

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 August 2015

Public Authority: Ministry of Justice
Address: 102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant requested information relating to a Memorandum of Understanding on Judicial co-operation between the United Kingdom and the Kingdom of Saudi Arabia.
2. The Ministry of Justice (MoJ) confirmed it held the requested information but refused to provide it citing sections 27(1) and 27(2) of the FOIA (international relations).
3. The Commissioner's decision is that the information is exempt from disclosure on the basis of section 27(1)(a) of FOIA and that in all the circumstances of the case the public interest favours maintaining the exemption. The Commissioner did not proceed to consider MoJ's application of section 27(2) to the same information.
4. The MoJ is not required to take any steps as a result of this notice.

Background

5. The *gov.uk* website, under the heading "Saudi Arabia - Country of Concern: latest update, 30 September 2014" states¹:

¹ <https://www.gov.uk/government/publications/saudi-arabia-country-of-concern/saudi-arabia-country-of-concern-latest-update-30-september-2014>

".. on 10 September, the Secretary of State for Justice, Chris Grayling, visited Saudi Arabia and signed a Memorandum of Understanding (MoU) with the Saudi Arabian Minister of Justice. This MoU is a mechanism for dialogue and exchange of expertise on justice, legal and human rights matters. Mr Grayling raised human rights concerns during his visit, and met the Human Rights and Legal Committees of the Majlis al Shura, and the National Society for Human Rights".

6. Similarly, the *Ministry of Justice Mid Year Report to Parliament April to September 2014*² reports that:

"The Secretary of State visited Riyadh in September 2014 to sign a Memorandum of Understanding on Judicial Cooperation, to build upon the existing bilateral justice relationship, promote UK legal services in Saudi Arabia and raise awareness of the upcoming Global Law Summit. He also met UK lawyers with offices in Riyadh. Discussions were also held on judicial cooperation, King Abdullah's reform programme, and human rights issues".

Request and response

7. On 25 January 2015, using the 'whatdotheyknow' website, the complainant made the following request for information under the FOIA:

"please provide an electronic copy of the September Memorandum of Understanding on Judicial Cooperation between the United Kingdom and the Kingdom of Saudi Arabia, which the Lord Chancellor and Secretary of State signed in Riyadh on behalf of the United Kingdom, including any appendix and all schedules, annexes and enclosures".

8. Having extended the time period - in accordance with FOIA - to consider the public interest test, MoJ responded on 18 March 2015 confirming that it holds the requested information. However, it refused to provide it citing sections 27(1) and 27(2) of FOIA (international relations) as its basis for doing so.
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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/391930/ministry-of-justice-mid-year-report-to-parliament-2014-15.pdf

9. Following an internal review MoJ wrote to the complainant on 15 April 2015 maintaining its original position, namely that, as the information relates to the conduct of international relations, sections 27(1) and 27(2) applied and that the public interest favoured withholding the information.

Scope of the case

10. The complainant contacted the Commissioner on 17 April 2015 to complain about the way his request for information had been handled.
11. The Commissioner notes that the complainant's arguments focus on MoJ's consideration of the public interest in this matter rather than the engagement of the exemptions. In that respect, when requesting an internal review, the complainant told MoJ:

"I believe that the balance of the public interest considerations has been determined wrongly, and I would ask for a review. To clarify, I concede that ss.27(1) and (2) may be applicable but the public interest favours disclosure in this case..."
12. The following analysis covers MoJ's application of section 27(1) to the withheld information.

Reasons for decision

Section 27 international relations

13. 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) relations between the United Kingdom and any international organisation or international court,

(c) the interests of the United Kingdom abroad, or

(d) the promotion or protection by the United Kingdom of its interests abroad."

14. 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."

15. In other words, section 27(1) focuses on the effects of the disclosure of the information, while section 27(2) relates to the circumstances under which it was obtained and the conditions placed on it by its supplier, and does not relate primarily to the subject of the information or the harm that may result from its disclosure. In the Commissioner's view, such information is confidential for as long as the state, organisation or court expects it to be so held.

16. In correspondence with the complainant, MoJ said:

"A UK Government Department is not obliged to provide information requested if its release would prejudice international relations. Specifically, the document which you have requested is one that is confidential between the UK Government and the Government of the Kingdom of Saudi Arabia. This type of document is covered by the provisions of Section 27(2) of the Act, which deal with confidential information obtained from another State. In addition, as the disclosure of confidential material obtained from another State would be likely to prejudice future relations between the UK Government and the Government of the Kingdom of Saudi Arabia, Section 27(1) of the Act is also engaged".

17. During the course of the Commissioner's investigation, MoJ confirmed that it is relying on both subsections (1) and (2) of Section 27. The Commissioner has first considered its application of section 27(1).

Is the exemption engaged – section 27(1)

18. In order for a prejudice based exemption, such as that set out in 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;
- thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e.

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; there must be a real and significant risk. With regard to the higher threshold, this places a stronger evidential burden on the public authority.

19. With the above in mind, the Commissioner has considered the withheld information and MoJ's submissions in support of its reliance on section 27(1).

20. In correspondence with the complainant, MoJ told him:

"The document was agreed to be confidential between the two Governments. As the UK Government engaged in the preparation and signing of this document on a confidential basis, I judge it reasonable for the Government of the Kingdom of Saudi Arabia to expect that the UK Government would not share its contents with a third party. My judgment is that to do so unilaterally might harm future relations with the Kingdom of Saudi Arabia, and may discourage them from entering into agreements or sharing information with the Department in future. In my view this risk extends across all areas of Government".

21. MoJ provided the Commissioner with further arguments identifying the particular harm it considers may arise from disclosure of the withheld information in this case.

22. From the evidence he has seen, the Commissioner is satisfied that there is a causal relationship between the potential disclosure of the withheld information and the interests which section 27(1)(a) is designed to protect.

23. With respect to the likelihood of prejudice occurring, MoJ told the complainant that it considered that disclosure in this case *would be likely* to prejudice future relations between the UK Government and the Government of the Kingdom of Saudi Arabia.

24. In other words, it considered that the lower level of prejudice applied.

25. However, during the course of his investigation, MoJ told the Commissioner that it considered that disclosure in this case:

*"**would** have a prejudicial effect on the relationship between the two Governments to the detriment of the United Kingdom".*

26. In that respect, MOJ said that when considering the request, it had consulted other government departments.

27. Having duly considered the arguments put forward by MoJ, and having viewed the withheld information, the Commissioner is satisfied that there would be a real and significant risk of prejudice if the withheld information were to be disclosed. Acknowledging that prejudice to the relationship between the UK and the Kingdom of Saudi Arabia - in the way predicted by MoJ - would occur, the Commissioner accepts that, in the circumstances of this case, the higher threshold of likelihood is met.
28. He therefore finds the exemption engaged in relation to the information withheld by virtue of section 27(1)(a) and has carried this higher level of likelihood through to the public interest test.

The public interest test

29. Section 27(1) is a qualified exemption and is subject to a public interest test. This means that, even where its provisions are engaged, it is necessary to decide whether it serves the public interest better to disclose the requested information or to withhold it because of the interests served by maintaining the relevant exemption. If the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information in question must be disclosed.
30. The Commissioner notes that, although it considers that two distinct limbs of the exemption apply in this case, MoJ put forward a single set of public interest arguments in support of its citing of section 27.

Public interest arguments in favour of disclosing the requested information

31. In favour of disclosure in this case, the complainant highlighted what he described as:

"Saudi Arabia's doubtful judicial and human rights record, and the need to assess what judicial cooperation is envisaged by the Agreement".

32. In correspondence with the Commissioner, MoJ acknowledged the complainant's argument in respect of the protection of human rights and the proper administration of justice.
33. Recognising the public interest in disclosure in this case, MoJ told the complainant:

"Disclosure would support the wider Government commitment to transparency and may encourage greater understanding of the general public about the Ministry's policies, activities and agreements with foreign nations".

34. MoJ also recognised that that the UK's agreement with the Kingdom of Saudi Arabia has been subject to debate, with questions in the media about the agreement and a level of public interest. It accepts that disclosure of the requested information could assist in a wider public understanding of the way in which governments operate internationally, and contribute to the accountability of Ministers and public officials.

Public interest arguments in favour of maintaining the exemption

35. In favour of maintaining the exemption, MoJ explained to the complainant that it considers it important for non-UK governments or bodies to know that they can discuss and agree issues with the UK Government in an atmosphere of confidentiality. In support of its withholding of the memorandum, it told the complainant:

"Releasing information provided in confidence without agreement may damage the wider public interest beyond the information in the scope of this request, by making it less likely that other Governments or bodies would share confidential information in the future. As such, it is of prime importance for the UK Government to maintain consistency in this area. The potential impact of disclosure has, as I intimated earlier, wider implications than the relationship between the UK Government and the Government of the Kingdom of Saudi Arabia in this particular context".

Balance of the public interest arguments

36. When balancing the opposing public interests in a case, the Commissioner is deciding whether it serves the public interest better to disclose the requested information or to withhold it because of the interests served by maintaining the relevant exemption. If the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information in question must be disclosed.
37. Although FOIA does not list the factors that would favour disclosure, the Commissioner has suggested that among the factors that would weigh in favour of disclosure are:
- furthering the understanding and participation in the public debate of issues of the day;
 - promoting accountability and transparency of public authorities for decisions taken by them; and
 - promoting accountability and transparency in the spending of public money.

38. He has also taken into account the presumption running through FOIA that openness is, in itself, to be regarded as something which is in the public interest.
39. In the Commissioner's view, there are a number of powerful public interest arguments in favour of disclosure in this case. In that respect he accepts that there is a public interest in the transparency of MoJ with respect to the way in which it works with other states, such as the Kingdom of Saudi Arabia.
40. The Commissioner also recognises the strength of the public interest in matters concerning human rights in general and aspects of Saudi Arabia's justice system in particular.
41. However, in the circumstances of this case, the public interest against disclosure is that in avoiding prejudice to international relations, specifically UK/Kingdom of Saudi Arabia relations. The relevant considerations in reaching a judgement on the balance of the public interest therefore extend beyond the actual content of the withheld information itself.
42. In the Commissioner's view it is strongly in the public interest that the UK maintains good international relations. He considers that it would not be in the public interest if there were to be a negative impact on the effective conduct of international relations as a result of the release of the information at issue in this case.
43. From the evidence he has seen, the Commissioner is satisfied that disclosure of the withheld information represents a significant and real risk to the UK's relations with the Kingdom of Saudi Arabia. In his view, it is clear that disclosure in this case would not only damage the UK's relationship with the Kingdom of Saudi Arabia on this issue, but has the potential to harm the relationship between the two Governments across a range of issues. The Commissioner is satisfied that such a broad prejudicial outcome is firmly against the public interest and he has therefore concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
44. In light of that conclusion, the Commissioner has not gone on to consider the FCO's application of section 27(2) to the same information. He accepts, however, that the issue of any breach of confidentiality in this case is very closely related to the damage which would be caused to relations between the UK and the Kingdom of Saudi Arabia.

Right of appeal

45. 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

46. 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.
47. 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
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