

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 September 2018

Public Authority: Department for International Development
Address: 22 Whitehall
London
SW1A 2EG

Decision (including any steps ordered)

1. The complainant submitted a request to the Department for International Development (DFID) seeking information about the UK's involvement in training the Libyan coastguard. DFID provided him with some of the information falling within the scope of his request but sought to withhold further information on the basis of sections 27(1)(a), (b), (c) and (d) (international relations) of FOIA. The Commissioner is satisfied that the withheld information is exempt from disclosure on the basis of these exemptions and that in all the circumstances of the case the public interest favours withholding the information.

Request and response

2. The complainant submitted the following request to DFID on 20 April 2017:

'Please would you let me know in writing if you hold information of the following description:

*Information about training for the Libyan coastguard on search and interdiction operations, which is financed by UK aid.'*¹

¹ For further details of UK's involvement with the Libyan coastguard see: <https://www.gov.uk/government/news/uk-maritime-personnel-train-the-libyan-coastguard>

3. DFID contacted the complainant on 19 May 2017 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 section 27 (international relations) of FOIA and it needed additional time to consider the balance of the public interest test.
4. DFID issued similar public interest test extension letters at approximately monthly intervals until it provided the complainant with a substantive response to his request on 12 December 2017. DFID provided him with some of the information it held and directed him to a number of website links where further relevant information could be found. However, DFID explained that it was seeking to withhold further information on the basis of sections 27(1)(a), (b), (c) and (d), 27(2) and 43(2) (commercial interests) of FOIA.
5. The complainant contacted DFID on 13 December 2017 in order to ask for an internal review of this decision.
6. DFID informed him of the outcome of the internal review on 19 March 2018. The review concluded that the exemptions contained at sections 27(2) and 43(2) did not apply to the withheld information. However, it found that the exemptions contained at sections 27(1)(a), (b), (c) and (d) continued to apply and that section 40(2) also applied to the names of officials that appeared in the information.

Scope of the case

7. The complainant contacted the Commissioner on 20 March 2018 in order to complain about DFID's decision to withhold information falling within the scope of his request.
8. During the course of the Commissioner's investigation, DFID disclosed a further document to the complainant which it had previously sought to withhold, namely a letter dated 26 August 2016 from the then UK Foreign Secretary and the then UK Secretary of State for Defence to the High Representative of the European Union for Foreign Affairs and Security Policy.
9. The information which DFID continues to withhold consists of two 'Overseas Security and Justice Assistance' forms relating to the UK's involvement in training the Libyan coastguard.² The focus of the

² Further details about the OSJA process are published at <https://www.gov.uk/government/publications/overseas-security-and-justice-assistance-osja-guidance>

Commissioner's investigation has therefore been to determine whether these forms are exempt from disclosure on the basis of sections 27(1)(a), (b), (c) and (d) of FOIA.

Reasons for decision

Section 27 – international relations

10. Section 27(1) of FOIA states 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*
- (b) relations between the United Kingdom and any international organisation or international court*
- (c) the interests of the United Kingdom abroad, or*
- (d) the promotion or protection by the United Kingdom of its interests abroad.'*

DFID's position

11. DFID argued that disclosure of the withheld information would be particularly likely to prejudice the UK's relations with the state of Libya. It also argued that its disclosure would be likely to prejudice relations with a range of international partners, particularly with the UK's partners (both individual states and the European Union).
12. In support of this position DFID provided the Commissioner with detailed submissions which referenced the content of the withheld information itself in order to explain how and why it believed that such prejudice would be likely to occur. Clearly, the Commissioner cannot include such submissions in this decision notice. However, DFID's overarching argument, as outlined in its refusal notice sent to the complainant, was that the withheld information in question contains sensitive information relating to the UK's partners and/or information exchanged with these partners and that disclosing such information would undermine the trust and confidence that these partners have in the UK. DFID argued that this relationship of trust allows for the free and frank exchange of views and information on the understanding that it will be treated in confidence; if this relationship were undermined it would be likely to inhibit the willingness of international partners to share sensitive information with the UK Government. In turn, DFID argued, that this would harm the ability of it to work with and influence other donors in eradicating poverty and undermine the UK's ability to respond to international development needs.

13. DFID also drew the Commissioner's attention to the foreword by the then Foreign Secretary in the OSJA guidance:

'Making accurate decisions requires officials to be candid in their assessments of the intent and ability of other countries to uphold international law. These assessments will often, though not always be sensitive. HMG is therefore only rarely able to publish the full reasoning behind its decisions. This is not borne out of any aversion to external scrutiny, but rather is a necessary corollary of conducting a thorough assessment.'

The Commissioner's position

14. In order for a prejudice based exemption, such as section 27(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.

15. 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'*.

16. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by DFID clearly relates to the interests which the exemptions contained at sections 27(1)(a), (b), (c) and (d) are designed to protect. With regard to the second criterion having considered the withheld information, and taken into account DFID's submissions to her, the Commissioner is satisfied that there is a causal link between disclosure of this information

and prejudice occurring to the UK's international relations. Furthermore, she is satisfied that the resultant prejudice would be real and of substance. Moreover, the Commissioner is satisfied that there is a more than hypothetical risk of prejudice occurring and therefore the third criteria is met. The Commissioner cannot elaborate in detail on why she has reached this view without referring to the content of the withheld information itself. However, the Commissioner would also note that she considers DFID's argument that in order for the UK to maintain effective relations with international partners it needs to enjoy their trust to be a compelling one, and furthermore, that in the circumstances of this case she is persuaded that disclosure of the information withheld on the basis of section 27(1) would clearly undermine this trust, primarily with Libya, but also with a number of other international partners.

17. Sections 27(1)(a), (b), (c) and (d) are therefore engaged.

Public interest test

18. However, section 27(1) is a qualified exemption and therefore subject to the public interest test set out in section 2(2)(b) of the 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 withheld information.
19. The complainant argued that there was a compelling public interest in the disclosure of the information he had requested for the following reasons: Firstly, to uphold public confidence that the human rights of asylum seekers and detainees are properly considered when providing DFID funding. Secondly, to provide assurance that DFID avoids improving the efficiency of organisations which are suspected of human rights abuses. Thirdly, to ensure that money is correctly spent on training the Libyan coastguard.
20. DFID acknowledged that there is a general public interest in transparency and accountability and in raising public understanding of how the UK Government works overseas and how it spends what are considerable amounts of public money in promoting international development, security and justice. DFID also accepted the public interest in demonstrating the effectiveness of the UK's international development and foreign policies by providing information which shows how relations with other states are conducted and the importance of their human rights record. It noted that to help meet this public interest, the FCO publishes a range of information, in particular the Annual Human Rights Report which is available on the GOV.UK website.
21. However, DFID argued that there is a very strong public interest in preserving good international relations with Libya. It explained that the UK Government has invested a great deal in international development

in the Mediterranean, supporting reconstruction, building key relationships with partner governments and international institutions to help promote economic growth and security for the benefit of Libya, its neighbours and the wider world. Furthermore, DFID emphasised that such harm would not be limited to the UK's relations with Libya. Rather disclosure of this information would have a damaging effect on the trust other overseas governments, including the UK's European partners, have in the UK and on international relations generally which would be contrary to the public interest. DFID argued that given the very live and ongoing nature of the migration crisis in the Mediterranean, it is absolutely critical and very much in the public interest to ensure the continuance of effective international dialogue with the relevant partners on this highly topical and challenging issue.

22. The Commissioner recognises that the UK's involvement in training the Libyan coastguard has been criticised by some humanitarian agencies in light of the actions of the coastguard's alleged treatment of refugee vessels.³ In this context the Commissioner also recognises that the public interest arguments advanced by the complainant are clearly legitimate ones. Disclosure of the withheld information would provide a clear and direct insight into the factors and risk assessment the UK undertook as part of its involvement with the Libyan coastguard and could directly address the specific points raised by the complainant. The public interest in disclosing this information should not therefore be underestimated. However, the Commissioner agrees with DFID that there is strong public interest in ensuring that the UK can enjoy effective relations with its international partners. More specifically, in the context of this case, the Commissioner agrees that there is a significant public interest in ensuring that the UK can continue to work effectively with its international partners in order to tackle the ongoing migration crisis in the Mediterranean. Furthermore, the Commissioner believes that the public interest in favour of withholding the information attracts particular, and ultimately compelling weight, given that disclosure would not only harm the UK's relations with Libya, but also a number of other partners. The Commissioner has therefore concluded that the public interest favours maintaining the exemptions contained at sections 27(1)(a), (b), (c) and (d) of FOIA.

³ <https://www.independent.co.uk/news/world/europe/refugee-crisis-deaths-mediterranean-libyan-coastguard-uk-eu-support-stop-shooting-charities-a7756156.html>

Right of appeal

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
Website: 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
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