

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 December 2019

Public Authority: 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 emails held by the Nigerian section which mentioned certain key words relating to an oil field. The FCO provided some information falling within the scope of the request but withheld parts of the information on the basis of sections 27(1)(a) and (b) (international relations), 31(1)(a) and (c) (law enforcement) and 40(2) (personal data) of FOIA. It also refused to confirm or deny whether it held any further information falling within the scope of the request on the basis of sections 23(5) (security bodies) and 24(2) (national security) of FOIA. The complainant argued that the FCO should have considered his request under the EIR and in any event disputed the application of the various FOIA exemptions it had cited.
2. The Commissioner has concluded that the request should be considered under FOIA and that the FCO is entitled to rely on sections 27(1)(a) and 40(2) to withhold information. She has also concluded that FCO is entitled to rely on sections 23(5) and 24(2) to refuse to confirm or deny whether it holds any further information.
3. The Commissioner does not require the FCO to take any steps.

Request and response

4. The complainant submitted a request to the FCO on 21 August 2018 seeking the following information:

*'Email correspondence to or within the FCO Nigeria section containing the words "Malabu" or "OPL245" or "Oil Production Licence 245" or "Shell" or "Zabazaba" OR "Etan", for the period 2013 to 2018.'*¹

5. The FCO contacted him and explained that given the amount of information falling within the scope of this request it was likely that section 14 (vexatious) of FOIA would apply given the burden of processing the request. It therefore asked him to consider refining his request.
6. The complainant contacted the FCO on 8 October 2018 and agreed to refine his request by removing 'Shell' from the search terms.
7. The FCO responded on 22 November 2018 and confirmed that it held information falling within the scope of the request but it considered section 27 (international relations) of FOIA to apply and it needed additional time to consider the balance of the public interest test. The FCO sent a similar letter on 20 December 2018.
8. The FCO provided the complainant with a substantive response to his request on 22 January 2019. It provided him with a digest of the information falling within the scope of the request but explained that some information had been withheld on the basis of sections 27(1)(a) and (b), 31(1)(a) and (c) (law enforcement), and 40(2) (personal data) 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 sections 23(5) (security bodies) and 24(2) (national security) of FOIA.
9. The complainant contacted the FCO on 18 March 2019 and asked it to conduct an internal review of this response. He argued that the FCO should have considered his request under the Environmental Information Regulations (EIR) rather than FOIA and that in any event the exemptions cited did not apply.

¹ Shell and ENI, an Italian oil company purchased an oil field in Nigeria, OPL 249. The companies are accused of paying bribes totalling \$1.1 billion to Dan Etete, then Nigerian Oil Minister, through his oil company Malabu to secure the oil field licence. Shell and ENI deny the accusation saying the money was paid directly to the Nigerian government. Shell and ENI are currently on trial in Milan facing accusations of bribery.

10. The FCO informed him of the outcome of the internal review on 14 May 2019. The review concluded that the request was correctly considered under FOIA rather than the EIR, and furthermore it upheld the application of the various exemptions cited in the refusal notice.

Scope of the case

11. The complainant contacted the Commissioner on 23 May 2019 in order to complain about the FCO's handling of his request. He argued that the FCO should have considered his request under the EIR rather than under FOIA, and if the request was considered under FOIA then the exemptions cited by the FCO did not apply.

Reasons for decision

The applicable access regime

12. The complainant argued that the FCO should have considered his request under the EIR rather than under FOIA as the requested information fell within the definition of 'environmental information' as defined by the section 2(1)(c). In support of this position the complainant emphasised that the definition in the EIR is derived from the Aarhus Convention, the implementation guide for which says that 'the clear intention of the drafters...was to craft a definition that would be as broad in scope as possible, a fact that should be taken into account in its interpretation.' The complainant argued that the FCO had not adopted this broad interpretation in considering the EIR.
13. The relevant provisions of the EIR state that:

'2.—(1) In these Regulations—...

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on—

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases

into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements'

14. In support of his position, the complainant argued that Shell's and Eni's activity in Nigeria has been implicated in the environmental devastation of parts of the country, particular the Niger delta. The complainant argued that the extraction of fossil fuels in itself creates concerns about damage to the environment globally and that any involvement with Shell, Eni or the Nigerian government in relation to OPL 245 raises environmental issues. The complainant argued that whether or not the extraction from the block goes ahead is of significant environmental impact in Nigeria affecting the health and safety of the citizens there, and in relation to the increase in greenhouse gas emissions globally.
15. The Commissioner has carefully examined the information falling within the scope of the request and in her view this does not fall within the scope of section 2(1)(c) of FOIA. This is because whilst the information ultimately concerns the oilfield OPL 245, the focus of the information is on the corruption investigation into the sale of this field, the related court action in Italy, the return of assets from the UK to Nigeria and associated media handling of issues concerning this topics. Therefore, in the Commissioner's opinion the withheld information does not focus on the actual extraction of oil from the field in question. Whilst the Commissioner acknowledges that the phrase 'information on' needs to be read broadly, in her view in the circumstances of this case even with a broad interpretation, the requested information does not fall within the scope of regulation 2(1)(c).

Section 27 – international relations

16. The FCO redacted information from four documents on the basis of section 27(1)(a) of FOIA.
17. 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...'*

The FCO's position

18. The FCO explained that disclosure of the information withheld on the basis of this exemption would be likely to prejudice the UK's relations with Nigeria and Italy. In support of this position, the FCO explained that the effective conduct of international relations depends upon maintaining trust and confidence between governments. With regard to the specific information that had been withheld the FCO explained that this contained free and frank discussions about the issues involved, which if disclosed would be likely to prejudice these relations (the FCO elaborated on the reasons why in submissions to the Commissioner which made reference to the content of the withheld itself). Furthermore, the FCO also explained that some of the withheld information had been provided to UK by one of these countries and given the circumstances in which it was provided, disclosure of it would also be likely to prejudice relations. The FCO also emphasised that the sensitivity of the information remained high.

The complainant's position

19. The complainant noted the Government of Nigeria is currently taking legal action against Shell in the English High Court (Case number CL 2018-000787) and Italian courts, and therefore he argued that disclosure of information falling within the scope of his request is unlikely to prejudice relations between the United Kingdom and Nigeria.²

The Commissioner's position

20. 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

² <https://www.financeuncovered.org/wp-content/uploads/2019/05/PoC-FRN-Shell-ENI.pdf>

- 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.
21. 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*'.³
 22. 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 content of the withheld information and taking 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 both Nigeria and Italy. 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. The Commissioner has reached this conclusion given the free and frank nature of the internal FCO discussions on a subject matter which she accepts remains a sensitive one.
 23. In reaching this conclusion the Commissioner acknowledges that the Nigerian government is taking legal action, in England, against Shell, an Anglo-Dutch company. However, despite this background the Commissioner is satisfied that disclosure of information would still be likely to still prejudice the UK's relations with Nigeria, and indeed with Italy. The Commissioner has reached this conclusion given the specific information that has been redacted.
 24. Section 27(1)(a) is therefore engaged.

³ Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence (EA/2006/0040), paragraph 81

Public interest test

25. 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 information.

Public interest arguments in favour of disclosing the withheld information

26. The complainant argued that there is a high public interest in knowing the extent of British government involvement or knowledge of a deal which is suspect and whether any steps were taken to report corruption. He argued that a suspicion of wrongdoing is reasonable with regard to the development of the OPL 245 oil fields in Nigeria and the deal to acquire the block is currently the subject of major ongoing corruption trial in Milan. The complainant argued that evidence has come to light suggesting that civil servants concerns over the terms of contracts were overruled by ministers raising potential environmental concerns. The complainant also argued that there was a high public interest in British citizens knowing the kind of environmental policies that the government is supporting.
27. The FCO acknowledged that there was a strong public interest in government transparency and accountability, particular in relation to the UK government's handling of this issue.

Public interest arguments in favour of maintaining the exemption

28. The FCO argued that there was a strong public interest in ensuring that the FCO is able to conduct the UK's international relations effectively. If it was not able to do so, then its ability to act as a significant player in the international arena, and promote and protect UK interests through international relations will be hampered. The FCO argued that these arguments attracted additional weight given that the sensitivity of the information remained high.

Balance of the public interest

29. With regard to the public interest in disclosing the information the Commissioner accepts that given the circumstances surrounding the sale of oil field OPL 249 there is a considerable public interest in disclosing information which would reveal information about the British government's knowledge this deal. However, having considered the information that has been withheld on the basis of section 27(1)(a), the Commissioner is not persuaded that disclosure of this would add significantly to the public's understanding of the British government's role, beyond the information that has already been disclosed in response

to this request. Furthermore, the Commissioner also believes that there is very strong public interest in ensuring that the trust and confidence in the UK's ability to conduct effective international relations are not undermined. In the particular circumstances of this case, given the sensitive and ongoing nature of this issue, she accepts that it would be against the public interest for the UK's relations with Nigeria and Italy to be harmed at this time. In view of the above, the Commissioner has concluded that the public interest favours maintaining the exemption contained at section 27(1)(a).

Section 40 personal information

30. The FCO withheld the names of junior officials on the basis of section 40(2) of FOIA. This provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
31. In this case the relevant condition is contained in section 40(3A)(a)⁴. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
32. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of FOIA cannot apply.
33. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

34. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

35. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

⁴ As amended by Schedule 19 Paragraph 58(3) DPA.

36. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
37. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
38. In the circumstances of this case, the Commissioner is satisfied that the names of the officials both relate to and identify the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
39. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
40. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

41. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

42. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
43. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

44. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and"

freedoms of the data subject which require protection of personal data, in particular where the data subject is a child”⁵.

45. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
46. The Commissioner considers that the test of ‘necessity’ under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

47. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
48. Further, a wide range of interests may be legitimate interests. They can be the requester’s own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be

⁵ Article 6(1) goes on to state that:-

“Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”.

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.

compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

49. In the circumstances of this case, for the reasons discussed above, the Commissioner accepts that there is a legitimate interest in the disclosure of information about the sale of the oil field in question and the subsequent investigations into allegations of corruption. However, she is not persuaded that there is a particularly strong or compelling interest in the disclosure of the names of officials named in the withheld information in order to inform the public about this subject matter.

Is disclosure necessary?

50. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so a measure would not be necessary if the legitimate aim could be achieved by something less. Disclosure under FOIA must therefore be the least restrictive means of achieving the legitimate aim in question.
51. In the Commissioner's view it is not sustainable to argue that disclosure of the names of the junior officials is necessary; disclosure of such information would not add to the public's understanding of this subject matter.
52. Given this finding the Commissioner has concluded that disclosure of the names would not be lawful and therefore article 6(1)(f) of the GDPR is not met. Disclosure of the names would therefore breach the first data protection principle and thus such information is exempt from disclosure on the basis of section 40(2) of FOIA.
53. In light of her findings in relation to section 27(1)(a) and 40(2), the Commissioner has not considered the FCO's reliance on section 27(1)(b) or sections 31(1)(a) and (c).

Section 23 – security bodies

Section 24 – national security

54. The FCO also explained that it was relying on sections 23(5) and 24(2) of FOIA as a basis to refuse to confirm or deny whether it held any *further* information falling within the scope of the request other than that which it had already disclosed or withheld on the basis of the exemptions discussed above.
55. Sections 23(5) and 24(2) exclude the duty of a public authority to confirm or deny whether it holds information which, if held, would be exempt under section 23(1) or 24(1) respectively.

56. Information relating to security bodies specified in section 23(3) is exempt information by virtue of section 23(1). Information which does not fall under section 23(1) is exempt from disclosure under section 24(1), if it is required for the purpose of safeguarding national security.
57. By virtue of section 23(5) 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 section 23(3).
58. By virtue of section 24(2) the duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security.
59. The Commissioner does not consider the exemptions at sections 23(5) and 24(2) to be mutually exclusive and she accepts that they can be relied on independently or jointly in order to conceal whether or not one or more of the security bodies has been involved in an issue which might impact on national security. However, each exemption must be applied independently on its own merits. In addition, the section 24 exemption is qualified and is therefore subject to the public interest test.
60. The test as to whether a disclosure would relate to a security body is decided on the normal 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.
61. 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. This is consistent with the scheme of FOIA because the security bodies themselves are not subject to its provisions. 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.
62. The Commissioner finds that on the balance of probabilities, further information about this subject matter, if held, could be related to one or more bodies identified in section 23(3).
63. With regard to section 24(2), the Commissioner again considers that this exemption should be interpreted so that it is only necessary for a public authority to show either a confirmation or a denial of whether requested information is held would be likely to harm national security.
64. In relation to the application of section 24(2) the Commissioner notes that the First Tier Tribunal (Information Rights) has indicated that only a

consistent use of a '*neither confirm nor deny*' (NCND) response on matters of national security can secure its proper purpose. Therefore, in considering whether the exemption is engaged, and the balance of the public interest, regard has to be given to the need to adopt a consistent NCND position and not simply to the consequences of confirming whether the specific requested information in this case is held or not.

65. In the context of section 24, Commissioner accepts that withholding information in order to ensure the protection of national security can extend to ensuring that matters which are of interest to the security bodies are not revealed. Moreover, it is not simply the consequences of revealing whether such information is held in respect of a particular request that is relevant to the assessment as to whether the application of the exemption is required for the purposes of safeguarding national security, but the need to maintain a consistent approach to the application of section 24(2).
66. On this occasion the Commissioner is satisfied that complying with the requirements of section 1(1)(a) would be likely to reveal whether or not the security bodies were in any way involved in the subject matter which is the focus of this request. The need for a public authority to adopt a position on a consistent basis is of vital importance in considering the application of an NCND exemption.
67. The Commissioner is satisfied that the public authority was entitled to rely on sections 23(5) and 24(2) in the circumstances of this case. She accepts that revealing whether or not further information, falling within the scope of the request, is held by the FCO would be likely to reveal whether information is held relating to the role of the security bodies. It would also undermine national security and for that reason section 24(2) also applies because neither confirming nor denying if additional information is held is required for the purpose of safeguarding national security.
68. As noted above section 24 is a qualified exemption. However, the Commissioner considers that there is a significant public interest in protecting information required for the purposes of safeguarding national security. Therefore, in the circumstances of this case the public interest in maintaining the exemption at section 24(2) outweighs the public interest in complying with the duty imposed by section 1(1)(a).

Right of appeal

69. 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@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

70. 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.

71. 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