

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 22 March 2016

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

#### Decision (including any steps ordered)

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1. The complainant submitted a request to the Foreign and Commonwealth Office (FCO) for information it held about a meeting between Nicola Sturgeon the First Minister of Scotland and the French Ambassador. The FCO confirmed that it held some information falling within the scope of the complainant's request but it considered this to be exempt from disclosure on the basis of section 27 (international relations), section 28 (relations within the UK) and section 40 (personal data). The Commissioner has concluded that the withheld information is exempt from disclosure on the basis of sections 27(1)(a) and 40(2) of FOIA. The Commissioner has also concluded that the FCO undertook its public interest considerations in a reasonable time and thus did not breach section 17(3) of FOIA.

#### Request and response

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2. The complainant submitted the following request to the FCO on 7 April 2015:

*'1...Does the Foreign Office hold information which relates to those occasions when Nicola Sturgeon the First Minister of Scotland has met with Sylvie Bermann the French Ambassador to the UK or Pierre Alain Coffinier the French Consul General in Edinburgh.*

*2...If the answer to this question is yes can you please provide a list of occasions when Nicola Sturgeon the First Minister of Scotland has met with either Sylvie Bermann or Pierre Alain Coffinier. In the case of*

*each meeting can you provide the date, time and venue as well as full list of those present.*

*3...In the case of these meetings was the appropriate section of the Foreign Office officially briefed about the discussions which took place. This briefing could have been provided by any of those present at the meeting and or anyone acting on their behalf. If the answer to this question is yes can you please provide copies of all documents held by the Foreign Office which specifically relate to these meetings and the issues which were discussed at those meetings. This documentation will include but NOT be limited to a much publicised document which was supposedly drafted by a senior civil servant who was briefed by Pierre Alain Coffinier. This particular memo contained information about a meeting which took place on February 26 2015. Please feel free to redact the names of any foreign office personnel from the documents but please do not redact the names of any of those who were present at the meeting (s).*

*4...During the aforementioned period has either the Foreign Secretary and or David Lidington exchanged correspondence and communications including emails with Sylvie Bermann and or Pierre Alain Coffinier about any of the aforementioned meetings and the subjects discussed at those meetings. If the answer is yes, can you please provide copies of all correspondence and communications including emails'.*

3. The FCO contacted the complainant on 5 May 2015 and explained that it held information falling within the scope of his requests but it needed additional time to consider the balance of the public interest. It aimed to provide the complainant with a response by 4 June 2015. It explained that it considered the exemptions contained at sections 28 (relations within the UK), 31 (law enforcement), 38 (health and safety), 40 (personal data) and 41 (information provided in confidence) of FOIA to be relevant.
4. The FCO provided the complainant with a substantive response to his request on 15 June 2015. It explained that it only held information falling within the scope of his third request. However, it considered this information to be exempt from disclosure on the basis of sections 21 (information reasonably accessible to the applicant)<sup>1</sup>, 27(1)(a), 27(2)

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<sup>1</sup> The FCO directed the complainant to the following link which sets out the findings of the Cabinet Office-led leak inquiry instigated to establish how the memo the complainant's requests refers to came to be written and how it got into the public domain - <https://www.gov.uk/government/news/scotland-office-memorandum-leak-cabinet-office-inquiry-statement>

(international relations) and 40(2) of FOIA. The refusal notice also explained that the FCO had concluded that the exemptions contained at sections 28, 31, 38 and 41 did not apply to the withheld information.

5. The complainant contacted the FCO on 16 June 2015 to ask for an internal review into this refusal.
6. The FCO informed him of the outcome of the internal review on 16 July 2015. The review upheld the application of the exemptions relied upon in the refusal notice.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 12 August 2015 to complain about the way his request for information had been handled. He was dissatisfied with the FCO's decision to withhold information on the basis of sections 27(1)(a), 27(2) and 40(2) of FOIA. He was also dissatisfied with the time it took the FCO to provide him with a response to his request, noting that it had missed its own revised date for replying.
8. During the course of the Commissioner's investigation, the FCO explained that it did in fact consider the withheld information to be exempt from disclosure on the basis of section 28(1) (relations within the UK) of FOIA.

### **Reasons for decision**

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#### **Section 27 – international relations**

9. Section 27(1)(a) provides that information is exempt if its disclosure would, or would be likely to, prejudice relations between the UK and any other State.

#### The FCO's position

10. The FCO argued that disclosure of the withheld information would be likely to prejudice the UK's relations with France. This was because the withheld information draws on information provided by representatives of the French Government on the assumption that it would be treated in confidence. Consequently, in the FCO's opinion disclosure of this information would damage the UK's relations with the individuals concerned, and France, and it would betray this confidence and result in France being more guarded and less cooperative in future dealings with the UK. The FCO also provided the Commissioner with more detailed

submissions to support the application of this exemption which directly referenced the content of the withheld information itself. For obvious reasons, the Commissioner has not referred to these submissions in the content of this notice but has taken them into account as part of his consideration of this complaint.

### The complainant's position

11. The complainant argued that the confidential nature of the withheld information had been undermined firstly by the leak of the memo which was the focus of his requests, and secondly by the result of the General Election in May 2015.
12. More broadly, the complainant argued that the general public was of course aware that members of the British government and Scottish Executive maintain contact with foreign governments, including France. Furthermore he argued that he did not see how the subject of these particular discussions could have serious implications for international relations or British interests abroad. He argued that FOIA did not provide a blanket ban on the disclosure of information concerning such discussions and nor should it be interpreted that way. Finally, the complainant argued that whilst disclosure of the withheld information could be embarrassing for certain individuals, or have party political implications, these are not legitimate grounds under which to withhold information on the basis of section 27(1)(a) of FOIA.

### The Commissioner's position

13. In order for a prejudice based exemption, such as section 27(1)(a), to be engaged the Commissioner considers that three criteria must be met:
  - Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
  - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
  - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring

must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.

14. 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'*.<sup>2</sup>
15. With regard to the first criterion of the three limb test described above, the Commissioner accepts that potential prejudice to the UK's relations with France clearly relates to the interests which the exemption contained at section 27(1)(a) is designed to protect.
16. With regard to the second criterion, the Commissioner is satisfied that disclosure of this information has the potential to harm the UK's relations with France. He has reached this conclusion because, having examined the content of the withheld information, it is clear that it does – as the FCO explained above – draw on information provided by French officials in confidence. In the Commissioner's view, it is self-evident that if information provided in confidence by representatives of other States was disclosed by the UK then it would be logical to conclude that the UK's relations with the confider could be harmed. The Commissioner is therefore satisfied that that there is a causal link between the potential disclosure of the withheld information and the interests which section 27(1)(a) is designed to protect. Moreover, the Commissioner is satisfied that the resultant prejudice which the FCO believes would be likely to occur can be correctly categorised, in light of the Tribunal's comments above, as real and of substance. In other words, subject to meeting the likelihood test at the third criterion, disclosure could result in making relations more difficult and/or demand a particular damage limitation exercise.
17. With regard to the third criterion, the Commissioner has carefully considered the points raised by the complainant, in particular the fact that the content of the memo which is the focus of his request was leaked into the public domain (save for the name of the author and its recipients). Nevertheless, the Commissioner is satisfied that regardless

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<sup>2</sup> [Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence \(EA/2006/0040\)](#), paragraph 81.

of this leak, the withheld information still draws upon what was clearly a private discussion about a number of topics between representatives of France and Scotland. In the Commissioner's opinion the leaking of the memo does not undermine the confidential nature of the withheld information itself. This is because, in his view, there is a legitimate distinction between the disclosure of information under FOIA and the leaking of information from an unofficial source. In other words, disclosure of the withheld information under FOIA by the FCO would still be likely to affect the UK's relations with France as it would represent an official disclosure of information which would reveal details of information French officials had assumed would be kept private and confidential. That is to say, in the circumstances of this case, the harm arises not simply because of the content of the information being disclosed, but because of the means by which the information would be placed into the public domain.

18. Furthermore, the Commissioner considers that it is important to take into account the controversy surrounding the leak of the memo at the time. Consequently, disclosure of the withheld information would not simply result in the disclosure of information that French officials had assumed would be treated confidentially, but the disclosure of information pertaining to a discussion which has already attracted significant press and public attention and indeed resulted in an investigation by the Cabinet Office. In the Commissioner's view, such circumstances arguably increase the sensitivity of the withheld information and thus the likelihood of prejudice occurring if the information was disclosed.
19. Therefore, in Commissioner's opinion, it is sustainable for the FCO to argue that a disclosure of the withheld information under FOIA would be likely to prejudice the UK's relations with France and, in particular, have the direct consequence of impacting on the future flow of information from French officials to the UK on a variety of bilateral topics.
20. With regard to the complainant's other grounds of complaint, the Commissioner is not entirely sure why the outcome of the General Election would directly affect the engagement or otherwise of the exemption. In any event, the Commissioner's role is limited to considering the application of any exemptions at the point the request was submitted. In this case the request was submitted on 7 April 2015, a month before the General Election.
21. Finally, the Commissioner acknowledges that the complainant is correct to say that FOIA does not provide a blanket or absolute exemption for information concerning discussions between officials or representatives of the UK and other States. However, in many cases, such discussions are considered to be confidential in nature given the established custom

and practice of such diplomatic exchanges. Consequently, it is often the case that under FOIA, public authorities may well have a legitimate case for arguing that such information is exempt from disclosure under FOIA on the basis of one or more of the exemptions contained within section 27.

22. In any event, the Commissioner does not consider that such a situation undermines the engagement of section 27(1)(a) in this case, which, for reasons set out above, he accepts the FCO can use to correctly withhold the requested information.

### **Public interest test**

23. Section 27 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

### **Public interest in disclosure of the information**

24. The complainant argued that there were strong public interest grounds for releasing this information; members of the public have a right, within reason, to know what is discussed on their behalf behind closed doors, how else can they judge the public pronouncements of politicians?

### **Public interest in favour of maintaining the exemption**

25. The FCO emphasised that section 27(1)(a) recognised that the effective conduct of international relations depends upon maintaining trust and confidence between governments. It argued that if the UK government does not maintain this trust and confidence, then its ability to protect and promote UK interests through international relations will be hampered, which will not be in the public interest. In the FCO's view, disclosure of the withheld information in this case was not in the public interest as it would be likely to damage the bilateral relationship between the UK and France. This would have the effect of reducing the UK government's ability to protect and promote UK interests through its relations with France.

### **Balance of the public interest**

26. With regard to the balance of the public interest, the Commissioner recognises that there is clearly a public interest in the public understanding how the UK government, and the devolved administrations, engage with other States. Disclosure of the withheld information would provide the public with details of a particular discussion which has, for obvious reasons, already been the subject of significant public discussion and conjecture.

27. However, in the Commissioner's view there is a very strong public interest in protecting the UK's relations with other States. Furthermore, the Commissioner considers that this argument attracts particular weight in this case given the importance of the Anglo-French relationship and the range of bilateral matters discussed between the two countries. Furthermore, having had the benefit of seeing the withheld information the Commissioner questions the degree to which disclosure of the withheld information would genuinely serve meet the public interests identified above.
28. The Commissioner has therefore concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.

#### **Section 40 – personal data**

29. The withheld information also includes the names of junior officials which the FCO argued were exempt from disclosure on the basis of section 40(2) of FOIA.
30. Section 40(2) of FOIA states that personal data is exempt from disclosure if its disclosure would breach any of the data protection principles contained within the Data Protection Act 1998 (DPA).
31. Personal data is defined in section (1)(a) of the DPA as:

*'.....data which relate to a living individual who can be identified from those data or from those data and other information which is in the possession of, or likely to come into the possession of, the data controller; and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any person in respect of the individual.'*
32. The Commissioner accepts that the names of junior officials constitute personal data within the meaning of section 1 of the DPA as they clearly relate to identifiable individuals.
33. The FCO argued that disclosure of such information would breach the first data protection principle which states that:

*'Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –*

  - (a) at least one of the conditions in Schedule 2 is met, and*
  - (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.'*



34. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:
- The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
    - what the public authority may have told them about what would happen to their personal data;
    - their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights (ECHR);
    - the nature or content of the information itself;
    - the circumstances in which the personal data was obtained;
    - any particular circumstances of the case, eg established custom or practice within the public authority; and
    - whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.
  - The consequences of disclosing the information, ie what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor the Commissioner may take into account:
    - whether information of the nature requested is already in the public domain;
    - if so the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?
35. Furthermore, notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling legitimate interest in disclosure to the public.
36. In considering 'legitimate interests', in order to establish if there is a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sake, as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to consider a proportionate approach.

37. The FCO argued that that it was established practice to withhold the names of officials who hold a position below senior management levels and do not have a public facing role. Therefore it argued that the junior officials whose names are contained in the withheld information would have a legitimate expectation that their names would not be disclosed in response to this request. With regard to the consequences of disclosure in this particular case, the FCO argued that disclosure of the officials' names risked exposing them to personal criticism given the controversy surrounding the leaked memo.
38. The Commissioner accepts that the individuals in question would have had a reasonable expectation that their names will not be disclosed in the context of the request given the FCO's established practice of not disclosing the names of junior officials. The Commissioner also agrees with the FCO that given the circumstances of this case there is a real risk of detriment to the individuals concerned if their names were disclosed.
39. In view of the above, the Commissioner finds that it would have been unfair to disclose the names of the junior officials in question. Disclosure would have contravened the first data protection principle. The FCO was therefore entitled to withhold the names of the officials on the basis of section 40(2).
40. In light of his findings in respect of section 27(1)(a) and 40(2) the Commissioner has not considered whether the withheld information is also exempt from disclosure on the basis of section 27(2) and 28(1) of FOIA.

## **Section 10 and section 17**

41. Section 10(1) of FOIA requires public authorities to respond to a request promptly and in any event within 20 working days of receipt.
42. Section 17(1) of FOIA explains that if a public authority intends to refuse to comply with a request it must provide the requestor with a refusal notice stating that fact within the time for compliance required by section 10(1). Section 17(3) allows a public authority to extend its consideration of the public interest for a reasonable period of time if necessary. The Commissioner considers that in most cases a reasonable period of time to be an additional 20 working days with only complex or exceptional cases requiring more than 40 working days of deliberations.
43. The complainant submitted his request on 7 April 2015 and the FCO completed its public interest test considerations on 15 June 2015, some 47 working days later. Given the sensitive and high profile nature of the background to this request the Commissioner is persuaded that 47 working days, is not an unreasonable amount of time to complete its public interest test considerations. The FCO has not therefore breached section 17(3) of FOIA.
44. However, the Commissioner notes that when the FCO contacted the complainant on 5 May 2015 in order to explain that it needed further time to consider the balance of public interest test, it indicated that it intended to have completed these considerations by 4 June 2015, a deadline which it clearly missed. As a matter of good practice, the Commissioner would recommend to the FCO that if it will not be able to comply with its own extended deadlines then it proactively contacts a requester and informs them of this and moreover considers providing an explanation as to why it needs additional further time to complete its public interest considerations.

## Right of appeal

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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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://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** .....

**Gerrard Tracey**  
**Principal Adviser**  
**Information Commissioner's Office**  
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**Wilmslow**  
**Cheshire**  
**SK9 5AF**