

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 17 October 2024

**Public Authority:** Foreign, Commonwealth & Development Office

**Address:** King Charles Street  
London  
SW1A 2AH

### **Decision (including any steps ordered)**

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1. The complainant submitted a request to the Foreign, Commonwealth & Development Office (FCDO) seeking information about a meeting between then Minister Anne-Marie Trevelyan and HSBC in April 2023. The FCDO disclosed information falling within the scope of the request but redacted further information on the basis of sections 27(1)(a) (international relations), 35(1)(a) (formulation or development of government policy), 40(2) (personal data) and 43(2) (commercial interests) of FOIA.
2. The Commissioner's decision is that the various exemptions cited by the FCDO provide a basis to withhold the information which it has not disclosed.
3. The Commissioner does not require further steps.

### **Request and response**

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4. The complainant submitted the following request to the FCDO on 30 October 2023:  
  
"Please provide  
-the agenda for,

- the minutes of
- any briefing prepared for Trevelyan ahead of
- any correspondence setting up or following up from

The following meeting as listed in the FCDO's meeting returns

Anne-Marie Trevelyan

27/04/2023

HSBC

Discuss findings of Hong Kong All-Party Parliamentary Group (APPG) report

Given HSBC has been accused of shutting down the bank accounts and withholding the pension funds of Hong Kong pro-democracy activists, there is a clear public interest in transparency around its engagement with the UK government, to inform the ongoing debate around the bank's relation with the Chinese Communist Party.

<https://www.scmp.com/news/hong-kong/politics/article/3222818/hsbc-among-hong-kong-banks-close-accounts-tied-opposition-group-members-say>

[https://www.reuters.com/business/finance/hsbc-blocking-hong-konger-pensions-matter-deep-concern-say-us-uk-lawmakers-2023-06-30/#:~:text=LONDON%2C%20June%2030%20\(Reuters\),funds%20in%20order%](https://www.reuters.com/business/finance/hsbc-blocking-hong-konger-pensions-matter-deep-concern-say-us-uk-lawmakers-2023-06-30/#:~:text=LONDON%2C%20June%2030%20(Reuters),funds%20in%20order%)

5. The FCDO responded on 19 January 2024 and disclosed some of the information it held falling within the scope of the request. The FCDO explained that the remaining information was exempt from disclosure on the basis of sections 27(1)(a), 35(1)(a), 40(2) and 43(2) of FOIA.
6. The complainant contacted the FCDO on 23 January 2024 in order to contest the application of all of these exemptions.
7. The FCDO informed the complainant of the outcome of the internal review on 20 March 2024. The review upheld the application of the exemptions cited in the refusal notice.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 23 April 2024 in order to complain about the FCDO's decision to withhold information falling within the scope of their request.

## Reasons for decision

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### Section 43(2) – commercial interests

9. The FCDO redacted some information from the disclosed digest on the basis of section 43(2) of which states that:

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

10. In order for a prejudice based exemption, such as section 43, 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.

11. The FCDO argued that disclosure of parts of the information would be likely to prejudice the commercial interests of HSBC. In support of this position the FCDO provided the Commissioner with confidential submissions which explained why, with reference to content of the withheld information, such information was considered to be sensitive and how and why disclosure would be likely to impact on HSBC's commercial interests.

12. Clearly, for the purposes of this decision notice the Commissioner cannot set out the details of such submissions. However, he notes the complainant's concern, as flagged in their complaint to him that the FCDO's response to the request were highly generic. The Commissioner would observe that the FCDO's submissions to him in relation to both this exemption, and the others which it cited, were focused on the specific nature and context of this request.

13. With regard to the first criterion of the test set out above, the Commissioner accepts that the type of harm that the FCDO believes would be likely to occur if the information was disclosed is applicable to the interests protected by section 43(2) of FOIA.
14. With regard to the second and third criteria, having considered the content of the withheld information, and the context to which this information relates, the Commissioner accepts disclosure of it presents a potential risk to HSBC's commercial interests. Furthermore, the Commissioner is satisfied that this risk is clearly one that it is more than remote or hypothetical. The Commissioner is therefore satisfied that section 43(2) is engaged.

### **Public interest test**

15. Section 43 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 43(2) outweighs the public interest in disclosing the information.
16. The complainant argued that there is a clear public interest in transparency about UK government actions in relation to HSBC, given the bank is currently enforcing a Chinese Community Party (CCP) policy in blocking Hong Kong activists from accessing their pensions that is causing many in that community significant financial harm.
17. The complainant emphasised that as a UK listed and regulated bank, there is a clear public interest in understanding how the government is approaching HSBC on this topic, and what arguments HSBC is using with the government to justify its compliance with the CCP policy, especially if that differs from the bank's public position given the harm this is causing. The complainant argued that disclosure of this withheld information would serve the public interest in holding both HSBC and the government to account in relation to this matter.
18. In its initial response to the request the FCDO argued that there is a clear public interest in allowing commercial organisations the space to conduct their lawful business competitively and without fear of disclosure of sensitive commercial information. The FCDO argued that the failure to protect such commercially sensitive information would also limit the sources of information and interlocutors available to it, and in turn limit the FCDO's ability to promote the British economy and lobby for the interests of British businesses overseas.
19. The FCDO elaborated on these arguments in its submissions to the Commissioner with reference to the content of the withheld information itself.

20. With regard to the public interest in disclosure, the Commissioner acknowledges the significance of the issue to which this information relates. He appreciates that this has been the subject of not only media interest, as identified by the complainant in the request, but as is clear from the purpose of the meeting in question, by parliamentarians, namely the Hong Kong All-Party Parliamentary Group. The Commissioner agrees that there is a considerable public interest in the disclosure of information which would provide transparency regarding the UK government's discussions with HSBC on this matter. Whilst the material disclosed to date goes some way to meeting this, the Commissioner considers that the disclosure of the material withheld on the basis of section 43(2) would go a significant way to further meeting this interest.
21. With regard to the public interest in maintaining the information, the Commissioner agrees with the FCDO that there is a strong public interest in ensuring that third parties who contact and liaise with it on matters such as this do not do so at the expense their own commercial interests. In the circumstances of this case the Commissioner is satisfied that disclosure of such information presents a real and credible risk to HSBC's commercial interests. Furthermore, the Commissioner also recognises, and accords considerable weight to, the line of argument that disclosure of commercially sensitive information which had been provided to the FCDO in confidence would be likely to reduce the willingness of commercial organisations to share such information with it, which in turn would undermine the FCDO's effectiveness.
22. Taking the above into account, and despite the considerable weight the Commissioner accepts should be given to the public interest in disclosure, he finds that this is outweighed by the public interest in maintaining the exemption given both the impact on HSBC and the wider implications for the FCDO in terms of its future relations with such commercial entities.

### **Section 27(1) – international relations**

23. The FCDO redacted some information from the disclosed 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—

relations between the United Kingdom and any other State”
24. As section 27(1) is a prejudiced based exemption, in order for it to be engaged the criteria at paragraph 10 have to be met.

25. 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'.<sup>1</sup>
26. In its initial response to the request the FCDO argued that disclosure of information relating to immigration matters would be likely to prejudice its relations with Hong Kong. In support of this position the FCDO noted that this exemption recognises that the effective conduct of international relations depends upon maintaining trust and confidence between governments. The FCDO argued that the disclosure of information detailing the UK's relationship with the Hong Kong Government could potentially damage the bilateral relationship between the UK and Hong Kong. This would reduce the UK government's ability to protect and promote UK interests through its relations with Hong Kong.
27. In its submissions to the Commissioner the FCDO elaborated on this position, with reference both to the withheld information and details of the UK's relationship with Hong Kong.
28. With regard to the first criterion of the test set out above, the Commissioner accepts that the type of harm that the FCDO believes would be likely to occur if the information was disclosed is applicable to the interests protected by section 27(1)(a) of FOIA.
29. With regard to the second and third criteria, the Commissioner is satisfied that based on the FCDO's submissions to him, the content of the withheld information, and taking into account the UK's relations with Hong Kong, he is satisfied that there is a real and genuine risk of relations being harmed if the information was disclosed. In reaching this decision the Commissioner has taken into account the comments of the Tribunal above in respect of threshold for prejudice in the context of this exemption. Section 27(1)(a) is therefore engaged.

### **Public interest test**

30. 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 information.

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<sup>1</sup> Campaign against Arms Trade v the Information Commissioner and Ministry of Defence EA/2007/0040

31. The complainant's arguments in respect of the public interest in disclosure are set out above at paragraphs 16 and 17.
32. The FCDO acknowledged the public's interest in comprehending how the UK government engages with foreign nations and promotes national interests overseas.
33. However, the FCDO emphasised that the efficacy of international relations relies on the preservation of trust and confidentiality in these exchanges. It argued that if this trust is breached, the UK's ability to protect and promote its interests through diplomatic channels could be significantly undermined, which is against the public interest. In this case, it argued that the public interest in preserving the confidentiality of the information supersedes the public interest in its disclosure under section 27(1) of the FOIA.
34. As discussed above, the Commissioner agrees with the complainant that there is a clear public interest in the disclosure of information which would assist the public in understanding the UK government's considerations in relation to this issue. Disclosure of the withheld information on this exemption could go some way to meeting this interest, albeit arguably not as much as the information which has been withheld on the basis of section 43(2) of FOIA.
35. With regard to the public interest in maintaining the exemption, the Commissioner considers there to be a significant public interest in ensuring the UK can maintain effective relations with its international partners. In the circumstances of this case the Commissioner is satisfied that disclosure of the material presents a serious and credible risk to the UK's relations with Hong Kong. The Commissioner accepts that such an outcome is one which would be firmly against the public interest as it would undermine the UK's ability to protect and promote its interests in the region. On balance the Commissioner has therefore concluded that the public interest for section 27(1)(a) favours maintaining the exemption.

**Section 35(1)(a) – formulation or development of government policy**

36. The FCDO redacted some information from the disclosed digest on the basis of section 35(1)(a) of FOIA which states that:

"Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to-

  - (a) the formulation or development of government policy"
37. Section 35 is a class based exemption, therefore if information falls within the description of a particular sub-section of 35(1) then this

information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes.

38. The Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a minister or decision makers.
39. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
40. Ultimately the key point is that policymaking can take place in various ways; there is no uniform process. Whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case by case basis, focussing on the precise context and timing of the information in question.
41. The Commissioner's guidance on section 35 includes the following examples of different processes that might involve policy:
  - White Papers, bills and the legislative process;
  - initiatives to review and improve existing policies;
  - Ministerial speeches;
  - press releases;
  - responding to unexpected events;
  - responding to questions put to Ministers; and
  - unusually sensitive or high-profile operational decisions.
42. Furthermore, the Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:
  - the final decision will be made either by the Cabinet or the relevant minister;
  - the Government intends to achieve a particular outcome or change in the real world; and
  - the consequences of the decision will be wide-ranging.<sup>2</sup>

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<sup>2</sup> <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-35-government-policy/#whatconstitutesformulation>



43. The FCDO argued that the information withheld on the basis of this exemption concerned the government's approach to the issue of BN(O)s withdrawal of pensions from Hong Kong's MPFA scheme, including the issues raised by the APPG report. It explained that the information pertained to active advice to Ministers on this policy issue. The Commissioner accepts that the withheld information relates to the development of government policy making on the issue of BN(O)s withdrawal of pensions from Hong Kong's MPFA scheme. As noted above, policy making can relate to a range of different processes and the Commissioner accepts that the government's response to the APPG report, and its broader considerations in relation to this issue, are examples of such a process. Section 35(1)(a) is therefore engaged.

### **Public interest test**

44. Section 35 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 35(1)(a) outweighs the public interest in disclosing the information.
45. The complainant's arguments in support of disclosure of the information are set out above at paragraph 16 and 17.
46. In terms of the public interest in maintaining the exemption, the FCDO argued that officials need to be able to conduct rigorous and candid risk assessments of their policies and programmes including considerations of pros and cons without there being a risk of premature disclosure, which might close off better options and inhibit the free and frank discussion of all policy options. In the circumstances of this case it emphasised that the policy making remained active and ongoing, and the withheld information included advice provided directly to a Minister.
47. With regard to balancing these public interest arguments, the Commissioner accepts that significant weight should be given to safe space arguments - ie the concept that the government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction - where the policy making process is live and the requested information relates to that policy making.
48. In the circumstances of this case the Commissioner accepts that at the time of the request the government's policy development in relation to this issue remained active. Accordingly, the safe space arguments attract considerable weight. In reaching this finding the Commissioner has also taken in to account the high profile nature of this issue, as well as the content of the information withheld on the basis of this exemption.

49. With regard to attributing weight to the chilling effect arguments, as a general approach the Commissioner recognises that civil servants are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. Nonetheless, chilling effect arguments cannot be dismissed out of hand and are likely to carry some weight in most section 35 cases. If the policy in question is still live, the Commissioner accepts that arguments about a chilling effect on those ongoing policy discussions are likely to carry significant weight. Arguments about the effect on closely related live policies may also carry weight. However, once the policy in question is finalised, the arguments become more and more speculative as time passes. It will be difficult to make convincing arguments about a generalised chilling effect on all future discussions.
50. The Commissioner accepts that there is some risk that disclosure of the material withheld on the basis of this exemption may lead to those offering advice on this issue in the future to be less candid in their contributions. Again, in reaching this finding the Commissioner recognises the high profile and sensitive nature of this issue. The Commissioner accepts that such an outcome would have a harmful effect on policy making in this area. Therefore, in the Commissioner's view the chilling effect arguments also attract some weight.
51. For the reasons discussed above, the Commissioner accepts that there is weighty public interest in the disclosure of information falling within the scope of this request, and this extends to aspects of government policy making about this issue. However, given that cumulative weight that he considers should be attributed to both the safe space and chilling effect arguments he has concluded that the public interest favours maintaining the exemption.

### **Section 40(2) – personal data**

52. The FCDO explained that on the basis of section 40(2) it has redacted the names and contact details of junior officials and third parties.
53. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
54. In this case the relevant condition is contained in section 40(3A)(a).<sup>3</sup> This applies where the disclosure of the information to any member of

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<sup>3</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').

55. It is common practice for a public authority to argue that the names and contact details of junior officials are exempt from disclosure under FOIA on the basis of section 40(2) as disclosure would contravene the principles set out in Article 5 of the GDPR. Furthermore, unless there are very case specific circumstances, the Commissioner accepts that the names and contact details of the junior officials are exempt from disclosure on the basis of section 40(2) of FOIA. This is in line with the approach taken in the Commissioner's section 40 guidance.<sup>4</sup>
56. The complainant explained that in *R (IAB & Ors.) v Secretary of State for the Home Department & Anor* [2023] EWHC 2930 (Admin), Mr Justice Swift noted in the judgement "names of civil servants should not routinely be redacted from disclosable documents; redaction should take place only where it is necessary for good and sufficient reason", noting that "junior civil servants" include civil servants with significant responsibilities.
57. The FCDO noted the complainant's citation of this case but argued that it was important to note that this case pertains to the disclosure/redaction of names in judicial review proceedings and does not apply to FOIA requests. Therefore, it argued that the judgment from this case is not relevant to the current FOIA request.
58. In any event, the Commissioner has reviewed the names of officials redacted on the basis of section 40(2) and accepts, based on the content and context of the redactions, that they have been applied to the names of junior officials. Therefore, he accepts that such information is exempt from disclosure on the basis of the reasoning set out in these previous decision notices which found that the personal data of junior officials was exempt from disclosure on the basis of section 40(2) of FOIA.<sup>5</sup> He notes that the contact details of senior officials (ie email addresses and telephone numbers) have been redacted, but again this

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[https://ico.org.uk/media/fororganisations/documents/1187/section\\_40\\_requests\\_for\\_personal\\_data\\_about\\_employees.pdf](https://ico.org.uk/media/fororganisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf) - see page 12

<sup>5</sup> IC-114449-B7P7 <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022310/ic-114449-b7p7.pdf> paragraphs 49-71 and IC-110922-T9R1 Paragraphs 49-71 and IC-110922-T9R1 <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022447/ic-110922-t9r1.pdf> paragraphs 39-62

in line with the approach of previous disclosures where the names of senior officials are disclosed, but their contact details are not.

59. Furthermore, the Commissioner is also satisfied that disclosure of similar information about the representatives from the third parties would be a breach of data protection principles as it would result in the disclosure of personal information about them that they would not necessarily expect to be made public. In addition, disclosure of such information would not contribute to or meet in any way the public interests considered above. Such information is therefore also exempt from disclosure on the basis of section 40(2) of FOIA.

## Right of appeal

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60. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

61. 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.
62. 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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