

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 January 2015

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 FCO for a copy of a file dating from 1963 concerning Nepal, namely 371/170877 which is entitled 'Conversation with Inspector General of Police about Intelligence Requirements and Counter Subversion'. The FCO provided the complainant with a copy of the file but made redactions to six documents on the basis of section 27(2). The complainant sought to dispute these redactions (with the exception of a name that was redacted from document 3).
2. The Commissioner has concluded that the disputed information, with a number of small exceptions, is not exempt from disclosure on the basis of section 27(2) of FOIA.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with unredacted copies of the documents numbered 1 to 6 in paragraph 9 of this notice. The only redactions which can be made are to certain parts of paragraphs 2 and 6 in document 3. The exact nature of these redactions is identified in the confidential annex, a copy of which will be given to the FCO only.
4. 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

5. The complainant submitted a request to the FCO on 19 September 2013 seeking access to a file concerning Nepal, namely 371/170877 which is entitled 'Conversation with Inspector General of Police about Intelligence Requirements and Counter Subversion' and dates from 1963.¹ He noted that The National Archives (TNA) website explained that this record was closed and had been retained by the FCO under section 3.4 of the Public Records Act.
6. The FCO responded to the request on 11 October 2013 and provided him with a copy of the file, albeit with a number of redactions had been made on the basis of section 27(2) of FOIA.
7. The complainant contacted the FCO on 16 October 2013 and asked for an internal review of the decision to withhold the redacted material. He provided the FCO with further submissions on 23 October 2013.
8. The FCO informed him of the outcome of the internal review on 6 February 2014. The review concluded that some, but all, of the previously withheld material could now be disclosed. He was therefore provided with a further copy of FO 371/170877 with some of the previous redactions lifted. The review also confirmed that the material which remained redacted was exempt from disclosure on the basis of section 27(2) of FOIA.

Scope of the case

9. The complainant contacted the Commissioner on 8 May 2014 in order to complain about the FCO's decision to withhold the remaining information contained in file 371/170877 on the basis of section 27(2) of FOIA. The redactions had been made to the following six documents:
 1. A set of minutes dated 22 November 1963 by J D Laughton.
 2. A letter from P C Petrie to C M MacLehose dated 17 October 1963.
 3. Record of a conversation with the Inspector General of Police on 12 October 1963.
 4. A letter from T J O'Brien to E J Emery dated 18 November 1963.

¹ The file, and the two other files referenced later in this notice, concerns the Tibetan Khamba guerrillas who were based in the border area of northern Nepal from 1960 to the mid 1970s.

5. A letter from E J Emery to T J O'Brien dated 13 February 1964.
6. A letter from T J O'Brien to E J Emery dated 2 March 1964.

10. The Commissioner has therefore considered the application of section 27(2) to the redactions made to these documents. The only exception to this is the FCO's use of section 27(2) to redact the name of an individual from document 3; the complainant is not seeking to dispute the application of this exemption to withhold this particular piece of information.

11. The complainant also complained about the time it took the FCO to complete the internal review. FOIA does not include a statutory timeframe within which such reviews must be completed. Therefore the Commissioner has dealt with this issue in the Other Matters section at the end of this notice. Finally the complainant was also dissatisfied with the amount of time it took the FCO to engage with the Commissioner's investigation of his complaint. Again, the Commissioner has commented on this in the Other Matters section.

Reasons for decision

Section 27(2) – international relations

13. Section 27(2) states 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'

14. Section 27(3) clarifies that:

'For the purposes of this section [ie section 27(2)], 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.'

The FCO's position

15. In support of its reliance on section 27(2) the FCO explained that the information redacted from documents 1 to 4 had been received from Nepal and that the information contained in documents 5 to 6 had been received from the Republic of India.
16. In submissions to the Commissioner the FCO argued that its belief that the redacted information was confidential was based upon the context in which the information was passed to UK representatives. It explained that the setting was a private dinner party at which the third party in question was the sole representative of his country and where the only two other participants were senior representatives of the UK government. The FCO emphasised that it was common diplomatic practice to use a private setting for the exchange of confidences. In particular, a private venue, such as the dinner party described, encourages information to be provided over and above that made available through official channels.
17. It should be noted that in its initial refusal notice the FCO suggested that disclosure of the redacted information would prejudice its relations with the countries concerned.
18. In response to the complainant's suggestion that similar information had been disclosed by the FCO, specifically in files FO 371/176118 'Raid by Khamba tribesmen into Tibet to ambush Chinese' and FO 371/176120 'Activities of Khamba tribesmen' both of which dated from 1964, it made two points. Firstly, there was no indication in the two files cited that the information disclosed had been passed in a confidential context. Secondly, that the information withheld from this file was not identical to that in the two files cited by the complainant. In particular the FCO noted that the redacted information contained in document 3 included the name of an individual that was not recorded in the two other files cited by the complainant. (As noted above, the complainant is no longer seeking to dispute the decision to redact this name.)

The complainant's submissions

19. The complainant provided detailed submissions to support his view that the information was not exempt from disclosure on the basis of section 27(2). The Commissioner has summarised these submissions below.
20. Firstly, the complainant noted that there was already a significant amount of information in the public domain about this topic. Consequently he argued that anyone with some knowledge of this subject could make what he considered to be an accurate assumption as to the nature of the redacted information.

21. More specifically, the complainant emphasised that via open FCO documents in the TNA (ie files FO 371/176118 and FO 371/176120) – as well as other sources - it was clear that the US had supported the Khambas, not least from documents which recorded the comments of PS Lama. He also noted that alleged Indian support for the Khambas was also discussed in the documents provided by the FCO in response another FOI request he had submitted seeking access to the file FO 371/176118.
22. Secondly, the complainant questioned the basis upon which the FCO had established that PS Lama was acting as an official representative of Nepal rather than as a private individual. He suggested that PS Lama's comments would not have been sanctioned by the Nepalese government. This was, the complainant suggested, because the US had not actually informed Nepal about CIA involvement in the Mustang area of the country. The complainant therefore suggested that section 27(2) could not apply because its purpose was limited to protecting confidential information provided by a State not by a private individual.
23. Thirdly, the complainant argued that given the amount of information in the public domain on this subject matter, the passage of time, and that change in relations between the countries involved, it was not plausible to argue that its disclosure would prejudice the UK's relations with these other States. In particular, the complainant drew attention to the amount of information in the public domain already about the US activities and thus he could not envisage how disclosure would impact UK-US relations.
24. Fourthly, the complainant emphasised the inconsistent approach that the FCO had adopted in withholding the information. He suggested that if information provided by an individual at a private dinner party was sacrosanct then why would did the FCO disclose the remainder of document 3 which revealed a range of other points made by PS Lama during the dinner party?
25. Finally, the complainant disputed that as a point of principle information provided at a private venue and private function should be considered to be confidential forever. He suggested that the files at TNA must be littered with examples of such discussions. Moreover he pointed to a number of examples of discussions contained in the related files which, although not taking place in the context of a private dinner party, were nevertheless clearly confidential discussions.

The Commissioner's position

26. As section 27(3) explains information will be exempt under section 27(2) as long as the terms on which the information 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. In the Commissioner's view this requires a consideration of both the content of the information itself and the context within which it is was provided. In the circumstances of this case, in the Commissioner's view it is important to consider whether the duty of confidence in relation to the information has lapsed over time.

27. The Commissioner notes that in its responses to the complainant the FCO explained that disclosure of the redacted information would prejudice the UK's relations with other countries. The Commissioner recognises that determining whether information is confidential for the purposes of section 27(2) is likely to involve some consideration of the effects of disclosing such information. For example, if disclosing information would offend a particular State that this may well be an indication that it was provided in confidence. However, section 27(2) exemption cannot be engaged simply on the basis that disclosure would prejudice relations with another State. Rather it is section 27(1)(a) of FOIA that provides an exemption for information if its disclosure would, or would be likely, to prejudice relations with another State. The FCO has not cited this exemption.
28. Having considered the submissions by both parties, and the withheld information, the Commissioner is not persuaded that all the redacted information is still confidential. (Indeed for the information redacted from document 1 he is not persuaded that it even constitutes information that was actually provided to the UK by a third party). He has reached this decision for a variety of different reasons, which in his view cumulatively undermine the FCO's application of section 27(2) to withhold the redacted information. These reasons are as follows:
29. Firstly, the Commissioner notes that the FCO's explanation of the context within which this information was passed to the UK, ie by the Inspector General of the Nepalese Police at a private dinner party, only relates directly to the information redacted from documents 1 to 4. That is to say, document 3 records the comments of PS Lama at the dinner party – entitled as it is 'Record of a conversation with Inspector General of Police' – and documents 1, 2 and 4 report and comment on the information provided by PS Lama as recorded in document 3.
30. However, the FCO has not explained why the information redacted from documents 5 and 6, which it has confirmed was provided to the UK by India, should be considered to be information that was provided in circumstances which would lead to it being considered confidential. Nevertheless the Commissioner accepts that disclosure of the information from documents 5 and 6 would still reveal something about

the nature of the information redacted from document 3, ie something about the information provided by PS Lama.

31. Furthermore, in the Commissioner's opinion the information redacted from document 1 consists simply of the comments of UK officials about information provided by PS Lama at the dinner party in question. However, the information in question which the officials are commenting on does not form part of the information that has been redacted from document 3. Rather it consists of comments by UK officials on information provided by PS Lama that has already disclosed in the version document 3 that has been provided to the complaint. Therefore, in the Commissioner's opinion it cannot be argued that the information redacted from document 1 is information which is confidential for the purpose of section 27(2).
32. Secondly, the Commissioner agrees with the complainant that the disclosure of document 3 in a redacted form undermines the FCO's application of section 27(2) to withhold the remaining information. As noted above the Commissioner recognises that determining whether information is confidential requires consideration of both the content and context of the information, but he notes that the FCO has only redacted a relatively small amount of information from document 3. In other words it has disclosed the majority of the information provided to the UK officials by PS Lama during the course of the dinner party. Given the emphasis the FCO has placed upon such settings providing participants with the opportunity to provide information above and beyond that disclosed through official channels, it therefore seems reasonable to assume that PS Lama may have considered other information – now disclosed – to also have been provided in confidence. Furthermore, the FCO's submissions to the Commissioner do not comment on the difference, or potential difference, between the content of the disclosed information and the redacted information.
33. Thirdly, the Commissioner does not believe that the FCO's position takes into account the fact that information is over 50 years old and that significant changes have occurred in the region since that date. The Commissioner is doubtful whether disclosure of the entirety of the redacted information would have the widespread chilling effect on future similar discussions as the FCO envisages.
34. Finally, whilst the Commissioner accepts the FCO's point that the redacted information is not identical to the information that has already been disclosed, he is satisfied that there is sufficient similarity between the redacted information and publically available information to cast further doubt on the FCO's line of the argument that the redacted information remains confidential. The Commissioner has expanded on this point in the confidential annex which has been provided to the FCO.

35. Consequently, the Commissioner has concluded that the information redacted from the six documents is not exempt from disclosure on the basis of section 27(2).
36. The only exceptions to this finding are certain parts of paragraphs 2 and 6 of document 3. The Commissioner accepts that this particular information is exempt from disclosure on the basis of section 27(2). The Commissioner is satisfied that despite his concerns outlined above regarding the FCO's reliance on section 27(2) it is reasonable to conclude that such information would still be considered to be confidential. This is because the information in question discusses the alleged role of a number of named individuals in the region in the early 1960s. Such information is not, as far as the Commissioner is aware, already in the public domain. In the Commissioner's view even despite the passage of time, such information would still be considered to be sensitive information.

Public interest test

37. Section 27(2) is a qualified exemption and thus subject to the public interest test. Therefore in relation to the information which the Commissioner accepts is exempt from disclosure on the basis of section 27(2), he must consider whether the public interest in favour of maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of maintaining the exemption

38. As noted above, the FCO argued emphasised that it was a common diplomatic practice to use a private setting for the exchange of confidences and thus such settings encourages information to be provided over and above that made through official channels. It argued that that disclosure of any information which was provided to the FCO in this way would inhibit further confidential exchanges. This would lead to a reduction in the UK's access to useful resources of information which would not be available via other means. This would be strongly against the public interest.

Public interest arguments in favour of disclosing the information

39. The complainant argued that disclosure of the redacted information was in the public interest as this would be likely to genuinely inform those with an interest in the history of Nepal, and in particular the events of the early 1960s. More specifically, the complainant argued that FCO files available in TNA record that despite the UK submitting clear evidence to the US of American support for the Khambas, the US continued to deny that it was in any way involved. Therefore the complainant suggested

that there was a legitimate historical question as to when the UK first got an indication of such US support. If, as he suspected the redacted information addressed this issue, then its disclosure was therefore in the public interest.

Balance of the public interest

40. The Commissioner accepts that disclosure of the withheld information would shed some, albeit limited, further light on the events in Nepal in the early 1960s. However, he believes that there is a significant public interest in withholding such information. This is because the information specifically identifies the names and roles played by individuals apparently involved in intelligence gathering at the time. In the Commissioner's view there is a clear public interest in protecting information of this nature. Moreover, disclosure simply of the identities of particular individuals would not, in the Commissioner's opinion, add significantly to the public's understanding of this topic. Consequently, in the Commissioner's view the quality of this particular information, when allied to its confidential nature, means that in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest disclosing this information.

Other matters

41. FOIA does not impose a statutory time within which such reviews must be completed albeit that the section 45 Code of Practice explains that internal reviews should be completed within a reasonable timeframe. In the Commissioner's view it is reasonable to expect most reviews to be completed within 20 working days and reviews in complex cases to be completed within 40 working days. In the circumstances of this case the complainant requested an internal review on 16 October 2013. The FCO informed him of the outcome of the internal review on 6 February 2014. It therefore took the FCO 78 working days to complete its internal review. The Commissioner considers this to be unsatisfactory. In the future he expects the FCO to ensure that internal reviews are completed within the timeframes set out within his guidance.

42. With regard to the complainant's concerns about the FCO's engagement with the Commissioner's investigation, the Commissioner wishes to note that he contacted the FCO on 3 July 2014 and asked to be provided with a copy of the withheld information along with submissions to support its application of section 27(2). The Commissioner asked for a response with 20 working days. Due to administrative error on the FCO's part this letter did not receive immediate attention. Therefore, the Commissioner did not receive a response from the FCO until 3 September 2014.

43. In its response the FCO explained that it required a representative of the Commissioner's office to view the withheld information at its offices given its sensitivity. In response the Commissioner explained that he would prefer to be provided with a copy of the information and in an exchange of emails, culminating on 25 September 2014, he provided the FCO with details of the process he had in place for the secure storage and viewing of such information. In an email of the same date, the FCO confirmed that it would now send the withheld information to the Commissioner. The Commissioner received a copy of the withheld information on 31 October 2014.
44. The Commissioner can understand the complainant's frustrations in the time it has taken to progress his case. That said, the Commissioner accepts that administrative errors do occur on occasion and in this case he is satisfied this was simply an unfortunate error. Nevertheless, it is regrettable that it took the FCO so long to provide him with a copy of the withheld information – following the email exchange of 25 September 2014 – especially in light of its previous delay in responding to the Commissioner's initial letter of 3 July 2014.
45. The Commissioner aims to conclude 90% of the complaints he receives within 6 months of receipt. The delay in the FCO providing him with a response to his letter of 3 July, and then its delay in providing him with a copy of the withheld information, impaired the Commissioner's ability to conclude this complaint within that timeframe.

Right of appeal

46. 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

47. 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.
48. 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

Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF