

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 February 2019

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 information involving the UK Mission to the UN in New York about Cameroon and Yemen. The FCO disclosed some information to the complainant but sought to withhold further information on the basis of sections 27(1)(a) and (b) (international relations), 35(1)(a) (formulation and development of government policy) and 21 (information reasonably accessible by other means). The Commissioner has concluded that sections 27 and 35 have been correctly applied by the FCO and that the public interest favours maintaining each exemption. However, the Commissioner has concluded that section 21 does not apply and furthermore that the FCO breached section 17(3) of FOIA by failing to conclude its public interest considerations within a reasonable timeframe.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with a copy of the information to which it sought to withhold on the basis of section 21 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.

Request and response

4. The complainant submitted the following request to the FCO on 15 August 2017:

'This is request under the UK Freedom of Information act for the following records as that term is defined in FOI, including but not limited to all electronic records, emails, text/SMS message and communications in any form, involving the UK Mission to the UN in New York since January 1, 2017 regarding Cameroon and/or Southern Cameroons, or Burundi or Western Sahara; since June 1, 2017 regarding Libya or Yemen (on which the UK holds the pen in the UN Security Council), and regarding UN reform including the UN bribery case US v. Ng Lap Seng / John Ashe, if any.

This request specifically includes all records related to briefings given by the UK Mission to the UN to members of the major international media (and any mentions of that term), as that information cannot legitimately be made public to some but not to the public. Given the situations in Yemen, Libya and South Cameroons, I and [name of organisation redacted] asked for expedited processes of this request: faster than the 20 working days provided for.

Please send the requested information as it become available to this email address. If a physical / regular mail address is needed, please send to [address redacted].'

5. The FCO responded on the same day and explained that as drafted the request was too broad and would exceed the appropriate cost limit and therefore invited the complainant to refine the request.
6. The complainant responded on the same day and explained that he was content to limit the request 'to Yemen and/or Cameroon'.
7. The FCO acknowledged receipt of this request on 16 August 2017 but subsequently explained that it was still too broad to answer within the cost limit.
8. The complainant responded on 16 August 2017 and further refined his request as follows:

'Noting that [the] original request, omitting Libya, Burundi and Western Sahara and limited to Yemen and Cameroon, was accepted under the Freedom of Information Act 2000 as 0783-17, in order to expedite your response the time frame can be limited to the three

months prior to the date of the request (that is, May 15 to August 15, 2017).

It includes but is not limited to the UK Mission to the UN's communications regarding the Yemen item on the UN Security Council's agenda, on which the UK is the penholder, the Council's monthly meetings on Yemen, any and all briefings given by the Mission including so-called background briefing (which are not exempt under FOIA), and all electronic communications in that connection.'

9. The FCO contacted the complainant on 13 September 2017 and explained that it held information falling within the scope of this request but it considered this to be exempt from disclosure on the basis of section 27 (international relations) of FOIA and that it needed additional time to consider the balance of the public interest test.
10. The FCO sent the complainant similar public interest extension letters on 11 October 2017 and 8 November 2017.
11. The FCO provided the complainant with a substantive response to his request on 5 February 2018. The response confirmed that the FCO understood the request to be seeking the following information:

*'the following records as that term is defined in FOI, including but not limited to all electronic records, emails, text/SMS message and communications in any form, involving the UK Mission to the UN in New York between *May 15 to 15 August 2017 regarding Cameroon and/or Yemen, on which the UK holds the pen in the UN Security Council [additional requests omitted at FCO request.]*

This request specifically includes all records related to briefings given by the UK Mission to the UN to members of the major international media (and any mentions of that term), as that information cannot legitimately be made public to some but not to the public.'

12. In relation to the first part of the request the FCO explained that it considered the information it held to be exempt from disclosure on the basis of sections 21 (reasonably accessible by other means), 27(1)(a) to (d), 35(1)(a) (formulation or development of government policy) and 40(2) (personal data) of FOIA. With regard to its reliance on section 21 of FOIA, the FCO directed the complainant to the website <https://www.gov.uk/world/uk-mission-to-the-united-nations-new-york> In relation to the second part of the request, the FCO explained that the weekly background briefings to selected UN media are given orally and they are not transcribed. Therefore, there were no records of these meetings.

13. The complainant contacted the FCO on 24 March 2018 in order to ask for an internal review of this decision and asked the FCO to consider the following points:
- The time to took the FCO to respond to this request;
 - The FCO's reliance on the various exemptions cited;
 - In relation to section 21, he argued that the website in question did not include any information falling within the scope of his request; and
 - With regard to the second part of the request, even if the briefings were oral, he argued that his request covered any written records associated with setting up these briefings and talking points related to them.
14. The FCO informed the complainant of the outcome of the internal review on 24 May 2018. The internal review concluded that some of the information within the scope of the request could be disclosed and this was provided to the complainant, albeit with redactions. In relation to the application of section 21, the FCO explained that the material which it considered to be covered by this exemption consisted of Security Council open sessions on Yemen which are reported through the UN's media channels (eg <http://webtv.un.org/>) and UK statements at the UN which are available at https://www.gov.uk/government/latest?world_locations%5B%5D=uk-mission-to-the-unitednations-new-york In relation to its application of section 27, the FCO explained that section 27(1)(a) was considered to apply because of the risk of prejudicing the UK's relations with Yemen and Cameroon. The internal review also upheld the decision to withhold some of the information on the basis of sections 35(1)(a) and 40(2) of FOIA.

Scope of the case

15. The complainant contacted the Commissioner on 28 July 2018 in order to complain about the FCO's handling of his request. More specifically, he asked the Commissioner to consider the following points:
- The FCO's reliance on the various exemptions to withhold information falling within the scope of the request;
 - The FCO's failure to provide information falling within the second part of his request, ie information related to the oral briefings; and
 - The FCO's delays in responding to the request.
16. During the course of the Commissioner's investigation, the FCO confirmed that it did hold information falling within the scope of the

second part of the request. However, the FCO explained that it considered such information to be exempt from disclosure on the basis of sections 35(1)(a), 27(1)(b) or 21 of FOIA.

Reasons for decision

Section 27 – international relations

17. Sections 27(1)(a) and (b) of FOIA state 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'*

The FCO's position

18. The FCO argued that disclosure of information withheld on the basis of sections 27(1)(a) and (b) would be likely to prejudice relations between the UK and Cameroon, UK and Yemen and/or the UK the UN. In support of this position the FCO emphasised that the effective conduct of public affairs depends upon maintaining trust and confidence between governments and international organisations. With regard to the specific information withheld in response to this request, the FCO explained it contained sensitive discussions about key political figures were which central to the UK's relations with these two countries. In respect of the information concerning Yemen, the FCO explained that information included comments and discussion about their allies in the coalition and sensitive discussions with a variety of other states surrounding their policy on Yemen. In respect of the information concerning Cameroon, the FCO explained that the information included sensitive discussions about UN proceedings regarding the region.

The Commissioner's position

19. 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.
20. 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'*.
21. 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) and (b) are designed to protect. With regard to the second criterion having considered the content of the withheld information the Commissioner notes that, as the FCO has suggested, it contains discussions about the situation both in Yemen and in Cameroon, and more specifically UN action in each country. The Commissioner also accepts, as the FCO has argued, that such discussions are sensitive ones given that they contain exchanges of information between the UK and international partners, exchanges which were clearly not intended for public disclosure and also internal UK comments about the situations in both countries. In this context, the Commissioner is satisfied that there is a causal link between disclosure of this information and prejudice occurring to the UK's relations with both Yemen, Cameroon and furthermore with the UN. She also notes that disclosure also risks harming the UK's relationship with other states given that the withheld information includes discussions with them about Yemen and Cameroon. 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 a hypothetical risk of prejudice occurring and therefore the third criterion is met.

22. Sections 27(1)(a) and (b) and are therefore engaged.

Public interest test

23. However, 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 withheld information.
24. The FCO acknowledged that disclosure of the withheld information would increase public knowledge about its relations with other member states of the UN, and in particular about Yemen and Cameroon. However, it argued that disclosure of the withheld information would undermine the trust and confidence other states have in the UK and this in turn would undermine the UK's ability to protect and promote UK interests, in this case in respect of the situation in Yemen, ie the ongoing civil war, and Anglophone crisis in Cameroon, which would be firmly against the public interest.
25. The Commissioner recognizes that there is clearly considerable public interest both within the UK, and internationally, in the situation both in Yemen and in Cameroon. More specifically, the Commissioner agrees that there is a public interest in the UK being open and transparent in respect of how it is approaching the respective crisis in each country and this extends to how the UK is working both with the UN and other member states on these issues. Disclosure of the withheld information would provide the public with a detailed insight into UK's discussions with the UN and member states in respect of the situation in Yemen, and to a lesser extent, the situation Cameroon. Therefore, the public interest in disclosing the information should not be underestimated.
26. However, Commissioner also believes that there is very strong public interest in ensuring that the UK's relationship both with the UN and with its member states are not harmed, especially given the ongoing nature of the situation in Yemen and Cameroon and thus the need for the UK to be able to enjoy effective relations with the countries in question is particularly great. Furthermore, the Commissioner notes that given the content of the withheld information disclosure of it would risk harming the UK's relations with other states not just Yemen, Cameroon and the UN. In view of these factors the Commissioner has concluded that the public interest favours maintaining the exemptions contained at sections 27(1)(a) and (b) in respect of the withheld information.

Section 35 – formulation and development of government policy

27. The FCO withheld some of the requested information on the basis of section 35(1)(a) of FOIA. This exemption states 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'

28. 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.

29. The phrase 'relates to' can be interpreted broadly. This means the information does not itself have to be created as part of the formulation or development of government policy making. Rather, any significant link between the information and the policy making is enough. Information may 'relate to' the activity due to its original purpose when created, or its later use, or its subject matter.

30. 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.

31. 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.

32. 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.

33. With regard to the policies to which the information relates, the FCO argued that these concerned the UK government's policy in respect of supporting the peace process in Yemen and in terms of Cameroon, the UK's policy in respect of ongoing efforts to encourage a political dialogue aimed at reducing the violence and displacement in the Anglophone regions of country.
34. 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 in respect of the civil war in Yemen and separately, the UK's response to the situation in Cameroon. In reaching his conclusion the Commissioner notes that the phrase relates to can be interpreted broadly and thus the range of information to which the FCO has applied section 35(1)(a) to can be said to fall within the scope of the exemption.
35. Section 35(1)(a) is therefore engaged.

Public interest test

36. 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.
37. The FCO acknowledged that there is a public interest in greater transparency in the decision making process to ensure accountability within public authorities. However, it argued that officials need to be able to conduct rigorous and candid risk assessments of their policies and programmes including considerations of the advantages and disadvantages, without there being a risk of premature disclosure which might close off better options and inhibit the free and frank discussion of all policy options. The FCO also emphasised that at the time of the request such policy making remained ongoing.
38. 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.

39. 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, the Commissioner is satisfied that at the point that this request was submitted the UK's policy making in respect of both the civil war in Yemen and the Anglophone crisis in Cameroon 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 these issues. Consequently, in the circumstances of this case the Commissioner believes that significant weight should be attributed to the safe space arguments.
40. 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 these issues 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).
41. 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 which would add to the public's understanding of the UK's approach to both Yemen and Cameroon. Disclosure of the information withheld on the basis of section 35(1)(a) would provide the public with a detailed insight into how the FCO, and more broadly the government, approached policy making in respect of Yemen, and to a lesser extent, simply because of the nature of the information held, an insight into policy making in relation to the Anglophone crisis in Cameroon.

42. Nevertheless, the Commissioner has concluded that by a relatively narrow margin the public interest favours maintaining the exemption. In reaching this view she fully acknowledges the public interest in disclosing information both about the civil war in Yemen and the Anglophone Crisis in Cameroon. However, given that at time of the request policy making in relation to both areas remained ongoing in the Commissioner's view this tips the balance of the public interest in favour of maintaining the exemption.

Section 21 – information reasonably accessible by other means

43. Section 21 of FOIA provides an exemption for information which is reasonably accessible to the requester by other means. The FCO applied this exemption to information which it held, but to which it considered to already be in the public domain. It directed the complainant to two websites and explained that the information to which section 21 had been applied could be located on such sites.
44. The complaint argued that he could not locate any relevant information on these websites.
45. The Commissioner has had the benefit of reviewing the information to which the FCO has applied section 21. Having done so, she can understand the complainant's difficulties in locating the information to which this exemption has been applied. Furthermore, the Commissioner notes that some of the withheld information which the FCO has indicated is exempt on the basis of section 21 is in fact available on different websites to the ones identified to the complainant. Therefore, the Commissioner is not satisfied that the information to which section 21 has been applied is in fact reasonably accessible to the complainant. Such information is not therefore exempt from disclosure on the basis of this exemption.

Time taken to consider the balance of the public interest test

46. 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.'*

47. 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.

48. 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.
49. In the circumstances of this case the FCO took 120 working days to consider the balance of the public interest test. The FCO explained that this additional time was needed because of the volume and sensitivity of the material falling within the scope of the request, and complexity of the search and number of individuals consulted. However, despite these complexities the Commissioner is not persuaded that it was reasonable for the FCO to take this amount of time to complete its deliberations. The FCO therefore breached section 17(3) of FOIA.

Right of appeal

50. 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

51. 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.
52. 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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