

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 July 2016

Public Authority: The 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 for information it held about meetings and correspondence between it and Shell which involved Sean Winnett, Shell's Head of UK Government Relations. The FCO disclosed the information it held to the complainant but made a number of redactions on the basis of the exemptions contained at the following sections of FOIA: section 27 (international relations), 29 (economy), 38 (health and safety), 40 (personal data), 41 (information provided in confidence) and 43 (commercial interests).
2. The Commissioner has concluded that the redacted information is exempt from disclosure on the basis of sections 27(1)(a), (c) and (d), 41(1) and 43(2).

Request and response

3. The complainant submitted the following request to the FCO on 11 November 2015:

'I am seeking information relating to former Principle Secretary Sean Winnett MBE, now Head of UK Government Relations at Shell, and the FCO.

I am seeking information on meetings and correspondence between the FCO and Shell, where Sean Winnett was present, for the period starting January 2015 until the date of this request. Please narrow your searches to the following departments:

- a. *Office of the Secretary of State*
- b. *MENA*
- c. *West Africa*

For any meetings please provide:

- I. Time*
- II. Place*
- III. Attendee list (including name, where disclose-able under requirements of DPA, and job title of each attendee)*

Please also provide any documentation in relation to any meetings, including:

- I. Any meeting minutes*
- II. Correspondence in relation to meetings*
- III. Meeting readouts*
- IV. Briefing notes*
- V. Or other meeting memoranda*

Please ensure that your search for correspondence includes email, notes of telephone calls, letters, briefing documents, text messages and information held on cloud services.'

4. The complainant subsequently refined this request on 13 November 2015 to simply focus on the departments/offices of the Secretary of State, Nigeria and Saudi Arabia.
5. The FCO contacted her on 11 December 2015 and confirmed that it held information falling within the scope of the refined request but it considered the exemptions contained at sections 43 (commercial interests) and 27 (international relations) of FOIA to apply and it needed additional time to consider the balance of the public interest test.
6. The FCO provided the complainant with a substantive response to her request on 13 January 2016. The FCO explained that the Foreign Secretary, Andy Brown (Upstream International Director, Shell), Sean Winnett (Head, UK Government Relations, Shell), Anna Clunes (FCO Director, Economic Diplomacy) and junior officials met on 3 August 2015 at the FCO. The FCO also confirmed that it held some information relevant to this meeting and provided it to her in the form of a digest. It also explained that information had been withheld on the basis of the exemptions contained at the following sections of FOIA: 27(1)(a),(c) and (d), 27(2), 29(1)(a), (economy) 38(1)(b) (health and safety), 40(2) (personal data), 41 (information provided in confidence) and 43(2) of FOIA.

7. The complainant contacted the FCO on 26 January 2016 and asked it to conduct an internal review of this decision. In submitting this review she raised the following points:
 - The information she requested constituted 'environmental information' as defined by the EIR and therefore should have been considered under that access regime rather than FOIA.
 - In her original request she asked for redacted documents to be provided rather than digested extracts.
 - She argued that the FCO had failed to demonstrate that the exemptions upon which it relied were correctly engaged.
8. The FCO responded on 23 February 2016. It explained it was confident that a reasonable search was carried out for information falling within the scope of her request and only one document relevant to the request about Nigeria was found. In response to the specific points she had raised, the FCO explained that it was of the view that the EIR did not apply to the information it had located. The FCO provided the complainant with a further portion of the email in question, which explained the context of the extract previously provided to her, and noted that the remainder of the information in the email was out of scope of the request. Finally, the FCO explained that the internal review had also concluded that all of the exemptions cited in the refusal notice had been correctly cited, with the exception of section 27(2) of FOIA which it was found did not apply.

Scope of the case

9. The complainant contacted the Commissioner on 23 February 2016 to complain about the way her request for information had been handled. She has asked the Commissioner to consider the following points:
 - The possibility that the FCO may hold further information falling within the scope of her request;
 - The FCO's failure to consider her request under the EIR rather than FOIA;
 - She also argued that the FCO had incorrectly relied on the various FOI exemptions (and indeed could not rely on the equivalent exceptions contained in the EIR); and
 - She was dissatisfied with the FCO's exclusion of information on the basis that it was out of scope. She explained that she had refined her request to information held by the office/departments of the

Secretary of State, Nigeria and Saudi Arabia. She had not narrowed the scope of her requests simply to those subjects.

10. During the course of the Commissioner's investigation, the FCO conducted further searches and located four additional documents. The FCO also accepted that the information previously considered to be out of scope was in fact in the scope of the request, albeit that the FCO considered some of this information to be exempt from disclosure on the basis of the exemptions previously cited in the refusal notice.
11. The FCO provided the complainant with redacted versions of the five documents it had located on 1 July 2016.
12. The Commissioner confirmed with the complainant that in light of this further disclosure she was satisfied that the FCO had located all of the information falling within the scope of her request. She also agreed not to dispute the redaction made to the last of the five documents as the redacted information simply consisted of the name and contact details of a junior civil servant. Therefore, this decision notice only considers two issues, firstly whether the requested information constitutes 'environmental information' and thus falls to be considered under the EIR rather than FOIA and secondly, whether any of the exemptions / exceptions in the relevant access regime provide a basis to withhold the information redacted from the remaining four documents. To clarify, the four documents in question consist of:
 - A record of a meeting held on 3 August 2015 between Foreign Secretary, Andy Brown (Upstream International Director, Shell), Sean Winnett (Head, UK Government Relations, Shell), Anna Clunes (Director, Economic Diplomacy) and junior officials.
 - A briefing for the Foreign Secretary for the above meeting.
 - A clutch card regarding the above meeting.
 - A letter from Andy Brown to Foreign Secretary dated 22 May 2015.

Reasons for decision

Is the information 'environmental information'?

13. Regulation 2(1) of the EIR defines environmental information as any information in any material form on:

'(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)'

14. The Commissioner considers that the phrase 'any information...on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. In the Commissioner's opinion a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor etc in question. In other words, information that would inform the public about the matter under consideration and would therefore facilitate effective participation by the public in environmental decision making is likely to be environmental information.
15. As the quote from regulation 2(1) above suggests there are a number of different ways in which information can be classed as environmental information.
16. The complainant emphasised that part of the requested information related to Shell's operations in Nigeria and it is well documented that the extraction of oil by Shell has led to numerous spills and widespread pollution, which has had a profound impact on the Niger Delta ecosystems. By virtue of regulation 2(1)(b), she explained that she would expect any information relating to the spillage of oil, clean-up or oil companies' impact on the environment to be considered as environmental. Furthermore, the complainant argued that she would expect any information relating to energy policy to be considered as environmental information by virtue of section 2(1)(c).

17. Having reviewed the requested information, the Commissioner has concluded that it does not constitute environmental information. Whilst the Commissioner obviously cannot reveal the content of the withheld information he can confirm that it does not include references to specific spills or pollution as potentially envisaged by the complainant. Moreover, in the Commissioner's view the withheld information cannot be said to relate to energy policy, even with a broad reading of the phrase 'any information...on'. Rather, in the Commissioner's opinion the information could be accurately described as a strategic, top-level discussion which focuses more on geopolitical issues rather than matters of energy policy.

Section 27 – international relations

18. The FCO redacted some of the information on the basis of sections 27(1)(a), (c) and (d) of FOIA.

19. These exemptions provide 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...

... (c) the interests of the United Kingdom abroad

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

20. The FCO explained that the information redacted on the basis of these exemptions detailed the UK's relationship with Nigeria, Iraq, Egypt, Cyprus, Russia, Qatar, Brunei, Kazakhstan and Iran. It argued that disclosure of such information risked damaging the UK's relations with these countries as it would involve the disclosure of information these states provided in confidence to the UK and also the disclosure of information which commented on the states in question. In the FCO's view disclosure of this information would undermine the UK's relations with the governments in question as effective international relations need to be based upon confidence and trust.

21. 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 – 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. The anticipated prejudice must be more likely than not.
22. 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
23. 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 identified by the FCO clearly relates to the interests which the exemptions contained at sections 27(1)(a), (c) and (d) are designed to protect.
24. The Commissioner is also satisfied that the second and third criteria are met. He has reached this conclusion because it is self-evident from the content of the redactions that the withheld information was either provided to the UK by one of the governments in question with the understanding that it would not be disclosed, or contains candid comments about the UK's views on the various governments in question. In the Commissioner's opinion it is logical and reasonable to argue that disclosure of such information would be likely to harm the UK's relations with the states in question. Furthermore, the Commissioner is satisfied the prejudice which would result is one that is both real and of substance.

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

Public interest test

25. Section 27 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
26. The complainant provided detailed submissions to support her point of view that the public interest favoured disclosure of the information falling within the scope of her request. The Commissioner has summarised these submissions below. She explained that her request focused on the discussions between Sean Winnett, the Head of UK Government Relations at Shell and the FCO given Mr Winnett's previous role within the FCO as Principle Private Secretary to the Foreign Secretary. She argued that there was a compelling public interest in understanding the relationship between a lobbyist, ie Mr Winnett, and civil servants who were recently his colleagues. The complainant acknowledged that it was accepted that multinationals will need specialised employees for liaising with national governments, however given Mr Winnett's previous role in the civil service he would have been privy to much information that would be useful in Shell's government relations department.
27. The complainant emphasised that it was important for functioning democracy that, as well as acting properly, the state should be seen acting properly, and therefore disclosure of this information was necessary in order to aid transparency in respect of how Mr Winnett's lobbying role may intersect with his former public office.
28. Moreover, regardless as to Mr Winnett's previous roles, the complainant emphasised that the Tribunal had found that there was a clear public interest in the disclosure of information that would reveal the nature of the relationship between government and lobbyists:

*'The public interest is stronger in respect of such communications than it might be in respect of communications between ministers and other non-lobbyist third parties because of **the undoubted influence that these unelected... lobbying bodies can have on the formulation and development of policy**' [emphasis added by complainant].²*
29. When the complainant submitted her request she emphasised there was a particularly pressing need for transparency surrounding government relations with fossil fuels as the UK will play a key role in negotiations at

² DBERR v ICO & FoE (29/04/2008)

the 2015 United Nations Climate Change Conference held in Paris COP, which may be able to help the world's governments from preventing catastrophic climate change. She also noted that in October 2015 Shell had left an influential climate change lobbying group amid concern over the company's attitude to environmental issues. The complainant argued that such matters should be at the top of the UK and Shell's agenda, negotiating ways in which to sway the company towards a more progressive agenda.³

30. In the Commissioner's opinion disclosure of the information redacted on the basis of the exemptions contained at section 27(1) would shed considerable further light on the matters discussed between the FCO and Shell at the meeting which took place in August 2015. In particular, disclosure of this information would reveal the FCO's views on the various countries in question, and in particular, how the situation in these countries may affect Shell's operations in these particular countries. The Commissioner agrees that there is a strong public interest in the government being transparent about its relations with third parties, particularly in respect of parties who have an interest in lobbying government. As noted above, disclosure of the redacted information would provide a clear insight into the FCO's discussions with Shell, and thus the public interest in disclosure of this information should not be underestimated. Moreover, the Commissioner accepts that given Mr Winnett's previous role at the FCO this adds further weight to the public interest in disclosure of information which would aid transparency about his interactions with the UK government. However, in the Commissioner's opinion the degree to which disclosure of the information redacted on the basis of section 27(1) would shed light on Mr Winnett's role is arguably very limited (and the same is also true of the redactions made on the basis on the other exemptions which are considered in this notice).
31. Furthermore, in the Commissioner's opinion there is a very strong public interest in protecting the UK's relations with other states. In the Commissioner's opinion it would be firmly against the public interest for the UK's relations with the various states identified by the FCO to be harmed. Moreover, disclosure of the redacted information in this case risks not just prejudicing the UK's relations with one state but with a number of states, which in the Commissioner's opinion increases the public interest in maintaining the exemption. Consequently the

³ <http://www.ft.com/cms/s/0/d63ea0c0-57dc-11e5-9846-de406ccb37f2.html>

Commissioner has concluded that the public interest favours maintaining the exemptions contained at sections 27(1)(a), (c) and (d).

Section 41 – information provided in confidence

32. The FCO argued certain information provided to it by Andy Brown of Shell had been redacted on the basis of the exemption contained at section 41(1) of FOIA. This states that:

33. 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.'

34. 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.

35. 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.

36. 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?

37. The Commissioner is satisfied that the information redacted on the basis of section 41(1) was clearly obtained from a third party, namely Andy Brown of Shell either in the meeting between him and the Foreign Secretary or in the letter Mr Brown sent to the Foreign Secretary.

Does the information have the necessary quality of confidence?

38. 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.
39. It is clear from the redacted information that the information was clearly of importance to the confider, detailing as it does Shell's plans and Mr Brown's views on certain related issues. Moreover, it is clear that such information is not accessible elsewhere.

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

40. The FCO argued that the meeting in question was a private one between the Foreign Secretary and Mr Brown during which a range of issues were frankly discussed and as a consequence Mr Brown would have the clear expectation that the views he expressed during the meeting would not be disclosed. Similarly, the FCO argued that in respect of redacted parts of Mr Brown's letter such information contained details of Shell's plans in respect of Nigeria and Mr Brown's views on related issues and there was a clear implication, given the content of this information, that these parts of the letter had been shared with the FCO with the expectation that it would not be disclosed.
41. In light of this explanation, and given the content of the withheld information, the Commissioner is satisfied that this criterion is met.

Would disclosure be detrimental to the confider?

42. The FCO argued that the information included details of Shell's potential future plans in a range of countries around the world and thus disclosure of this information would clearly be detrimental to the confider as it would provide Shell's competitors with a potential commercial advantage.
43. Given the content of the information the Commissioner is satisfied that its disclosure would be likely to have detrimental consequences for Shell in the way suggested by the FCO.

Public interest defence

44. 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.

45. The FCO explained to the Commissioner that Shell has expressed concerns that if the redacted information was disclosed this would risk inhibiting the frankness and candour of future debate between the parties. Furthermore, the FCO expressed concerns that disclosure of this information would also risk limiting the frankness and openness which other third parties would share information with the FCO. The FCO argued that to achieve its objectives of promoting prosperity, security and ensuring the safety of British nationals overseas, it is essential that third parties feel they can share information with the FCO and that any such confidential information will be treated in confidence.
46. As noted above, the Commissioner agrees that there is a clear public interest in disclosure of information concerning Shell's discussions with the UK government. However, the Commissioner's considers it plausible to argue that disclosure of information provided by Shell in confidence risks undermining the manner in which Shell engages with the FCO in the future. Moreover, the Commissioner accepts that it is reasonable to argue that disclosure of the redacted information presents a credible risk to the nature of the information shared with the FCO by other parties. In the Commissioner's opinion such an outcome would be firmly against the public interest as it would undermine the FCO's ability to meet its objectives and consequently he has concluded that the public interest in disclosing the information does not outweigh the public interest in maintaining the confidence.

Section 43 – commercial interests

47. The FCO also argued that some of the redacted information was exempt from disclosure on the basis of section 43(2) of FOIA. This section provides 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).'

48. 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.
49. As noted above, the FCO explained that it had consulted with Shell in respect of the disclosure of the information redacted under this exemption. It had confirmed that Shell was of the view that disclosure of such information would be likely to prejudice its commercial interests as

it would reveal specific details of their current and future activities in the countries in question which could be used by its competitors to give them an advantage. Moreover, Shell explained how, given the content of some of the redacted information, its disclosure could potentially undermine its ability to operate in the countries in question.

50. With regard to the three limb test set out above, the Commissioner is satisfied that the first limb is clearly met as the harm to Shell's interests is clearly one that section 43(2) is designed to protect.
51. With regard to the second limb, the Commissioner accepts that there is clearly some causal link between disclosure of the withheld information and harm occurring to Shell's commercial interests. Disclosure of the information would provide a broad insight into Shell's current and future operations in a range of countries and markets as set out by one of its senior executives. Thus in the Commissioner's opinion it is sustainable to argue that disclosure risks having a real and significant impact on Shell's commercial interests. Finally, with regard to the third limb, the Commissioner is satisfied that this is met given the various ways in which disclosure could assist Shell's competitors and the nature of the competitive overseas oil and gas market.

Public interest test

52. Section 43 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
53. The FCO argued that Shell have legitimate economic interests in the various countries in which they operate and thus it would be against the public interest to put Shell at disadvantage in these markets given that their investments also benefit the UK economy.
54. Again, as discussed above, the Commissioner accepts there is a public interest in the disclosure of information which would aid the public's understanding of Shell's discussions with the FCO. However, the Commissioner believes that there is an inherent public interest in ensuring fairness of competition; in that respect he agrees with the FCO that it is against the public interest for the commercial interests of a third party to be undermined simply because they liaised with, and share information with, the government. The Commissioner has therefore concluded that the public interest favours maintaining the exemption contained at section 43(2).

55. In light of his findings in respect of sections 27, 41 and 43 the Commissioner has not gone on to consider the FCO's reliance on the exemptions contained at sections 29, 38 and 40.

Right of appeal

56. 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

57. 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.
58. 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

Jonathan Slee
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF