

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 January 2019

Public Authority: Foreign and Commonwealth Office
Address: King Charles Street
London
SW1A 2AH

Decision (including any steps ordered)

1. The complainant has submitted a request to the Foreign and Commonwealth Office (FCO) for correspondence between it and the Internet Computer Bureau about the internet domain '.io'. The FCO provided the complainant with some information but sought to withhold additional information on the basis of the exemptions contained at the following sections of FOIA: sections 40 (personal data), 41 (information provided in confidence) and 43 (commercial interests). The FCO also refused to confirm or deny whether it hold any further information falling within the scope of the request on the basis of section 23(5) of FOIA. The Commissioner has concluded that the FCO is entitled to rely on all of these exemptions in the manner in which it has. However, she has also concluded that the FCO breached section 17(3) by failing to complete its public interest considerations within a reasonable timeframe.

Request and response

2. The complainant submitted the following request to the FCO on 15 December 2017:

*'I am requesting any and all correspondence with Internet Computer Bureau (ICB) and or Batelco Sure regarding the BIOT (British Indian Ocean Territory) .io domain since January 1, 2014.'*¹

3. The FCO contacted the complainant on 15 December 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 43(2) (commercial interests) of FOIA and it needed additional time to consider the balance of the public interest.
4. The FCO sent the complainant similar public interest extension letters on the following dates: 14 February 2018, 14 March 2018 and 13 April 2018.
5. The FCO provided him with a substantive response on 11 May 2018. As part of this response the FCO provided the complainant with some of the information falling within the scope of his request but explained that further material had been withheld on the basis of sections 40(2) (personal data), 41 (information provided in confidence) and 43(2) of FOIA. The FCO also refused to confirm or deny whether it held any further information falling within the scope of the request on the basis of section 23(5) (security bodies) of FOIA.
6. The complainant contacted the FCO on 25 May 2018 and asked it to conduct an internal review of this response.
7. The FCO informed him of the outcome of the internal review on 18 July 2018. The review upheld the application of the exemptions cited in the refusal notice.

Scope of the case

8. The complainant contacted the Commissioner on 19 August 2018 in order to complain about the FCO's handling of his request. More specifically, the complainant explained that he disagreed with FCO's decision to withhold information falling within the scope of his request. He was also dissatisfied with the time it took the FCO to initially respond to his request.

¹ ICB is a UK based company which operates several code country top-level domain registries. This includes maintaining the .io domain which is designation for the British Indian Ocean Territory (BIOT).

Reasons for decision

Section 41 – information provided in confidence

9. The FCO applied section 41(1) of FOIA to the majority of the withheld information.

10. This section states that:

'(1) Information is exempt information if—

- (a) it was obtained by the public authority from any other person (including another public authority), and*
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.'*

11. Therefore, for this exemption to be engaged two criteria have to be met; the public authority has to have obtained the information from a third party and the disclosure of that information has to constitute an actionable breach of confidence.

12. With regard to whether disclosure would constitute an actionable breach of confidence the Commissioner follows the test of confidence set out in *Coco v A N Clark (Engineering) Ltd* [1968] FSR 415. This judgment suggested that the following three limbed test should be considered in order to determine if information was confidential:

- Whether the information had the necessary quality of confidence;
- Whether the information was imparted in circumstances importing an obligation of confidence; and
- Whether an unauthorised use of the information would result in detriment to the confider.

13. However, further case law has argued that where the information is of a personal nature it is not necessary to establish whether the confider will suffer a detriment as a result of disclosure.

Was the information obtained from a third party?

14. The FCO explained that the information withheld on the basis of section 41(1) was provided to it by Internet Computer Bureau (ICB). Having examined the information the Commissioner is satisfied that this is an accurate description of the information and therefore section 41(1)(a) is met.

Does the information have the necessary quality of confidence?

15. The Commissioner considers that information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial; information which is of importance to the confider should not be considered trivial.
16. It is clear from the information withheld on the basis of section 41(1) that it was clearly of importance to the confider, detailing as it does aspects of ICB's business operations and a press story concerning ICB.

Was the information obtained in circumstances importing an obligation of confidence?

17. The FCO noted that some of the emails from the third party were marked 'In Confidence/Confidential'. As part of its consideration of this FOI request it liaised with the third party in question in order to ascertain whether it considered only these emails to be have been provided in confidence or all emails falling within the scope of the request. The third party was clear all of the information should be treated as confidential and not be disclosed.
18. In light of this explanation, and given the content of the withheld information, the Commissioner is satisfied that this criterion is met.

Would disclosure be detrimental to the confider?

19. The FCO argued that it was clear, given the content of the information which had been withheld, that if it was disclosed then this would be detrimental to the confider. The Commissioner is satisfied that this is the case. She cannot elaborate on why she has reached this conclusion in any detail without revealing the content of the information. However, she can confirm that disclosure of parts of the information would cause specific personal detriment to one individual and also that disclosure of other parts of the information would be detrimental to ICB's commercial interests.
20. On this latter point, the complainant argued that ICB is acting as an agent of the BIOT Administration and is in a quasi-governmental role rather than a purely commercial one. The complainant suggested that ICB's entire business appeared to be serving the country code top-level domain (ccTLD) .io as well the ccTLD .ac and .sh for the Governor of St Helena and Dependencies. The complainant therefore suggested that ICB has no competitors and has served in this role since approximately 1997. Despite this the Commissioner is satisfied that disclosure of the information could be detrimental to ICB's interests. In reaching this finding, the Commissioner notes that ICB is part of a wider group of

companies which provide a range of internet services. Furthermore, whilst the Commissioner accepts the complainant's point that ICB appears to have sole control of the ccTLD he identified, in her view the nature of the information withheld would nevertheless be of interest to competitors who administer other ccTLD domains.

Public interest defence

21. However, although section 41 is an absolute exemption, the law of confidence contains its own built in public interest test with one defence to an action being that disclosure is in the public interest.
22. The complainant acknowledged that it was unclear of the exact nature of the information being withheld. However, he alleged that recently the ccTLD.io had become the centre of money laundering and crypto currency criminal activity involving tens of millions of pounds. The complainant suggested that the digest of information disclosed by the FCO to date showed the FCO's actual concern was about 'bad news stories' arising from litigation involving this alleged criminal activity. He therefore argued that the interest of the FCO and ICB in avoiding public scrutiny of their relationship and/or potential embarrassment did not outweigh the public interest in disclosure of the information. He also argued that there was an additional public interest in these documents because of the current controversy over the FCO administration of the BIOT which is now the subject of pending litigation in the International Court of Justice.²
23. The FCO argued that, given the content of the information, there was a limited public interest in its disclosure and this did not outweigh the need to defend an actionable breach of confidence by releasing the information nor the public interest in ensuring that the detrimental consequences it had identified did not occur.
24. Unlike the complainant, the Commissioner has obviously had the benefit of reviewing the withheld information. Having done so, in her view there is only a very small amount of information which actually relates to the complainant's allegations of .io being used for criminal activity. Moreover, in the Commissioner's opinion the degree to which disclosure of this particular information would add to the public's understanding of this issue is very limited. The Commissioner acknowledges that disclosure of other parts of the withheld information would provide the public with a greater understanding of the FCO and ICB's relationship and also some insight into press coverage of ICB. However, the

² <https://www.icj-cij.org/en/case/169>

Commissioner agrees with the FCO that there is a clear public interest in ensuring that the detriment identified both to the individual in question and the ICB's interests does not occur. On balance the Commissioner has therefore concluded that the public interest in disclosing the information does not outweigh the public interest in maintaining the confidence.

Section 43(2) – commercial interests

25. Section 43(2) states that:

'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).'

26. In order for a prejudice based exemption, such as section 43(2), 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 to discharge.

27. The FCO argued that disclosure of the particular information withheld on the basis of this exemption would be likely to prejudice the commercial interests of ICB as it could be used by its competitors.

28. Having considered the information in question, the Commissioner is satisfied that the three criteria above are met. The prejudice described by the FCO clearly relates to the interests which the exemption contained at section 43(2) is designed to protect. With regard to the second criterion, the Commissioner is satisfied that disclosure of the information withheld on the basis of section 43(2) has the potential to harm the commercial interests of ICB. With regard to the third criterion,

the Commissioner is satisfied that there is clearly a more than a hypothetical risk of prejudice occurring to ICB if the information disclosed. In reaching this conclusion the Commissioner notes that the withheld information relates directly to ICB activities and in her view it is plausible to argue that this information would be of interest, and indeed of use, to other companies which provide ccTLD services.

29. Section 43(2) is therefore engaged.

Public interest test

30. Section 43 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.
31. The complainant's public interest arguments for disclosure of the withheld information are set out above.
32. The FCO argued that there was a public interest in protecting the commercial interests of third parties. It also argued that the BIOT Administration needed to converge with business people and commercial organisations without fear of disclosure of sensitive information which could undermine its ability to engage with the private sector in the future.
33. As with the information withheld under section 41, disclosure of the information withheld on the basis of section 43(2) would not provide any real insight into the complainant's allegations of .io being used for criminal activity. That said, the Commissioner acknowledges that there is a public interest in the FCO being open and transparent about its relations with commercial organisations. Disclosure of the information withheld on the basis of section 43(2) would provide the public with some insight into how ICB administers the domain .io and as well its relationship with the FCO. The public interest in this information should not therefore be dismissed. However, in the Commissioner's opinion there is very strong and inherent public interest in ensuring fairness of competition and in her view it would be firmly against the public interest if a company's commercial interests are harmed simply because they have a relationship with a government department. Furthermore, the Commissioner accepts that it is in the public interest for the BIOT Administration to be able to receive such commercially sensitive information from companies such as ICB. Taking the weight of these interests into account, the Commissioner has concluded that the public interest favours maintaining the exemption and withholding the information.

Section 40 – personal data

34. The FCO has withheld the names and contact details of junior staff and the same information about third parties on the basis of section 40(2) of FOIA.³ This section states that personal data is exempt from disclosure under FOIA if it is not exempt on the basis of section 40(1) of FOIA (ie if it is the requester's own personal data) and its disclosure would breach any of the data protection principles contained within the Data Protection Act 1998 (DPA).

35. 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.'

36. The Commissioner is satisfied that the information which the FCO is seeking to withhold on the basis of section 40(2) constitutes personal data and therefore is potentially exempt from disclosure on the basis of section 40(2) of FOIA.

37. The FCO argued that disclosure of this personal data would breach the first data protection principle. This 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.'

38. The relevant Schedule 2 condition in this case is the sixth one which states that:

'The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in

³ 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.

any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.'

39. 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:

- 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?

40. 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.

41. 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.

42. In relation to the names of the various officials contained in the withheld information the Commissioner accepts that it is established custom and practice for the FCO, and other public authorities, to redact the names and contact details of junior staff and non-front line staff from any disclosures under FOIA. In light of this, she accepts that disclosure of such information would be against the reasonable expectations of these individuals. Furthermore, the Commissioner is not persuaded that there is a particularly strong or compelling legitimate interest in the disclosure of these names. Disclosure of this category of information would therefore breach the first data protection principle and such information is therefore exempt from disclosure on the basis of section 40(2) of FOIA. Similarly, the Commissioner accepts that individuals in private sector companies would not expect their names or contact details to be disclosed in response to an FOI request. The Commissioner notes that in the circumstances of this case the FCO informed such individuals that their names and contact details would not be disclosed and in light of this, and given that there is not a compelling interest in the disclosure of this information, the Commissioner also accepts that it is exempt from disclosure on the basis of section 40(2) of FOIA.

Section 23(5) – security bodies

43. The FCO also sought to refuse to confirm or deny whether it held any *further* information on the basis of section 23(5) of FOIA, beyond that disclosed to the complainant or withheld on the basis of the exemptions.

44. Section 23(1) of FOIA states that:

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

45. Section 23(5) of FOIA states that:

'The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).'

46. The full list of bodies specified in section 23(3) can be viewed online.⁴
47. In the Commissioner's opinion the exemption contained at section 23(5) should be interpreted so that it is only necessary for a public authority to show that **either** a confirmation **or** denial of whether requested information is held would involve the disclosure of information relating to a security body. It is not necessary for a public authority to demonstrate that both responses would disclose such information. Furthermore, the Commissioner considers that the phrase 'relates to' should be interpreted broadly. Such an interpretation has been accepted by the First-Tier Tribunal (Information Rights) in a number of different decisions.⁵
48. Consequently, whether or not a security body is interested or involved in a particular issue is in itself information relating to a security body. Therefore, in the Commissioner's opinion section 23(5) could be used by a public authority to avoid issuing a response to a request which revealed either that a security body was involved in an issue or that it was not involved in an issue.
49. The test of whether a disclosure would relate to a security body is decided on the normal civil standard of proof, that is, the balance of probabilities. In other words, if it is more likely than not that the disclosure would relate to a security body then the exemption would be engaged.
50. From the above it can be seen that section 23(5) has a very wide application. If the information requested is within what could be described as the ambit of security bodies' operations, section 23(5) is likely to apply. Factors indicating whether a request is of this nature will include the functions of the public authority receiving the request, the subject area to which the request relates and the actual wording of the request.
51. The Commissioner is satisfied that on the balance of probabilities, confirming whether or not the FCO holds further information falling within the scope of this request would reveal something about the security bodies. The Commissioner is not able to elaborate on her basis for this finding without potentially revealing information which itself could be exempt from disclosure.

⁴ <http://www.legislation.gov.uk/ukpga/2000/36/section/23>

⁵ See *Dowling v Information Commissioner and The Police Service for Northern Ireland*, EA/2011/0118, paras 17 to 22.

Section 10 and section 17

52. Section 10(1) of FOIA requires public authorities to respond to a request promptly and in any event within 20 working days of receipt.
53. Section 17(1) of FOIA explains that if a public authority intends to refuse to comply with a request it must provide the requestor with a refusal notice stating that fact within the time for compliance required by section 10(1). Section 17(3) allows a public authority to extend its consideration of the public interest for a reasonable period of time if necessary. The Commissioner considers that this should normally be no more than an extra 20 working days, which is 40 working days in total to deal with the request. Any extension beyond this time should be exceptional and the public authority must be able to justify it.
54. In this case the complainant submitted his request on 16 December 2017 but the FCO did not inform him of the outcome of its public interest considerations until 11 May 2018, 100 working days later.
55. The FCO acknowledged that this response took longer than the Commissioner's guidance recommended and that it had apologised to the complainant about this delay. It also emphasised that it recognised the importance of dealing with FOI requests on time but this had to be balanced with the needs of other conflicting priorities. The Commissioner is not unsympathetic to the competing needs which public authorities face, however, even taking these into account she considers that the FCO should have completed its public interest considerations in a shorter period of time. It follows that the Commissioner has concluded that the FCO breached section 17(3) of FOIA.

Right of appeal

56. 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

57. 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.
58. 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
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF