive the fact that the efforts of individual diplomats and UK diplomats generally would be compromised if the information were released. The Commissioner is of the view that it would damage the UK's reputation for discretion within the diplomatic community and therefore damage the UK's ability to work effectively with the United States of America in future.

20. In this particular instance the Commissioner's view is therefore that the public interest in maintaining the exemption, to avoid the prejudicing of the relationship between the United Kingdom and another country,

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<sup>2</sup> A person who informally explains the views of a government and may also relay messages back to his/her government.

outweighs those public interest factors favouring release of the withheld information.

21. The Commissioner next considered the very small amount of withheld information that cannot be withheld by reference to section 27(1). This information is being withheld by reference, first, to section 28 of the Act.

### **Section 28**

22. Section 28(1) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice relations between any administration in the United Kingdom and any other such administration.”

23. The information withheld by reference to section 28(1) is advice and comments from the public authority's staff on the co-ordination of Scottish Government and United Kingdom matters in the context of foreign affairs. The public authority maintain that the withheld information comprises internal public authority advice on the co-ordination of Scottish Government policies and those of the Government in Westminster, as well as communications between HM Ambassador in Washington / Director of Americas in London and the Foreign Secretary's Office. This is, the public authority maintains, particularly sensitive given the different political parties and policies involved and the release of the information would erode the working relations between the public authority and the Scottish Executive.
24. As with its application of section 27, the public authority has failed to specify whether the prejudice specified in section 28(1) would or would be likely to occur. The Commissioner will therefore (for the reasons detailed in paragraph 12 above) apply the lower threshold of “likely to prejudice”. The Commissioner therefore next considered whether the releasing of the information would be likely to prejudice the relations between any administration in the United Kingdom and any other such administration. In this context the Commissioner notes that sub-section 28(2) of the Act defines ‘Administration in the United Kingdom’ as meaning (a) the government of the United Kingdom, (b) the Scottish Administration, (c) the Executive Committee of the Northern Ireland Assembly or (d) the Welsh Assembly Government.
25. The Commissioner, having read the withheld material, concurs with the analysis of the information by the public authority (laid out above) that disclosing it would be likely to prejudice relations between the Scottish

Administration and the government of the United Kingdom. The exemption though engaged is subject to the public interest test. That is, the public interest in maintaining the exemption must outweigh the public interest in disclosing the withheld information to prevent its release. The Commissioner therefore next considered the public interest arguments, for and against release, advanced by the public authority and the complainant.

**26. Public interest arguments in favour of disclosing the requested information:**

- Disclosure would provide insight into the UK Government's approach towards devolved administration issues in relation to foreign affairs. It would demonstrate how the UK view as regards devolution is considered and promoted as necessary and that interlocutors are clear on UK policy.
- Disclosure would make the public more aware that the British Embassy and the public authority's work extends to coverage of devolved administration issues, and provide an insight into the approach and factors that are considered when dealing with such matters.

**27. Public interest arguments in favour of maintaining the exemption:**

- Disclosure would be likely to hamper UK Government/Scottish relations
- Disclosure would be likely erode the working relationship between the public authority and the Scottish Government

**Balance of Public Interest Arguments**

28. The Commissioner takes cognisance of the fact that, as the exemption is engaged, it is accepted that the release of the information would be likely to prejudice the relations between administrations within the United Kingdom and the potential prejudice to international affairs would be real and substantial. The Commissioner considers there to be a very clear public interest in maintaining good working relationships between the Westminster Government and the Scottish Government and this in itself carries significant, though not decisive, weight in favour of maintaining the exemption. The Commissioner further believes that the public interest arguments for releasing this particular information are not compelling as the release will not overly add to the public's existing knowledge of the public authority's role with the



Scottish Government. Neither will it add to the public's existing knowledge of the United Kingdom government's approach to devolved administration. Therefore there is little in the way of public interest argument in favour of disclosure. For these reasons the Commissioner concludes that the public interest favours the maintenance of the exemption.

### **Remaining exemptions**

29. Since the Commissioner has decided that the public authority properly relied on the exemptions provided by sections 27(1) (a) and 28 to withhold information he did not go on to consider the applicability of section 35.

### **Procedural Requirements**

30. 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.”

31. The Commissioner considers that the public authority has breached section 10(1) and 17(1) of the Act as it failed to respond to the request within twenty working days following the date of receipt of the information request and by its late release of information during the course of the Commissioner's investigation.

### **The Decision**

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32. The Commissioner's decision is that, apart from the procedural breaches recorded in paragraph 30 above, the public authority dealt with the request for information in accordance with the Act.

### **Steps Required**

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33. The Commissioner requires no steps to be taken.

## Other matters

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34. Although they do not form part of this Decision Notice the Commissioner wishes to highlight a matter of concern.
35. The Commissioner has issued guidance regarding the time limits on considering the public interest following requests for information (Good Practice Guidance 4). The Commissioner considers that public authorities should aim to respond fully to all requests within 20 working days. In cases where the public interest considerations are exceptionally complex it may be reasonable to take longer but, in the Commissioner's view, in no case should the total time exceed 40 working days. A full copy of this guidance is available from [www.ico.gov.uk](http://www.ico.gov.uk).
36. The Commissioner has noted that the public authority did not complete its public interest test considerations until 2 July 2009 and thus well in excess of 40 working days post receipt of the request for information.

## Right of Appeal

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37. 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](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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.

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 20<sup>th</sup> day of December 2010**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

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

## Legal Annex

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### 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.”

**Section 17(1)** provides that –

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

**Section 17(2)** states –

“Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-

- (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
  - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2, the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached."

**Section 17(3)** provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

## **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."

## Relations with the United Kingdom

**Section 28(1)** provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice relations between any administration in the United Kingdom and any other such administration.”

**Section 28(2)** provides that –

“In subsection (1) “administration in the United Kingdom” means-

- (a) the government of the United Kingdom,
- (b) the Scottish Administration,
- (c) the Executive Committee of the Northern Ireland Assembly,
- or
- (d) the Welsh Assembly Government.”

## Formulation of Government Policy

**Section 35(1)** provides 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,
- (b) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request or the provision of such advice, or
- (d) the operation of any Ministerial private office.

## Communications with Her Majesty

**Section 37(1)** provides that –

“Information is exempt information if it relates to-

- (a) communications with Her Majesty, with other members of the Royal Family or with the Royal Household, or
- (b) the conferring by the Crown of any honour or dignity.”

**Section 37(2)** provides that –

“The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).”