

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 November 2015

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

Decision (including any steps ordered)

1. The complainant submitted a request to the Foreign and Commonwealth Office (FCO) for information relating to communications between it and Tony Blair about Egypt. The FCO confirmed that it held information falling within the scope of the request but considered this to be exempt from disclosure on the sections 27(1)(a), (c) and (d) (international relations), section 40(2) (personal data) section, 41(1) (information provided in confidence) and section 21 (information reasonably accessible to the applicant).
2. The Commissioner is satisfied that the FCO is entitled to rely on these various exemptions to withhold the information falling within the scope of the complainant's request.

Request and response

3. The complainant submitted the following request to the FCO on 20 March 2015 which sought:

'Since January 2014, information concerning communications between, on the one hand, the Foreign and Commonwealth Office and, on the other hand, Tony Blair or the Office of Tony Blair, specifically on the subjects of policy and/or trade matters involving Egypt. Please can you also include dates of Mr Blair's visits and the officials he was meeting, whether British, Egyptian or from other countries.'

4. The FCO contacted the complainant on 8 April 2015 and confirmed that it held information falling within the scope of the request. However, it explained that it considered this information to be exempt from disclosure on the basis of section 27 of FOIA and it needed further time to consider the balance of the public interest test.
5. The FCO contacted the complainant again on 13 May 2015 and explained that it had completed its public interest considerations and concluded that the requested information was exempt from disclosure on the basis of the following sections of FOIA: 27(1)(a), (c) and (d); 41(1) and 40(2). The FCO also explained that it did not hold an authoritative list of the dates of Tony Blair's visits or the officials with whom he met.
6. The complainant contacted the FCO on the same day and asked it to conduct an internal review.
7. The FCO informed him of the outcome of the internal review on 11 June 2015. The review confirmed the findings of the refusal notice albeit it noted that one extract of the requested information was publically available and should therefore have been withheld on the basis of section 21 of FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 11 June 2015 in order to complain about the FCO's decision to withhold the information falling within the scope of his request.

Reasons for decision

Section 41 – information provided in confidence

9. Section 41 of FOIA states that:

'(1) Information is exempt information if—

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.'

10. Therefore for this exemption to be engaged two criteria have to be met; the public authority has to have obtained the information from a third party **and** the disclosure of that information has to constitute an actionable breach of confidence.
11. With regard to whether disclosure would constitute an actionable breach of confidence the Commissioner follows the test of confidence set out in *Coco v A N Clark (Engineering) Ltd* [1968] FSR 415. This judgment suggested that the following three limbed test should be considered in order to determine if information was confidential:
 - Whether the information had the necessary quality of confidence;
 - Whether the information was imparted in circumstances importing an obligation of confidence; and
 - Whether an unauthorised use of the information would result in detriment to the confider.
12. However, further case law has argued that where the information is of a personal nature it is not necessary to establish whether the confider will suffer a detriment as a result of disclosure.

Was the information obtained from a third party?

13. The FCO explained that the information withheld on the basis of this exemption concerns information received from Tony Blair. The Commissioner has reviewed the information in question and is satisfied that this is an accurate description of it. Section 41(1)(a) is therefore met as the FCO clearly received this information from a third party.

Does the information have the necessary quality of confidence?

14. The Commissioner considers that information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial; information which is of importance to the confider should not be considered trivial.
15. The Commissioner is satisfied that the information is clearly not otherwise accessible and moreover given its content, focusing as it does on Mr Blair's work in the Middle East, is clearly more than trivial.

Was the information obtained in circumstances importing an obligation of confidence?

16. The FCO explained that there was an expectation on the part of Mr Blair – given both the content and manner in which this information was shared – that it was being provided to the FCO in confidence. The FCO

also confirmed that in light of this request it had specifically confirmed with Mr Blair's office that each item of information withheld on the basis of section 41 had been provided in confidence.

17. In light of these circumstances the Commissioner is satisfied that this criterion is met.

Would disclosure be detrimental to the confider?

18. The FCO explained that the information reported on private high level discussions on sensitive international negotiations or issues. In many instances the information consists of reported conversations involving other international partners. The FCO argued that if this information was disclosed it would be detrimental to Mr Blair because interlocutors would be less likely to share sensitive views and information with him.
19. Given the content of the information the Commissioner has no hesitation in accepting that disclosure of it would have significant detrimental consequences for Mr Blair as it would clearly undermine third parties expectations that any frank conversations that they had with him would be treated confidentially.

Public interest defence

20. However, although section 41 is an absolute exemption, the law of confidence contains its own built in public interest test with one defence to an action being that disclosure is in the public interest.
21. The complainant argued that disclosure of the information he requested was in the public interest for the following reasons: Firstly, to uphold public confidence that records are kept of communications which might influence international relations. Secondly, to provide assurance that there is transparency about Britain's relationship with Egypt. Thirdly, to ensure that money is correctly spent in communicating with third parties about relations with foreign countries.
22. The FCO acknowledged that disclosure of this information would increase public knowledge about the UK's relations with Egypt and the views of regional interlocutors. However, it was firmly of the view that in light of the detrimental consequences identified above if the information was disclosed, the public interest favoured maintaining the duty of confidence owed.
23. The Commissioner agrees that there is a public interest in disclosure of the information that would inform the public as to the UK's relationship with Egypt during the time period covered by the request. Moreover, disclosure of the withheld information would provide the public with a genuine insight into the UK's role in Egypt. However, the Commissioner

is conscious of the sensitive nature of the discussions to which the information withheld under section 41 relates and the high level at which these discussions took place. In the Commissioner's view, it is clear that disclosure of such information would have clearly detrimental consequences not only for Mr Blair as interlocutors would be less willing to share information with him in the future, but also it is likely that they would be unwilling to share similar information with the FCO as they may consider it likely that such information would be released. Such an outcome would be firmly against the public interest as it would impact on the FCO's ability to maintain effective relations with the countries in the region. The Commissioner has therefore concluded that the public interest in disclosing the information does not outweigh the public interest in maintaining the confidence.

Section 27(1)(a) – international relations

24. The FCO also argued that part of the withheld information was exempt from disclosure on the basis of sections 27(1)(a), (c) and (d) of FOIA. These sections state that that:

'Information is exempt information if its disclosure would, or would be likely to, prejudice –

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

(c) the interests of the United Kingdom abroad, or

(d) the promotion or protection by the United Kingdom of its interests abroad'

25. In order for a prejudice based exemption, such as the three cited by the FCO, to be engaged the Commissioner considers that following 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 considers 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.
26. 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*'.¹

The FCO's position

27. The FCO explained that the information withheld under these exemptions again concerned the details of Mr Blair's meetings (ie the information withheld under section 41(1)) but also included information concerning these meetings not directly provided by Mr Blair. It included, for example, information provided to the FCO by other parties or internal FCO comments on the discussions in question. The FCO explained that disclosure of the withheld information in question would be likely to prejudice the UK's relations with the States in question, most notably Egypt. This was on the basis that the information had either been provided to the UK with the expectation that it would be kept confidential or it contained assessments of the situation in the Middle East that would be likely to damage the UK's relations with the States in question if disclosed.

The Commissioner's position

28. With regard to the first criterion of the three limb test described above, the Commissioner accepts that potential prejudice to the UK's relations with the States in question clearly relates to the interests which the exemptions contained at sections 27(1)(a), (c) and (d) are designed to protect. The Commissioner accepts that these three exemptions are sufficiently interrelated that they can be considered together.

¹ [Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence \(EA/2006/0040\)](#), paragraph 81.

29. With regard to the second criterion, given the sensitive nature of the discussions to which the information relates, and given the situation both in Egypt and in the wider Middle East at the period covered by the request, the Commissioner is satisfied that disclosure of this information has the potential to harm the UK's relations for the reasons advanced by the FCO. The Commissioner is therefore satisfied that there is a causal link between the potential disclosure of the withheld information and the interests which sections 27(1)(a), (c) and (d) are designed to protect. Moreover, the Commissioner is satisfied that the resultant prejudice which the FCO believes would be likely to occur 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 damage limitation exercise.
30. With regard to the third criterion, having had the benefit of examining the withheld information, the Commissioner is satisfied that its disclosure would clearly undermine the trust and confidence between the UK and Egypt and indeed also clearly risks harming the UK's relations with other States involved in the Middle East. In light of such harm the Commissioner is satisfied that it would be more difficult for the UK to promote its interest and policies in Egypt and the Middle East.
31. The Commissioner has therefore concluded that sections 27(1)(a), (c) and (d) are therefore engaged.

Public interest test

32. Section 27 is a qualified exemption and therefore the Commissioner must consider the public interest test 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 in disclosure of the information

33. The complainant argued that there was a public interest in disclosure of the withheld information for the reasons identified in paragraph 21 above.

Public interest in favour of maintaining the exemption

34. The FCO emphasised that section 27(1) recognised that the effective conduct of international relations depends upon maintaining trust and confidence between governments. It argued that if the UK government does not maintain this trust and confidence, then its ability to protect and promote UK interests through international relations will be hampered, which will not be in the public interest. Consequently, the FCO argued that disclosure of this information was not in the public

interest as it would be likely to damage the UK's bilateral relationships with a number of States, primarily Egypt, and thus would reduce the UK government's ability to protect and promote UK interests in the region.

Balance of the public interest

35. With regard to the balance of the public interest, the Commissioner recognises that there is clearly a public interest in the UK being open and transparent about the way in which it engages with other States. As noted above, disclosure of the withheld information in this case would provide the public with a more detailed insight into the UK's relations with Egypt.
36. However, in the Commissioner's view there is a very strong public interest in protecting the UK's relations with other States. In the particular circumstances of this case, as disclosure risks undermining the UK's ability to enjoy effective diplomatic relations not only with Egypt but also other States, and taking into account the sensitive political situation in Egypt and the surrounding region during the period covered by the request, the Commissioner has concluded that the balance of the public interest clearly favours maintaining the exemptions. Moreover, the Commissioner believes that there is significant public interest in the UK being able to protect and promote its interests in Egypt and the wider region.

Section 21 – information reasonably accessible to the applicant

37. Section 21 provides that information is exempt from disclosure if it is reasonable accessible to the applicant.
38. In this case the FCO relied on this exemption to withhold two pieces of information as they were already in the public domain by virtue of having been provided in response to Parliamentary questions (PQs). The complainant was provided with a website link to the responses to the PQs in question. On this basis the Commissioner is satisfied that this information is reasonably accessible to the complainant such that section 21 applies to it.

Section 40 – personal data

39. Section 40(2) of FOIA states that personal data is exempt from disclosure if its disclosure would breach any of the data protection principles contained within the Data Protection Act 1998 (DPA).
40. Personal data is defined in section (1)(a) of the DPA as:

‘.....data which relate to a living individual who can be identified from those data or from those data and other information which

is in the possession of, or likely to come into the possession of, the data controller; and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any person in respect of the individual.'

41. The FCO withheld the names and contacts details of members of FCO staff and third parties whose details are not already in the public domain. The Commissioner accepts that such information constitutes personal data within the meaning of section 1 of the DPA as they clearly relate to identifiable individuals.

42. The FCO argued that disclosure of such information would breach the first data protection principle which states that:

'Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.'

43. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:

- The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
 - what the public authority may have told them about what would happen to their personal data;
 - their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights (ECHR);
 - the nature or content of the information itself;
 - the circumstances in which the personal data was obtained;
 - any particular circumstances of the case, eg established custom or practice within the public authority; and
 - whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.
- The consequences of disclosing the information, ie what damage or distress would the individual suffer if the

information was disclosed? In consideration of this factor the Commissioner may take into account:

- whether information of the nature requested is already in the public domain;
 - if so the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?
44. Furthermore, notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling legitimate interest in disclosure to the public.
45. In considering 'legitimate interests', in order to establish if there is a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sake, as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to consider a proportionate approach.
46. The FCO argued that individuals both in its organisations and other third parties whose names were not in the public domain would have a reasonable expectation that they would not be disclosed in this context.
47. The Commissioner accepts that individuals would have had a reasonable expectation that their names will not be disclosed in the context of the request. In respect of the FCO employees, he accepts that the individuals concerned were carrying out public functions and must therefore have the expectation that their actions in that regard will be subject to a greater scrutiny than would be the case in respect of their private lives. However, he is particularly mindful of the fact that the officials were not in public facing roles.
48. In view of the above, the Commissioner finds that it would have been unfair to disclose the names of the junior officials in question. Disclosure would have contravened the first data protection principle. The FCO was therefore entitled to withhold the names of the officials on the basis of section 40(2).
49. With regard to the personal data of non-FCO third parties, the Commissioner is satisfied from the content of the information that those individuals would all have had a reasonable expectation that their names and contact details would not be disclosed under FOIA. In light of such an expectation the Commissioner accepts that disclosure of the

information would breach the first data protection principle and thus such information is exempt from disclosure on the basis of section 40(2) of FOIA. In addition, for completeness, he does not consider that any Schedule 2 condition, as referred to in paragraph 42 above, could apply in the circumstances of this case.

Right of appeal

50. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

51. 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.
52. 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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