

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 July 2017

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

Decision (including any steps ordered)

1. The complainant has requested information relating to the production assistance given by the Foreign and Commonwealth Office (FCO) in relation to two television programmes (FCO ref 1135-15). He then made a request for the meta data relating to that request and has also requested documents relating to programmes aired by the BBC (FCO ref 0547-16 and 0548-16). The FCO has disclosed information in relation to one programme detailed in the first request and stated that it holds no information falling within the scope of the request as it relates to the other programme. It had refused both subsequent requests citing section 14(1) FOIA. During the course of the Commissioner's investigation, it withdrew its reliance on section 14 for both requests, disclosed the information in relation to 0547-16 and, following an extension of the public interest test, sought to withhold the information within the scope of 0548-16 on the basis of section 36 FOIA.
2. The Commissioner's decision is that in relation to the request under reference 1135-15 the FCO failed to disclose the requested information within the statutory time frame of 20 working days and has breached section 10 FOIA. It is her position that on the balance of probabilities the FCO has disclosed all of the information it holds within the scope of this request. In relation to the request held under 0548-16, the Commissioner's decision is that having relied on section 14 initially, the refusal notice was issued in accordance with FOIA section 17(5) but that having withdrawn its reliance on section 14 and then excessively extending its public interest test considerations, the FCO breached section 17(3).
3. During the course of the investigation, the FCO disclosed the information requested under reference 0547-16, but as this was disclosed outside of

the statutory time frame, the Commissioner considers that the FCO has again breached section 10 FOIA.

Request and response

4. On 26 November 2015, the complainant wrote to the FCO and requested information in the following terms:

"This is a request under the Freedom of Information Act. I request that a copy of the following documents be provided to me:

In response to one of my previous requests you informed me of productions that had 'significant input' from your department including Channel 4: Our Man In and BBC1: Holiday Hit Squad. I request that copies of all documents relating to and/or detailing the production assistance granted by the FCO to these two productions be released to me.

I would prefer electronic forms of any records responsive to my request instead of paper copies, so as to reduce unnecessary costs and use of natural resources. I would prefer email attachments but would accept CD-ROM if not."

5. This request was given the reference number 1135-15.
6. On 22 April 2016, following extensions to allow the FCO to consider the public interest test (PIT) in relation to section 43 – commercial interests; a response to this request was issued. The response was issued 153 working days after the request was made.
7. The FCO disclosed information falling within the scope of the request as it related to 'Our Man In' but did not refer to the request as it related to 'Holiday Hit Squad'.
8. Following an internal review the FCO wrote to the complainant on 1 June 2016. It stated that it did not hold the requested information in relation to 'Holiday Hit Squad'. The internal review set out that the FCO did not rely on section 43 in its final response as it had been decided that there was *"no public interest consideration."*
9. The internal review also set out that the *"4 month extension of the deadline by PIT was not necessary in this case."*

10. The review further set out that there was no information held in relation to 'Holiday Hit Squad' which fell within the scope of the request. The review acknowledged that this should have been set out to the complainant in his original request.
11. The issue of the delay in order to consider the PIT in this case will be addressed in the other matters section as it is relevant to this request and to the complainant's subsequent request which, for completeness, is also being considered in this decision notice.
12. On the same date, 1 June 2016, the complainant made the following request for information:

"This is a request under the Freedom of Information Act. I request that a copy of the following documents be provided to me:

"Last November I requested the release of documents pertaining to the TV shows Our Man In and Holiday Hit Squad (ref FOI 1135-15). This request was not substantively responded to until April 22nd. I request that a copy of all documents discussing or pertaining to discussions about this request be released to me. To clarify, I mean all documents in your possession where my request is discussed, or the documents that were eventually released to me were discussed. This includes but is not limited to emails, memos, text messages and other communications between the people involved in making the decision whether to release the documents; emails, memos and other recordings and/or records detailing face to face and telephone conversations about this request and whether to release the documents.

This may seem like an excessive request but it took months for you to decide whether to release 10 pages of material and when I requested a review of this process you 'lost' my initial email and then told me I could expect a response that I still have not received. I want to know why it took you months to decide whether to release this material. I have asked you this and all I've met with is delaying tactics and people saying things that are demonstrably untrue. So I apologise for the work involved in attempting to meet this request but you have given me no other option."

13. This request was allocated reference number 0547-16 by the FCO.
14. Also on the same date, the complainant requested information of the following description:

"I request that all available documents on the programs 'BBC Panorama: Rescued from a Forced marriage' and 'KEO films for BBC3: Bangkok Airport' be released to me".

15. This request was allocated reference number 0548-16 by the FCO.
16. On 29 June 2016 the FCO responded to both requests. In relation to 0547-16, the FCO relied on section 14 stating that the burden of complying with the request outweighed the purpose and value of the request.
17. In relation to 0548-16 the FCO set out that it was also relying on section 14 stating that the request formed part of a series of requests asking for similar information for which it could see little purpose or value.
18. The response set out that the FCO considered some of the complainant's communications to have been discourteous and offensive.
19. On the same date, the complainant requested an internal review of these responses.
20. The FCO responded to the review requests on 8 August 2016 and upheld its position relating to both requests.

Scope of the case

21. The complainant contacted the Commissioner on 8 August 2016 to complain about the way his requests for information had been handled.
22. Specifically the complainant was concerned about the overall handling of his three requests and the fact that the FCO seem to be denying him his rights under FOIA for spurious reasons.
23. In respect of the original request held under reference 1135-15, the complainant set out to the Commissioner that he wanted documentation in relation to 'Holiday Hit Squad' disclosed to him, information which FCO concluded did not fall within the scope of the request. In relation to this request the Commissioner therefore considers the scope of the investigation is to consider the delay in issuing a response and whether all information falling within the scope of the request has been disclosed to the complainant.
24. In relation to the two subsequent requests, upon receipt of the complaint the Commissioner considered the scope of the investigation was to determine whether or not the FCO was entitled to rely on section

14 to refuse the requests held under references 0547-16 and 0548-16. However during the course of her investigation the FCO withdrew its reliance on section 14. In relation to 0547-16 the FCO provided the complainant with the information he requested on 22 March 2017 and in relation to 0548-16 on the same date explained that it held information falling within the scope of the request but needed additional time to consider the balance of the public interest test. The FCO subsequently informed the complainant of the outcome of its public interest test considerations on 17 July 2017. Therefore in relation to request 0547-16 the Commissioner has considered the FCO's delay in providing the complainant with a response to this request and in relation to 0548-16 its delay in providing the complainant with the outcome of its public interest test considerations.¹

25. The Commissioner's investigation has also addressed the many procedural issues raised by this complaint and these are set out in the 'other matters' section of this notice.

Reasons for decision

Request 1135-15

26. Section 1 of the FOIA states that:

*“(1) 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 the information of the description specified in the request, and
(b) if that is the case, to have that information communicated to him”*

27. In cases where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes might be held, the Commissioner, in accordance with a number of First-Tier Tribunal decisions, applies the civil standard of the balance of probabilities.
28. Furthermore, the Commissioner applies the civil burden of proof in order to determine whether a public authority holds any information which falls within the scope of a request (or was held at the time of the request).

¹ The FCO's decision to refuse request 0548-16 on the basis of section 36 will now be the subject of a further investigation by the Commissioner.

29. In its submission to the Commissioner, the FCO has provided copies of the information identified in relation to 'Holiday Hit Squad' (1135-15) which it does not consider falls within the scope of the request.
30. In its internal review response, the FCO set out that it had located one document in relation to 'Holiday Hit Squad' but that this did not fall within the scope of the request. In his complaint to the Commissioner, the complainant stated that he wanted this document disclosed.
31. The Commissioner will first consider the scope of the request.
32. The complainant asked for copies of all documents *"relating to and/or detailing the production assistance granted by the FCO to these two productions"*
33. The Commissioner considers therefore that the request relates specifically to production assistance granted by the FCO in relation to the two programmes. Information relating to 'Our Man In' has been disclosed.
34. The FCO has provided the Commissioner with the documents identified in relation to its search for documents relating to 'Holiday Hit Squad' and the Commissioner has been able to consider whether these fall within the scope of the request.
35. The information which has been submitted to the Commissioner comprises emails between FCO officials relating to the programme 'Holiday Hit Squad'; however, the Commissioner is satisfied that those emails do not relate to production assistance granted by the FCO; they relate to matters post production.
36. The Commissioner has also received a copy of a submission in respect of 'Holiday Hit Squad' and considers that the submission does not fall within the scope of the request. A further access agreement was provided but this related to a different production and did not fall within the scope of the request; although this was not immediately clear, the Commissioner made further enquiries in respect of the access agreement.
37. Having considered the FCO's position, the Commissioner considers that at the time of the request, the FCO did not, on the balance of probabilities, hold information in relation to production assistance for the programme 'Holiday Hit Squad'. Furthermore, having seen the meta data which relates to this request, the Commissioner is satisfied that there is no suggestion that the FCO held relevant information which it has sought to conceal.

38. She acknowledges that the FCO's failure to refer to the programme 'Holiday Hit Squad' in the initial response has aroused the complainant's suspicions and the internal review stating that no documents were held has compounded his concerns. However this omission in the original request seems to have been an oversight on the part of the FCO.
39. Despite this conclusion the Commissioner has found that the FCO breached section 10(1) in its handling of request 1135-15. This is because this provision of the FOIA requires a public authority to respond to a request promptly and in any event within 20 working days. The FCO failed to disclose to the complainant the information it did hold in relation request 1135-15 within this time period and this therefore represents a breach of section 10(1) of the legislation.

Request 0547-16

40. Although the FCO initially sought to withhold the information sought by request 0547-16 on the basis of section 14(1), it subsequently concluded that this provision did not apply and disclosed the requested information on 22 March 2017. By failing to disclose this information to the complainant within 20 working days of his request the FCO committed a further breach of 10(1).

Request 0548-16

41. Under section 17(3), a public authority citing a qualified exemption can have a 'reasonable' extension of time to consider the balance of the public interest. The Commissioner's position is that a further 20 days represents a 'reasonable' extension of time as this gives a public authority 40 working days to issue a response covering the application of the qualified exemption and the balance of the public interest.
42. In relation to the request held under reference 0548-16, this request was submitted on 1 June 2016. The FCO initially refused this request on 29 June 2016 by citing section 14(1) but then withdrew this and issued the complainant with a public interest test extension letter on 22 March 2017. The FCO informed the complainant of outcome its public interest test deliberations on 17 July 2017, concluding that the public interest favoured maintaining the exemption contained at sections 36(2)(b) and (c) of FOIA. The Commissioner considers that the FCO has significantly exceeded the 40 working days and accordingly has breached section 17(3) FOIA.

Other matters

43. The Commissioner considers, unusually, that this decision notice is most pertinent in terms of addressing the many procedural issues which have arisen during the course of these requests and responses.
44. It is apparent that there is a breakdown in trust and respect between the complainant and the FCO and that this has, wittingly or otherwise, impacted on this case.
45. Having considered the case, the Commissioner considers that the original request, 1135-15, was not handled appropriately by the FCO. By its own admission, there was no need to apply the extension for the PIT, not least because the information considered to be relevant to section 43 did not fall within the scope of the request. It is also the FCO's position that there was a period of inactivity between the request being received and the response being issued and that this was due to competing priorities.
46. The Commissioner notes that prior to receiving the complaint in her office, the FCO had considered its own practices in this case and identified lessons to be learned. One of these lessons was that the FCO should not rely on the PIT extension for requests such as the complainant's. This was discussed with the FOIA team in a bid to improve practices.
47. The Commissioner would reiterate here the need for early assessment and expresses her considerable concern that the FCO has admitted that it should have prioritised this request and "*not used delaying tactics*".
48. She considers this to be an abuse of the FOIA. The PIT permitted extension is designed to provide public authorities the necessary time to consider issues relating to the public interest test and to reach an informed decision by addressing where the balance lies. The permitted extension is certainly not intended to present public authorities with a mechanism to delay a case for no apparent reason.
49. As noted above, the Commissioner's guidance sets out that the law says you can have a "reasonable" extension of time to consider the public interest test. She considers that this should normally be no more than an extra 20 working days, which is 40 working days in total to deal with the request. Any extension beyond this time should be exceptional and must be justified by the public authority.

50. Her guidance further sets out that a public authority must identify the relevant exemptions and ensure they can be applied in the particular case, for example, by considering the prejudice test before you do this. A public authority cannot use the extra time for considering whether an exemption applies and should release any information that is not covered by an exemption within the standard time.
51. The complainant has expressed many concerns in this case but the Commissioner will only consider those that relate directly to the handling of the requests under FOIA.
52. Where the complainant has referenced his concerns about the FCO in terms of language used, potentially libellous comments and lies regarding email addresses, the Commissioner will not comment other than insofar as these contribute to the overall breakdown in the relationship between the public authority and the requester. These matters are for the complainant to address with the FCO.
53. The complainant has expressed concerns that the FCO branded him a 'vexatious requester' when this proved not to be the case.
54. The Commissioner considers that the FCO initially relied on section 14 to refuse the requests held under reference 0547-6 and 0548-16. The application of section 14 relates to the request rather than the requester and the Commissioner can see no evidence that the FCO applied this to the requester rather than the request.
55. Upon receipt of this complaint the Commissioner considered the application of section 14 to both of the requests. She considered a submission and documents from the FCO.
56. With regard to 0547-16 it was clear from the submission that the FCO considered that the request could not achieve anything other than had already been achieved by upholding a complaint about the delay and therefore that the burden of complying with the request would outweigh the serious purpose or value of the request.
57. It is of course important to remember that the FOIA is applicant and purpose blind and although the FCO had upheld the complaint regarding delay, this did not necessarily mean that the complainant could gain nothing further from disclosure of the requested documents nor does it detract from the purpose and value of the request in this case. The admission of procedural error and disclosure of requested information are quite distinct.
58. The Commissioner considered that the delay in this case was the very thing that prompted the request for the meta data and that in these

circumstances, disclosure would have promoted accountability and, given the strained relationship which already existed regarding FOIA requests, may have helped rebuild mutual trust. Furthermore, it was the Commissioner's position that there was a serious purpose and value to the request given the extreme delay in this case. In addition to the serious purpose and value of the request, she did not consider that the burden to the public authority could, in the circumstances, outweigh the serious purpose and value of the request. By the FCO's own admission, there had been a period of inactivity on the case and it seemed unlikely that retrieving meta data from a fairly recent request would be particularly onerous. With that in mind, the Commissioner asked the FCO to consider the request again in order to determine whether it still wished to rely on section 14. This is not an uncommon approach for the Commissioner to take.

59. The FCO reconsidered its position in relation 0547-16 and disclosed the meta data in accordance with the request.
60. The request held under 0548-16 was also refused under section 14. In its submission to the Commissioner, the FCO set out that the tone and language of the requester's communications went beyond the level of criticism that a public authority or its employees should reasonably expect to receive. The FCO provided evidence to support this position.
61. The complainant sets out that he had been kind and courteous up until the point at which the FCO started lying to him; he acknowledges also that he became rude to staff at the point at which he considered it had become clear that the FCO was trying to avoid releasing information.
62. The Commissioner considered the tone and content of correspondence which the complainant sent to the FCO and she considers that it is indeed highly critical of the FCO, is sarcastic, accuses the FCO of lying, asks if the department is thoroughly incompetent from top to bottom, which he states he doubts, but then asks if the FOIA office is 'just plain useless'.
63. In other correspondence, the complainant has used similar critical language accusing the FCO of being deceitful and incompetent, describing its behaviour as illegal. He has accused the FCO of not taking its obligations under FOIA seriously and suggests that the FCO should be ashamed of how useless and two faced its staff are. He suggests that the entire FOIA office should be sacked and uses the term 'some useless idiot' in relation to a member of staff whom the complainant considers has 'forgotten' to send documents. His language and tone is without doubt aggressive, rude and offensive.
64. He describes the staff as a disgrace to the FCO, the country, themselves and their families. The Commissioner considers this to be an

unacceptable personal attack on FCO staff. The complainant goes on to conclude that people are dying of cancer and being forced to look for jobs so that 'your pensions are secure'. The Commissioner considers this to be highly offensive and unnecessarily inflammatory language.

65. The Commissioner considers that the above examples provide a flavour of the tone and content of some of the complainant's correspondence and she is in no doubt that it is unacceptable, offensive, rude, threatening and personal.
66. She notes that the FCO has provided documents relating to a previous FOIA request where the requester's tone has been deemed unacceptable by the FCO. She has considered this but does not consider that the tone is as offensive as that used by the complainant in relation to this case.
67. Whilst the Commissioner certainly does not condone the unacceptable behaviour displayed by the complainant, in considering the application of section 14 she had to consider all of the evidence before her.
68. The majority of the offensive content relates to the FCO's handling of this case and there is no doubt that this has contributed to the frustrations of the complainant. It is always important to consider what action, if any, the public authority has taken which may have prompted or exacerbated any negative behaviour.
69. In considering whether the complaint could be reasonably considered vexatious based on the tone and content of the language, the Commissioner considered this to be very finely balanced. However, she considered that the FCO's actions could reasonably be perceived to have contributed to the unacceptable behaviour displayed by the complainant and that in these circumstances, the Commissioner did not consider that the application of section 14 stood up to the ICO's stringent scrutiny. She therefore asked the FCO to reconsider its position and a response to this request (0548-16).
70. The Commissioner notes that the tone and content of some of the complainant's correspondence to her office has also been aggressive and rude.
71. It is her position that no-one should be subjected to aggressive behaviour, rudeness, insults or attempts to demean as they go about their legitimate business.
72. She acknowledges that there was a significant delay in this case being handled at her office but has explained the reason for that delay and has apologised for it.
73. The fact that a request has not been handled by a public authority as a complainant would like or the fact that it may even have been handled

inappropriately, does not excuse rude and aggressive behaviour and although in this case she does not agree that refusal under section 14 was appropriate, the Commissioner considers that the language and tone used was unacceptable.

74. Should the Commissioner receive future complaints from the complainant about the FCO where rude and aggressive language and behaviour is a relevant factor, she will consider, on a case by case basis, whether the circumstances are such that it is appropriate to give due weight to the behaviour already displayed in this case.
75. The Commissioner's remit is to determine if the request for information has been handled in accordance with the FOIA. The reasons for her decision are set out in this decision notice. In conclusion she considers that the FCO has handled the requests in an unacceptable manner and in respect of the delays it has breached section 10 FOIA. There is no doubt that there has been a flagrant abuse of the permitted extension for consideration of the PIT but there is no evidence, as the complainant suggests of any crime or illegal activity in relation to the FOIA.
76. That being said, the Commissioner considers the FCO shortcomings in this case are not inconsiderable and have undoubtedly contributed to the current position of trust and respect between the parties. The Commissioner asks the FCO to consider the handling of these three requests for information and to ensure that lessons to be learned are identified as soon as possible.

Right of appeal

77. 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 7395836

Email: GRC@hmcts.gsi.gov.uk

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

78. 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.

79. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Jonathan Slee
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF