

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 December 2012

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

Decision (including any steps ordered)

1. The complainant has requested from the Foreign and Commonwealth Office ("the FCO") details of correspondence and meetings during 2004, concerning conflicts relating to oil operations in the Niger Delta, between the FCO and the diplomatic missions of the United States of America ("USA") and the Netherlands, and also the Shell and Chevron companies ("the oil companies").
2. FCO provided some information after considering the information request and disclosed further information during the course of the Information Commissioner's investigation. The Commissioner's decision is that the FCO correctly applied the section 27 FOIA (International relations), section 38 FOIA (Health and safety) and section 43 FOIA (Commercial interests) exemptions. The Commissioner did not find it necessary to consider FCO's application of the section 41 FOIA (Information provided in confidence) exemption.
3. The Commissioner did not uphold the complaint and requires no steps to be taken.

Request and response

4. On 6 May 2011 the complainant wrote to FCO and requested information in the following terms:

'All details of correspondence (including letters, emails, notes of telephone conversations and memos) between senior civil

servants in the FCO in London, Lagos, Warri, Port Harcourt or Abuja (including High Commissioners, Deputy Heads of Missions, Attaches, Head of Political Sections, Department Directors, and Permanent Under Secretaries) with

a. Shell

b. Chevron

c. The United States Embassy in the UK and diplomatic missions in Nigeria

d. The Netherlands Embassy in the UK and diplomatic missions in Nigeria

concerning the conflict in the Niger Delta and Shell and Chevron's oil operations there between 1 January 2004 – 1 January 2005.

2. All details of meetings (including agendas, minutes, and dates) between senior civil servants in the FCO (including High Commissioners, Deputy Heads of Missions, Attaches, Head of Political Sections, Department Directors, and Permanent Under Secretaries) in London and Nigeria (including Lagos, Warri, Port Harcourt or Abuja) with

a. Shell

b. Chevron

c. The United States Embassy in the UK and diplomatic missions in Nigeria

d. The Netherlands Embassy in the UK and diplomatic missions in Nigeria

concerning the conflict in the Niger Delta and Shell and Chevron's oil operations there from 1 January 2004 – 1 January 2005.

Please send me copies of the original documents by email.'

5. FCO responded several months later on 23 September 2011 disclosing a digest of some of the requested information. FCO withheld other information citing the exemptions in section 27(1)(a) and (c) FOIA (International relations), section 38(1)(b) FOIA (Health and safety), section 41(1)(b) FOIA (Information provided in confidence), and section 43(2) FOIA (Commercial interests).
6. On 11 November 2011 the complainant asked for an internal review of the FCO's partial refusal to disclose information, and he made further representations to FCO on 17 January 2012 and amended them on 13 February 2012.
7. On 16 May 2012, following an internal review, FCO wrote to the complainant confirming the extent of the information held by FCO and maintaining the application of the FOIA exemptions.

Scope of the case

8. On 13 June 2012 the complainant contacted the Commissioner to complain about the way his request for information had been handled. With the complainant's agreement a colleague of his working for the same named charity made extensive representations to the Commissioner on the complainant's behalf.
9. On 10 August 2012 FCO put its representations to the Commissioner. FCO maintained the section 27, 38(1), 40(2), 41(1), and 43(2) FOIA exemptions; some of the FCO representations to the Commissioner were provided in confidence. The Commissioner's staff reviewed the withheld information and considered the application to it of the exemptions, together with the relevant public interest test where appropriate.
10. The Commissioner did not find it necessary to consider FCO's application of the section 41 FOIA exemption as the relevant information had been correctly withheld relying on other exemptions. The complainant did not challenge the redaction by FCO of the names of junior officials and some other related information using the section 40 FOIA exemption. The Commissioner did not consider the application of the section 40 FOIA exemption.
11. During the Commissioner's investigation he noted information, originally derived from USA sources, that had been placed in the public domain and disclosed through "*wikileaks*". His attention had been drawn to this information by the complainant's colleague.
12. During the course of the Commissioner's investigation, FCO disclosed further information to the complainant. FCO accepted, but the complainant and his colleague declined, the Commissioner's invitation to accept informal resolution on the basis of FCO's further disclosures.
13. This decision notice relates solely to the information the FCO decided should continue to be withheld.

Reasons for decision

Section 27 FOIA (International relations)

14. 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.'*

15. In order for a prejudice-based exemption, such as section 27(1), to be engaged the Commissioner considers that three criteria must be met. First, the actual harm which the public authority alleges would or would be likely to occur if the withheld information were 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 nature of the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance and arise from a clear causal link to the proposed disclosure. Thirdly, it is necessary to establish whether the likelihood of the prejudice being relied upon by the public authority is met – ie 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.
16. 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"* (*Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence* (EA/2006/0040), paragraph 81).
17. The Commissioner's staff have analysed carefully all of the withheld information. He considered the application of the FCO's reliance on section 27(1) FOIA exemption to the relevant information and decided it had been correctly withheld. There was other information which had initially been withheld by FCO in applying the section 27(1) exemption, which FCO disclosed as the public interest in maintaining the exemption was not sufficiently significant to outweigh the strong public interest in openness and transparency by the UK government with its citizens.

18. The Commissioner identified the relevant interests being protected by the exemption as those of the UK in the context of its relationships with the USA, the Netherlands and Nigeria including Nigerian sub-national administrations. He accepted that the type of harm that the FCO believes would occur if the relevant information was disclosed relates to the section 27(1)(a) and 27(1)(c) FOIA exemptions.
19. With regard to the second criterion the Commissioner notes that the withheld information includes both information provided to representatives of the UK government in confidence by their correspondent government representatives and internal assessments by UK officials of issues which were clearly only intended for a limited audience within UK government departments. The Commissioner accepts that disclosure of the withheld information would harm the UK's relevant bilateral relationships. Disclosure could result in making relations more difficult and/or demand a particular diplomatic response. The Commissioner is therefore satisfied that there is a strong causal relationship between the potential disclosure of the withheld information and the interests which section 27(1) is designed to protect.
20. In relation to the third criterion, the likelihood of the harm identified occurring, the Commissioner has considered whether the prejudice 'would', or 'would be likely to', occur. He believes that, for the lower level of likelihood ie 'would be likely to', there should be more than a hypothetical possibility of prejudice; there must be a real and significant risk of prejudice stopping short of being more likely to occur than not. For the higher threshold of 'would' occur, the prejudice arising from disclosure must be more likely to occur than not. On the facts of this case, the Commissioner is satisfied that the higher threshold of 'would' prejudice is met for the relevant information. In reaching this conclusion the Commissioner found persuasive the specific and detailed submissions provided to him in confidence by FCO. He also had regard for the fact that FCO has already disclosed to the complainant what FCO considered to be the fullest possible redacted version of the requested information.

Public interest test

21. 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 that in disclosing it.

Public interest arguments in favour of disclosing the requested information

22. There is a strong general public interest in the fullest possible transparency in UK public affairs. The UK public has a legitimate interest in understanding what its government and accredited representatives are doing. More specifically disclosure of the requested information would increase public knowledge about the nature of the UK's international relationships with the governments of the USA, the Netherlands and Nigeria.
23. Some observers of the Nigerian scene have alleged that there have been abuses of human rights and that the conduct of the oil companies' operations in the Niger Delta has been damaging to the local population. To the extent that diplomatic communications may shed light on these matters, there is a public interest in their disclosure.
24. The passage of time between the 2004 date of the requested information and the May 2011 information request is likely to weaken the case for withholding the information. Allied to that, there have been changes in political structures and personnel within Nigeria so that the 2004 information may have been less relevant to the situation that existed at the 2011 date of the information request.

Public interest arguments in favour of maintaining the exemption

25. The effective conduct of international relations depends upon maintaining trust and confidence between governments. If the UK does not maintain this trust and confidence, its ability to give and be given confidences will be diminished, as will its ability to protect and promote UK interests through diplomatic activities - which would be contrary to the public interest.
26. FCO said that there is a strong public interest in the UK enjoying 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 the USA, Netherlands and the Nigerian authorities at national and sub-national level, 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 Nigeria would be compromised as FCO staff would be less able to protect or promote the UK's interests through its international partners if they were less well respected and trusted by their counterparts.

27. FCO did not agree that the age of the requested information (2004) meant that disclosure in May 2011 would not be as prejudicial to the interests of the UK. FCO provided evidence to the Commissioner that, despite political changes in the interim, many of the actors operating in the Niger Delta in 2004 were still active now, either in government or in opposition, or in other institutions of the Nigerian state. Many of the relevant political parties and personnel were still active and those in opposition might some day be in power. FCO added that disclosure of the withheld information could still have a very real and unpredictable impact on the UK's relations with Nigeria and therefore on relevant UK interests. Similarly political developments within the USA and the Netherlands did not obviate the need to respect confidences given in the past.
28. The Commissioner accepted FCO's evidence that candid comments in its diplomatic reporting act as a direct reflection of FCO's own views. FCO provided evidence that diplomatic exchanges, which reflect the views of posts and FCO departments, are essential building blocks in the development of FCO policy. They feed into the development of FCO departmental policy and in turn inform the development of the policies of the UK government which, in its promulgated form, may or may not always fully reflect the views and preferences of FCO.
29. FCO accepted the complainant's point that relationships with the USA and the Netherlands are robust. However FCO did not accept that disclosure of frank and confidential exchanges of views between diplomats would not damage relationships. Further it does not follow that the disclosure by unofficial sources of controversial information meant that for official sources to confirm or add to such apparent revelations would not damage diplomatic relationships. The fact that information comes from FCO rather than another state, or from a non-governmental organisation, gives that information additional credibility. This means that the fact of FCO disclosing information, as well as the content, can readily impact international relations.
30. FCO added that, in its experience, diplomats frequently share policy views with each other in the formative stages of policy development to collate and test views, and inform their own policy debates. If these insights and confidences were shared as a result of FOI

requests the ability of the UK to obtain this type of insight and use it to inform policy development would be reduced, which would not be in the public interest.

Balance of public interest arguments

31. In determining the balance of the public interest, the Commissioner has taken into account the content of the withheld information; he also took all of the above factors into account. He noted the considerable volume of the requested information that FCO has already disclosed to the complainant both initially and again during the course of his investigation.
32. The Commissioner supports the need for strong accountability and transparency and for action to be taken which will foster public trust in the UK government. The weight to be applied to these factors 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 considers that the detailed content of the withheld information would not itself provide the public with particularly strong additional insights into the nature of the relevant relationships.
33. However, the Commissioner finds very persuasive the case put to him by FCO that there is a strong public interest in the UK government's accredited representatives being able to exchange full and frank confidences with their international counterparts and with their UK colleagues in FCO and elsewhere in government. Accordingly he decided that, for the information still being withheld relying on the section 27(1) exemption, FCO had applied the exemption correctly and the public interest in maintaining the exemption outweighed that in disclosure.

Section 38 FOIA (Health and safety)

34. Section 38(1) of the FOIA states that:

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

(a) endanger the physical or mental health of any individual, or

(b) endanger the safety of any individual.'

35. FCO applied the section 38(1) FOIA exemption to two isolated redactions of information in document A of the bundle of FCO documents. This related to the cost of repairing damage to oil industry facilities in the Niger Delta swamp area.

36. In determining whether the application of section 38(1) FOIA to the requested information was correct, the Commissioner has conducted a 'prejudice test' to determine whether disclosure would endanger the health and safety of an individual. He received evidence from FCO that the relevant withheld information would provide militants in the area with an indication of the impact of relevant hostile activities. Disclosure would influence the likelihood and nature of any further hostile activity thereby endangering the safety of the staff of the oil companies. The Commissioner accepted that if there were any further relevant hostile activity, it would be real, actual or of substance. If the effect of disclosure was to increase the likelihood of hostile activity, that would be to the considerable detriment of the health and safety of those Nigerian nationals and expatriates living, visiting or working in the area of the relevant facility.
37. The FCO told the Commissioner, with supporting arguments provided in confidence which he accepted, why disclosure would be at the higher level threshold and 'would', rather than 'would be likely to' endanger the safety of relevant persons.

Public interest test

38. As the section 38 FOIA exemption is qualified, the Commissioner considered whether or not the balance of the public interest favoured disclosure of the information or maintenance of the exemption.

Arguments in favour of disclosure

39. The Commissioner considers that there is always an intrinsic public interest in increased transparency and openness in relation to information held by public authorities. He also noted the passage of time in that the information related to events which took place in or before 2004. For its part, FCO told the Commissioner that there was no public interest case for disclosure of the withheld information.
40. The complainant told the Commissioner that an amnesty in 2009 had dramatically lowered the risk of militant attacks on the personnel and infrastructure of the oil companies. He said that the vulnerability of companies and government were already widely known from other published information. However, FCO told the Commissioner that, despite the 2009 amnesty, violence in the Niger Delta region had not been eliminated at the time of the information request or subsequently.

Arguments in favour of maintaining the exemption

41. FCO said that relevant parts of Nigeria could still be difficult to operate in and that the withheld information would assist those who wished to know to identify which past attacks had, and had not, proved damaging. If hostilities were to resume, or if new combatants emerged, disclosure of the withheld information would pose a threat to the safety of those living, visiting or working in and around the relevant oil company facilities.

Balance of the public interest test

42. The Commissioner considered the real threat which disclosure would pose to the safety of many individuals and balanced that against the public interest arguments in favour of disclosure. The Commissioner accorded strong weight to protecting individuals from the risk of exposure to further violent or lethal hostile action and noted that a significant number of individuals in and around the oil companies' facilities would be at risk. He therefore decided that the public interest in maintaining the exemption outweighed the public interest in disclosure.

Section 43 FOIA (Commercial interests)

43. Section 43(2) FOIA states that:

'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).'

44. In the Commissioner's view, a commercial interest relates to a person's ability to participate competitively in a commercial activity, ie the production, purchase and sale of goods or services. In determining whether the application of section 43(2) FOIA to the requested information withheld in reliance on this exemption was correct, the Commissioner conducted a 'prejudice test' to determine whether disclosure would adversely affect the commercial interests of any person. He identified: the applicable interests within the exemption; the nature of the prejudice and how it would arise; and the likelihood of the prejudice arising.
45. FCO told the Commissioner, and he so decided, that the applicable interests within the scope of the request and protected by reliance on the FOIA commercial interests' exemption were those of the oil companies.
46. FCO told the Commissioner that it believed that its application of the exemption had been rigorous and that it has now disclosed

some potentially sensitive information following internal discussion and having regard for the balance of the public interest. Further information, for which the exemption was engaged but the balance of the public interest no longer favoured maintaining the exemption had, FCO said, been disclosed during the Commissioner's investigation.

47. FCO told the Commissioner that the withheld 2004 information related to the oil companies' corporate internal assessment of the then situation in Nigeria and the key players with regard to sensitive technical and operational matters. The complainant said that full disclosure of the position in his view would not prejudice the commercial interests of the oil companies – a view that the oil companies disputed. Following further consultation with the oil companies FCO added, and following his inspection of the withheld information the Commissioner accepted, that disclosure of the relevant information had the capacity to impact on the reputation of the oil companies and other aspects of their commercial interests, and to prejudice their future commercial and security relationship with the Nigerian authorities, all of which would have adverse consequences for the commercial interests of the oil companies including either of or both their worldwide sales and operating costs in Nigeria.
48. FCO's assessment of the likelihood of prejudice occurring is at the lower level threshold that prejudice would be likely to occur. Following his review of the withheld information, the Commissioner accepted the accuracy of this assessment.
49. The Commissioner found that the section 43 FOIA commercial interests exemption was engaged in respect of the relevant withheld information and that disclosure would be likely to prejudice the relevant commercial interests of the oil companies.

Public interest test

50. As the section 43 FOIA commercial interests exemption is qualified, the Commissioner considered whether or not the balance of the public interest favoured disclosure of the information or maintenance of the exemption.

Arguments in favour of disclosure

51. There is always an intrinsic public interest in increased transparency and openness in relation to information held by public authorities, in this instance about the commercial interests of the oil companies

and any relevant actions or relevant analysis or expression of opinion by FCO officials.

52. The Commissioner noted the passage of time in that the information related to events which took place in or before 2004 and that the scope for disclosure prejudicing the oil companies' commercial interests could have diminished between then and the May 2011 information request. The latter followed the Nigerian government's amnesty initiative towards militant groups in the region in 2009. For its part, FCO told the Commissioner that there was no public interest case for disclosing the relatively small amount of commercial interests' information that it was still withholding.
53. The complainant told the Commissioner that an amnesty in 2009 had dramatically lowered the risk of militant attacks on personnel and infrastructure. He said that the vulnerability of companies and government were already widely known from other published information. However, FCO told the Commissioner that, despite the 2009 amnesty, violence in the Niger Delta region had not been eliminated at the time of the information request or subsequently. That is, the reasons for withholding the relevant information remained current at the time of the information request.
54. The complainant and his colleague argued that there was a public interest in disclosing any information held by FCO that would cast additional light on the role and exercise of social responsibilities by the oil companies in Nigeria. He added that there was a public interest in transparency regarding the actions by the oil companies to the extent that the information shed light on the impact of their community work on the human rights of those living within the relevant region. He added that the public commitment of the UK government to championing human rights worldwide strengthened the case for disclosing any information that shed light on the response of FCO officials to any alleged abuses of human rights that may have come to their attention.

Arguments in favour of maintaining the exemption

55. The activities of FCO are funded from the public purse and there is a strong inherent public interest in its not taking action that would be likely to prejudice the commercial interests of the oil companies, while also being as open and transparent as it can be.
56. During the course of the Commissioner's investigation, FCO asked one of the oil companies to review its previously expressed opposition to disclosing the requested information. The oil company

reaffirmed that it wished FCO to maintain the relevant exemptions in respect of the information still being withheld.

57. The Commissioner has seen that, despite the passage of time, disclosing some of the requested information would still have been likely to adversely impact upon the commercial and security operations of the oil companies and that this would not be in the public interest.
58. Much of the information that remains withheld had been provided to FCO in confidence by executives of the oil companies. There is a strong public interest in FCO officials respecting confidences and maintaining the trust of company executives. Any breaches of trust by FCO officials would adversely affect FCO's future relationships with the oil companies to the detriment of both parties including the commercial interests of the oil companies.
59. There is a public interest in FCO not disclosing information that would be likely to put at risk the security of the commercial assets, facilities and staff of the oil companies.
60. FCO said that some of the information held was hearsay, the sources of which were now unclear and unsupported; much of it could be characterised as impressionistic analysis, the supporting evidence for which was not now clear. It would be unfair and potentially damaging to the commercial interests of the oil companies for FCO to disclose such information to the world at large when there was a lack of clear supporting evidence.
61. The complainant said that the oil companies' reputations had already been tarnished by controversy surrounding their operations in Nigeria, an assertion that the oil companies rejected, and that further revelations would be incapable of causing additional harm. FCO, while acknowledging that the oil companies' Nigerian operations could be controversial, expressed concern that apparently official FCO disclosures would be capable of inflicting reputational damage on the oil companies, damage which would not necessarily be fully evidenced or justified.
62. The complainant argued that past controversial allegations about their operations in Nigeria had not had an adverse impact upon the oil companies' share prices. However, the Commissioner noted that the price of a multinational company's shares at any given time is a collective assessment by the market of the company's future prospects and, as such, is an amalgam of the market's collective assessment of a wide range of factors worldwide that might or might not be heavily influenced by events in one region of one

country of operation. He therefore gave little weight to this argument.

Balance of the public interest arguments

63. When balancing the opposing public interests, the Commissioner is deciding whether the public interest would be better served by disclosing the requested information or by withholding it because of the likely harm to the oil companies' commercial interests.
64. The complainant said that disclosing any withheld information about militant activity against the oil companies' operations would, in his view, add little to the information that was already in the public domain. The Commissioner decided that this was a neutral factor in his analysis since, to the extent it is true, then less harm would be likely to emerge from disclosure but, by the same token, the public interest in disclosure would be diminished.
65. In determining the public interest balance in this matter, the Commissioner gave significant weight to the public interest in transparency of UK government actions and the need, where possible, for openness with regard to the actions of FCO officials in their dealings with oil company executives. He has also had regard to the concerns raised by the complainant that the withheld information might shed light on any allegations of human rights abuses arising from the operations of the oil companies.
66. Where, in his reviews of withheld information, the Commissioner sees evidence of any plausible suspicion of wrongdoing by a UK public authority he regards that as a factor favouring disclosure of the relevant information. However that issue did not arise in this case.
67. In reaching his decision the Commissioner has taken into account the loss of trust that would result from a failure by FCO officials to protect information provided to them in confidence and the detrimental effect that would have on the ability of FCO officials to operate effectively in the future, including in their relations with officials of other companies, and to keep themselves fully informed and thus to accurately advise the UK government about the past, present and future activities and perspectives of the oil companies and their commercial activities.
68. Accordingly the Commissioner decided that, for the information still being withheld by FCO the public interest in maintaining the section 43 FOIA commercial interests exemption outweighs that in disclosing the information.

Section 41 FOIA (Information provided in confidence)

69. FCO additionally applied the section 41 FOIA (Information provided in confidence) exemption to some of the information. As the Commissioner decided that the relevant information had been correctly withheld relying on the section 43 exemption, he did not find it necessary to consider FCO's application of the section 41 exemption.

Other matters

70. It took FCO some four months to respond to the information request of May 2011. FCO told the Commissioner that it kept the applicant informed throughout. Be that as it may, this was far too long and well in excess of the 20 working days specified in section 10(1) FOIA; FCO was therefore in breach of section 17(1) FOIA.
71. It then took FCO a further six months to complete its internal review of its initial decision. FCO acknowledged and apologised for their further delay but this was far too long and also merits criticism.

Right of appeal

72. 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

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

73. 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.
74. 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**