

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 October 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) for information related to the Secretary of State's decision not to block Bermuda's Domestic Partnership Bill. The FCO withheld the information falling within the scope of the request on the basis of sections 27(1)(a) and 27(2) (international relations); 35(1)(a) (formulation and development of government policy); 42(1) (legal professional privilege) and 40(2) (personal data). The Commissioner has concluded that the withheld information is exempt from disclosure on the basis of sections 27(1)(a), 35(1)(a), 42(1) or section 40(2) and in relation to the qualified exemptions the public interest favours maintaining the exemptions. The only exception to this finding is in relation to part of the submission to the Secretary of State which the Commissioner accepts is exempt from disclosure on the basis of section 35(1)(a), but for which she has concluded that the public interest in maintaining the exemption does not outweigh the public interest in its disclosure.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with paragraphs 4 to 6 from the submission to the Secretary of State with the exception of the parts of paragraphs 4 and 6 which were highlighted in the copy of the submissions provided to the Commissioner. (The Commissioner accepts that for these highlighted sections the public interest favours maintaining the exemption contained at section 35(1)(a) of FOIA.)

3. 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.

Background

4. In May 2017 the Bermuda Supreme Court found that the Matrimonial Clauses Act's definition of marriage as between a man and a woman to be inconsistent with Bermuda's Human Rights Act. As a result the court ruled that same sex marriages should be allowed in Bermuda.
5. In December 2017 Bermuda's Legislature passed the Domestic Partnership Bill. The Bill removed the right for same sex couples to marry but introduced domestic partnerships for same sex couples.
6. As Bermuda is an overseas territory of the UK, the UK government had the power to block the law change. However, the Bermuda Governor, who is Her Majesty The Queen's representative in Bermuda gave his assent to the Bill on 7 February 2018. The Foreign Office minister, Harriett Baldwin, made the following statement to Parliament on 8 February 2018 in relation to this decision:

*'After full and careful consideration of Bermuda's constitutional and international obligations, the Secretary of State decided that in these circumstances, it would not be appropriate to use the power to block legislation, which can only be used where there is a legal or constitutional basis for doing so, and even then, only in exceptional circumstances. It is important to recognise that the regime for domestic partnerships implemented by Bermuda in its Domestic Partnership Act can also meet the European Court of Human Rights requirement for legal recognition of same-sex relationships.'*¹

¹ <https://hansard.parliament.uk/Commons/2018-02-08/debates/F42BE7AE-00AE-4757-8AEA-1D7C3F76A12E/Same-SexMarriageInBermuda#contribution-8730A319-677E-4D59-8EA6-4F8EFA937D76>

Request and response

7. The complainant submitted the following request to the FCO on 8 February 2018:

'Your minister told Parliament today: "After full and careful consideration in regard to Bermuda's constitutional and international obligations, the Secretary of State decided that in these circumstances it would not be appropriate to use this power to block legislation, which can only be used where there is a legal or constitutional basis for doing so, and even only in exceptional circumstances."

Please could you provide an electronic copy of all recorded information you hold relating to the consideration she referred to.'

8. The FCO contacted the complainant on 13 March 2018 and confirmed that it held information falling within the scope of the request but it needed additional time to consider the balance of the public interest test in relation to section 42 (legal professional privilege) and 35 (formulation and development of government policy) of FOIA. The FCO sent him a similar letter on 12 April 2018.
9. The FCO provided him with a substantive response to his request on 11 May 2018. This concluded that the requested information was exempt from disclosure on the following sections of FOIA: 27(1)(a) and 27(2) (international relations); 35(1)(a); 42(1) and 40(2) (personal data). In relation to the qualified exemptions, the FCO concluded that the public interest favoured maintaining these.
10. The complainant contacted that FCO on 14 May 2018 and asked it to conduct an internal review of this decision.
11. The FCO informed him of the outcome of the internal review on 11 June 2018. The review upheld the application of the various exemptions cited in the refusal notice.

Scope of the case

12. The complainant contacted the Commissioner on 12 June 2018 in order to complain about the FCO's handling of his request. He explained that he was dissatisfied with the FCO's decision to withhold information falling within the scope of his request and also with the time it took the FCO to complete its public interest test considerations.

13. The FCO holds five documents falling within the scope of this request. It has explained to the Commissioner that the exemptions have been applied to these documents as follows:

- A submission to Secretary of State - withheld in full under section 35(1)(a) with some of the information also exempt under sections 27(1)(a) and 42(1);
- Annex A - withheld in full under sections 35(1)(a) and 42(1);
- Annex B - withheld in full under sections 35(1)(a), 42(1), 27(1)(a) and 27(2);
- Annex C - withheld in full under sections 35(1)(a), 27(1)(a) and s27(2); and
- Annex D - withheld in full under sections 35(1)(a) and 42(1).²

14. The FCO also explained that the names of junior officials were exempt from disclosure on the basis of section 40(2) of FOIA.

Reasons for decision

Section 42 – legal professional privilege

15. The FCO has sought to withhold annexes A and D in their entirety on the basis of section 42(1) of FOIA. This provides that information is exempt from disclosure if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings.
16. There are two categories of legal professional privilege (LPP): advice privilege and litigation privilege.
17. In this case the FCO is relying on advice privilege. For advice privilege to apply, the information must record communications that were confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice.
18. Annex D consists of legal advice, prepared by FCO lawyers, for the Secretary of State in relation to the Domestic Partnership Bill. Annex A consists of a summary of that advice. The Commissioner is satisfied that both documents clearly attract legal professional privilege and therefore are exempt from disclosure on the basis of section 42(1) of FOIA.
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² Annex A to D were all attached to the submission to the Secretary of State.

Public interest test

19. However, section 42 is a qualified exemption and therefore the Commissioner must consider the public interest test and 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

20. The FCO acknowledged that disclosure of the withheld information would increase public knowledge of the UK's engagement with the government of Bermuda on LGBT equality issues and the factors the Secretary of State considered when deciding whether or not to use the UK's reserved powers to directly intervene. It also acknowledged that disclosure of the legal advice could improve transparency of decision making by knowing that decisions are taken in the correct legal context.
21. The complainant argued that there was a substantial public interest in disclosure of the withheld information so that the public could understand how the UK government, which purports to be pro-LGBTQ rights, came to give its affirmative approval to a legislative instrument which revokes LGBTQ rights in an area of UK sovereignty. He argued that this was an unprecedented decision of the UK to interfere with the human rights of an LGBTQ community abroad and the public interest in exploring how this happened, amplified by the fact that there is now an ongoing legal challenge in Bermuda to the decision in question, is immense.

Public interest in favour of maintaining the exemption

22. The FCO argued that the exemption recognises the validity of withholding information that is subject to LPP which exists in order to encourage clients to be frank and open with their legal adviser. The FCO explained that it is important that the government is able to seek legal advice so that it can make decisions in the correct legal context. It emphasised that the process of providing advice relies for its effectiveness on each side being open and candid with the other and the legal adviser must be in possession of all of the facts in order to provide sound advice. The FCO argued that the advice was still live as there was ongoing litigation in Bermuda in relation to the Domestic Partnership Act; the Government of Bermuda are appealing a ruling of the Supreme Court on 6 June 2018 that certain parts of the legislation are unconstitutional. The FCO therefore argued that the public interest favoured maintaining the exemption contained at section 42(1) of FOIA.

Balance of the public interest test

23. Although the Commissioner accepts that there is a strong element of public interest inbuilt into legal professional privilege, she does not

accept, as previously argued by some public authorities that the factors in favour of disclosure need to be exceptional for the public interest to favour disclosure. The Information Tribunal in *Pugh v Information Commissioner* (EA/2007/0055) were clear:

'The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty than those in favour of maintaining the exemption'. (Para 41).

24. Consequently, although there will always be an initial weighting in terms of maintaining this exemption, the Commissioner recognises that there are circumstances where the public interest will favour disclosing the information. In order to determine whether this is indeed the case, the Commissioner has considered the likelihood and severity of the harm that would be suffered if the advice were disclosed by reference to the following criteria:

- how recent the advice is; and
- whether it is still live.

25. With regard to the age of the advice the Commissioner accepts the argument advanced on a number of occasions by the Tribunal that as time passes the principle of legal professional privilege diminishes. This is based on the concept that if advice is recently obtained it is likely to be used in a variety of decision making processes and that these processes are likely to be harmed by disclosure. However, the older the advice the more likely it is to have served its purpose and the less likely it is to be used as part of any future decision making process.

26. In many cases the age of the advice is closely linked to whether the advice is still live. Advice is said to be live if it is still being implemented or relied upon and therefore may continue to give rise to legal challenges by those unhappy with the course of action adopted on that basis.

27. In the circumstances of this case the advice in question was clearly very recent as it consists of legal advice submitted to the Secretary of State only a matter of weeks before the Governor gave his assent to the Domestic Partnership Bill. The Commissioner also accepts that the advice could be correctly categorised as live; although the decision by the Secretary of State not to intervene had been taken prior to the request, the FCO was in effect still relying on the advice to support its decision. Furthermore, the Commissioner acknowledges that litigation in respect of the Domestic Partnership Act is ongoing in Bermuda. In light of this the Commissioner believes that there is a significant and weighty public interest in upholding the exemption.

28. With regard to the public interest in favour of disclosing the information the Commissioner recognises that the decision by the UK government not to intervene in order to prevent assent to the Bill generated criticism from MPs, as evidenced in the Hansard link at footnote 1, as well as by LGBTQ campaigners and also from companies involved in operating in Bermuda.³ The Commissioner also agrees with the complainant that given the UK government's stance – as noted by the Minister's comments to Parliament – of proactively supporting LGBTQ rights abroad the decision not to intervene arguably looks out of step with the government's broader policy in this area. In light of this the Commissioner accepts that there is a clear public interest in the disclosure of information regarding the decision not to intervene in order to provide the public with a greater understanding of the factors considered by the Secretary of State in reaching this decision. Disclosure of the legal advice provided to him on this would go a considerable way to meeting this aim and would also allow the public to assess the detailed and nuanced legal arguments surrounding this issue. In the Commissioner's view there is consequently a weighty public interest in the disclosure of the information withheld by the FCO on the basis of section 42(1) of FOIA.
29. However, the Commissioner has ultimately concluded that the public interest favours maintaining the exemption contained at section 42(1) of FOIA. In reaching this conclusion the Commissioner does not dispute the public interest in disclosure of the information but given the significant weight in protecting information which attracts legal professional privilege, allied to the fact that the information is both recent and live, means that the balance of the public interest tips in favour of maintaining the exemption.

Section 27 – international relations

30. The FCO argued that annexes B and C were exempt from disclosure on the basis of section 27(1)(a) of FOIA.
31. This 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'

³ <https://www.bbc.com/news/business-43542805>

32. The FCO noted that the legislation includes the British Overseas Territories (OTs) in the definition of a State. In the case, the FCO argued that release of the information withheld on the basis of this exemption would be likely to harm the UK's relations with the Bermudan government. In support of this position the FCO explained that the effective conduct of public affairs depends on maintaining trust and confidence between governments and this was especially the case with the OTs, each of which have their own written constitutions, local laws and governments. The FCO explained that the UK's constitutional relationship allows Bermuda to consult the UK in the knowledge that this dialogue can be conducted in confidence and as a result disclosure of the information provided to the UK in confidence about this issue would therefore be likely to cause offence to Bermuda. The FCO also argued some of the information withheld on the basis of section 27(1)(a) contained a frank assessment of the sensitive issues surrounding this issue. Disclosure of such information, given its content, would be likely to harm the UK's relationship with Bermuda.
33. 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.
34. 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'*.

35. 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 exemption contained at section 27(1)(a) is 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 relations with Bermuda. 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 criterion is met. The Commissioner has reached this conclusion because she accepts that disclosure of information which was either provided by Bermuda with the expectation that it would be treated confidentially, or disclosure of information which contains a candid assessment of the situation, both present a clear risk of prejudicing the UK's relations with Bermuda. Furthermore, the Commissioner is persuaded that the sensitive and ongoing nature of this issue increases the likelihood that disclosure of the information withheld on the basis of section 27(1)(a) is likely to be prejudicial. Section 27(1)(a) is therefore engaged.

Public interest test

36. 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.

37. The complainant's and indeed the FCO's arguments for disclosing the information are set out above at paragraphs 20 and 21.

38. With regard to the public interest in maintaining the exemption, the FCO argued that it would be against the public interest to harm the UK's relations with Bermuda because to do so would make it more difficult to protect and promote UK interests within the Territory and moreover place a considerable strain on the relationship between the Governor and the government of Bermuda. The FCO emphasised that its policy objective for the OTs was to promote and encourage good governance, in which human rights and equality play an integral part; an objective which it argued was clearly in the public interest. However, the FCO argued that it needed to maintain positive bilateral relations with Bermuda in order to be able to do this and disclosure of the withheld information would directly undermine this relationship.

39. With regard to the balance of the public interest, for the reasons discussed above at paragraph 28, the Commissioner agrees that there is a considerable public interest in the disclosure of information about this

issue. In terms of the information contained in annexes B and C this would provide the public with a clear insight into the position of the Bermudan government's views on the Bill alongside further details of the factors that the Secretary of State took into account. The Commissioner therefore accepts that there is a strong case for arguing that disclosure of such information is in the public interest. However, the Commissioner agrees with the FCO that there is also a strong public interest in ensuring that the UK can enjoy effective relations with its OTs. 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 Bermuda in order to support the aforementioned policy objective. Furthermore, the Commissioner believes that the public interest in favour of withholding the information attracts particular, and ultimately compelling weight, given that the issue is not concluded. The Commissioner has therefore concluded that the public interest favours maintaining the exemption contained at sections 27(1)(a) of FOIA.

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

40. The FCO sought to withhold all of the information falling within the scope of the request on the basis of section 35(1)(a) of FOIA. However, as the Commissioner has already concluded that the four annexes are exempt from disclosure on the basis of either section 42(1) or section 27(1)(a) of FOIA she has not considered whether these documents are also exempt from disclosure on the basis of section 35(1)(a) of FOIA.
41. Therefore, the Commissioner has only considered whether the submission to the Secretary of State is exempt from disclosure on the basis of section 35(1)(a) of FOIA.
42. 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'

43. 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.
44. 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.

45. 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.
46. 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.
47. The FCO argued that the policy in question concerned the decision whether or not the UK can, or should, intervene in preventing assent of the Domestic Partnership Act in Bermuda, and more broadly the LGBT rights in the OT.
48. The Commissioner is satisfied that the information in question relates to the formulation and development of government policy in relation to the government's decision to intervene or not to prevent assent of the Domestic Partnership Bill.

Public interest test

49. 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.

Public interest in maintaining the exemption

50. The FCO argued that ministers need to be able to discuss policy freely and frankly, exchange views on available options and understand their possible implications, including any wider implications which may or may not be disclosed at the time of policy announcement. The FCO argued that policy development in this area was ongoing at the point the complainant made his request because although the UK made the decision not to intervene in this case, it remained committed to promoting LGBT equality globally through projects, partnerships and persuasion and policy making in this area therefore remained ongoing, including within the OTs. The FCO argued that release of the material that was being withheld on the basis of section 35(1)(a) would undermine its ability to openly and frankly discuss how it could advance this policy of

supporting LGBT rights by revealing the advice and options which were considered in this specific case.

Public interest in disclosing the withheld information

51. The public interest arguments advanced by both parties in favour of disclosing the information are set out at paragraphs 20 and 21 above. In the context of section 35(1)(a), the complainant argued that as the FCO had now taken the decision not to intervene the policy making was complete and the risk of chilling effect if the information was released was low.

Balance of the public interest arguments

52. 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.
53. 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 the FCO had already taken the decision not to intervene by refusing to assent to the Domestic Partnership Bill. However, in the Commissioner's opinion there is some validity to the FCO's position that the policy making remained on going despite this decision given that the Domestic Partnership Act, despite being passed, was now the subject of legal challenge in Bermuda and given that the FCO continued to promote LGBT equality including within the OTs. Therefore, the Commissioner accepts that at the time of the request the subject of LGBTQ rights abroad remained the subject of active policy formulation and development. Furthermore, the Commissioner recognises that disclosure of the *majority* of the information contained in the submission would have been likely to result in significant 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.
54. 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, the ongoing nature of the policy making, and the frank content of the submission information itself, the Commissioner accepts that the chilling effect arguments in this case should be given notable weight in relation to the *majority* of the submission.

55. The exception to the Commissioner's findings in relation to the weight that should be attributed to the safe space and chilling effect arguments concerns a brief section of the submission, namely paragraphs 4 to 6 save for the parts of these paragraphs which were highlighted in the copy of the submission provided to the Commissioner. In the Commissioner's opinion this part of the submission essentially contains only factual information setting out the background to the issue and where it contains any particular aspect of analysis she is not persuaded that its disclosure would encroach in any significant way on the FCO's safe space or have any particular or notable chilling effect.
56. With regard to attributing weight to the public interest arguments in the 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 submission would provide the public with a clear insight into the factors taken into account by the Secretary of State in reaching his decision. The public interest in disclosure of this information, given the reaction to this decision and the perception that it was a controversial one, should not be underestimated.
57. Nevertheless, the Commissioner has concluded that for the majority of the information the public interest narrowly favours maintaining the exemption. In reaching this view she fully acknowledges the public interest in this issue. However, the fact that the request was submitted so soon after the FCO took the decision not to intervene, and allied to the fact that the Act continued to be the subject of legal challenge in Bermuda, and more broadly the ongoing nature of the FCO's promotion of LGBTQ issues abroad, mean that in the Commissioner's view the cumulative weight of such points tips the balance of the public interest towards maintaining the exemption.
58. The exception to this conclusion is in respect of the minority of the submission described. In the Commissioner's view such information

could be disclosed without any significant or material negative consequences for the FCO's policy making in this area. Given the public interest in disclosure of information about this subject matter the Commissioner has therefore concluded that for this information the public interest favours disclosure of this information.

Section 40(2) – personal data

59. Section 40(2) of FOIA states that personal data is exempt from disclosure if its disclosure would breach any of the data protection principles contained within the Data Protection Act 1998 (DPA).⁴

60. Personal data is defined in section (1)(a) of the DPA as:

'.....data which relate to a living individual who can be identified from those data or from those data and other information which is in the possession of, or likely to come into the possession of, the data controller; and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any person in respect of the individual.'

61. The FCO withheld the names of junior FCO staff. The Commissioner accepts that such information constitutes personal data within the meaning of section 1 of the DPA as they clearly relate to identifiable individuals.

62. The FCO argued that disclosure of such information would breach the first data protection principle which states that:

'Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.'

63. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:

⁴ On 25 May 2018 the General Data Protection Regulation and Data Protection Act 2018 came into force. However, in line with the provisions contained within the Data Protection Act 2018 under FOIA for any request where a public authority has responded before 25 May 2018 the DPA 1998 applies.

- The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
 - what the public authority may have told them about what would happen to their personal data;
 - their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights (ECHR);
 - the nature or content of the information itself;
 - the circumstances in which the personal data was obtained;
 - any particular circumstances of the case, eg established custom or practice within the public authority; and
 - whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.
 - The consequences of disclosing the information, ie what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor the Commissioner may take into account:
 - whether information of the nature requested is already in the public domain;
 - if so the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?
64. Furthermore, notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling legitimate interest in disclosure to the public.
65. In considering 'legitimate interests', in order to establish if there is a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sake, as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to consider a proportionate approach.

66. The FCO explained that it had a clear policy that the names of junior officials would not be released under FOIA and therefore the individuals in question had a reasonable expectation that their names and contact details would not be released into the public domain.
67. The Commissioner is satisfied that the junior officials would have a reasonable expectation in the circumstances of this case, based upon established custom and practice, of their names and contact details being redacted from any disclosures made under FOIA and thus the disclosure of their names would be unfair and breach the first data protection principle. This information is therefore exempt from disclosure on the basis of section 40(2) of FOIA.

Time taken to consider the balance of the public interest test

68. 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.'*

69. 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.
70. 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.
71. In the circumstances of this case the FCO took 64 days to consider the balance of the public interest test. The FCO argued that the sensitivities surrounding the issue, the read across to the wider policy considerations and the fact that it was subject to an ongoing legal challenge in the jurisdiction in question made this an exceptional circumstance. The Commissioner is persuaded that such factors are just sufficient to ensure that this was a reasonable period of time for the FCO to take to reach a conclusion in respect of the balance of the public interest.

Right of appeal

72. 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

73. 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.

74. 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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