

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 March 2024

Public Authority: Ministry of Defence
Address: Whitehall
London
SW1A 2HB

Decision (including any steps ordered)

1. The complainant submitted a two part request to the Ministry of Defence (MOD) seeking information it held regarding Boris Johnson's visits to Ukraine and his meetings with President Zelensky. The MOD explained that it did not hold any information falling within the first part of the request and that the information it held falling within the second part of the request was exempt from disclosure on the basis of the following exemptions: 23(1) (security bodies) and 24(1) (national security) cited in the alternative, 26 (defence), 27(1)(a) and (c) (international relations), 40 (personal data) of FOIA.
2. The Commissioner's decision is that on the balance of probabilities the MOD does not hold any information falling within the scope of the first part of the request and the information it does hold in the second part of the request is exempt from disclosure on the basis of sections 27(1)(a) and (c) of FOIA.
3. The Commissioner does not require further steps.

Request and response

4. The complainant submitted the following request to the MOD on 16 June 2023:

“Please provide the following information

1. Any records, briefings, communications related to visits made by Boris Johnson to Ukraine 2022- 2023, as Prime Minister and ex-Prime Minister.
2. Any records of formal or informal meetings between Boris Johnson with Ukrainian President Zelenskyy, in person or via electronic communications, video conferencing, telephone calls, including any messaging services, and audio-visual media records. 2022-2023, as Prime Minister and ex-Prime Minister.”
5. The MOD responded on 3 August 2023 and confirmed that it held some information falling within the scope of the request. However, it considered this information to be exempt from disclosure on the basis of sections 24(1) (national security) and 27(1) (international relations) of FOIA.
6. The complainant contacted the MOD on the same day and asked it to undertake an internal review of this response.
7. The MOD informed him of the outcome of the internal review on 22 February 2024. It explained that it did not hold any information falling within the scope of part 1 of his request. With regard to part 2 of the request, it explained that it held some information falling within scope in the form of readouts of telephone calls between Mr Johnson when he was Prime Minister and President Zelensky. The MOD confirmed that this was the information which was withheld at the point of the initial refusal on the basis of sections 24(1) and 27(1)(a) and (c). With regard to the application of these exemptions, the internal review upheld the application of sections 27(1)(a) and (c) of FOIA. In relation to section 24(1), the MOD explained it had concluded that it was more appropriate to apply sections 23(1) and 24(1) in the alternative.¹ Furthermore, the MOD explained that it considered this information to be exempt from disclosure on the basis of section 26 (defence) of FOIA and that some of the information was also exempt from disclosure on the basis of section 40(2) (personal data). The MOD advised, under section 16 (advice and assistance), that summaries of phone calls made between Mr Johnson

¹ Citing the sections 23(1) and 24(1) of FOIA 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 in the Commissioner’s guidance <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/how-sections-23-and-24-interact/#text4>

and President Zelensky were routinely published to gov.uk which the complainant may find useful.²

Scope of the case

8. The complainant initially contacted the Commissioner on 9 October 2023 to complain about the MOD's handling of his request and its delays in completing the internal review. Following the completion of the internal review the complainant advised the Commissioner that he disputed the MOD's position that it did not hold any information falling within part 1 of the request and challenged the MOD's decision to withhold the information falling within the scope of part 2 of the request.

Reasons for decision

Part 1 of the request

Section 1 – right of access

9. In cases such as this where there is some dispute as to whether information falling within the scope of the request is held, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
10. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request.
11. The MOD explained that following the searches it had carried out, it did not hold any information that constitutes a briefing or communication specifically relating to a visit made by Mr Johnson to Ukraine in 2022 or 2023. It explained that whilst information that originated from the MOD, which is routinely created and regularly shared, may have been used in any briefing provided directly to Mr Johnson prior to any visit to Ukraine, MOD does not hold a record of which, if any, information of this nature was utilised as part of any briefing pre-visit. The MOD noted that it was

² The MOD provided the complainant with this example:
<https://www.gov.uk/government/news/pm-call-with-president-zelenskyy-of-ukraine-2-april-2022>

likely that any such brief on defence concerns would have been delivered by his own military assistance.

12. In relation to this aspect of the request, the MOD suggested, under section 16 of FOIA, that the complainant submitted a request for such information to the Cabinet Office.
13. For his part, the complainant simply explained that he wished to challenge the MOD's position that it did not hold any information falling within the scope of this part of the request.
14. The Commissioner is satisfied with the logic of the MOD's explanation that it does not hold any information falling within the scope this part of the request, ie that whilst it delivers briefing materials to the Cabinet Office in relation to the Prime Minister's engagement with the Ukrainian government, it does not hold records of which briefings were used for a pre-visit briefing. Furthermore, as part of his investigation of this case, the Commissioner has seen samples of such briefings and it is not clear from these whether they were utilised as part of Mr Johnson's visits to Ukraine, as opposed to being used for telephone calls between him and President Zelensky. On the balance of probabilities, the Commissioner is therefore satisfied that the MOD does not hold any information falling within the scope of part 1 of the request.

Part 2 of the request

Section 27 – international relations

15. The MOD argued that the withheld information was exempt from disclosure on the basis of sections 27(1)(a) and (c) of FOIA which 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.'

16. In order for a prejudice based exemption, such as section 27, to be engaged the Commissioner believes that three criteria must be met:
 - Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption.
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the

information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance.

- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e., disclosure would be likely to result in prejudice or disclosure would result in prejudice. If the likelihood of prejudice occurring is one that is only hypothetical or remote the exemption will not be engaged.
17. 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'.³

The MOD's position

18. The MOD argued that the UK has built a strong relationship with Ukraine with the publicly declared aim of providing military support and training to its forces. The MOD argued that it is important for the UK Government to maintain trust and confidence with other governments and states, and these relationships would be damaged if the information in scope of part 2 of the request was released under FOIA. More specifically, the MOD argued that such a release could negatively impact upon the UK's ability to work closely with the Ukrainian Government on current or future shared defence and security objectives which would also undermine the interests of the UK abroad. The MOD argued that the level of prejudice was set at the higher level of higher level of "would" prejudice.

The Commissioner's position

19. With regard to the first criterion of the test set out above, the Commissioner accepts that the type of harm that the MOD believes would occur if the information was disclosed is applicable to the interests protected by sections 27(1)(a) and (c). With regard to the second and third criteria, the Commissioner is satisfied that there is a causal relationship between disclosure of the information and prejudice occurring, and that the risk of this occurring is more than a hypothetical possibility. Furthermore, the Commissioner accepts that disclosure of the information would, rather than simply be likely to, prejudice the UK's

³ Campaign against Arms Trade v the Information Commissioner and Ministry of Defence EA/2007/0040 (26 August 2008)

relations with the Ukraine. In turn, the Commissioner accepts that it would be more difficult for the UK to protect its interests within the region.

20. The Commissioner has reached this conclusion because he accepts that Ukraine would not expect the detailed internal readouts held by the UK side of such conversations to be disclosed, and that doing so under FOIA, would clearly make such relations more difficult and/or require a response to limit the damage. In reaching this conclusion the Commissioner has taken into account that the discussions in question took place at the highest level of government on both the UK and Ukraine side and that the matters under discussion were clearly ones of the utmost seriousness. The Commissioner has also taken into account the fact that the UK government has released summaries of such phone calls. However, the Commissioner considers there to be clear distinction between the content of such summaries and the detailed readouts falling within the scope of the request.
21. For the above reasons the Commissioner is therefore satisfied that sections 27(1)(a) and (c) are engaged.

Public interest test

22. Section 27 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemptions contained at sections 27(1)(a) and (c) outweigh the public interest in disclosing the information.
23. The MOD acknowledged that release of the information would increase the public's understanding of the nature of the relationship between the UK and Ukraine which the UK Government has publicly declared its support for at a time of conflict. However, the MOD argued that there was a clear and significant public interest in ensuring that the UK's relations with the Ukraine were not undermined during the ongoing conflict and similarly that there was a strong public interest in the UK being able to protect its interests. Furthermore, in the MOD's view the availability of the summaries of calls between Mr Johnson and President Zelensky went some way to addressing the public interest in disclosure of the information.
24. The complainant argued that there was clearly a serious and vital public interest in knowing what was discussed between Mr Johnson and the Ukrainian government in his communications with them. The complainant argued that this was particularly the case as it was "widely believed" that a peace deal between Ukraine and Russia was a

possibility and that this had been blocked by UK/US intervention.⁴ The complainant noted that Mr Johnson had denied these allegations.⁵ In view of this the complainant argued that it followed that the public interest in disclosure of withheld information that would support either side, or both sides of the story, was clear.

25. The Commissioner accepts that there is a clear public interest in the disclosure of the withheld information. The UK has been a strong supporter of Ukraine and he accepts that it is legitimate for the public to be able to understand how, at the highest level of government, this support has been offered and discussed. Disclosure of the withheld information would provide a significant insight into these discussions, and notably go beyond the public summaries which have been published. The Commissioner notes the complainant's point regarding allegations the UK intervened to block potential peace talks or a peace deal. It is not the Commissioner's role to commit on the veracity of such allegations, nor indeed can he comment in this decision notice as to whether or not the withheld information would either support such allegations, or indeed provide evidence to refute them. However, the Commissioner acknowledges the seriousness of such claims, and as a result, he accepts that the public interest in revealing in full the nature of discussions between Mr Johnson and President Zelensky is arguably increased as a result of such claims.
26. However, the Commissioner considers there to be a significant public interest in ensuring that the UK maintains effective relations with other states. In the particular circumstances of this case the Commissioner is particularly aware that disclosure of the information would harm the UK's relations with Ukraine at a time when the Ukraine-Russia conflict remains ongoing. Clearly as result of this the UK needs to be able to ensure that it has effective relations in place with Ukraine, in order to continue the UK's policy of supporting the latter's war efforts, but also so that the UK can continue to protect its own interests. The Commissioner accepts that in this context it would be very firmly against the public interest if the UK's relations with Ukraine were to be prejudiced.
27. On balance, whilst the Commissioner recognises that there is strong public interest in the disclosure of this information, he has concluded

⁴ The complainant cited amongst others, these two sources in support of this point: <https://responsiblestatecraft.org/2022/09/02/diplomacy-watch-why-did-the-west-stop-a-peace-deal-in-ukraine/> and <https://www.pravda.com.ua/eng/news/2022/05/5/7344206/>

⁵ <https://www.thetimes.co.uk/article/boris-johnson-ukraine-peace-talks-russia-war-k220zcrvf>

that this is outweighed by the public interest in maintaining the exemptions contained at sections 27(1)(a) and (c).

28. In view of this finding the Commissioner has not considered the further exemptions cited by the MOD to withhold the information falling within the scope of part 2 of this request.

Other matters

29. FOIA does not impose a statutory time within which internal reviews must be completed, albeit that the section 45 Code of Practice explains that such reviews should be completed within a reasonable timeframe.⁶ The Commissioner expects that most internal reviews should be completed within 20 working days, and even for more complicated requests, reviews should be completed within a total of 40 working days.⁷ In this case, as noted above, the MOD failed to meet these timescales.

⁶ <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

⁷ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/request-handling-freedom-of-information/#internal>

Right of appeal

30. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

31. 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.
32. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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