

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 June 2013

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

Decision (including any steps ordered)

1. The complainant requested the names of all individuals within the Foreign and Commonwealth Office (FCO) who were involved in the drafting of the aide memoire shared with the Government of Ecuador concerning the asylum claim of Julian Assange. The FCO refused to disclose this information and cited the exemptions provided by sections 36(2)(b)(i) and (ii) (inhibition to the free and frank provision of advice and exchange of views) of the FOIA.
2. The Commissioner's decision is that these exemptions were applied correctly and so the FCO is not required to disclose this information.

Request and response

3. On 17 August 2012, the complainant wrote to the FCO and requested information in the following terms:
"Please release the name of the author of the letter, sent to the Ecuador authorities, in which you are threatening them to enter their embassy."
4. The FCO responded on 17 September 2012. At this stage it stated only that the *"note was a product of collective deliberations within the FCO, hence there was no single author"*. Although it was later confirmed that the FCO did hold the names of the authors of the aide memoire sent to the Ecuadorean authorities, in this response the FCO was not clear about this and gave no grounds for not disclosing those names.

5. The complainant responded on the same date and requested an internal review. The FCO responded with the outcome of the internal review on 13 November 2012. At this stage it confirmed that it did hold the names of the authors, but refused to disclose these under the following exemptions from the FOIA:

36(2)(b)(i) (inhibition to the free and frank provision of advice)

36(2)(b)(ii) (inhibition to the free and frank exchange of views)

38(1)(a) and (b) (endangerment to health and safety)

40(2) (personal information)

Background

6. The 'letter' referred to in the request is an aide memoire shared on 15 August 2012 with the Government of Ecuador concerning the asylum claim at the Ecuador Embassy in London of Julian Assange. A reference within that aide memoire to a provision within the Diplomatic and Consular Premises Act 1987 excited considerable debate and comment.

Scope of the case

7. The complainant contacted the Commissioner on 13 November 2012 to complain about the refusal to disclose the information requested. The complainant stressed what he believed to be the strong public interest in favour of disclosure of the requested information.
8. In correspondence with the ICO about this case the FCO stated that its intention was not to withhold the identity of the Foreign Secretary as the Minister with political responsibility for the aide memoire. The analysis in this notice concerns non-Ministerial participants in the preparation of the aide memoire.

Reasons for decision

Section 36

9. The FCO has cited the exemptions provided by subsections 36(2)(b)(i) and (2)(b)(ii). These subsections apply where disclosure of the requested information would, or would be likely to, have the following results:

36(2)(b)(i) – inhibition to the free and frank provision of advice

36(2)(b)(ii) – inhibition to the free and frank exchange of views for the purposes of deliberation.
10. Consideration of these exemptions is a two-stage process. First, the exemptions must be engaged, and secondly, these exemptions are qualified by the public interest. This means that the information must be disclosed if the public interest in the maintenance of the exemptions does not outweigh the public interest in disclosure.
11. Covering first whether these exemptions are engaged, the exemptions provided by section 36 can be cited only on the basis of the reasonable opinion of a specified qualified person (QP). Reaching a conclusion as to whether these exemptions are engaged involves establishing whether an individual authorised to act as QP has given an opinion and whether, if such an opinion was given, that opinion was reasonable. If these conditions are met, the exemption is engaged.
12. Section 36(5)(a) provides that the QP for a government department is any Minister of the Crown. The FCO has provided evidence that in this case the Foreign Secretary acted as QP and that the opinion on the use of this exemption was given on 12 November 2012.
13. The Commissioner accepts, therefore, that these exemptions were cited on the basis of the opinion of an authorised QP. The next step is to consider whether the opinion of the QP was reasonable. In forming a conclusion on this point the Commissioner has considered the explanation provided to the QP in a submission prepared to assist him in the formation of his opinion, a copy of which was supplied to the ICO.
14. The view of the QP related to the strength of support for Julian Assange within some online communities that identify themselves as supporters. The QP believed that disclosure of the names of the individuals involved in the drafting of the aide memoire would lead to them being targeted. The submission to the QP referred to previous examples of FCO staff and government websites being targeted by groups identifying themselves as supporters of Julian Assange. The QP believed that disclosure of the

names of officials resulting in such targeting would have the effect of inhibiting those officials when providing advice and exchanging views in future.

15. Taking into account the evidence of previous actions taken against FCO staff in relation to this issue, the Commissioner accepts that the officials would have genuine and legitimate fears of such targeting resulting through disclosure of their involvement with the aide memoire. Following from this the Commissioner accepts that it was reasonable for the QP to hold the opinion that disclosure would have an inhibitory effect upon the contributions of these officials during other discussions on this same issue. The Commissioner also, therefore, accepts that the opinion of the QP was reasonable and so the exemptions provided by sections 36(2)(b)(i) and (ii) of the FOIA are engaged.

Public interest

16. The next step is to consider the balance of the public interest. The role of the Commissioner here is to consider whether the public interest in disclosure is outweighed by the public interest in maintaining the exemption. When assessing the balance of the public interest in relation to section 36, the Commissioner will give due weight to the reasonable opinion of the QP, but will also consider the severity, extent and frequency of the inhibition that he has accepted would result through disclosure.
17. The view of the Commissioner is that the severity of the inhibition would be considerable. The situation surrounding the asylum claim of Julian Assange remains ongoing. Clearly it may be necessary for officials within the FCO to discuss this issue. Given the sensitivities and difficulties surrounding this issue, it will be important that these officials contribute in an entirely uninhibited way to any such discussions. The impact of them not doing so could have severe implications for the FCO's role in the handling of this ongoing situation.
18. As to the extent and frequency of this inhibition, the Commissioner has accepted that the opinion of the QP is reasonable specifically in relation to discussions on the Julian Assange situation, rather than in relation to FCO policy discussions more generally. The extent and frequency of the inhibition would, therefore, be limited to that situation. That does not mean, however, that the Commissioner underestimates the harm resulting from this inhibition given that this situation is of great sensitivity and is ongoing. The sensitivity that existed at the time of request is therefore an important factor that adds further, significant, weight to the arguments for non-disclosure.

19. Turning to those factors that favour disclosure of the information in question, the Commissioner recognises that there is a significant general public interest in the disclosure of all information relating to the drafting of the aide memoire, noting the significant public debate about Mr Assange's position at the time of the request and related debates about freedom of speech. This public interest extends to the names of all those involved in that process. However, the view of the Commissioner is also that, when the names of the officials involved in the drafting are considered as specific information, there is not a strong and compelling public interest in disclosure of those names, noting the significant arguments in favour of non-disclosure
20. As noted above, the FCO has stated that the Foreign Secretary is responsible at the political level for the drafting of the aide memoire. This means that, to the extent that it is necessary to have an individual with responsibility for this note, this would be the Foreign Secretary. Beyond the political responsibility of the Foreign Secretary, this note was issued by the FCO and set out the position of the Government on the asylum claim of Julian Assange. It did not set out the personal views of the officials involved in its drafting and they are not ultimately accountable for the content. This is a further argument supporting the view that the public interest in favour of disclosure of the identity of those officials is not sufficiently compelling.
21. The Commissioner therefore finds that the public interest in the maintenance of the exemptions outweighs the public interest in disclosure and, therefore, the FCO is not required to disclose the information in question.

Other matters

22. As noted above, the initial response to the request was inadequate in that it did not confirm that the requested information was held, or give any explanation for the refusal to disclose this information. The Commissioner is concerned that this obfuscatory response was issued, despite it having become apparent during the investigation of this case that the FCO was aware prior to issuing that response that it did hold information falling within the scope of the request and had taken the decision to refuse to disclose that information.
23. As the FCO is aware, when responding to an information request it must clearly confirm or deny whether it holds information falling within the scope of the request. In relation to any information that is held, this should be disclosed, or the complainant should be given an explanation

of the grounds valid under the FOIA for why the information will not be disclosed.

24. A record has been made of the initial failure by the FCO to issue a valid response to the request in this case. Should future cases reveal that this is a recurring issue with the FCO's information request handling, this issue may be revisited.

Right of appeal

25. 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

26. 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.
27. 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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