

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 21 November 2011

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

#### Decision (including any steps ordered)

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1. The complainant requested copies of diplomatic telegrams sent from the UK embassy in Zagreb, Croatia to the Foreign and Commonwealth Office (FCO) between 14 April and 19 April 2011.
2. The Commissioner has concluded the telegrams in question are exempt from disclosure on the basis of the international relations exemption because their disclosure would prejudice the UK's relations with Croatia.

#### Request and response

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3. On 19 April 2011, the complainant wrote to the FCO and requested information in the following terms:

*'Under the FOIA, I would like to see Diplomatic Telegrams sent from the UK Embassy [sic] in Zagreb, Croatia to the FCO from 14th April to 19th April 2011.'*

4. The FCO responded on 20 May 2011 and confirmed that it held information relevant to his request but it considered it to be exempt from disclosure on the basis of sections 27(1)(a) and 27(1)(b) of FOIA.
5. The complainant contacted the FCO on the same day and asked for an internal review of this decision to be taken. The complainant suggested that whilst he could understand why some of the information may be exempt from disclosure he believed that the decision to withhold all of the information was extreme.

6. The FCO informed the complainant of the outcome of the internal review on 30 June 2011; the review upheld the application of both exemptions.

### Scope of the case

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7. On 12 July 2011 the complainant contacted the Commissioner and asked him to consider the FCO's decision to provide the information he requested on the basis of sections 27(1)(a) and 27(1)(b).

### Reasons for decision

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8. Section 27(1) of FOIA states that:

*'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-*

*(a) relations between the United Kingdom and any other State,*

*(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.'*

9. 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; and
  - 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.

10. Furthermore, the Commissioner has been guided by the comments of the Information Tribunal which suggested that in the context of section 27(1), prejudice can be real and of substance 'if it makes relations more difficult or calls for a particular damage limitation response to contain or limit damage which would not have otherwise have been necessary'.<sup>1</sup>
11. The Commissioner has initially considered the FCO's reliance on section 27(1)(a).

*The FCO's position*

12. In its responses to the complainant the FCO explained that disclosure of the requested information would prejudice its relations with Croatia. In its submissions to the Commissioner the FCO provided a detailed explanation as to exactly how, and why, it believed this prejudice would occur. These submissions made direct reference to the content of the withheld information itself and therefore the Commissioner cannot set out these submissions in any detail in the body of this notice without compromising the withheld information. In summary, the FCO argued that disclosure of the requested information would clearly undermine the trust and confidence between the two governments because of the content of the information itself and because of the general nature of UK/Croatian relations. The FCO explained that it was of the view that even in a severely redacted form disclosure of the withheld information could still result in prejudice occurring to the UK's relations with Croatia. In order to illustrate this view the FCO identified a number of apparently innocuous passages and explained why, in the context of relevant background, disclosure of such passages could still result in prejudice occurring.
13. In its submission to the Commissioner, dated 28 September 2011, the FCO confirmed that it was relying on the higher threshold of likelihood; i.e. it believed that prejudice would occur to its relations with Croatia if the requested information was disclosed.

*The Commissioner's position*

14. The Commissioner accepts that the type of harm that the FCO believes would occur if the information was disclosed is applicable to the exemption contained at section 27(1)(a).

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<sup>1</sup> *Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence* (EA/2006/0040), paragraph 81.

15. With regard to the second criterion the Commissioner notes that the withheld information includes both information provided to the UK in confidence by representatives of the Croatian government and internal assessments of various issues which were clearly only intended for a limited audience within UK government departments. The Commissioner accepts that it is logical to argue that disclosure of either category of information has the potential to harm the UK's bilateral relationship with Croatia.
16. The Commissioner is therefore satisfied that there is a causal relationship between the potential disclosure of the withheld information and the interests which section 27(1)(a) is designed to protect. Moreover, the Commissioner is satisfied that the resultant prejudice which the FCO believes would occur is one that can be correctly categorised, in light of the Tribunal's comments above, as real and of substance. In other words, subject to meeting the likelihood test at the third criterion, disclosure could result in making relations more difficult and/or demand a particular diplomatic response.
17. In relation to the third criterion, the Commissioner has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Tribunal decisions. He believes that for the lower level of likelihood, i.e. 'likely', to be met the chance of prejudice occurring should be more than a hypothetical possibility; there must have been a real and significant risk. With regard to the alternative limb of 'would prejudice' the Commissioner believes that this places a stronger evidential burden on the public authority to discharge.
18. Having considered the circumstances of this case, the Commissioner is satisfied that the higher threshold of prejudice is clearly met. In reaching this conclusion the Commissioner has been particularly persuaded by the specific and detailed submissions provided to him by the FCO. As noted above as these submissions make detailed reference to the content of the withheld information itself and therefore the Commissioner's analysis of the FCO's position within this notice is also necessarily brief. Nevertheless, the Commissioner wishes to make it clear that he has given careful consideration to whether a redacted version of the withheld information could be disclosed. However given the way the information is structured and moreover the nature of UK/Croatian relations the Commissioner is satisfied that disclosure of even a redacted version of the information would still prejudice the UK's relations with Croatia.

### **Public interest test**

19. Section 27(1) is a qualified exemption and therefore the Commissioner must consider the public interest test at section 2(2)(b) of FOIA and

whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information.

### **Public interest arguments in favour of disclosing the requested information**

20. The FCO acknowledged that the public has a legitimate interest in understanding what its government is doing. More specifically disclosure of the requested would provide the public with an insight into the nature of the UK's relations with Croatia.

### **Public interest arguments in favour of maintaining the exemption**

21. The FCO argued that it was clearly in the public interest that the UK enjoys effective relations with foreign States. In the circumstances of this case it would not be in the public interest if the UK's relationship with Croatia were damaged as this would make bilateral relations more difficult and less effective. Furthermore, the UK's ability to protect and promote its interests in Croatia would be compromised as FCO staff would not be able to promote the UK's commercial interests if they were not respected and trusted by their Croatian counterparts.

### **Balance of public interest arguments**

22. With regard to attributing weight to the public interest arguments in favour of disclosing the information the Commissioner notes that they relate to issues often cited in any consideration of the public interest test, namely accountability and transparency and the public's trust in government. Such concepts are inherent to FOIA, but this should not diminish their relevance to this case. The weight that should be applied to them will depend upon the specific facts of the case and in particular the content of the information that the Commissioner has decided is exempt under section 27(1). The Commissioner believes that detailed nature of the telegrams themselves would provide the public with a particularly strong insight into the nature of UK and Croatian relations. This arguably increases the weight that should be attributed to the public interest arguments in the favour of disclosure.
23. With regard to the public interest arguments in favour of maintaining the exemption, the Commissioner accepts that it is very strongly in the public interest that the UK enjoys effective relations with foreign governments. The Commissioner also agrees that it is very much in the public interest that the UK's ability to promote and protect its interests is also not undermined. In respect of this point the Commissioner recognises that the coalition government has made it clear that one of its key priorities is promoting the British economy abroad and lobbying

for inward investment into the UK. The Commissioner also believes that the public interest arguments in favour of maintaining the exemption attract further weight given that the fact that disclosure would not simply be likely to occur to the UK's relations with Croatia but would in fact occur.

24. In light of the prospect of prejudice occurring the Commissioner has concluded that the public interest in maintaining the exemption outweighs the public interest in disclosure. Furthermore, although disclosure would inform the public about the UK's relationship with Croatia in relation to the issues discussed in the telegrams, it would also have the broader effect of undermining the bilateral relationship not just in relation to these issues but also on a far broader range of matters in the future.
25. In reaching this conclusion the Commissioner acknowledges that some of the points upon which he has placed weight in the above analysis could be seen as factors which are inherent in sections 27(1)(c) and (d) rather than section 27(1)(a) and thus should not be given weight in a public interest balance which focuses solely on section 27(1)(a). 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.
26. The Commissioner recognises that the absence in this decision notice of references to the specific facts from his reasons for reaching his conclusion, both in relation to engaging the exemptions and the public interest test, may prove to be frustrating to the complainant. However, as noted above the Commissioner believes that any more detailed explanation of his reasoning risks revealing the content of the requested information itself.
27. In light of his conclusion in respect of section 27(1)(a) the Commissioner has not considered whether the information is also exempt from disclosure on the basis of section 27(1)(b).

## Right of appeal

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28. 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: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

29. 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.
30. 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** .....

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