

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 23 October 2006

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

### Summary Decision

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1. On 12 January 2005 the complainant sought disclosure from the Foreign and Commonwealth Office ("the FCO") of information relating to; the UK – US Energy dialogue; the Cheney Task Force; forecasts about peak oil production, and US attempts to seek exclusive oil agreements. Subsequently, on 18 February 2005, he also asked for a list of documents falling within the scope of the request. In relation to the initial request the FCO provided the information relating to forecasts but withheld the remainder, citing sections 27 and (subsequently) 35 (1) (a) of the Freedom of Information Act 2000 ("the Act"). The FCO declined to provide a schedule of documents on the grounds that the Act did not require it to create new information. Following confirmation of this decision on review, the complainant appealed to the Commissioner. Having viewed the information, the Commissioner accepted that most of the information had been correctly withheld under the exemptions cited but considered that some information could be released. The Commissioner did not accept the FCO argument that the production of a list of relevant documents constituted the creation of new information but nevertheless thought that the exemptions in respect of the substantive information applied here also.

### The Commissioner's Role

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2. The Commissioner's role is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of the Act. This Notice sets out his decision.

### The Request

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3. On 12 January 2005 the complainant requested from the FCO the following information:

- a) minutes of all meetings of US and UK officials under the terms of the 'US-UK Energy Dialogue' from April 2002;
- b) any documents or emails relating to the 'Cheney Taskforce' which reported in May 2001;
- c) any documents or emails relating to the peaking of world oil production;
- d) any documents relating to US attempts to secure an exclusive oil supply with Nigeria or any other country.

The complainant recognised that this request might be too broad in nature and said that he would try to narrow it down if that would assist the FCO. In reply, the FCO suggested that attempting to meet the request as it stood would exceed the cost limits set down by the legislation: the complainant was invited to submit a more focused request. On 20 January 2005 the complainant replied; in relation to item d) of his request, he agreed to narrow it to cover West African countries only, within a timeframe of January 2001 to May 2003.

4. The FCO subsequently provided to the complainant information in answer to item c) of his request but, in a letter dated 11 February 2005, refused to release the other information sought. The FCO said that it was withholding this information under section 27(1)(a) of the Act as releasing it would, or would be likely to, prejudice international relations and would not be in the public interest. The FCO confirmed that, in reaching this decision, it had sought the advice of the British Embassy in Washington. The FCO replied within the timescale set down in the legislation and notified the complainant of his right to a review, and of the role of the Information Commissioner.
5. On 18 February 2005 the complainant sought a review. He also asked to be provided with a list of documents falling within the scope of the request. On 20 February the complainant wrote again. As well as confirming that he wished for the earlier decision to be reviewed, he also asked to be given the dates of all of the meetings covered by item a) of his request and the names of those who had attended them. The FCO referred this request for advice to the Department of Trade and Industry (the lead department in this subject).
6. On 31 March 2005 the FCO responded to the review request. The reply confirmed the original decision but additionally cited sections 27 (2) and (3): the FCO reiterated that it did not believe release of the information to be in the public interest. The FCO also said that there was no obligation under the legislation to provide a list of documents falling within the scope of the complaint. On 4 April the FCO replied to the second request. The FCO provided the dates of all of the meetings falling within item a) of the original request but declined to provide the names of those who had attended them on the grounds that to do so would constitute a breach of the Data Protection Act.

## The Investigation

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### Scope of the case

7. On 6 April 2005 the complainant wrote to the Commissioner to complain about the failure to release the information sought. The complainant said that, in his view, there was clearly a strong public interest argument for the release of the information he had requested and he thought that the refusal to release the list of documents was not in accordance with the spirit of the Act.

### **Chronology of the case**

8. The Commissioner wrote to the FCO on 21 July 2005 to confirm that he would be investigating the complaint. He asked the FCO to provide any comments it might wish to make and to make available the information sought by the complainant. The FCO subsequently asked to be given the opportunity to formally review the complainant's second request (that relating to the names of those attending the meetings) before the Commissioner began his investigation. This was agreed and, in due course, the names of those attending the meetings were released to the complainant. The Commissioner's staff subsequently visited the FCO and examined all the relevant information. Further correspondence ensued in order to establish particular points more accurately.
9. In the course of that correspondence the FCO said that it now wished to also cite section 35(1)(a) as justification for withholding the information, while acknowledging that this exemption had not at any time been cited in correspondence with the complainant. The Commissioner has noted that, when referring to section 27, the FCO had additionally cited section 27(1)(c), which relates to information the disclosure of which might prejudice the interests of the United Kingdom abroad.

### **Analysis**

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10. The Commissioner has considered the public authority's response to the complainant's request for information.

### **Procedural breaches**

11. There were no procedural breaches of the legislation to consider.

### **Exemptions**

12. The FCO cited section 27 of the Act. Initially, only section 27(1) (a) was applied; this provides that information is exempt if its disclosure would, or would be likely to, prejudice relations between the United Kingdom and any other State. Subsequently, the FCO widened its application of this section to incorporate section 27(2), which exempts information obtained on a confidential basis from a State other than the United Kingdom or from an international organisation. In addition the FCO cited the supplementary section 27(3), which says that information obtained from such a State or international organisation remains confidential at any time while the terms on which it was obtained require it to be so held, or while the circumstances in which it was so obtained make it reasonable for the State or international organisation to expect it to be so held.

- During subsequent correspondence the FCO extended its application of section 27(1) to also include subsection (c) which refers to information the release of which would, or would be likely to, prejudice the interests of the United Kingdom abroad.
13. Section 35(1)(a) of the Act, which the FCO cited at a much later stage in the proceedings, provides that information is exempt information if it relates to the formulation or development of government policy.
  14. The FCO applied no exemption in respect of its refusal to provide a list of documents as requested by the complainant. Its view was that the production of such a list was, in effect, a request for the provision of new information, for which no obligation existed under the legislation.
  15. The material covered by the request consists of a mixture of; notes of meetings, emails, drafts of policy papers, and at least one submission to a Minister. All of the information these documents contain falls under the umbrella of the 'US-UK Energy Dialogue'. The emails are informal in nature and contain a range of often candid assessments of countries, policies, interests and individuals. The more formal documentation, while different in tone, covers similar ground. While much of the information indicates the thinking of the UK Government at home, supported by views from the British Embassy in Washington and from diplomatic staff in West Africa, it also reflects the thinking of the US Government. The documents also chart the continuing development of international energy policy in the West African region. Many of these documents, but by no means all, are covered by a security classification.
  16. The FCO has argued that the development and pursuit of an energy policy under the umbrella of the 'US-UK Energy Dialogue' remains a matter of considerable sensitivity. In particular, the FCO takes the view that the release of information which includes frank and wide-ranging comments on the internal politics and circumstances of countries which are, or which it is hoped might become, key players in this developing energy policy would prejudice our relations with those countries to the detriment of that policy. The FCO also says that the successful pursuit of this policy requires the continuing support of the US government and that to release information constituting exchanges between the two countries on matters relating to the 'US-UK Energy Dialogue' would prejudice that relationship, particularly as much of the contribution to those exchanges from the United States was made on a confidential basis.
  17. The Commissioner has examined in detail the information sought and has considered whether or not it falls within the exemptions cited. In respect of Section 27, the Commissioner is of the view that all of the material referred to in the previous paragraph falls within both section 27(1) (a) and section 27 (1) (c). In addition, it is the Commissioner's view that some of the information is also caught by section 27(2) in that it was provided by a State other than the United Kingdom on a confidential basis. Section 27 is therefore engaged.
  18. In respect of the matter of prejudice it is also the Commissioner's view, having considered the information, that the release of the majority of it would, or would

be likely to, cause prejudice of the kind identified by the FCO (see paragraph 16). That prejudice now needs to be considered in the light of the operation of the public interest test (see below). It should be noted that the Commissioner has identified some information the release of which, in his opinion, would not cause prejudice of the kind identified in relation to the exemption. However, it is the Commissioner's view that this information, to the extent that it is not already in the public domain, is only incidental to the topics that form the subject matter of the information request and could in any event only be released following an exercise in redaction that would render it largely meaningless.

19. Section 35(1)(a) was cited much later by the FCO, although the FCO has stated that the failure to cite it earlier was an oversight. This merits criticism. The FCO has taken the view that this section applies to all of the information sought by the complainant, as the information relates to the development of government policy in the specific area of energy but also, in some instances, to the development of much broader policies. The Commissioner accepts that much of the information sought falls within this exemption although he is of the opinion that section 27 is in itself sufficient to cover the totality of the information sought and that there is no need to take into account the additional exemption. The Commissioner will therefore give no further consideration to section 35. In respect of the public interest test, which this exemption also attracts and which is examined below in respect of section 27, the considerations would in any event be very similar.

### **Public Interest Test**

20. In considering the question of the public interest in this matter the Commissioner has noted that the existence of the 'US-UK Energy Dialogue' is a matter of public record and that there is no shortage of information in the public domain about its areas of interest and broad scope (for example, the memorandum and report to President Bush dated 30 July 2003 on the work taking place under the umbrella of the dialogue). The information in the public domain includes specific references to the development of policies relating to Angola, Nigeria and other parts of West Africa, drawing attention to particular issues such as gas flaring and transparency.
21. The complainant has argued that, in the light of diminishing supplies of fossil fuels and widespread predictions that they might shortly run out, the public has a right to know what steps are being taken by the UK Government to ensure the security of future UK energy supply. As the 'US-UK Energy Dialogue' forms a significant element of planning for that future, it was in the public interest that more information about its activities should be made available.
22. The FCO said that energy policy is a sensitive and high-profile area. Discussions about energy policy often extend to the consideration of wider foreign policy issues. Such discussions of necessity involve information provided in confidence either by or about other States, the release of which would be likely to have a detrimental effect on our relations with those States. Equally, in the process of developing policy, it was often necessary to speak frankly and candidly and the premature disclosure of policy developments could prove damaging. If the details of such discussions were to be released into the public domain then it would prove difficult for those contributing, either at meetings or in written form, to feel able to express

themselves in such a way in the future. The FCO argument was, therefore, that the public interest was best served in this case by maintaining the exemption rather than by releasing the information.

23. The Commissioner has considered these arguments carefully in applying the public interest test in this case. Much of the available information held by the FCO is contained in emails, the broad content of which is set out earlier in this Notice. The Commissioner recognises that; such exchanges form an essential element of communication between officials; they were not drafted for wider circulation; sometimes contain confidential views, and that their authors would have been very much more restrained in their phraseology had they been aware that their exchanges might enter the public domain. It is also pertinent that these exchanges occurred at a time when policies were starting to develop and a wide range of different options were under active consideration. The Commissioner recognises that, in the early stages of the development of policy, particularly where it involves the interests and views of other States, there is a strong argument for that process to be conducted in confidence so that as wide a range of views as possible can be expressed, and he accepts the argument that such views might be expressed less candidly if it was thought that they would be accessible in the public domain. The formation of a successful policy in this area, which the Commissioner accepts is in the public interest, will also depend very much upon the ability to take account of the (often conflicting) viewpoints and interests of those other States and it is unlikely that such a policy would be developed if the confidence of those other countries could not be retained. The Commissioner notes also that policy in this area is still substantially in the formative stages. Therefore, while recognising the existence of public concern in relation to this subject (reflected in the fact that information about it has been placed in the public domain), the Commissioner is of the view that in this case the public interest favours upholding the exemption.
24. Similar considerations affect the various policy papers relating to individual countries. A good proportion of the information contained in those papers is factual information already accessible in the public domain. The remainder consists of sometimes frank assessments of the countries concerned: those assessments relate to issues such as political stability and corruption, the characteristics of the relevant governments, comments about prominent individuals, and the potential of the countries concerned to act as future, long-term, energy suppliers. These assessments, based on information derived from a variety of sources, have not been shared with the countries concerned and relate to proposals which, the Commissioner understands, are still in the process of development. The Commissioner is therefore inclined to accept the view that the release of that information would be likely to prejudice the development of the UK Government's relationships with the US (whose opinions are reflected in the papers) as well as the countries forming the subjects of the papers, and accepts that this would not be in the public interest.
25. The information held by the FCO also includes notes relating to two of the meetings held under the umbrella of the 'US-UK Energy Dialogue'; those held on 20 February 2004 and 13 December 2004. The fact that these meetings took place is

already in the public domain. The note of the first meeting is recorded in the form of a letter from the Department of Trade and Industry to the US Department of Energy, dated 26 February 2004. It is extremely general in content, setting out essentially those areas in which it is felt that more useful work might be done, reflecting very much what is already available in the public domain. The Commissioner is not of the view that the release of this letter would be likely to cause prejudice of the kind described elsewhere in this Notice. The record of the second meeting is couched in the form of a more traditional meeting note but is nevertheless quite informal in nature. The Commissioner is of the view that, for much the same reasons as set out in paragraph 23, it would be inappropriate for that information to be released. The note of the meeting is, however, headed by a summary. This, again, is very general in nature and the Commissioner, as before, sees no reason why the release of this summary would be likely to cause prejudice. He therefore recommends that this information be released.

26. The information held by the FCO also includes one Ministerial submission. As with several of the other documents referred to above, this submission contains some factual information already available in the public domain and other information which, if released, would not cause harm but which would be relatively meaningless out of context. However, the document also incorporates comment and opinion which, in the Commissioner's view, could cause prejudice if released, particularly in the context of section 27(1) (a) and the United Kingdom's relationship with other States. It is therefore the Commissioner's view that the public interest, again for the reasons set out earlier, is best served in relation to this document through maintaining the exemption.

### **Schedule of Documents**

27. The Commissioner has also considered the request by the complainant to be provided with a schedule of documents relating to the case. The FCO has argued that it is under no obligation to provide such information. It says that if it were to accede to this request it would, in effect, be required to create new information and that there is no obligation on public bodies under the Act to do that.
28. The Commissioner does not accept this view. Many requests made for information under the Act are likely to be rather general in nature because the requester cannot know what information the public body holds: he may expect the public body to hold some information about the topic in question but he cannot be precisely sure what. In many cases the public body itself may be uncertain what it holds and may ask the complainant, as indeed happened in this case, to narrow the scope of the request in order to facilitate that task. Indeed, the purpose of section 16(1) of the Act is to create a requirement for the public body, in such circumstances, to provide advice and assistance. Even if the outcome of that advice and assistance is the provision of a more focussed request, the public authority will still need to find out what information it holds, if any, that could be said to fall within the parameters of that revised request. The information already exists: the public authority cannot be said to be creating it. And, while producing a list of the documents in which the relevant information is contained may be a new task, it is not creating new information; it is simply a re-presentation of existing information as a by-product of

responding to the information request. Indeed, as a result of the response made by the FCO to the Commissioner following this complaint, the information sought by the complainant now exists in the format in which he requested it.

29. Does this, however, mean that the information should be released to the complainant, particularly given that the FCO have cited no exemption to cover it? The schedule provided to the Commissioner briefly describes the contents of each of the documents considered by the FCO to fall within the parameters of the request. It is therefore not unreasonable to conclude that the exemptions cited earlier by the FCO to cover the total contents of the documents might also be applicable to the descriptions of those documents contained in the schedule. On that basis it is the Commissioner's view that the release of those descriptions as they stand would make available information which he has already indicated, in paragraphs 23 and 24 of this Notice, it would not be in the public interest to release. Therefore he does not believe that any further information should be released to the complainant in respect of the schedule of documents. The only exception to that would be in respect of the information referred to in paragraph 25, where the Commissioner has taken the view that the information itself can be released.

## The Decision

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30. The Commissioner's decision is that the public authority did deal with some aspects of the request for information in accordance with the Act, but failed to deal correctly with others.

## Steps Required

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31. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

release to the complainant the information identified in paragraph 25 of the Decision Notice.

32. The public authority must take the steps required by this Notice within 35 calendar days from the date of this notice.
33. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act, and may be dealt with as a contempt of court.

## Right of Appeal

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34. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@dca.gsi.gov.uk](mailto:informationtribunal@dca.gsi.gov.uk)

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 23rd day of October 2006**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

### Relevant Extracts from the Freedom of Information Act 2000:-

**Section 1(1)** 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 the information communicated to him.

**Section 27 (1)** provides 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)
- (c) the interests of the United Kingdom abroad

**Section 27 (2)** provides that-

Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.

**Section 27 (3)** provides that –

For the purposes of this section, any information obtained from a State, organisation or court is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.

**Section 35 (1) (a)** 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