

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

### **Decision notice**

**Date:** 22 December 2021

**Public Authority:** Foreign, Commonwealth & Development 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) (now the Foreign, Commonwealth & Development Office, FCDO) seeking access to six files concerning Sri Lanka in the 1980s. The FCO disclosed some part of the files to the complainant but sought to withhold other parts on the basis of the following exemptions within FOIA: section 23(1) (security bodies), section 24(1) (national security), sections 26(1)(a) and (b) (defence), sections 27(1)(a) and 27(2) (international relations), sections 31(1)(a) and (b) (law enforcement), section 40(2) (personal data) and section 41(1) (information provided in confidence).
2. The complainant disputed the FCO's reliance on these exemptions and also argued that the FCO should have provided him with a schedule of how it was applying the exemptions to the specific redactions.
3. The Commissioner's decision is that FCO is entitled to withhold the remaining information on the basis of the exemptions it has cited. The only exception to this is a small portion of information contained at folio 38 and its attachment in file FCO 37/4354. In the Commissioner's view none of the exemptions that the FCO have relied on to withhold this information provide a basis to withhold it. However, the Commissioner has also concluded that the FCO was not obliged to provide the complainant with a schedule setting out how the exemptions had been applied. It did however breach section 17(3) by failing to complete its public interest test considerations in a reasonable time.

4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Provide the complainant with a copy of folio 38 and its attachment from file FCO 37/4354 with sub-paragraphs (1) and (2) of paragraph 6 unredacted.
5. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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6. The complainant submitted a request to the FCO<sup>1</sup> on 29 August 2018 seeking access to the following files:
  - '1. FCO 37/4354 Forthcoming trial of alleged Irish National Liberation Army (INLA) terrorists and the interest of Keeni Meeni Services (KMS) in training Sri Lankan forces.*
  - 2. FCO 37/4337 Internal political situation in Sri Lanka.*
  - 3. FCO 37/4338 Internal political situation in Sri Lanka. 4. FCO 37/4346 Visits from the UK to Sri Lanka.*
  - 5. FCO 37/4347 Ministerial visits from Sri Lanka to the UK.*
  - 6. FCO 37/4348 Visits by Ranasinghe Premadasa, Prime Minister of Sri Lanka, to the UK; meeting with Margaret Thatcher, May 1986.'*
7. The FCO contacted him on 26 September 2018 and confirmed that it held information falling within the scope of his request but it considered this to be exempt from disclosure on the basis of sections 24 (national security), 26 (defence), 27 (international relations) and 31 (law enforcement) of FOIA and it needed additional time to consider the balance of the public interest test.
8. The FCO provided him with a substantive response to this request on 18 March 2019. The FCO explained that it had concluded that parts of each

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<sup>1</sup> The FCO merged with the Department for International Development on 2 September 2020 to form the FCDO. This decision notice is therefore served on the FCDO but refers to the FCO where it was the body that took certain actions in relation to the request.

of the six files could be disclosed and these would be posted to the complainant in due course. However, the FCO explained that further material from each of the six files was considered to be exempt from disclosure. The FCO explained that the exemptions in question were being applied as followed:

- FCO 37/4354 Partial release with redactions under Section 23(1), Section 26(1), Section 27(1)(a)
  - FCO 37/4337 Partial release with redactions under Section 23(1), Section 24(1), Section 27(1)(a), Section 27(2)
  - FCO 37/4338 Partial release with redactions under Section 26(1) and Section 27(2)
  - FCO 37/4346 Partial release with redactions under Section 24(1)
  - FCO 37/4347 Partial release with redactions under Section 24(1), Section 27(1)(a), Section 31(1)(a) and (b), and Section 40
  - FCO 37/4348 Partial release with redactions under Section 24(1).
9. The complainant contacted the FCO on 19 March 2019 and asked it to provide him with *'a schedule of which folios contain which redactions under what exemptions'*.
  10. The disclosable information was subsequently sent to the complainant on 4 April 2019 and on 18 April 2019 the FCO contacted him and explained that it had considered his request for a schedule explaining how the exemptions had been applied and it was of the view that it did not need to provide this under FOIA.
  11. The complainant contacted the FCO on 21 April 2019 in order to ask for an internal review of its decision to withhold information from all six files on the basis of the various exemptions it had cited. He argued that the FCO's refusal to provide him with a schedule of redactions hampered his ability to refute the exemptions because in many cases he could not tell which exemptions were being relied upon.
  12. The FCO informed him of the outcome of the internal review on 13 February 2020. The FCO explained that it remained of the view that it was not obliged to provide the complainant with a schedule of redactions. The FCO explained that as a result of its internal review it had concluded that additional information could be released but the remaining information was exempt from disclosure on the following basis:

- FCO 37/4354 Folios W4, 25, 33, 37, 38 and attachment, 47, 49, 54 second and fifth attachments, folios 64, 65, 67 and 73, have been partially released and folio 32 and the attachment to folio 49 have been released in full. The remaining material is withheld under section 23/24 in the alternative, section 26(1), section 27(1)(a) section 38 (1)(b), section 40 and section 41.
- FCO 37/4337 Folios 168,169, 174 and 174 attachment have now been released in full. The remainder of the file is withheld under section 23/24 in the alternative, section 27(1)(a) and section 27(2).
- FCO 37/4338 Material remains withheld under section 26(1) and section 27(2).
- FCO 37/4346 Material remains withheld under section 24(1).
- FCO 37/4347 Material remains withheld under Section 24(1), section 27(1)(a), section 31(1)(a) and (b), and section 40.
- FCO 37/4348 Material remains withheld under section 24(1).

### **Scope of the case**

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13. The complainant contacted the Commissioner on 10 December 2019 in order to complain about the FCO's handling of his request. He raised the following grounds of complaint:
  - the FCO's decision to withhold information falling within the scope of the request;
  - the FCO's failure to clarify which exemption(s) apply to specific documents/redactions; and,
  - the time it took the FCO to process the request.
14. During the course of the Commissioner's investigation of this complaint, and following a further review of the withheld information, in February 2021 the FCDO provided the complainant with copies of additional folios from files FCO 37/4346 and FCO 37/4354, some of which were redacted and some which released in full.

## Reasons for decision

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### **Section 23(1) – information supplied by or relating to bodies dealing with security matters** **Section 24 – national security**

15. Section 23(1) of FOIA provides an exemption which states that:

*'Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).'*

16. To successfully engage the exemption at section 23(1), a public authority needs only to demonstrate that the relevant information was directly or indirectly supplied to it by, or relates to, any of the bodies listed at section 23(3).<sup>2</sup>

17. Section 24(1) states that:

*'Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security'.*

18. FOIA does not define the term 'national security'. However, in *Norman Baker v the Information Commissioner and the Cabinet Office* (EA/2006/0045 4 April 2007) the Information Tribunal was guided by a House of Lords case, *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, concerning whether the risk posed by a foreign national provided grounds for his deportation. The Information Tribunal summarised the Lords' observations as follows:

- 'national security' means the security of the United Kingdom and its people;
- the interests of national security are not limited to actions by an individual which are targeted at the UK, its system of government or its people;

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<sup>2</sup> A list of the bodies included in section 23(3) of FOIA is available here: <http://www.legislation.gov.uk/ukpga/2000/36/section/23>

- the protection of democracy and the legal and constitutional systems of the state are part of national security as well as military defence;
  - action against a foreign state may be capable indirectly of affecting the security of the UK; and,
  - reciprocal co-operation between the UK and other states in combating international terrorism is capable of promoting the United Kingdom's national security.
19. Furthermore, in this context the Commissioner interprets 'required for the purposes of' to mean 'reasonably necessary'. Although there has to be a real possibility that the disclosure of requested information would undermine national security, the impact does not need to be direct or immediate.
20. As is clear from the wording of section 24(1), the exemptions provided by sections 23(1) and 24(1) are mutually exclusive. This means they cannot be applied to the same request.
21. However, the Commissioner recognises that the fact that section 24(1) can only be applied to information that is not protected by section 23(1) can present a problem if a public authority does not want to reveal whether or not a section 23 security body is involved in an issue. To overcome this problem, as referred to above at footnote 2, the Commissioner will allow public authorities to cite both exemptions 'in the alternative' when necessary. This means that although only one of the two exemptions can actually be engaged, the public authority may refer to both exemptions in its refusal notice.
22. As the Commissioner's guidance on this issue explains, a decision notice which upholds the public authority's position will not allude to which exemption has actually been engaged. It will simply say that the Commissioner is satisfied that one of the two exemptions cited is engaged and that, if the exemption is section 24(1), the public interest favours withholding the information.

#### The complainant's position

23. In relation to section 23(1), the complainant argued that this did not cover foreign special forces, foreign intelligence agencies, nor British

'mercenaries such as KMS'<sup>3</sup>. He noted that the fact that Sri Lanka's army commando unit was trained by the SAS is a matter of public record which has been disclosed in the Ministry of Defence (MOD) in files at The National Archives. The complainant argued that public bodies must act in a proportionate and rational fashion, and it was neither proportionate nor rational for the FCDO to withhold information of a similar nature to which the MOD had already released.

24. In relation to section 24(1), the complainant noted that it was already in the public domain that the SAS trained Sri Lankan army commandos in 1980. As a result he argued that subsequent references to this in the FCO files cannot be said to jeopardise national security.

#### The Commissioner's position

25. Based on submissions provided to him by the FCDO during the course of his investigation, the Commissioner is satisfied that the parts of the withheld information either fall within the scope of the exemption provided by section 23(1) of FOIA or fall within the scope of the exemption provided by section 24(1) of FOIA, and that if the exemption engaged is section 24(1) then the public interest favours maintaining the exemption.
26. The Commissioner cannot elaborate on his rationale behind this finding without compromising the content of the withheld information itself or by revealing which of these two exemptions is actually engaged.

#### **Section 24 – national security**

27. In addition to the information which the FCO withheld on the basis of sections 23 and 24 in the alternative, it also sought to withhold some information simply on the basis of section 24(1) of FOIA.
28. The Commissioner cannot elaborate on why the FCDO considers this information to be exempt from disclosure without revealing the content of it. However, having considered the content of the information the Commissioner is satisfied that its disclosure could harm the UK's national security. The information is therefore exempt from disclosure on the basis of section 24(1) of FOIA.
29. With regard to the balance of the public interest, the Commissioner considers there to be a very significant public interest in ensuring that

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<sup>3</sup> KMS refers to Keenie Meenie Services, a private British military contractor.

the UK's national security is not harmed. Furthermore, in the Commissioner's view disclosure of this information would not be likely to provide any particular insight into the matters which are the focus of the complainant's complaint.

30. In light of this the Commissioner has concluded that the public interest favours maintaining the exemption contained at section 24(1).

### **Section 26 - defence**

31. The FCDO withheld some of the information on the basis of sections 26(1)(a) and (b) of FOIA. These state that:

*'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice—*

*(a) the defence of the British Islands or of any colony, or*

*(b) the capability, effectiveness or security of any relevant forces.'*

### The FCDO's position

32. The FCDO's submissions to the Commissioner to support the application of the section 26(1) refer directly to the content of the withheld information itself and therefore are not included in this decision notice. However, in summary the FCDO argued that disclosure of the information withheld on the basis of this exemption would be likely to prejudice the reputation and effectiveness of the UK's Defence Attaches, not only in Sri Lanka but also more widely.

### The Commissioner's position

33. In order for a prejudice based exemption, such as section 26(1), 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 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.

34. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the FCDO clearly relates to the interests which the exemption contained at sections 26(1)(a) and (b) are designed to protect. With regard to the second criterion having considered the content of the withheld information and taking into account the FCDO's submissions, the Commissioner is satisfied that there is a causal link between disclosure of this information and prejudice potentially occurring both to the defence of the British islands and to the capability, effectiveness or security of any relevant forces. Furthermore, he is satisfied that the resultant prejudice would be real and of substance and that there is a more than a hypothetical risk of prejudice occurring. The third criterion is therefore met and sections 26(1)(a) and (b) are engaged.

#### Public interest test

35. Section 26(1) is a qualified exemption and therefore subject to the public interest test set out in section 2(2)(b) of FOIA. The Commissioner has therefore considered 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*

36. In his submissions to the Commissioner the complainant emphasised that the FCDO's failure to explain which exemptions had been applied to which parts of the withheld information significantly limited his ability to make focused and meaningful submissions to challenge each of the specific exemptions.
37. Nevertheless, the complainant did set out why he considered there to be a significant public interest in disclosure of information on this topic. He explained that the four files sought by his request contain detail of British involvement with the Sri Lankan security forces between 1983 and 1985, during a period of intense repression of the Tamil liberation movement. He noted that the repression involved torture, disappearances, sexual violence and massacres of Tamil civilians on a grand scale and in a systematic fashion.
38. The complainant suggested that the UK's role in this period appeared to have shifted from providing advice on police special branch matters in

1983 to a British mercenary company training a Sri Lankan police para-military unit by 1984, and that the same company then taking responsibility during 1985 for flying helicopter gunships on combat missions and forming an army commando unit. The complainant argued that the disclosures of information indicated that senior company officials were even responsible for planning Sri Lankan military operations at the highest level, thus raising concerns about whether they had command responsibility for war crimes.

39. The complainant noted that several key figures from that company are still alive today. He also noted that some British diplomats who were involved in the UK-Sri Lanka relations in the period in question either continue to work for the FCO in a censorship capacity or for the 'TNA's censorship watchdog' (the Commissioner understands this to be a reference to the 'The Advisory Council on National Records and Archive'). He argued that it was therefore clear that the four files are of the greatest public interest to ensure accountability for war crimes, and to reassure the public that the FCDO is not covering up British culpability for such grave offences.
40. Finally, the complainant also noted that it emerged in August 2020 that the Metropolitan Police's war crimes team had opened an investigation into alleged war crimes by British mercenaries in Sri Lanka in the 1980s.<sup>4</sup> The complainant emphasised that as noted in the article, the UN Working Group on Mercenaries has also raised concerns about the conduct of British mercenaries in Sri Lanka and the lack of accountability. He argued that these further demonstrate the significant public interest in disclosure, which he did not feel the FCO gave adequate consideration to.

*Public interest in maintaining the exemption*

41. The FCDO argued that it would be firmly against the public interest to disclose information that would undermine the effectiveness of Defence Attaches and in turn cause the prejudice which the exemption was designed to protect.

*Balance of the public interest arguments*

42. The Commissioner agrees that there is a significant public interest in the disclosure of information which would better inform the public about

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<sup>4</sup> <https://www.dailymaverick.co.za/article/2020-08-13-exclusive-met-police-open-war-crimes-investigation-into-british-mercenaries/>

how the British government has conducted international relations. In the particular circumstances of this request the Commissioner recognises the significance and seriousness of the arguments advanced by the complainant. In such circumstances, the Commissioner considers there to be a particularly strong public interest in the disclosure of the withheld information.

43. However, the Commissioner is also conscious that disclosure of the information risks undermining the capability and effectiveness of Defence Attaches, and in turn the interests which the exemptions contained at section 26(1) are designed to protect. Such outcome, in the Commissioner's view, would be firmly against the public interest. Furthermore, in his view the fact that the prejudicial effects of disclosure are not limited to Sri Lanka but apply to Defence Attaches in other states adds considerable weight to the public interest in maintaining the exemption. The Commissioner notes that the FCDO has disclosed other parts of the files, and that wider further disclosures from the period have resulted in additional information on this subject being in the public domain. In the Commissioner's opinion the availability of this information reduces, slightly, the weight that should be attributed to the public interest arguments in favour of disclosure.
44. On balance, and taking the above into account, the Commissioner has concluded that the balance of the public interest favours maintaining the exemptions contained at section 26(1) of FOIA.

## **Section 27 – international relations**

45. Section 27(1)(a) of FOIA states that:

*'(1) 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'*

### The FCDO's position

46. The FCDO argued that that the effective conduct of international relations depends upon maintaining trust and confidence between governments. If the UK does not maintain this trust and confidence, its ability to protect and promote its interests through international relations will be hampered.
47. In the circumstances of this case, the FCDO provided the Commissioner with specific submissions to support its view that the information withheld on the basis of section 27(1)(a) would be likely to prejudice relations with a number of states. As these submissions refer to the

content of the withheld information itself the Commissioner has not included these in this decision notice.

### The complainant's position

48. The complainant argued that the FCDO had already released various files as open at TNA on this subject and he therefore questioned whether disclosure of the information redacted on the basis of this exemption would actually result in harm occurring to the UK's relations with other states. For example, the complainant explained that his book on this subject demonstrated that the FCDO had already released various files as open at TNA which make disparaging references to both Sri Lanka and India. He also noted that previous disclosures made clear that India was not particularly concerned about the activities of the British security company KMS in Sri Lanka. As a result the complainant argued that there was nothing in the closed file that is more likely to prejudice international relations than that which is already open to the public at TNA.

### The Commissioner's position

49. In considering whether section 27(1)(a) applies the Commissioner needs to consider whether the three criteria set out above are met.
50. 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'*.<sup>5</sup>
51. In relation to the criteria referred to above at paragraph 33, the Commissioner is satisfied that the first criterion is met as the prejudice envisaged by the FCDO is clearly one that is protected by the exemption contained at section 27(1)(a) of FOIA. Given the content of the withheld information the Commissioner also accepts that there is causal link between disclosure of the information withheld under this exemptions and prejudice occurring. The second criterion is therefore met. Furthermore, the Commissioner accepts that there is a more than a hypothetical chance of the UK's relations with the states in question being harmed if the information was disclosed. The Commissioner

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<sup>5</sup> Campaign against Arms Trade v the Information Commissioner and Ministry of Defence EA/2007/0040 (26 August 2008)

cannot elaborate on these findings without referring to the content of the withheld information itself.

### Public interest test

52. Section 27(1) is a qualified exemption and therefore subject to the public interest test set out in section 2(2)(b) of FOIA. The Commissioner has therefore considered 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*

53. The complainant's submissions in support of his view that the public interest favours disclosing the information are set out at paragraphs 33 above.

#### *Public interest in maintaining the exemption*

54. The FCDO argued that it would be firmly against the public interest to disclose information which would make it harder for the UK to maintain effective relations with another state.

#### *Balance of the public interest arguments*

55. For the reasons set out above, the Commissioner accepts that there is a significant public interest in the disclosure of information on this subject, and therefore the weight that should be attributed to disclosing the withheld information should not be underestimated.
56. However, the Commissioner agrees with the FCDO that it would be firmly against the public interest to disclose information which would make the UK's relations with another state more difficult. Having considered the content of the withheld information, and taken into account the availability of information already disclosed by the FCDO in relation to this subject, the Commissioner has concluded that the public interest favours maintaining the exemption.

### **Section 31 – law enforcement**

57. The FCDO withheld some information on the basis of sections 31(1)(a) and (b) of FOIA which state that:

*'Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice -*

*(a) the prevention or detection of crime,*

*(b) the apprehension or prosecution of offenders'*

58. The FCDO argued that the information withheld on the basis of this exemption related to operational policing practices (in the UK) and that disclosure of the information in question would be likely to result in the prejudice described in the two exemptions above.
59. With regard to the three limb test set out above at paragraph 33, in relation to the first limb, the Commissioner is satisfied that the potential prejudice described by the FCDO clearly relates to the interests which the exemptions contained at sections 31(1)(a) and (b) are designed to protect. With regard to the second criterion having considered the content of the withheld information and taking into account the FCDO's submissions, the Commissioner is satisfied that there is a causal link between disclosure of this information and prejudice to the prevention or detection of crime and to the apprehension or prosecution of offenders. Furthermore, he is satisfied that the resultant prejudice would be real and of substance and that there is a more than a hypothetical risk of prejudice occurring. The third criterion is therefore met and sections 31(1)(a) and (b) are engaged.

#### Public interest test

60. Section 31(1) is a qualified exemption and therefore subject to the public interest test set out in section 2(2)(b) of FOIA. The Commissioner has therefore considered whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
61. For the reasons set out above, the Commissioner accepts that there is strong public interest in disclosure of information on this subject. However, in the Commissioner's view disclosure of the particular information that has been withheld on the basis of section 31 would not address or meet the specific public interests identified by the complainant. In contrast the Commissioner considers there to be a significant public interest in ensuring that the ability of the police to prevent and detect crime, or to apprehend offenders is not undermined.

In light of this, the Commissioner has concluded that the public interest favours maintaining the exemptions contained at sections 31(1)(a) and (b).

#### **Section 41 – information provided in confidence**

62. Section 41(1) 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.'*

63. 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.
64. 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:
- The information has the necessary quality of confidence. (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.)
  - The information was communicated in circumstances importing an obligation of confidence. (An obligation of confidence can be expressed explicitly or implicitly. Whether there is an implied obligation of confidence will depend upon the nature of the information itself, and/or the relationship between the parties); and
  - Whether an unauthorised use of the information would result in detriment to the confider.
65. 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.
66. The FCDO explained to the Commissioner that the information it was seeking to withhold on the basis of this exemption had been provided to it by a UK company. The Commissioner has examined the information and is satisfied that this information meets the requirements of section 41(1)(a).
67. With regard to section 41(1)(b), the FCDO argued that it was clear from the content of the information and the circumstances in which it was provided to the Commissioner that the limbs set out above were met.

68. The Commissioner has examined the information, and taken into account the FCDO's submissions, he accepts that these limbs are met and therefore that section 41(1)(b) applies.
69. 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.
70. For the reasons discussed above, the Commissioner considers there to be a significant public interest in the disclosure of this topic. However, having considered the content of the withheld information, he is not persuaded that public interest in disclosing the information outweighs the public interest in maintaining the confidence.

### **Section 40 – personal data**

71. The FCDO withheld the names of some individuals on the basis of section 40(2) of FOIA. This provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
72. In this case the relevant condition is contained in section 40(3A)(a)<sup>6</sup>. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
73. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of FOIA cannot apply.
74. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

#### *Is the information personal data?*

75. Section 3(2) of the DPA defines personal data as:

*'any information relating to an identified or identifiable living individual'.*

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<sup>6</sup> As amended by Schedule 19 Paragraph 58(3) DPA.



76. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
77. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
78. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
79. In the circumstances of this case, the Commissioner is satisfied that the names redacted by the FCDO both relate to and identify the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
80. As noted above, the fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
81. The most relevant DP principle in this case is principle (a).

*Would disclosure contravene principle (a)?*

82. Article 5(1)(a) of the GDPR states that:

*'Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject'.*

83. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
84. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

*Lawful processing: Article 6(1)(f) of the GDPR*

85. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

*'processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child'<sup>7</sup>.*

86. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
  - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
  - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
87. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

#### *Legitimate interests*

88. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency

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<sup>7</sup> Article 6(1) goes on to state that:-

*"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".*

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

*"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".*

for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

89. In his submissions to the Commissioner in relation to related case, the complainant outlined why he did not consider it appropriate for the FCDO to rely on section 40(2) to redact the names of certain KMS staff.
90. In the circumstances of this case, for the reasons discussed above, the Commissioner accepts that there is a legitimate interest in the disclosure of information about this subject. However, he is not persuaded that there is a particularly strong or compelling interest in the disclosure of the particular names that have been withheld in order to inform the public about this issue.

*Is disclosure necessary?*

91. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so a measure would not be necessary if the legitimate aim could be achieved by something less. Disclosure under FOIA must therefore be the least restrictive means of achieving the legitimate aim in question.
92. In the Commissioner's view it is not sustainable to argue that disclosure of the names in question is necessary; disclosure of such information would not materially add to the public's understanding of this subject matter, and in particular would not further the legitimate interests in disclosure identified by the complainant elsewhere in this decision notice, including those set out at paragraphs 37 to 40. In reaching this conclusion the Commissioner notes that none of the names withheld on the basis of section 40(2) are of the nature envisaged by the complainant (see paragraph 89 above).
93. Given this finding the Commissioner has concluded that disclosure of the names would not be lawful and therefore article 6(1)(f) of the GDPR is not met. Disclosure of the names would therefore breach the first data protection principle and thus such information is exempt from disclosure on the basis of section 40(2) of FOIA.

**Sections 27(2) and 38**

94. The Commissioner is satisfied the information withheld on the basis of section 27(2) is exempt from disclosure on the basis of section 27(1)(a) and therefore he has not considered FCDO's reliance on this exemption.

95. Although the FCDO cited section 38 in its internal review, it did not seek to rely on this exemption in its submissions to the Commissioner. Therefore, the Commissioner has not considered this exemption in this notice.

### **Exception to the above findings**

96. The only exception to the above findings relates to folio 38 and its attachment in file FCO 37/4354. Paragraph 6 contains 3 sub-paragraphs; sub-paragraph (3) was disclosed. In the Commissioner's view, sub-paragraphs (1) and (2) do not contain sufficiently different information to justify withholding them on the basis of the exemptions cited by the FCDO.

### **Refusal notice**

97. The complainant argued that although the FCDO has relied on numerous exemptions, it had not clarified which exemption applied to each document/redaction. The complainant argued that this position was unreasonable and unacceptable and hampered his ability to understand the FCDO's position, and in turn, make submissions to support his complaint.

98. Section 17 of FOIA states that:

*'A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which—*

*(a) states that fact,*

*(b) specifies the exemption in question, and*

*(c) states (if that would not otherwise be apparent) why the exemption applies.'*

99. In its submissions to the Commissioner the FCDO noted that the Commissioner's guidance on refusing requests stated that *'If possible, indicate which sections you removed using which exemption.'*<sup>8</sup> The FCDO explained that its position remained that it was not obliged under FOIA

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<sup>8</sup> <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/refusing-a-request/#19>

to provide a schedule of redactions. Rather, as the Commissioner's guidance made clear, it is optional for a public authority to provide such a schedule when responding to a request. The FCDO emphasised that section 17 sets out what needs to be done when relying on exemptions and notably does not include a requirement to provide such a schedule. Furthermore, the FCDO argued that highlighting which redactions relate to which exemptions may lead to deductions being made about those redactions which reveal sensitive information.

100. The Commissioner appreciates that when a requester submits a multi-part or broad request such as the one which is the focus of this decision notice, and the public authority relies on multiple exemptions to refuse a request, it cannot always be straightforward for the requester to understand how exemptions have been relied on.
101. Nevertheless, the Commissioner accepts that the provision, or completion of a schedule does not form part of a public authority's statutory obligations under FOIA. Furthermore, he also accepts that nor does the requirement to label individual redactions that are applied to disclosed documents.

### **Time taken to respond to the request**

102. Section 10(1) of FOIA provides that a public authority must comply with section 1(1), ie the right to access information, promptly and in any event not later than the twentieth working day following the date of receipt.
103. Under section 17(3) a public authority can, where it is citing a qualified exemption, have a 'reasonable' extension of time to consider the balance of the public interest. The Commissioner considers it reasonable to extend the time to provide a full response, including public interest considerations, by up to a further 20 working days, which would allow a public authority 40 working days in total. The Commissioner considers that any extension beyond 40 working days should be exceptional and requires the public authority to fully justify the time taken.
104. In this case the complainant submitted his request on 29 August 2018 but the FCO did not provide him with a substantive response to his request until 18 March 2019. The FCDO explained to the Commissioner that the complex nature of the sensitivity review and the need for detailed consultation with multiple external stakeholders and an internal FCO stakeholder delayed its response to this request.
105. Despite these factors, the Commissioner does not accept that it was reasonable for the FCO to have taken the time it did to provide the

complainant with a substantive response to his request. The FCO therefore breached section 17(3) in its handling of this request.

## **Other matters**

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106. The FOIA does not impose a statutory time within which internal reviews must be completed, albeit that the section 45 Code of Practice<sup>9</sup> explains that such reviews should be completed within a reasonable timeframe. The Commissioner expects that most internal reviews should be completed within 20 working days, and even for more complicated requests, reviews should be completed within a total of 40 working days.
107. In this case the FCO took 268 calendar days to complete the internal review. In its response to the Commissioner, the FCDO explained that as with its public interest test considerations, the internal review was delayed due to consultations with stakeholders and the complex nature of the review process, including the need to consult material at TNA.
108. The Commissioner appreciates that this request required extensive consultation and consultation of material at TNA. However, he would strongly encourage that even in such cases, the internal reviews are completed as swiftly as possible.

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<sup>9</sup> <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

## Right of appeal

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109. 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

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

110. 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.

111. 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 .....**

**Gerrard Tracey**  
**Principal Adviser**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**