

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 June 2019

Public Authority: The 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 seeking information it held about Operation Flavius.¹ The FCO initially withheld all of the information falling within the scope of the request but at the internal review stage provided the complainant with some of the information in scope but sought to withhold the remainder on the basis of the exemptions contained at the following sections of FOIA: section 23(1) (security bodies), or in the alternative 24(1) (national security), 26(1)(a) and (b) (defence), 27(1)(a), (c) and (d) (international relations) and 40(2) (personal data). The Commissioner is satisfied that the exemptions cited by the FCO provide a basis upon which it can withhold the remaining information. However, she has concluded that the FCO breached section 17(3) by failing to complete its public interest considerations within a reasonable timeframe.

¹ Operation Flavius was an operation in which three members of the Provisional Irish Republican Army (IRA) were shot dead by the British Special Air Service (SAS) in Gibraltar on 6 March 1988.

Request and response

2. The complainant submitted the following request to the FCO on 17 August 2016:

'We ask you to urgently provide:

- (a) The materials relating to Operation Flavius which pre-date the shootings at Gibraltar;*
- (b) In particular, the materials showing the discussions/communications establishing the Rules of Engagement and/or any other policies for engaging with the suspects in question or any other individuals;*
- (c) Other associated documents which would normally expected to be released which are held by the FCO and whether relate to Operation Flavius, including but not limited to:
 - (ii) [sic] FCO files (Foreign and Commonwealth Office);*
 - (iii) HQNI files;*
 - (iv) WO (War Office) files;*
 - (v) DEFE (MoD) files;*
 - (vi) Weekly Brigade Intelligence Summary (Intsum) for all Brigade areas in NI, (supplemented by Special Branch notes where appropriate) for the week before and after 6th March 1988;*
 - (vii) HQNI – Weekly Intsum for the week before and after 6th March 1988;*
 - (viii) HQNI Daily and weekly News summaries or equivalent, for the week before and after 6th March 1988;*
 - (ix) Director of Operations brief daily for the week, and weekly brief if applicable;*
 - (x) MO4 (or equivalent) monthly report for March 1988;*
 - (xi) DS10 (civilian unit within MOD based at Stormont) or equivalent – Daily summaries for the week before and after 6th March 1988 (this unit may have had a name change by 1987);**

If a list of material has been recovered and retained or otherwise 'held back' please

- (a) Confirm this;*
- (b) Provide a comprehensive list of what that material consists of;*
- (c) Provide detailed reasons as to why it has not been released;*
- (d) Identify the government department responsible for 'screening' this material and deciding upon what should not be released'*

3. The FCO contacted the complainant on 24 August 2016 and invited it to refine and clarify the scope of the request as presently drafted it would exceed the appropriate cost limit.
4. The complainant responded on 26 August 2016 and explained that it was content for the request to be limited to information covering the period '*Six months before, one before after 6th March 1988*'.
5. The FCO contacted the complainant on 27 September 2016 and confirmed that it held information falling within the scope of the request but it considered the exemptions contained at sections 24 (national security), 26 (defence) and 27 (international relations) of FOIA to apply and it needed additional time to consider the balance of the public interest.
6. The FCO contacted the complainant again on 17 March 2017 and explained that it still required additional time to consider the balance of the public interest test.
7. The FCO continued to send further public interest test letters on an approximately monthly basis until 28 February 2018 when it provided the complainant with a substantive response to its request. The response explained that the FCO was seeking to withhold information on the basis of sections 27(1)(a), (c) and (d) and section 40(2) (personal data) of FOIA. The FCO also explained that it was relying on sections 23(5) (security bodies), 24(2) and 26(3) of FOIA to refuse to confirm or deny whether it held any further information falling within the scope of the request. The FCO explained that in line with the provisions of section 17(4) of FOIA it could not explain why it was seeking to rely on sections 24(2) and 26(3) of FOIA.
8. The complainant contacted the FCO on 13 March 2018 in order to ask it to conduct an internal review of its response to this request.
9. The FCO informed the complainant of the outcome of the internal review on 1 February 2019. The FCO explained that following a further review of the withheld information, and consultation with relevant stakeholders, it was satisfied that some of the information in scope could be disclosed. (Such information was subsequently sent to the complainant). However, the FCO explained that the remainder of the information continued to be withheld on the basis of sections 27(1)(a), (c) and (d) and section 40(2) of FOIA. Furthermore, the FCO explained that it was no longer seeking to rely on sections 23(5), 24(2) and 26(3) of FOIA to refuse to confirm or deny whether it held any further information falling within the scope of the request. Instead the FCO confirmed that it considered that some of the withheld information was exempt from disclosure on the basis of

section 23(1) or section 24(1) (these two exemptions being relied on in the alternative)², and also sections 26(1)(a) and (b) of FOIA.

Scope of the case

10. The complainant contacted the Commissioner on 30 July 2018 in relation to the FCO's failure (at that stage) to complete the internal review, its delays in initially responding to the request, and also its initial refusal to provide any of the information falling within the scope of the request. Following the disclosure of some of the withheld information by the FCO in February 2019, the scope of this decision notice is to determine whether the remaining information is exempt from disclosure on the basis of the exemptions cited by the FCO. The Commissioner has also considered the time it took the FCO to process this request.

Reasons for decision

Section 27 – International relations

11. Sections 27(1)(a), (c) and (d) of FOIA state 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...

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

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

The FCO's position

12. In its internal review the FCO explained that in its view the information withheld under sections 27(1)(a), (c) and (d) would be likely to cause

² Citing these two exemptions in the alternative means that although only one exemption is engaged the other one is also cited so as to disguise which exemption is in fact being relied upon. This approach may be necessary in instances where citing one exemption would in itself be harmful. Further information on this issue is contained on page 9 of the following guidance issued by the Commissioner: https://ico.org.uk/media/for-organisations/documents/1196/how_sections_23_and_24_interact_foi.pdf

offence to the other governments with which the UK government had dealings with over Operation Flavius and its aftermath, and therefore harm to the important bilateral relations the UK has with the governments in question.

13. In its submissions to the Commissioner, the FCO provide more detailed arguments in support its reliance on these exemptions, arguments which referred directly to the content of the withheld information, and identified the particular states with whom the FCO considered relations would be likely to be damaged if the withheld information was disclosed. Given the nature of these submissions the Commissioner cannot refer to them in this decision notice. However, she can confirm that as part of its submissions the FCO emphasised that the UK government works in partnership with other states and relies on relationships of trust and goodwill in order to do so. The FCO explained that in its view given the content of the information, such trust and goodwill would be undermined if the information was disclosed and that this would result in prejudice not only to the UK's relations with these states but also damage UK interests, and the protection of those interests, by jeopardising future cooperation over similar situations in the future.

The Commissioner's position

14. 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.

15. 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'*.
16. 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 exemptions contained at sections 27(1)(a), (c) and (d) are designed to protect. With regard to the second criterion, the Commissioner is satisfied that there is a causal relationship between disclosure of this information and harm occurring to the UK's relationship with the various countries which it had dealings with in respect of Operation Flavius. She has reached this view given both the content of the information, parts of which clearly relate to confidential discussions between the UK and other countries, and parts of it which concern internal UK discussions about the issue, and the underlying sensitivity of the matters associated with Operation Flavius. With regard to the third criterion, given this context and taking into account the content of the withheld information the Commissioner is satisfied that there is a more than hypothetical risk of prejudice occurring to the interests which sections 27(1)(a), (c) and (d) are designed to protect. In reaching this conclusion the Commissioner wishes to emphasise that she has taken into account the passage of time since Operation Flavius took place. However, despite this the Commissioner accepts that disclosure of the information still presents a real and genuine risk to damaging the UK's relations with the countries in question.
17. The Commissioner has therefore concluded that sections 27(1)(a), (c) and (d) of FOIA are engaged.

Public interest test

18. However, section 27(1) is a qualified exemption and therefore subject to the public interest test set out in section 2(2)(b) of FOIA. The Commissioner has therefore considered whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.

Public interest arguments in favour of disclosing the information

19. The complainant argued that there is legitimate public interest in the disclosure of information that informs the public about historic events and provides an accurate record of past military operations. It also argued that there is clear public interest in disclosure of information which would inform public debate and promote understanding of international affairs.
20. The FCO acknowledged that disclosure of the withheld information would add to the public's understanding and knowledge of this subject and could also help the public have a better historical understanding of Britain's conduct overseas.

Public interest in favour of maintaining the exemption

21. The FCO argued that section 27 recognised that the effective conduct of international relations depends upon maintaining trust and confidence between governments. It argued if the UK does not maintain this trust and confidence then its ability to protect and promote UK interests through international relations will be harmed, which would not be in the public interest.

Balance of the public interest test

22. The Commissioner agrees that there is a public interest in the disclosure of information which would lead to a greater understanding of British actions and decision making in historic events, including relatively recent historic events such as Operation Flavius. The Commissioner recognises the significance of the event in question and the controversy that it attracted at the time. She therefore accepts that there is a weighty and significant public interest in the disclosure of information which would aid the public's understanding of this incident, and in particular the UK's relations with other states in respect of Operation Flavius. Disclosure of the information withheld on the basis of section 27(1) would go a considerable way to meeting this particular interest.
23. However, the Commissioner agrees that there is a very strong public interest in the UK maintaining effective international relations with other countries. In the circumstances of this request, disclosure of the information risks harming the UK's relations not just with one state, but with a number of states. Given these broad ranging prejudicial consequences of disclosure, allied to the sensitivity of the information in question, the Commissioner has concluded that by a relatively narrow margin the public interest favours maintaining the exemptions contained at sections 27(1)(a), (c) and (d).

Section 40 – personal data

24. 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).³

25. 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.'

26. The FCO explained that the information which it was seeking to withhold on the basis of section 40(2) consists of the personal data of various named individuals who were witnesses to the shootings and the related events. The FCO explained that it knew, or had to assume that despite the passage of time, that the individuals were still alive.

27. The Commissioner has examined the information in question and is satisfied that it is clearly the personal data of the individuals in question given that they are identifiable from it and it includes their opinions and views of the shooting and aftermath.

28. The FCO argued that disclosure of the information which it had withheld on the basis of section 40(2) 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.'

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

³ 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. In this case the FCO responded on 28 February 2018 and therefore DPA 1998 applies.

'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'.

30. 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?

31. 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.

32. 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.
33. The FCO argued that the individuals in question would have a reasonable expectation that the information in question would not be made public.
34. The Commissioner has considered the information withheld on the basis of section 40(2). The information clearly constitutes the personal data of a range of different individuals. However, she is satisfied that none of the individuals in question would expect such information to be disclosed into the public domain, especially given the passage of time that has elapsed since the shootings took place. Furthermore, the Commissioner is satisfied that disclosure of the information in question would be likely to lead to some damage or distress for all of the individuals concerned as it could result in a renewed interest in their role, even simply as a witness, to events which took place over 30 years ago. In the Commissioner's view, the damage or distress, and corresponding invasion of privacy, is likely to be more significant for some individuals than for others.
35. With regards to balancing the legitimate interests in disclosure, as discussed above, the Commissioner accepts that there is a legitimate interest in the disclosure of the information which would aid the public's understanding of the events of Operation Flavius. Disclosure of the information withheld on the basis of section 40(2) would, in the Commissioner's view, go a considerable way to meeting this aim. However, despite this strong legitimate interest in disclosure, she considers this to be outweighed by the legitimate interests of the data subjects given their expectations that such information would not be disclosed, expectations which the Commissioner considers to be entirely reasonable, and the consequences of disclosing such information.

Section 23(1) – information supplied by or relating to bodies dealing with security matters

Section 24 – national security

36. Section 23(1) of FOIA provides an exemption which states that:

'Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).'

37. To successfully engage the exemption at section 23(1), a public authority needs only to demonstrate that the relevant information was directly or indirectly supplied to it by, or relates to, any of the bodies listed at section 23(3).⁴

38. Section 24(1) states that:

'Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security'.

39. FOIA does not define the term 'national security'. However in *Norman Baker v the Information Commissioner and the Cabinet Office* (EA/2006/0045 4 April 2007) the Information Tribunal was guided by a House of Lords case, *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, concerning whether the risk posed by a foreign national provided grounds for his deportation. The Information Tribunal summarised the Lords' observations as follows:

- 'national security' means the security of the United Kingdom and its people;
- the interests of national security are not limited to actions by an individual which are targeted at the UK, its system of government or its people;
- the protection of democracy and the legal and constitutional systems of the state are part of national security as well as military defence;
- action against a foreign state may be capable indirectly of affecting the security of the UK; and
- reciprocal co-operation between the UK and other states in combating international terrorism is capable of promoting the United Kingdom's national security.

40. Furthermore, in this context the Commissioner interprets 'required for the purposes of' to mean 'reasonably necessary'. Although there has to be a real possibility that the disclosure of requested information would undermine national security, the impact does not need to be direct or immediate.

⁴ A list of the bodies included in section 23(3) of FOIA is available here: <http://www.legislation.gov.uk/ukpga/2000/36/section/23>

41. As is clear from the wording of section 24(1), the exemptions provided by sections 23(1) and 24(1) are mutually exclusive. This means they cannot be applied to the same request.
42. However, the Commissioner recognises that the fact that section 24(1) can only be applied to information that is not protected by section 23(1) can present a problem if a public authority does not want to reveal whether a section 23 security body is involved in an issue. To overcome this problem, as referred to above at footnote 1, the Commissioner will allow public authorities to cite both exemptions 'in the alternative' when necessary. This means that although only one of the two exemptions can actually be engaged, the public authority may refer to both exemptions in its refusal notice.
43. As the Commissioner's guidance on this issue explains, a decision notice which upholds the public authority's position will not allude to which exemption has actually been engaged. It will simply say that the Commissioner is satisfied that one of the two exemptions cited is engaged and that, if the exemption is section 24(1), the public interest favours withholding the information.
44. Based on submissions provided to her by the FCO during the course of her investigation, the Commissioner is satisfied that parts of the withheld information either fall within the scope of the exemption provided by section 23(1) of FOIA or falls within the scope of the exemption provided by section 24(1) of FOIA, and that if the exemption engaged is section 24(1) then the public interest favours maintaining the exemption.
45. The Commissioner cannot elaborate on her rationale behind this finding without compromising the content of the withheld information itself or by revealing which of these two exemptions is actually engaged. The Commissioner also wishes to note that despite the age of the information, and the passage of time since it was created, she is satisfied that this does not undermine the FCO's position that section 23(1) or section 24(1) applies.
46. Furthermore, whilst the Commissioner is satisfied that the FCO is entitled to rely on section 23(1) or section 24(1) to withhold parts of the withheld information, in the Commissioner's view, considerable proportions of that information would also be exempt from disclosure on the basis of sections 27(1)(a), (c) and (d) and/or section 40(2) of FOIA.
47. In light of the above findings the Commissioner has not considered the FCO's reliance on sections 26(1)(a) and (b) of FOIA.

Time taken to consider the public interest test

48. Section 1(1) of FOIA provides that 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.'*

49. Section 10(1) of FOIA provides that 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.

50. Under section 17(3) a public authority can, where it is citing a qualified exemption, have a 'reasonable' extension of time to consider the balance of the public interest. The Commissioner considers it reasonable to extend the time to provide a full response, including public interest considerations, by up to a further 20 working days, which would allow a public authority 40 working days in total. The Commissioner considers that any extension beyond 40 working days should be exceptional and requires the public authority to fully justify the time taken.

51. In the circumstances of this case the FCO took 391 working days to consider the balance of the public interest test. The FCO explained that such delays were due to the fact that this was a complex case which required extensive stakeholder consultation. The Commissioner appreciates that this is complex case and the consultation the FCO needed to undertake meant it was unrealistic for it to be able to complete its public interest considerations within 40 working days. However, she does not accept that it can be reasonable, despite such factors, that a public authority takes nearly ten times this amount of time to complete this process. The Commissioner has therefore decided that the FCO breached section 17(3) by failing to complete its public test considerations in reasonable time.

Other matters

52. FOIA does not contain a time limit within which public authorities have to complete internal reviews. However, the Commissioner's guidance explains that in most cases an internal review should take no longer than 20 working days in most cases, or 40 working days in exceptional circumstances. In this case the FCO took 227 working days to complete its internal review which, despite the complexities of the case, the Commissioner does not consider to be an acceptable period of time.
53. Furthermore, the Commissioner wishes to emphasise that given the FCO's combined delays in completing its public interest test considerations and in completing the internal review, it took nearly two and half years for the FCO to process this request, the request being submitted on 17 August 2016 and the internal review being issued on 1 February 2019. In the Commissioner's view such delays risk undermining a requestor's right to information and the purpose of the legislation itself.

Right of appeal

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

55. 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.
56. 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
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF