

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

### **Decision notice**

**Date:** 4 January 2016

**Public Authority:** Foreign and Commonwealth 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 and Commonwealth Office (FCO) regarding allegations that the charity Islamic Relief Worldwide had provided funding to Hamas. The FCO refused to disclose the information it held on the basis of the exemptions contained at the following sections of FOIA: sections 21 (information reasonably accessible by other means); 27(1)(a), (c) and (d); 27(2) (international relations); 35(1)(a) (government policy) and 41(1) (information provided in confidence) of FOIA. The FCO also sought to refuse to confirm or deny whether it held any further information on the basis of sections 23(5) and 24(2) of FOIA (security bodies and national security).
2. The Commissioner has concluded that the withheld information is exempt from disclosure on the basis of the exemptions contained at sections 35 and 27 FOIA. The Commissioner is also satisfied that the FCO is entitled to rely on sections 23(5) and 24(2) to refuse to confirm or deny whether it holds any further information falling within the scope of the request.

#### **Request and response**

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3. The complainant submitted a request to the FCO on 17 December 2014 seeking the following:

*'Information held at the British Embassy in Israel during 2014 concerning suspected links between the Islamic Relief charitable organisation and Hamas.'*<sup>1</sup>

4. The FCO contacted the complainant on 16 January 2015 and explained that it held information falling within the scope of this request but needed further time to consider the balance of the public interest test. It issued a similar letter on 13 February 2015.
5. The FCO provided the complainant with a substantive response on 31 March 2015. The response confirmed that the FCO held information but it considered this to be exempt from disclosure on the basis of sections 21; 27(1)(a), (c) and (d); 27(2); 35(1)(a) and 41(1) of FOIA. In addition the FCO also relied on sections 23(5) and 24(2) of FOIA as a basis to neither confirm nor deny whether the withheld information represented all of the information that it held falling within the scope of the request.
6. The complainant contacted the FCO on 31 March 2015 and asked it to conduct an internal review of this decision.
7. The FCO informed him of the outcome of the internal review on 30 April 2015. The review upheld the application of the various exemptions cited in the refusal notice.

## **Scope of the case**

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8. The complainant contacted the Commissioner on 5 May 2015 to complain about the way his request for information had been handled. He disputed the FCO's reliance on the various exemptions, with the exception of section 21, as a basis to withhold the information that fell within the scope of his request.

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<sup>1</sup> In June 2014 the Government of Israel designated the charity Islamic Relief Worldwide (IRW) as an 'unauthorised association' in the West Bank on the basis of alleged links between IRW and Hamas. IRW strongly denied these allegations.

## Reasons for decision

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

9. The FCO withheld the majority of the requested information on the basis of section 35(1)(a) of FOIA.

10. Section 35(1)(a) of FOIA states that:

*'Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-*

*(a) the formulation or development of government policy'*

11. 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.

12. 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. '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.

13. 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.

14. 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.

15. The FCO explained to the Commissioner that information withheld under this exemption related to the use of the Home Secretary's powers under the Terrorism Act 2000 to proscribe an organisation if she believes it is concerned with terrorism as defined by that Act. The FCO explained that government retains the right to review the policy to proscribe an organisation as necessary.<sup>2</sup>
16. In light of this explanation, and in particular the further submissions provided to him by the FCO, the Commissioner is satisfied that the information withheld under section 35(1)(a) relates to the formulation or development of government policy. In reaching this conclusion, the Commissioner recognises that the powers under which the Home Secretary can proscribe an organisation are already established policy – by virtue of the powers contained in the Terrorism Act. However, the Commissioner's guidance on section 35 recognises the examples of different processes which might involve policymaking, including 'unusually sensitive or high-profile operational decisions'.<sup>3</sup> In the Commissioner's opinion the information withheld under this exemption relates to an example of such policy making. Furthermore, such an issue is clearly one which involves the final decision being made by a Minister, is one which will be intended to have particular outcome and moreover is likely to have broad ranging consequences.

#### Public interest test

17. 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.

#### *Public interest arguments in favour of maintaining the exemption*

18. The FCO argued that the policy making in question remained ongoing at the point the request was submitted. The FCO emphasised that the government's decisions in respect of this policy making attracted significant international interest. It emphasised the need for officials to be able to conduct rigorous and candid risk assessments, including their

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<sup>2</sup> The FCO provided the Commissioner with more detailed submissions to support its reliance on section 35(1)(a), as it did with the other exemptions it cited. However, the Commissioner cannot set out the detail contained in these submissions without revealing the content of the withheld information itself.

<sup>3</sup> <https://ico.org.uk/media/for-organisations/documents/1200/government-policy-foi-section-35-guidance.pdf> see paragraph 40.

pros and cons without there being premature disclosure which might close off better options and inhibit the free and frank discussion of all policy options. The FCO argued that this would have a negative impact on the quality of decision making which was clearly not in the public interest.

### *Public interest arguments in favour of disclosure*

19. The complainant argued that there was compelling public interest in the disclosure of the withheld information for the following reasons: firstly, to uphold public confidence that the British government takes seriously allegations that recipients of public funds are linked to Hamas; secondly, to provide assurance that the British government takes adequate steps to prevent money reaching Hamas; and, thirdly, to ensure that public money is spent correctly monitoring relationships between Islamic Relief and Hamas.

### *Balance of the public interest arguments*

20. In considering the balance of the public interest arguments outlined above, the Commissioner has taken into account the comments made in a key Information Tribunal decision involving the application of the section 35(1)(a). In that case the Tribunal confirmed that there were two key principles that had to be taken into account when considering the balance of the public interest test: firstly the timing of the request and secondly the content of the requested information itself.<sup>4</sup>
21. The Commissioner has initially considered the weight that should be attributed to the public interest arguments in favour of maintaining the exemption. The Commissioner considers that the FCO's line of argument appears to encompass two concepts, firstly that of safe space and secondly that a chilling effect.
22. With regard to 'safe space', the Commissioner accepts that the government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. This will carry significant weight in some cases. The need for a safe space will be strongest when the issue is still live. Once the government has made a decision, a safe space for deliberation will no longer be required and this argument will carry little weight. Nevertheless, the Commissioner does accept that the government may also need a safe space for a short time after a decision is made in order to properly promote, explain and

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<sup>4</sup> *DFES v Information Commissioner and Evening Standard* (EA/2006/0006)

defend its key points. However, this safe space will only last for a short time, and once an initial announcement has been made there is also likely to be increasing public interest in scrutinising and debating the details of the decision. The timing of the request will therefore be an important factor in determining the weight that should be given to safe space arguments.

23. Based upon the submissions provided to him by the FCO the Commissioner accepts that when the complainant submitted his request the government's policy making in relation to this issue was clearly still ongoing. As a consequence of the policy making still being live, the Commissioner believes that the safe space arguments as defined above are relevant in this case. Moreover, the Commissioner believes that such arguments should attract significant and notable weight in the particular circumstances of this case given the sensitive and high profile nature of the policy making in question. In the Commissioner's view disclosure of the withheld information in response to this request would have been likely, indeed very likely, to result in the FCO and indeed other government departments having to deal with external interest in its policy making process in respect of deciding whether to proscribe organisations under the Terrorist Act 2000. In the Commissioner's opinion this would be firmly against the public interest.
24. With regard to attributing weight to the chilling effect arguments, 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.
25. As noted above, the Commissioner accepts that the policy making in relation to this issue remained ongoing at the time of the request. In light of the sensitive and high profile nature of the matters under discussion, and the ongoing nature of the policy making, the Commissioner accepts that the chilling effect arguments in this case should be given notable weight.
26. With regard to the public interest in disclosure, the Commissioner acknowledges that the ban on IRW announced by Israel and the UK government's reaction to that ban is clearly a matter in which there is a

genuine public interest not least because of the funds that the Department for International Development has provided to the IRW. Disclosure of the information withheld under this exemption would add to the public's understanding of how the government's response to Israel's decision to ban IRW was developed and formulated. Disclosure would also add to the public's understanding of how this particular issue relates to the UK's other ongoing concerns and interests – and its approach to these – in the Middle East. More specifically disclosure of the information would go some way to addressing the particular public interest arguments identified by the complainant.

27. Nevertheless, the Commissioner has concluded that the public interest favours maintaining the exemption. In reaching this conclusion the Commissioner is not seeking to dismiss the public interest in disclosing this information. However, in the Commissioner's opinion, because of the significant and cumulative weight that he feels should be attributed to the public interest in relation to both the safe space and chilling effect arguments in the circumstances of this case, he believes that the public interest lies clearly in favour of maintaining the exemption.

## **Section 27 – international relations**

28. In respect of the remaining information it has confirmed that it holds, the FCO sought to withhold that on the basis of sections 27(1)(a), (c) and (d) of FOIA.

29. These sections state that that:

*'Information is exempt information if its disclosure 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.'*

30. In order for a prejudice based exemption, such those cited by the FCO, 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 to discharge.
31. 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>5</sup>

#### *The FCO's position*

32. The FCO explained that the information it had held withheld under these exemptions detailed the UK government's relationship with the Israeli government. It argued that disclosing this information would harm the UK's bilateral relationship with Israel as it would reveal information that was provided to the UK in confidence. Consequently disclosure of this information would, the FCO argued, reduce the UK government's ability to protect and promote UK interests through its relations with Israel.

#### *The Commissioner's position*

33. With regard to the first criterion of the three limb test described above, the Commissioner accepts that potential prejudice to the UK's relations with the Israel and the resulting impact on the UK's interests are clearly matters which the exemptions contained at section 27(1)(a), (c) and (d) are designed to protect.

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<sup>5</sup> [\*Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence \(EA/2006/0040\)\*](#), paragraph 81.



34. With regard to the second criterion, having examined the nature of the information itself the Commissioner is satisfied that disclosure of it clearly has the potential to harm the UK's relations with the Israel. Furthermore, the Commissioner accepts that Israel is one the UK's key partners in the region and thus it is logical to suggest that if the UK's relationship with Israel was harmed that then the UK's ability to protect its interests in the region could be materially affected. The Commissioner is therefore satisfied that there is a causal link between the potential disclosure of the withheld information and the interests which the three exemptions cited by the FCO are designed to protect. Moreover, the Commissioner is satisfied that the resultant prejudice which the FCO believes would occur is one that can be correctly categorised, in light of the Tribunal's comments above, as real and of substance. In other words, subject to meeting the likelihood test at the third criterion, disclosure could result in making relations more difficult and/or demand a particular damage limitation exercise.
35. With regard to the third criterion, the Commissioner is satisfied that based upon the content of the withheld information, and the focused submissions provided to him by the FCO, the likelihood of harm occurring is clearly more than a hypothetical possibility. In the Commissioner's opinion there would be a real and significant risk of prejudice occurring if the withheld information were to be disclosed. In reaching this conclusion the Commissioner would emphasise that it is clear that the information withheld was provided to the UK in confidence by Israel or/and relates to a discussion of such information and associated issues. Moreover, the Commissioner is satisfied that the FCO has sufficiently demonstrated that the higher threshold of 'would prejudice' is met.

#### Public interest test

36. Section 27 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

#### *Public interest in disclosure of the information*

37. The complainant's basis for arguing that there was a public interest in disclosing the withheld information is set about above at paragraph 19.

#### *Public interest in maintaining the exemption*

38. The FCO argued that the effective conduct of international relations depends upon maintaining the trust and confidence between governments. It explained that if the UK does not maintain this trust

and confidence its ability to protect and promote UK interests through international relations will be hampered. In the particular circumstances of this case the FCO emphasised that the UK's strong relationship with Israel allowed it to understand and engage with the wider issues affecting the Middle East region as well as allowing the UK to discuss a range of bilateral matters with Israel.

### *Balance of the public interest*

39. The Commissioner accepts that there is a very significant and inherent public interest in ensuring that the UK enjoys strong and effective relations with other states. In the context of this request the Commissioner acknowledges that the UK's relationship with Israel is an important part of the UK's engagement in the Middle East and this relationship allows the UK to protect and promote a range of different interests both in the region itself and more widely. The Commissioner agrees that it would be firmly against the public interest if the UK's ability to protect and promote such interests was harmed. In the particular circumstances of this case, the fact that disclosure of the information would prejudice the UK's relations with Israel (rather than simply being likely to) adds, in the Commissioner's view, further weight to the public interest in maintaining the exemption.
40. Consequently, whilst the Commissioner acknowledges, for the reasons discussed above, that the public interest in disclosing the withheld information cannot be ignored, he does not believe that the weight that should be attributed to such arguments outweighs the clear public interest in maintaining the exemption.
41. In light of his findings in relation to sections 35 and 27 the Commissioner has not gone on to consider the other exemptions the FCO has cited to withhold the information it acknowledges holding.

### **Section 23 – security bodies**

### **Section 24 – national security**

42. The FCO also explained that it was relying on sections 23(5) and 24(2) of FOIA as a basis to refuse to confirm or deny whether it held any further information falling within the scope of the request other than which it had withheld on the basis of the other exemptions cited in the refusal notice.
43. Sections 23(5) and 24(2) exclude the duty of a public authority to confirm or deny whether it holds information which, if held, would be exempt under section 23(1) or 24(1) respectively.
44. Information relating to security bodies specified in section 23(3) is exempt information by virtue of section 23(1). Information which does

not fall under section 23(1) is exempt from disclosure under section 24(1), if it is required for the purpose of safeguarding national security.

45. By virtue of section 23(5) the duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in section 23(3).
46. By virtue of section 24(2) the duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security.
47. The Commissioner does not consider the exemptions at sections 23(5) and 24(2) to be mutually exclusive and he accepts that they can be relied on independently or jointly in order to conceal whether or not one or more of the security bodies has been involved in an issue which might impact on national security. However, each exemption must be applied independently on its own merits. In addition, the section 24 exemption is qualified and is therefore subject to the public interest test.
48. The test as to whether a disclosure would relate to a security body is decided on the normal standard of proof, that is, the balance of probabilities. In other words, if it is more likely than not that the disclosure would relate to a security body then the exemption would be engaged.
49. From the above it can be seen that section 23(5) has a very wide application. If the information requested is within what could be described as the ambit of security bodies' operations, section 23(5) is likely to apply. This is consistent with the scheme of FOIA because the security bodies themselves are not subject to its provisions. Factors indicating whether a request is of this nature will include the functions of the public authority receiving the request, the subject area to which the request relates and the actual wording of the request.
50. The Commissioner finds that on the balance of probabilities, further information about this subject matter, ie allegations that IRW had provided funding to Hamas, if held, could be related to one or more bodies identified in section 23(3).
51. With regard to section 24(2), the Commissioner again considers that this exemption should be interpreted so that it is only necessary for a public authority to show either a confirmation or a denial of whether requested information is held would be likely to harm national security.
52. The Commissioner interprets the phrase '*required*' in the context of this exemption as '*reasonably necessary*'. In effect this means that there has

to be a risk of harm to national security for the exemption to be relied upon, but there is no need for a public authority to prove that there is a specific, direct or imminent threat.

53. In relation to the application of section 24(2) the Commissioner notes that the First Tier Tribunal (Information Rights) has indicated that only a consistent use of a '*neither confirm nor deny*' (NCND) response on matters of national security can secure its proper purpose. Therefore, in considering whether the exemption is engaged, and the balance of the public interest, regard has to be given to the need to adopt a consistent NCND position and not simply to the consequences of confirming whether the specific requested information in this case is held or not.
54. In the context of section 24, Commissioner accepts that withholding information in order to ensure the protection of national security can extend to ensuring that matters which are of interest to the security bodies are not revealed. Moreover, it is not simply the consequences of revealing whether such information is held in respect of a particular request that is relevant to the assessment as to whether the application of the exemption is required for the purposes of safeguarding national security, but the need to maintain a consistent approach to the application of section 24(2).
55. On this occasion the Commissioner is satisfied that complying with the requirements of section 1(1)(a) would be likely to reveal whether or not the security bodies were in any way involved in the subject matter which is the focus of this requests. The need for a public authority to adopt a position on a consistent basis is of vital importance in considering the application of an NCND exemption.
56. The Commissioner is satisfied that the public authority was entitled to rely on sections 23(5) and 24(2) in the circumstances of this case. He accepts that revealing whether or not further information is held about the allegations of IRW funding Hamas would be likely to reveal whether information is held relating to the role of the security bodies. It would also undermine national security and for that reason section 24(2) also applies because neither confirming nor denying if additional information is held is required for the purpose of safeguarding national security.

#### Public interest test

57. Section 23(5) is an absolute exemption and no public interest is required once it is found to be engaged. However, this is not the case for section 24(2).
58. As discussed above, the Commissioner accepts there is clear and considerable public interest in disclosure of information which would

uphold public confidence that the government takes seriously allegations that recipients of public funds are linked to Hamas. To this end the Commissioner therefore accepts that there is a strong public interest in the public authority confirming or denying whether it holds information within the scope of the request which would engage sections 23(1) or 24(1).

59. However, in all the circumstances of this case, the Commissioner considers that the significant public interest in protecting information required for the purposes of safeguarding national security outweighs the public interest in confirmation or denial.
60. The Commissioner therefore finds that on balance, the public interest in maintaining the exemption at section 24(2) outweighs the public interest in complying with the duty imposed by section 1(1)(a).

## Right of appeal

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61. 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 123 4504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

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

62. 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.
63. 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 .....**

**Alexander Ganotis**  
**Group Manager**  
**Information Commissioner's Office**  
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