

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 5 January 2015

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

#### **Decision (including any steps ordered)**

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1. The complainant submitted a request to the Foreign and Commonwealth Office (FCO) seeking information about a residential tenancy agreement it had entered into in Hong Kong. He specifically sought the dates and costs of the tenancy. The FCO withheld this information under section 43 of FOIA on the basis that disclosure would be likely to prejudice both its commercial interests and those of the landlord. The Commissioner has concluded that the exemption is engaged and that the public interest favours maintaining the exemption.

#### **Request and response**

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2. The complainant submitted the following request to the FCO on 25 April 2014:

*'I would be grateful if you could provide the following information pursuant to the provisions of the Freedom of Information Act as follows:-*

1. *A number of press reports have reported that the British Consul General is renting residential premises in Hong Kong situated at The Opus, No. 53 Stubb Road, Hong Kong. I would accordingly be grateful if you could confirm whether it is in fact the case that the British Consul General in Hong Kong, or the British Consulate Hong Kong, or the Foreign and Commonwealth Office or any of their nominees have rented premises in The Opus, No 53 Stubb Road, Hong Kong.*

- 2. I would be grateful if you could confirm commencement and termination date of any such tenancy.*
  - 3. The amount of rental and other payments payable under any such rental agreement.'*
3. The FCO responded on 23 May 2014. In relation to request 1 it confirmed that the Consulate General is renting the property in question. However the FCO refused to provide the information sought by requests 2 and 3 on the basis of section 43(2) of FOIA, the commercial interests exemption.
4. The complainant contacted the FCO on 26 May 2014 in order to ask for an internal review of the decision to withhold this information.
5. The FCO informed him of the outcome of the review on 18 July 2014. The review upheld the application of section 43(2).

### **Scope of the case**

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6. The complainant contacted the Commissioner on 28 August 2014 to complain about the FCO's decision to withhold the information sought by requests 2 and 3 on the basis of section 43(2) of FOIA.

### **Reasons for decision**

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#### **Section 43 – commercial interests**

7. Section 43(2) 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).'*

8. In order for a prejudice based exemption, such as section 43(2), 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 – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner believes that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority to discharge.
9. In relation to the commercial interests of third parties, the Commissioner does not consider it appropriate to take into account speculative arguments which are advanced by public authorities about how prejudice may occur to third parties. Whilst it may not be necessary to explicitly consult the relevant third party, the Commissioner expects that arguments which are advanced by a public authority should be based on its prior knowledge of the third party's concerns.

#### The FCO's position

10. The FCO argued that disclosure of information sought by requests 2 and 3 would be likely to prejudice its own commercial interests as well as those of its landlord, Swire Pacific Limited (Swire) from whom it rented residential premises in the Opus development.
11. With regard to its interests, the FCO argued that disclosure would severely prejudice its future negotiations for both residential and commercial property in Hong Kong. It also argued that disclosure would be likely to set a precedent that will prejudice future negotiations worldwide. This would not only affect the FCO's commercial and residential property interests, but potentially all UK government property interests at home and abroad.
12. To support these positions the FCO argued that disclosure of the amount of rent it was paying, along with details of the lease term, would directly prejudice its ability to negotiate such deals in the future in Hong Kong, including with this particular landlord. The FCO suggested that disclosure would also have a significant effect on its ability to take a new lease in this property – should it wish to do so – when this lease expired. This was because the terms of the lease were subject to a confidentiality agreement between the FCO and the landlord.
13. The FCO acknowledged that disclosure of the lease dates was slightly less contentious, but it still considered this to be commercially sensitive

information as the lease term can and does have direct linkage to the level of rent agreed. Furthermore, it argued that if the market in general knows exactly when the FCO's current lease expires this can put it at a disadvantage when discussing leases with third parties should it decide to move when its existing lease expires. If landlords knew the FCO had to move by a particular date then this can make negotiating leases on alternative premises more difficult. The FCO conceded that this was not always critical but placed it in a stronger position if it entered a negotiation without having divulged such information first.

14. The FCO liaised directly with the landlord in order to seek its submissions in relation to whether disclosure of the withheld information would harm its commercial interests. The landlord provided a statement outlining its concerns, a copy of which has been provided to the Commissioner, along with associated correspondence.
15. Firstly, the landlord argued that disclosure of the terms of the lease would be likely to harm its commercial interests because disclosure of such terms could undermine its own competitive position when negotiating new lettings, renewals and rent review situations.
16. Secondly, the landlord argued that in the case of the Opus tenancies most of its tenants would not want their own rent or other tenancy information, or similar information for other occupiers' in the same building, to be placed in the public domain for privacy reasons. If such information was disclosed, the landlord argued that tenants of the calibre it wished to rent in Opus development would almost certainly have second thoughts about moving in, or in relation to existing tenants continuing to stay. Therefore, from a landlord's perspective keeping such information private and confidential was central to securing new rental commitments as well as retaining/renewing existing commitments.

#### The Commissioner's position

17. With regard to the three limb test the Commissioner is satisfied that the first limb is met given that the nature of prejudice envisaged to both the commercial interests of the FCO and the landlord are clearly ones that fall within the scope of the exemption provided by section 43(2).
18. With regard to the second limb, the Commissioner is satisfied that there is some causal link between disclosure of the redacted information and prejudice both to the FCO's commercial interests and those of its landlord.
19. With regard to the third limb, the Commissioner is satisfied that if the information was disclosed the likelihood of prejudice occurring to the

FCO's interests when negotiating future leases in Hong Kong is one that goes beyond being simply a hypothetical risk. The Commissioner has reached this conclusion primarily because he considers the rationale underpinning these arguments to be logical and sound. That is to say it is broadly accepted that a situation of information asymmetry - where one party to a commercial transaction has more (or better) information than the other - is highly likely to distort the competitive buying process to the extent that the party in a position of having less (or worse) information is commercially disadvantaged. In the circumstances of this case the Commissioner accepts that disclosure of the withheld information would clearly have a direct impact on the FCO's negotiating position in future discussions with other landlords for residential and commercial property in Hong Kong.

20. For the same reasons, the Commissioner accepts that disclosure of the withheld information would also have a direct – and prejudicial - impact on the landlord's position in any future negotiations about tenancy agreements for properties in the Opus development. Furthermore, given the nature of this particular development and the fact that all tenancy agreements are covered by confidentiality agreements, the Commissioner also believes that there is more than a hypothetical risk in prejudice occurring to the landlord's interests in the way described at paragraph 16.
21. However, the Commissioner is not prepared to accept that disclosure of the withheld information represents anything more than a hypothetical risk to the FCO's property negotiations worldwide. In the Commissioner's view the suggestion that disclosure of the lease terms in relation to this tenancy could undermine the FCO's, or more broadly the UK government's, ability to secure favourable deals across the world is simply too speculative an argument to be sustainable.

### **Public interest test**

22. Section 43(2) is a qualified exemption. Therefore the Commissioner must consider the public interest test contained at section 2 of FOIA and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

### Public interest arguments in favour of disclosing the withheld information

23. The complainant argued that there was public concern about the expenditure incurred by the British Consul General in Hong Kong on residential accommodation at the Opus development, particularly at a time when there are government cut backs in the services available to the general public. Furthermore, the complainant argued that he did not

find it acceptable that the FCO sought to rely on claims that its lease agreement was subject to a confidentiality clause. He argued that the FCO was part of the government and therefore should be transparent as to their dealings and the expenditure they occur.

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

24. The FCO argued that disclosure of the information was against the public interest because it would undermine its ability to secure tenancy agreements on the most favourable terms possible. It also argued that it was against the public interest to disclose information which would undermine the ability of commercial organisations, in this case Swire, to conduct their lawful business competitively and without fear that their sensitive commercial information would be disclosed.

#### Balance of the public interest arguments

25. In the Commissioner's opinion there is an inherent public interest in the disclosure of information which would reveal how public authorities have spent money. The Commissioner recognises that in the particular circumstances of this case the FCO's tenancy of residential premises at the Opus development has attracted press interest, and indeed some criticism, largely it would appear because of the alleged cost of this tenancy and opulent nature of the development itself.<sup>1</sup> In light of this the Commissioner recognises that the public interest in favour of disclosure arguably attracts further weight in order to increase the FCO's transparency regarding the terms of this tenancy. That said, given the limited amount of information about the terms of other similar tenancy agreements that is already in the public domain – due primarily of course to the confidential nature of such agreements – in the Commissioner's opinion the ability of the public to use the withheld information to make an accurate assessment as to whether the tenancy provides value for money is quite limited.
26. Furthermore, the Commissioner believes that there is very strong public interest in ensuring that public authorities can secure the best price and terms available when entering into tenancy agreements. In the Commissioner's opinion it would be firmly against the public interest if the FCO's ability to negotiate the best terms possible for future tenancies in Hong Kong was undermined. Furthermore, the Commissioner does not believe that Swire's commercial interests should

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<sup>1</sup> [Our woman in Hong Kong... and her £35million flat that costs you £60,000 a month in rent](#)

be harmed simply because it has entered into contract with a public body, in this case the FCO. The Commissioner believes that this argument should be given significant weight.

27. In conclusion the Commissioner accepts that the public interest arguments in favour of disclosing the information cannot be dismissed lightly. However, he considers that these are outweighed by the cumulative negative impact of disclosure on the commercial interests of the FCO and the negative impact of disclosure on the commercial interests of Swire.

## 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 123 4504

Fax: 0870 739 5836

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

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

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 .....**

**Alexander Ganotis**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**