

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 March 2024

Public Authority: Serious Fraud Office
Address: 204 Cockspur Street
London
SW1Y 5BS

Decision (including any steps ordered)

1. The complainant requested information obtained by the Serious Fraud Office (SFO) during its criminal investigation into Airbus SE (Airbus) that resulted in a Deferred Prosecution Agreement (DPA) in January 2020. The SFO confirmed it holds information, but refused to provide it, citing sections 30(1)(b)(c) (investigations and proceedings), 31(1)(a)(b)(c) (law enforcement), 40(2) (personal information) and 27(1)(a) (international relations) of FOIA.
2. The Commissioner's decision is that section 27(1)(a) is engaged in respect of all the requested information, and that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
3. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

4. On 20 December 2022, the complainant wrote to the SFO and requested information in the following terms:
"...we would like to receive documents collected by the SFO from Airbus during its investigation and through the DPA [deferred prosecution

agreement]. Accordingly, we request respectfully that you please provide the following information (the "Requests"):

(a) Documents (including, but not limited to records, notes, minutes and / or testimony) detailing in part or in whole the financial transactions related to and underlying commissions paid to agents between 2008 and 2015; and

(b) Documents (including, but not limited to records, notes, minutes and / or testimony) detailing in part or in whole the persons within the Airbus group involved and / or responsible – whether directly or indirectly – in the preparation and execution of the financial transaction referred to under 5.1 (a) between 2008 and 2015".

5. The SFO responded on 22 May 2023. It confirmed it holds some information in scope of the request, but refused to provide it, citing sections 30(1)(b)(c) (investigations and proceedings), 31(1)(a)(b)(c) (law enforcement), 40(2) (personal information) and 27(1) (international relations) of FOIA.
6. On 20 July 2023, the complainant sought a review on public interest grounds in relation to sections 30, 31 and 27 and asked the SFO to reconsider its decision to apply section 40.
7. The SFO responded on 31 August 2023. It confirmed that, having taken account of the complainant's submissions, it maintained its application of all of the exemptions.

Scope of the case

8. The complainant disputes the SFO's refusal to provide the requested information. It argued that it cannot be in the public interest "to blanket refuse to provide information regarding investigations".
9. During the course of the Commissioner's investigation, the SFO confirmed its position, namely that the information requested is exempt from disclosure under section 27(1)(a), section 30(1)(b)(c), section 31(1)(a)(b)(c) and section 40(2) of FOIA. It also confirmed that it considers that the exemptions apply equally to all the information.
10. By way of context to the request, the SFO told the Commissioner:

"The request above relates to information obtained in the course of the criminal investigation into Airbus SE ("Airbus") which resulted in a DPA".

11. The investigation that provides the context to the request is described by the SFO as a "criminal investigation into allegations of fraud, bribery and corruption in the civil aviation business of Airbus Group".
12. An entry on the SFO website, dated 31 January 2020¹, refers to the DPA that the SFO entered into and provides a link to the DPA² itself.
13. The 31 January 2020 entry states:

"The Serious Fraud Office has entered into a record-breaking Deferred Prosecution Agreement (DPA) with the global aerospace company Airbus SE... Airbus SE has also reached a Convention Judiciaire d'Intérêt Public with the Parquet National Financier (PNF) and a Deferred Prosecution Agreement with the US Department of Justice and US Department of State today".
14. The Commissioner notes that the complainant referred, in correspondence with the SFO, to its understanding that Airbus co-operated with the investigation and provided statements and more than 30 million documents, including organisation charts, e-mails, agreements, invoices, payments and accounting records to the SFO and PNF.
15. The Commissioner has not seen the withheld information in this case. The SFO has, however, provided him with a copy of the Statement of Facts which includes examples, in anonymised form, of the type of information held by the SFO. The SFO also provided an indication of the amount of information within the scope of the request.
16. The Commissioner accepts that the scope of the request is broad and that the SFO confirms that it captures a substantial amount of information.
17. In the circumstances of this case, the Commissioner is satisfied that the Statement of Facts, supported by the SFO's submission, are sufficient to enable him to progress his investigation without the need to see the withheld information.

¹ <https://www.sfo.gov.uk/2020/01/31/sfo-enters-into-e991m-deferred-prosecution-agreement-with-airbus-as-part-of-a-e3-6bn-global-resolution/>

² <https://www.sfo.gov.uk/download/airbus-se-deferred-prosecution-agreement-statement-of-facts/>

18. The Commissioner has first considered the SFO's application of section 27. If he considers that it has been incorrectly cited, he will consider its application of the other exemptions.

Reasons for decision

Section 27 international relations

19. Section 27(1)(a) of FOIA 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".

20. In order for a prejudice based exemption, such as section 27, to be engaged, the Commissioner considers that three criteria must be met:

- First, 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.

21. Furthermore, the Commissioner has been guided by the comments of the Information Tribunal³ 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".

The complainant's position

22. The complainant acknowledges that the SFO worked with other agencies in the course of the investigation. It also recognised that the investigation concluded with the SFO and Airbus entering into a DPA in January 2020. Referencing a statement subsequently made by the SFO in March 2023, the complainant considers that the investigation has concluded and is final.

SFO's position

23. The SFO told the complainant:

"The effectiveness of the UK's relationships with international prosecution and law enforcement agencies depends primarily upon maintaining the trust and confidence of other States, and our partner organisations abroad".

24. It argued that if it were to disclose the requested information, it would damage relations between the UK and other jurisdictions and damage the trust and confidence other states and international organisations have in the UK.

25. In its submission to the Commissioner, the SFO described receiving information within the scope of the request "from foreign law enforcement agencies." With reference to the nature of the withheld information, it confirmed that the SFO's investigation into Airbus was a joint investigation with the French Parquet National Financier ("PNF") and in parallel with the investigation of the US Department of Justice ("DOJ") and US Department of State ("DOS"). Furthermore, it told the Commissioner that its investigation also spanned alleged wrongdoing in other countries, and that the investigative process "was aided through co-operative and mutual legal assistance from further countries".

26. The SFO acknowledges that the complainant disputes that disclosure would damage international relations. However, in support of its application of section 27(1)(a), the SFO told the Commissioner:

"The SFO believes that any erosion of the principle of confidentiality in the UK would damage relations between it and international partners, which in turn would undermine mutual trust and inhibit the effective exchange of information".

27. The SFO argued strongly that international third parties involved in providing information to government agencies to aid in their cases should have a reasonable expectation that sensitive matters discussed would not be disclosed publicly under FOIA.

The Commissioner's position

28. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the SFO relates to the interests which the exemption contained at section 27(1)(a) is designed to protect. With regard to the second and third criteria, having considered the nature and context of the information withheld on the basis of this exemption, and taken into account the SFO's submissions to him, the Commissioner is satisfied that a causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the Commissioner is satisfied that the likelihood of such prejudice occurring is one that meets the higher threshold of 'would'.
29. He has reached this decision in light of the nature of the withheld information – its content and context - and the broader effect of any disclosure on the UK's relations with its international partners.
30. Section 27(1)(a) is therefore engaged.

Public interest test

31. 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 exemption contained at section 27(1)(a) outweighs the public interest in disclosing the withheld information.

Public interest in favour of disclosing the withheld information

32. In favour of disclosure, the complainant argued that disclosure would promote transparency and accountability. It also disputed the arguments put forward by the SFO.
33. Describing the requested information as being "between 8 and 15 years' old", the complainant disputes that such historical information, gathered for a closed investigation, is sensitive. Rather, they consider that the public interest, and the lack of sensitivity of the information, given the concluded nature of the investigation, support disclosure.
34. In that respect, the complainant told the SFO:

"We understand that the SFO coordinated with (i) the French Parquet National Financier and (ii) the US Department of Justice and State Departments in its investigation of Airbus. However, we do not understand how the disclosure of the Available Information would damage relations with these organisations or their governments. In particular, we note that the French and US investigations also concluded in 2020 so are equivalently final. There is accordingly no risk of the disclosure frustrating ongoing investigations of other states".

Public interest in favour of withholding the information

35. The SFO stated that it had taken into account the public interest in promoting accountability and transparency, in furthering the understanding of, and participation in the public debate of issues of the day and in helping individuals understand decisions made by public authorities which affect their lives. However, it told the complainant:

“We concluded that it was not clear to us that the release of the information held would support any of these public interests”.

36. Instead, it argued that, in its view, the release of material that would prejudice the United Kingdom’s international relations with other States would not be in the public interest.

37. In its submission to the Commissioner, the SFO referred to the public interest in maintaining strong co-operative international links. It also argued that the process of reaching a DPA “inherently provides transparency around the investigation”.

Balance of the public interest arguments

38. The Commissioner accepts that there will always be a general public interest in transparency. He also recognises that there may also be a public interest in transparency about the issue the information relates to. In this case, he recognises that the information under consideration is clearly of interest to the complainant.

39. However, he also recognises that a substantial amount of information about the matter is already in the public domain, via the information in the DPA.

40. In his guidance on section 27, the Commissioner states:

“Section 27(1) is designed to protect the interests of the UK abroad and its relations with other international organisations, courts or states. There is a public interest in ensuring that the UK enjoys effective international relations with other states, organisations and courts in order to further its foreign policy and domestic policy aims”.

41. The Commissioner recognises the importance of ensuring that such relations are effective ones in order to support the UK’s ability to investigate and, where appropriate, prosecute international crime. As a result he accepts that disruption to these relationships would be firmly against the public interest.

42. He gives weight to the argument that it would not be in the public interest to damage relations with other jurisdictions such as to result in

a lack of cooperation when international assistance is required in further and ongoing investigations.

43. Taking all the above into consideration, the Commissioner has decided that, in this case, the public interest in maintaining the exemption outweighs the public interest in disclosure. He is therefore satisfied that the SFO was entitled to refuse the request under section 27(1)(a) of FOIA.
44. Since the Commissioner has determined that the SFO was entitled to rely on section 27(1)(a) to refuse the request, it has not been necessary to go on to consider the other exemptions cited by the SFO.

Right of appeal

45. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

46. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
47. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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