

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 November 2018

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 (FCO) seeking communications between the FCO in London and the British embassy in Washington which contained the keywords 'Twitter', 'tweets', or 'Britain First' and were sent between 29th November 2017 and 13th December 2017. The FCO provided the complainant with some information falling within the scope of his request but sought to withhold further information on the basis of sections 27(1)(a), (c) and (d) and 27(2) (international relations); 35(1)(a) (formulation and development of government policy) and 40(2) (personal data) of FOIA. The complainant sought to challenge the FCO's reliance on sections 27 and 35; he was also dissatisfied with the time it took the FCO to complete its public interest test considerations. The Commissioner has concluded that the withheld information is exempt from disclosure on the basis of sections 27(1)(a), (b) and (d) and 35(1)(a) and that in all the circumstances of the case the public interest favours maintaining the exemptions. However, the Commissioner has concluded that the FCO breached section 17(3) of FOIA by failing to complete its public interest test considerations within a reasonable time.

Request and response

2. The complainant submitted the following request to the FCO on 5 January 2018:

*'Please provide all communications between the Foreign and Commonwealth Office and the British embassy in Washington which contain the keywords 'Twitter', 'tweets', or 'Britain First' and were sent between 29th November 2017 and 13th December 2017.'*¹

3. The FCO contacted him on 2 February 2018 and confirmed that it held information falling within the scope of his request but it considered section 27 (international relations) of FOIA to apply but it needed further time to consider the balance of the public interest test. Similar letters were sent on 2 March and 3 April 2018.
4. The FCO provided the complainant with a substantive response to his request on 1 May 2018. The FCO provided a digest of information that it considered could be disclosed, however it explained that the remaining information in the scope of the request was being withheld on the basis of sections 27(1)(a), (c) and (d); 35(1)(a) (formulation and development of government policy) and 40(2) (personal data) of FOIA.
5. The complainant contacted the FCO on 3 May 2018 and asked it to conduct an internal review of its application of sections 27 and 35 of FOIA.
6. The FCO informed him of the outcome of the internal review on 4 June 2018. The review concluded that these exemptions had been applied correctly.

Scope of the case

7. The complainant contacted the Commissioner on 7 June 2018 in order to complain about the FCO's decision to withhold information falling within the scope of his request on the basis of sections 27(1)(a), (c) and (d)
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¹ In November 2017 President Trump retweeted three videos from the group Britain First. The Prime Minister Theresa May criticised him for doing so which led the President to tweet in response 'Don't focus on me, focus on the destructive Radical Islamic Terrorism that is taking place within the United Kingdom'. <https://www.bbc.co.uk/news/world-us-canada-42176507>

and 35(1)(a) of FOIA. He was also dissatisfied with the length of time it took the FCO to complete its public interest considerations.

8. During the course of the Commissioner's investigation, the FCO explained that some of the information it withheld on the basis of section 27(1)(a),(c) and (d) was also exempt on the basis of section 27(2) of FOIA.

Reasons for decision

9. 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...*
- ...(c) the interests of the United Kingdom abroad, or*
- (d) the promotion or protection by the United Kingdom of its interests abroad.'*

The FCO's position

10. In its refusal notice the FCO argued that the effective conduct of the UK's international relations depends upon maintaining trust and confidence with other governments and international organisations. It argued that to do this there must be good working relationships with other governments and international organisations based on confidence and trust. This relationship of trust allows for the free and frank exchange of information on the understanding that it will be treated in confidence. The FCO argued that if the UK does not maintain this trust and confidence, its ability to act as a significant player in the international arena, and protect and promote UK interests through international relations, will be hampered. The FCO suggested that other governments and international organisations may be more reluctant to share information with the UK government in future, and may be less likely to respect the confidentiality of information supplied by the UK government to them, to the detriment of UK interests.
11. The FCO provided the Commissioner with further detailed submissions, which made direct reference to the content of the withheld information itself, to support its reliance on these exemptions. Clearly, the Commissioner cannot include such submissions in this decision notice. However, the FCO's overarching argument, based upon the rationale set out in the refusal notice, was that the disclosure of information withheld on the basis of this exemption would be likely to prejudice the UK's

relationship with the US for two reasons. Firstly, although the communications falling within the scope of the request were between FCO officials they contained direct reference to information provided to FCO officials by US officials, information which was clearly provided in confidence. Disclosure of such information would therefore be likely to prejudice bilateral relations. Secondly, the withheld information also included sensitive internal UK commentary on this issue..

The Commissioner's position

12. 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.
13. 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*'.
14. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the FCO clearly relates to the interests which the exemptions contained at sections 27(1)(a), (c) and (d) are designed to protect. With regard to the second criterion, having considered the withheld information, and taken into account the FCO'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 is clear that the FCO's argument that in order for the UK to maintain effective relations with international partners it needs to enjoy their trust is a compelling one. Furthermore, the Commissioner is satisfied that given the high profile nature of the matter of the requested information dealing as it does with the reaction and response to President Trump's tweets concerning Britain First, there is clearly a significant risk of prejudicing occurring to UK-US relations if this information was disclosed.

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

Public interest test

16. 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.

17. The FCO acknowledged that there was a strong public interest in accountability and transparency. The complainant noted that in balancing the public interest test the FCO should have given greater consideration to the fact that details of President Trump's visit to the UK have now been confirmed.

18. The FCO argued that that it was firmly against the public interest to harm the UK's relations with one of its closest allies. It argued that this is particularly the case at the present time given that the UK's relationship with the US is at a pivotal stage in light of Brexit and the corresponding opportunity for the UK to secure a trade deal with the US. Moreover, the FCO argued that disclosure of the withheld information would also undermine the UK's ability to work with the US on a range of bilateral issues such as counter-terrorism, defence and security issues which remain fundamental to the UK's national security.

19. With regard to the public interest in disclosing the information the Commissioner recognises that President Trump's re-tweeting of Britain First videos and then his subsequent tweet about the Prime Minister's response to this clearly attracted considerable public attention. Moreover, in light of such tweets the Commissioner accepts that there was a particular public interest in understanding how these impacted on the earlier decision to invite President Trump for an official visit to the

UK. Disclosure of the withheld information would provide a detailed insight into the initial reactions of senior FCO staff on this as well as providing an insight into UK-US discussions which took place and the Commissioner accepts that there is a genuine public interest in the disclosure of this information. However, the Commissioner also believes that there is very strong public interest in ensuring that the UK's relationship with the US is not harmed given that the US is one of the UK's key allies. The Commissioner accepts that this is particularly the case at this present time as the FCO has argued. Furthermore, the Commissioner has taken into account that the nature of the withheld information concerns the UK's relations at the highest level, ie with the Prime Minister and President. In view of these factors, the Commissioner has concluded that the public interest favours maintaining the exemptions contained at sections 27(1)(a), (c) and (d) in respect of the remaining withheld information.

Section 35(1)(a) – formulation and development of government policy

20. The FCO sought to withhold some of the requested information on the basis of section 35(1)(a) of FOIA. This provides that:

'Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

(a) the formulation or development of government policy'

21. Section 35 is a class based exemption, therefore if information falls within the description of a particular sub-section of 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes.
22. The Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a minister or decision makers. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
23. Ultimately whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case by case basis, focussing on the precise context and timing of the information in question.
24. The Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:

- the final decision will be made either by the Cabinet or the relevant minister;
 - the Government intends to achieve a particular outcome or change in the real world; and
 - the consequences of the decision will be wide-ranging.
25. The FCO argued that the policy in question concerned the UK's bilateral relationship with the US and upcoming meetings between the Prime Minister and President Trump, including at the World Economic Forum in Davos and during a potential visit to the UK.
26. The complainant argued that the request related to a specific incident and did not justify the application of such a broad exemption. He also noted that the decision had already been taken to invite President Trump to a visit to the UK.
27. The Commissioner would be reluctant to accept the line of argument that a government policy – for the purposes of section 35(1)(a) of FOIA – consisted of the UK's bilateral relations with another state. In her view such a 'policy' would simply be too broad and overarching to be considered to be a policy for the purposes of this exemption. However, she is prepared to accept that the UK's reaction to a particular issue or event and how this impacts on its bilateral relations with another state can be correctly seen as a policy for the purposes of section 35(1)(a). This is because such a policy is more focused and specific than simply being about the UK's overall relations with another state. Furthermore, having reviewed it, the Commissioner is satisfied that the withheld information clearly relates to the formulation or development of the UK's position and response to President Trump's tweets set against the context of the Prime Minister's upcoming meetings with him.
28. Section 35(1)(a) is therefore engaged.

Public interest test

29. Section 35 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 contained at section 35(1)(a) outweighs the public interest in disclosing the information.
30. The FCO acknowledged that there is a public interest in the disclosure of information which would reveal the views of the UK government and officials. However, it argued that it was essential that officials are able to communicate in confidence on how to formulate policy, particularly in the face of challenging circumstances. The FCO argued that disclosure of the withheld information would risk undermining future decision making

and discussion on this subject and similar subjects in future. This is on the basis that officials need to be able to conduct rigorous and candid risk assessments of their policies and programmes including the consideration of the pros and cons without there being premature disclosure which might close off better options and inhibit the free and frank discussion of all policy options. The FCO also emphasised that the policy discussions in question involved high profile decisions requiring new and novel challenges. Finally the FCO emphasised that at the point the complainant submitted his request, ie on 5 January 2018 these discussions were continuing.

31. The complainant argued that the public interest favoured disclosing the information noting that a decision to invite President Trump had already been made.
32. With regard to the arguments advanced by the FCO, the Commissioner considers that these can be categorised as arguments generally known as safe space and chilling effect arguments.
33. With regard to the former, the Commissioner accepts that significant weight should be given to the safe space arguments - ie the concept that the government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction - where the policy making process is live and the requested information relates to that policy making. In the circumstances of this case, at the point that the complainant made his request the Commissioner acknowledges that as the complainant notes, the decision to invite President Trump had already been taken. However, the withheld information does not simply consider this invitation but goes beyond this and discusses other aspects of the UK-US relationship in light of the President's tweets. The Commissioner is satisfied that at the point that this request was submitted such aspects of policy making remained live and ongoing. Furthermore, the Commissioner recognises that disclosure of the information withheld on the basis of section 35(1)(a) would have been likely to result in public and media attention in respect of the FCO's deliberations on this issue. Consequently, in the circumstances of this case the Commissioner believes that significant weight should be attributed to the safe space arguments.
34. With regard to attributing weight to the chilling effect arguments, the Commissioner recognises that civil servants are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. Nonetheless, chilling effect arguments cannot be dismissed out of hand and are likely to carry some weight in most section 35 cases. If the policy in question is still live, the Commissioner accepts that arguments about a chilling effect on those ongoing policy discussions are likely to carry significant weight.

Arguments about the effect on closely related live policies may also carry weight. However, once the policy in question is finalised, the arguments become more and more speculative as time passes. It will be difficult to make convincing arguments about a generalised chilling effect on all future discussions. As noted above, the Commissioner accepts that the policy making in relation to this issue remained ongoing at the time of the request. In light of the sensitive nature of the matters under discussion and the ongoing nature of the policy making, the Commissioner accepts that the chilling effect arguments in this case should be given considerable weight in relation to the information withheld on the basis of section 35(1)(a).

35. With regard to attributing weight to the public interest arguments in favour of disclosure, for the reasons discussed above the Commissioner accepts that there is significant public interest in disclosure of information about this subject. Disclosure of the information withheld on the basis of section 35(1)(a) would provide the public with some insight into how the FCO, and more broadly the government, considered the implications of the President's tweets for UK-US relations.
36. Nevertheless, the Commissioner has concluded that by a narrow margin the public interest favours maintaining the exemption. In reaching this view she fully acknowledges the public interest in this issue. However, given that at time of the request policy making in relation to this decision remained ongoing and in her view this tips the balance of the public interest in favour of maintaining the exemption.

Time taken to consider the balance of the public interest test

37. Section 1(1) of FOIA provides that any person making a request for information to a public authority is entitled:

*'(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
(b) if that is the case, to have that information communicated to him.'*
38. Section 10(1) of FOIA provides that a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.
39. 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.

40. In the circumstances of this case the FCO took 81 days to consider the balance of the public interest test. The FCO explained that this additional time was needed because the request came at a time of intense interest and scrutiny in the UK's relationship with the US Administration. The FCO's response to the request involved consultation with officials in the UK and the British Embassy in Washington who were busy responding to the continually fast-developing events and close scrutiny of the UK's relationship with the US including the planned visit of President Trump. The Commissioner is not unsympathetic to the pressures that the FCO officials who were involved in considering this request were under at the point the request was submitted. Therefore, she accepts that given this, and given that the information related to ongoing issues, some additional time beyond the 40 working days was arguably merited. However, the Commissioner is not persuaded that an additional 41 days, thus taking the public interest considerations to a total of 81 days can be completely justified. In reaching this conclusion the Commissioner would note that the information in question is in no way voluminous. The FCO therefore breached section 17(3) of FOIA.

Right of appeal

41. 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

42. 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.
43. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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