

**Freedom of Information Act 2000 (FOIA)  
Environmental Information Regulations 2004 (EIR)  
Decision notice**

**Date:** 15 November 2017

**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) asking it to confirm whether it was funding Risk Advisory Group to help train the Lebanese army, and if so, details about the nature of this contract. The FCO refused to confirm or deny whether it held any information falling within the scope of this request on the basis of section 38(2) (health and safety) and section 40(2) (personal data) of FOIA. The Commissioner has concluded that section 38(2) is engaged and that the public interest favours maintaining this exemption.

**Request and response**

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2. The complainant emailed the FCO on 5 and 12 March 2017 asking for the following information:  
*'I would be grateful if you could confirm whether the FCO is funding the Risk Advisory Group, a private security company, to help train the Lebanon army and if so, what is the nature of this training, how long is the contract for, and what oversight/transparency mechanisms are in place to ensure the company is adhering closely to the training program it has been contracted to deliver?'*
3. The FCO responded on 31 March 2017 and explained that it was relying on the exemptions contained at sections 38(2) and 40(5) of FOIA to refuse to confirm or deny whether it held any information falling within the scope of the request.

4. The complainant contacted the FCO on 3 April 2017 in order to ask for an internal review of this decision.
5. The FCO informed him of the outcome review on 6 June 2017. The review upheld the exemptions cited in the refusal notice.

### **Scope of the case**

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6. The complainant contacted the Commissioner on 6 June 2017 in order to complain about the FCO's handling of his request.
7. In relation to this complaint it is important to note that the right of access provided by FOIA is set out in section 1(1) and is separated into two parts: Section 1(1)(a) gives an applicant the right to know whether a public authority holds the information that has been requested. Section 1(1)(b) gives an applicant the right to be provided with the requested information, if it is held. Both rights are subject to the application of exemptions.
8. As explained above, the FCO is seeking to rely on section 38(2) and section 40(5) of FOIA to refuse to confirm or deny whether it holds information falling within the scope of the request. Therefore, this notice only considers whether the FCO is entitled, on the basis of these exemptions, to refuse to confirm or deny whether it holds the requested information. The Commissioner has not considered whether the requested information – if held – should be disclosed.

### **Reasons for decision**

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#### **Section 38 – health and safety**

9. Section 38(2) of FOIA states that:

*'The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, have either of the effects mentioned in subsection (1).'*

10. The effects in question in this case concern those listed at section 38(1)(b) of FOIA, namely endangerment to the safety of any individual.

#### *The complainant's position*

11. In his submissions to the Commissioner the complainant argued that the information he has asked for was very general and would not result in the disclosure of personal data. He also emphasised that similar

information had been provided to him in the past in relation to Iraq and Afghanistan where the FCO has hired private security companies (PSC) to protect its staff and support the training given to local forces.

### *The FCO's position*

12. In its responses to the complainant the FCO explained that it was satisfied that confirming or denying whether it held information falling within the scope of the request would be likely endanger individuals' safety. The FCO explained that in reaching this conclusion it had consulted its staff in Beirut.
13. The FCO provided the Commissioner with more detailed submissions to support its reliance on section 38(2), and indeed section 40(5). However, the Commissioner cannot refer to these submissions in this notice without potentially disclosing information that is itself exempt from disclosure under FOIA.<sup>1</sup>
14. The Commissioner also asked the FCO to respond to the specific points of complaint advanced by the complainant. With regard to the complainant's point that he had previously been provided with information about PSCs hired by the FCO in Iraq and Afghanistan, the FCO explained that in handling this request it had made a specific assessment based on the safety of individuals and the situation in Lebanon. The FCO emphasised that its approach to previous FOI requests about Iraq and Afghanistan is separate to this and not relevant to the position taken in relation to this request.

### The Commissioner's position

15. In order for a prejudice based exemption, such as section 38(2), to be engaged the Commissioner considers 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 - or in this case confirmation as to whether or not the requested information is held - 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

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<sup>1</sup> In effect, this is a situation where section 17(4) of FOIA applies which states that a public authority is not obliged to explain why an exemption applies if to do so would involve the disclosure of information which would itself be exempt.

information being withheld – or the confirmation as to whether or not the requested information is held - 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, confirmation as to whether the requested information is held 'would be likely' to result in prejudice or confirmation as to whether the requested information is held '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.
16. With regard to the first limb, the Commissioner is satisfied that this is clearly met given that the nature of prejudice envisaged by the FCO, namely harm to individuals, is clearly one that falls within the scope of the exemption contained at section 38(1)(b).
17. Furthermore, based on the detailed submissions provided by the FCO to the Commissioner she is satisfied that both the second and third limbs of the test are met. That is to say, in the Commissioner's view there is a causal link between the FCO confirming whether or not it holds the requested information and the prejudice it envisages occurring. Moreover, in the Commissioner's view the chances of this prejudice occurring are more than hypothetical. In reaching this conclusion the Commissioner agrees with the FCO that despite similar information being disclosed in respect of other countries, each request must be considered on its own merits. Based upon the circumstances of this case, and specifically on the detailed submissions which the FCO has provided to her, the Commissioner is satisfied that section 38(2) is engaged. The Commissioner cannot explain in any greater detail why she has reached this conclusion in the decision notice as to do so would require her to refer directly to the FCO's submissions.

## **Public interest test**

18. Section 38(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 confirming whether or not the requested information is held.
19. The complainant argued that there was clear public interest in the FCO disclosing any information it held falling in the scope of his request in order to ensure accountability. More specifically, the complainant made the following points:
  - The FCO is a signatory to the Montreux Document, which covers good practices that should be followed when a government employs a PSC and issues of accountability. The complainant argued that if the FCO is hiring PSCs it is not clear how or whether they are being held accountable for their actions to a public body such as Parliament.
  - The FCO was instrumental in setting up the International Code of Conduct Association that is responsible for ensuring that PSCs are properly monitored, that their actions are transparent and they can be held accountable for them. The complainant suggested that at the time the UK government also made it clear that they would only hire PSCs that have signed the International Code of Conduct, but having checked the register he noted that Risk Advisory Group was not on it.
20. FCO acknowledged that there is a general public interest in openness in government because this increases public trust in, and engagement with, the government. However, it argued that there is clear a public interest in ensuring individual safety and in its view the degree of harm that would be caused by confirming whether or not information is held in respect of this request meant that the balance of the public interest strongly favoured maintaining the exclusion to confirm or deny under section 38(2). In respect of the complainant's specific points of complaint, the FCO explained that the Montreux Document is not a legally binding document but sets out good practice relating to the contracting of PSCs by states during armed conflict. However, the FCO argued that this document is not relevant to this request as there is no armed conflict in Lebanon. The FCO also explained to the Commissioner, as part of its submissions which it did not wish to be reproduced in the decision notice, why it believed that the complainant's argument about the International Code of Conduct Association did not affect the balance of the public interest test.
21. The Commissioner recognises that there is a significant public interest in the government being open and transparent about decisions it takes as part of its foreign policy and this extends to information concerning how

the UK is delivering its publicly acknowledged commitment to help train the Lebanese Army.<sup>2</sup> However, the Commissioner also believes that there is very strong public interest in ensuring the safety of individuals. She has also been persuaded, based on the FCO's submissions, that the complainant's points in respect of the Montreux Document and International Code of Conduct Association do not materially affect the balance of the public interest in this case. In light of this she has concluded that the public interest favours maintaining the exemption contained at section 38(2) of FOIA.

22. Given this decision the Commissioner has not gone on to consider the FCO's reliance on section 40(5) of FOIA.

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<sup>2</sup> <https://www.gov.uk/government/news/shorter-congratulates-lebanese-army-on-successful-operation>

## Right of appeal

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23. 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](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

24. 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.
25. 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**