

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 September 2018

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 Foreign and Commonwealth Office (FCO) seeking information about discussions between FCO staff in France and the French authorities on the issuing Cartes de Sejour to British nationals residing in France. The FCO provided some information in response to the request but sought to withhold further information on the basis of the exemptions contained at sections 27(1)(a) (international relations), 35(1)(a) (formulation and development of government policy) and 40(2) (personal data) of FOIA. During the course of the Commissioner's investigation the FCO disclosed a small portion of information which it had previously sought to withhold. However, it continued to withhold further information on the basis of the above exemptions.
2. The Commissioner's decision is as follows:
 - The information which the FCO is continuing to withhold is exempt from disclosure on the basis of sections 27(1)(a) and 40(2) of FOIA, subject to the following exception:
 - The Commissioner has concluded that the remaining information redacted from the 'table of issues' document is not exempt from disclosure on the basis of section 27(1)(a) or on the basis of section 40(2) of FOIA. By failing to provide the complainant with a copy of this information within 20 working days of his request the FCO breached section 10(1) of FOIA.
 - In relation to the information disclosed during the course of the her investigation, the Commissioner has found that the FCO also breached section 10(1) of FOIA by failing to disclose this information within 20 working days of the request.

- By failing to respond to the request within 20 working days the FCO committed a further breach of section 10(1) and also breached section 17(1) of FOIA.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with an unredacted copy of the 'table of issues' document.
 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 the following request to the FCO on 9 March 2018:

'1. what meetings and correspondence and other communications, together with copies of the corresponding minutes, contents, memoranda etc., have taken place between consular/Embassy staff in France and the French authorities on the issue of (and refusal to process applications) Cartes de Sejour (CDS), to expat British nationals residing in France, in advance of the intended UK withdrawal from the EU. In particular, concerning the circumstances in which applications can lawfully be refused or the authorities can lawfully decline to process them.

2. what legal advice has been received by the Consulate/Embassy on the obligations of the French authorities, both under EU and French law, in connection with the processing of such applications, and copies of that advice.

3. what future meetings etc. are planned in connection with this matter and what are the proposals if any for resolving this issue, and their timetable.'

6. He submitted the following supplementary request to the FCO on 10 March 2018:

'4. copy(ies) of your Embassy's database/compilation/ notes/ tables etc. of the difficulties/experiences reported to you in obtaining CDSs from the French authorities, which was described to me by your Nicola,

with (intended) applicants' personal data redacted (ie. individual applicants not identified).'

7. The FCO contacted him on 21 March 2018 to acknowledge receipt of these requests which it confirmed it had received on 12 March 2018.
8. The FCO provided him with a substantive response to his requests on 13 April 2018. In relation to the part 1 of the request the FCO provided him with an email between the British Embassy in Paris and French Ministry of Interior which had been redacted on the basis of section 40(2) (personal data) of FOIA. The FCO explained that further information falling within the scope of the part 1 of the request, and information falling within the scope of part 3 of the request was being withheld on the basis of section 27(1)(a) (international relations) of FOIA. The FCO explained that it did not hold any information falling within the scope of part 2 of the request. In relation to part 4, the FCO provided him with a table of issues experienced by British nationals in France with information redacted on the basis of section 40(2) of FOIA.
9. The complainant contacted the FCO on 13 April 2018 in order to ask for an internal review of this response.
10. The FCO informed the complainant of the outcome of the internal review on 14 May 2018. The review concluded that section 27(1)(a) had been applied correctly to the information withheld in relation to parts 1 and 3 of the request and that the information redacted from the table of issues about specific administrations was exempt on the basis of section 27(1)(a) in addition to section 40(2). The review also concluded that section 40(2) had been correctly applied to the redactions made to the email which had been disclosed. Finally, the review explained that the information which the FCO held falling within the scope of part 3 of the request also attracted the exemption contained at section 35(1)(a) (formulation and development of government policy) of FOIA.

Scope of the case

11. The complainant initially contacted the Commissioner on 9 April 2018 in order to complain about the FCO's failure to respond to his request within 20 working days. Following the completion of the internal review, he contacted the Commissioner again on 16 May 2018 in order to complain about the FCO's response to his complaint.
12. During the course of the Commissioner's investigation the FCO provided the complainant with some further information which it had previously sought to withhold on the basis of section 27(1)(a) of FOIA. Despite this disclosure, the complainant requested that the Commissioner adjudicate on whether the FCO initially had any grounds to withhold this information.
13. This decision notice therefore considers:
 - Whether the remaining withheld information is exempt from disclosure on the basis of the exemptions cited by the FCO;
 - Whether the FCO breached FOIA by initially seeking to withhold the information which it disclosed to the complainant during the course of the Commissioner's investigation; and
 - Whether the FCO breached FOIA by failing to respond to the request within 20 working days.

Reasons for decision

Complaint 1 - The information which the FCO is continuing to withhold

Section 27(1)(a) – international relations

14. With the exception of a small number of redactions made to the names of individuals, the FCO has sought to withhold all of the remaining information on the basis of section 27(1)(a) of FOIA which states 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'

The FCO's position

15. In its refusal notice the FCO argued that section 27(1)(a) of FOIA recognises the need to protect information that would be likely to prejudice relations between the United Kingdom and other states if it was disclosed. The FCO further argued that the effective conduct of international relations depends upon maintaining trust and confidence between governments. This relationship of trust allows for the free and frank exchange of information on the understanding that it will be treated in confidence. The FCO argued that if the United Kingdom does not maintain this trust and confidence, its ability to protect and promote UK interests through international relations will be hampered, which will not be in the public interest. The FCO suggested that France may be reluctant to share sensitive information with the UK government in the future and may be less likely to respect the confidentiality of information supplied by the UK government to them, to the detriment of UK interests if this withheld information was disclosed.
16. In its submissions to the Commissioner the FCO provided more detailed arguments to support its reliance on section 27(1)(a) to withhold the remaining information. Its arguments can be summarised as follows:
17. With regard to the information falling within the scope of part 1 of the request, the FCO explained that it regularly held meetings with the French Ministry of Interior to discuss consular, bilateral and other matters. It argued that if it disclosed minutes of such meetings this would be likely to be detrimental to relations with the French Ministry of Interior specifically (e.g. migration, counter-terrorism etc) but also on other areas of cooperation with the French government as a whole as it would undermine the trust and collaboration between the French and British. With regard to the information falling within the scope of point 3, the FCO explained that it could not provide a running commentary on its official engagement with the French government as this would undermine the trust and collaboration and therefore the UK's ability to engage on this, and other, issues.
18. With regard to the information falling within part 4 of the request, the FCO argued that disclosing information which highlighted the specific administrations and their approaches would prejudice relations between the UK and the French Government and its regional representation. This was on the basis that the table of issues released in response to point 4 provides a summary of issues associated with specific prefectures, and can be interpreted as an unfavourable assessment of the ability of a close ally to deliver on existing obligations to EU/British citizens. The FCO argued that disclosure of this overall picture may put undue pressure on specific prefectures, leading to a deterioration of the relationship between the UK and France.

The Commissioner's position

19. In order for a prejudice based exemption, such as 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; 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.
20. 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*'.
21. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the FCO clearly relates to the interests which the exemption contained at section 27(1)(a) is designed to protect.
22. With regard to the second criterion, the Commissioner is satisfied that there is a causal link between disclosure of information concerning meetings between the UK and the Ministry of Interior and prejudice occurring to the UK's relations with France. Furthermore, she is satisfied that the resultant prejudice would be real and of substance. The Commissioner has reached this finding because she accepts the FCO's rationale that disclosure of information about such meetings, be it meeting minutes, the UK's internal comments about such meetings or information about future meetings, would undermine the trust and collaboration between the UK and Ministry of Interior given that such meetings take place on an implied understanding that they are confidential. Moreover, having considered the particular content of the information which the FCO is still seeking to withhold, the Commissioner

is satisfied that disclosure represents more than a hypothetical risk of prejudice occurring and therefore the third criteria is met and thus this information is exempt from disclosure on the basis of section 27(1)(a) of FOIA.

23. However, with regard to the information which the FCO is still seeking to withhold in response to point 4 of the complainant's request – ie information redacted from the copy of the table of issues provided to the complainant – the Commissioner has reached a different conclusion. The Commissioner is prepared to accept that there is arguably a causal link between disclosure of this information and the prejudice envisaged the FCO, and thus the second criterion is met. However, she is not persuaded that the risk of prejudice if this information was disclosed is one that is more than hypothetical. In reaching this conclusion the Commissioner recognises that the FCO suggested that the table released could be interpreted as an unfavourable assessment of the ability of a close ally to deliver on existing obligations to EU/British citizens. The Commissioner accepts that such an interpretation of the information that was disclosed is not inconceivable; nevertheless, the FCO still decided to disclose this information. Furthermore, whilst the Commissioner acknowledges that the details redacted from the table list some specific prefectures, it is also clear from the redacted information that the problems EU/British citizens are not limited to one particular area or prefecture. In light of this, and given the information from the table that the FCO has already disclosed, the Commissioner is not persuaded that disclosure of the overall picture may put undue pressure on specific prefectures thus leading to a deterioration in UK-French relations. The remaining information redacted from the table provided to the complainant is not therefore exempt from disclosure on the basis of section 27(1)(a) of FOIA.

Public interest test

24. Section 27(1) is a qualified exemption and therefore subject to the public interest test set out in section 2(2)(b) of the FOIA. The Commissioner has therefore considered whether in all the circumstances of the case the public interest in maintaining the exemption in relation to the information which she accepts is exempt from disclosure on the basis of section 27(1)(a) outweighs the public interest in disclosing this information.
25. The FCO acknowledged that disclosure of this information would increase the public's knowledge of the UK's relations with France about this issue. However, the FCO argued that disclosure of the information would undermine the UK's relations with the French government in the ways described above. Furthermore, it argued that if this relationship was undermined this would be likely to harm the UK's ability to protect and promote its interests abroad, an outcome which would be clearly

against the public interest. More specifically, the FCO argued that disclosure would undermine spirit of trust and confidence which had been built between the UK and French governments which would impact on the position of the French towards the UK during the Brexit negotiations and affect the UK's ability to influence the creation of a working registration system for British citizens after Brexit.

26. The Commissioner recognises that the difficulties that some British nationals have encountered in obtaining a Carte de Séjour, ahead of Brexit, is clearly a serious issue and it is understandable that those directly affected by this issue have a particular interest in understanding the actions the FCO is taking in response. In the Commissioner's opinion disclosure of the withheld information which she accepts is exempt on the basis of section 27(1)(a) of FOIA would provide the public with a direct insight into the UK's discussions with the French government about this issue and also an understanding about how the UK had approached such discussions. Given the impact this issue potentially has on the lives of British nationals, and the insight disclosure of the withheld information would provide, the Commissioner considers there to be a strong public interest in the disclosure of the information.
27. However, balanced against this the Commissioner recognises that there is clear public interest in the UK being able to enjoy effective international relations with its partners. More specifically, in the context of this case, the Commissioner agrees that there is a very significant public interest in ensuring that the UK can continue to work effectively with France to protect the rights of British nationals both before, and after, Brexit. Consequently, in her view disclosure of information which would undermine the effectiveness of such discussions would be firmly against the public interest. The Commissioner is also conscious that in addition to disclosing some information to the complainant in response to this request the FCO also provided him with some background information on this issue and a summary of its actions in response to it, namely:

'As you are know, we are very much aware of difficulties that some British Nationals have had in obtaining a Carte de Séjour (CdS) in France. This issue predated the referendum of June 2016, and is not limited to British nationals. Nationals of other EU member states have sometimes experienced the same issue (individual prefectures insisting that CdS were not necessary for EU nationals). But it is clear that, with some members of the British community keen on obtaining a CdS over the past 18 months in order to document their residency status in France ahead of Brexit, this has become even more important an issue today. The situation remains uneven, with some prefectures issuing without problems and others being much slower.'

We take this issue very seriously. It is clear that the rights of British nationals to obtain a CdS remain unchanged whilst we remain part of the European Union. Accordingly, our team at the Paris Embassy, as well as at our Consulates, have been (i) ensuring that we have as much information as possible on the situation in different regions, and (ii) raising this with the relevant prefectures, and nationally with the Ministry of the Interior (MOI) in order to overcome problems. Over recent years we have seen this have an impact on individual cases and with individual prefectures, and we have been reassured by confirmation from senior representatives of the MOI that British nationals legally resident in France continue to be entitled to a CdS. Following our lobbying, they have also committed to sending a letter to all prefectures clarifying the situation.'

28. In the Commissioner's opinion the above quote clearly demonstrates a degree of openness and transparency on the FCO's part in explaining how it is dealing with this particular issue. Whilst the Commissioner accepts that disclosure of the withheld information would no doubt provide a further insight into the FCO's actions, in her view there is a stronger and more compelling public interest in ensuring that the UK is able to continue to liaise effectively with the French government about this, and related issues, at this time. The Commissioner has therefore concluded that the balance of the public interest test favours maintaining the exemption contained at section 27(1)(a) of FOIA.
29. In light of this decision, the Commissioner has not considered whether the parts of the information which the FCO have sought to withhold on the basis of section 27(1)(a) are also exempt from disclosure on the basis of section 35(1)(a) of FOIA.

Section 40(2) – personal data

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).¹
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,

¹ On 25 May 2018 the General Data Protection Regulation and Data Protection Act 2018 came into force. However, in line with the provisions contained within the Data Protection Act 2018 under FOIA for any request where a public authority has responded before 25 May 2018 the DPA 1998 applies.

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 FCO redacted the names of civil servants and government officials from the disclosures of documents made to the complainant and also applied this exemption to similar information contained in the documents which it had sought to withhold in their entirety.
33. The FCO also argued that disclosure of the Prefecture/administration identified in the table of issues, allied to the comments disclosed in the version of the table disclosed to the complainant (eg 'UK citizen who applied for CdS has note on application "voir si UE ou pas"' and 'Refused to issue a CdS until BREXIT situation resolved') could allow an individual to be identified.
34. The Commissioner is satisfied that the names of civil servants and government officials clearly constitute personal data.
35. With regard to FCO's argument that the names of the Prefecture/administration need be redacted on the basis of section 40(2), in the Commissioner's opinion truly anonymised data are not personal data and thus can be disclosed without reference to the DPA. The Commissioner's test of whether the information is truly anonymised is whether a (or any) member of the public could, on the balance of probabilities, identify individuals by cross-referencing the 'anonymised' data with information or knowledge already available to the public.
36. Whether this 'cross-referencing' is possible is a question of fact based on the circumstances of the specific case. If identification is possible the information is still personal data and the data protection principles do need to be considered when deciding whether disclosure is appropriate. However, where the anonymised data cannot be linked to an individual using the additional available information then the information will, in the Commissioner's opinion, have been truly anonymised and can be considered for disclosure without any reference to the DPA principles.
37. The Commissioner recognises that the table disclosed to the complainant by the FCO does contain some limited examples of the particular problems individual British nationals have had in getting a Carte de Sejour. However, the Commissioner is not persuaded that this information, even when allied to the names of particular Prefectures/administrations represents anything more than a hypothetical risk of such individuals being identified by the public. Therefore, in the Commissioner's opinion the names of the Prefecture/administration can be considered to be 'anonymised' data and thus cannot be exempt from disclosure on the basis of section 40(2) of FOIA.

38. With regard to the information redacted on the basis of section 40(2) of which the Commissioner *does* accept is personal data, the FCO argued that disclosure of this information it had redacted would breach the first data protection principle. This 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.'

39. The relevant condition in this case is the sixth condition in schedule 2 which states that:

'The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject'.

40. 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?
41. 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.
42. 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.
43. The Commissioner accepts that it is established custom and practice for the FCO, and other public authorities, to redact the names of junior staff and non-front line staff from any disclosures under FOIA. In light of this, she accepts that disclosure of such information would be against the reasonable expectations of these individuals. Furthermore, the Commissioner is not persuaded that there is a particularly strong or compelling legitimate interest in the disclosure of these names. Disclosure of this category of information would therefore breach the first data protection principle and such information is therefore exempt from disclosure on the basis of section 40(2) of FOIA.

Complaint 2 – did the FCO breach FOIA in initially withholding information which it subsequently disclosed during the course of the Commissioner's investigation?

44. In his submissions to the Commissioner the complainant argued that it was important that she also considered whether or not the FCO were correct, in their decision and in their subsequent review, to withhold the information that they disclosed during the course of her investigation. The complainant suggested that the FCO should not be allowed to avoid a finding against them for failing to disclose this information in response to his request, and only disclose it during the course of the Commissioner's investigation, , particularly as the FCO had already had the opportunity to re-consider their position at the internal review stage.
45. In scenarios such as this where information has been disclosed by a public authority during the course of her investigation, the Commissioner will not formally consider in her decision notice whether,

at the time of the request, the exemptions cited by the public authority would have provided a basis to withhold the information which the public authority has subsequently disclosed. The Commissioner takes this approach because in her view it is not an efficient use of resources to make a full investigation of whether information was exempt from disclosure given that it has now been disclosed.

46. However, in such scenarios the Commissioner will nevertheless include a finding that by failing to disclose such information within the time compliance required by FOIA then the public authority will have breached section 10(1) of FOIA which states that:

'Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.'

47. Section 1(1) of 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 information of the description specified in the request, and
(b) if that is the case, to have that information communicated to him'*

48. In the circumstances of this case the complainant submitted his request to the FCO on 9 March 2018, amending this the following day. The FCO's disclosures of information during the course of the Commissioner's investigation were made on 20 July and 20 August 2018. Both dates are clearly well outside the 20 working days provided for at section 10(1) of FOIA and therefore the FCO breached this section of the legislation by failing to provide the complainant with this information within that time period.

Complaint 3 – the FCO's delay in responding to the requests

49. As noted above, the complainant's requests were submitted on 9 and 10 March 2018. The FCO did not respond to this request until 13 April 2018 which is more than the 20 working days permitted by section 10(1) of FOIA. Therefore, in respect of the information which the FCO provided to the complainant in its response of 13 April 2018 this constitutes a further breach of section 10(1) of FOIA because the FCO failed to disclose this information within 20 working days. Furthermore, as the FCO's response of 13 April 2018 also cited a number of exemptions to withhold further information, in line within the requirements of section 17(1) of FOIA it should have provided this refusal notice within 20 working days of the request. The failure to do so represents a breach of section 17(1) of FOIA.

Right of appeal

50. 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

51. 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.
52. 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

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