

Freedom of Information Act 2000 (FOIA)

Decision Notice

Date: 31 March 2016

Public Authority: Scotland Office
Address: Dover House
Whitehall
London
SW1A 2AU

Decision (including any steps ordered)

1. The complainant has requested information relating to a memorandum that was leaked to the media. The Scotland Office refused the request in reliance on the exemptions at sections 27(1)(a), 27(2), 38(1)(a) and 40(2) of the FOIA. The Commissioner's decision is that the Scotland Office was entitled to rely on the exemptions at sections 27(1)(a) and 40(2) of the FOIA in respect of the withheld information. However the Commissioner also finds that some of the information is not exempt and ought to be disclosed to the complainant.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose to the complainant the information relevant to the complainant's request as indicated in the Scotland Office letter to the Commissioner dated 25 February 2016.
3. The public authority must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the FOIA and may be dealt with as a contempt of court.

Request and response

4. On 8 April 2015 the complainant made the following request to the Scotland Office:

"The Daily Telegraph newspaper published a story on 3rd April 2015 stating that a "senior British civil servant" composed a memorandum on 6th March 2015 regarding a conversation between him and Pierre-Alain Coffinier, the Consul General of France in Edinburgh. The Daily Telegraph states that this memorandum contains details provided by M. Coffinier about a conversation which took place between Nicola Sturgeon MSP, the First Minister of Scotland, and Sylvie Bermann, the French Ambassador to the United Kingdom.

I request

- a) A copy of [the] memorandum*
- b) A copy of any documents relating to the memorandum*
- c) A copy of any documents relating to the meeting between Nicola Sturgeon and Sylvie Bermann.*

By documents, I use the word in the broadest possible sense to mean any recorded information pertaining to this subject, eg emails, minutes, diary entries, papers, etc."

5. On 8 May 2015 the Scotland Office advised the complainant that it required additional time to consider the public interest before it could issue a substantive response. It cited the exemptions at sections 28, 31, 38, 40(2) and 41 of the FOIA, and said that it aimed to provide a full response by 6 June 2015.
6. On 15 June 2015 the Scotland Office issued its substantive response to the complainant. It confirmed that it held information relevant to parts a) and b) of the request, but said that it did not hold any information relevant to part c).
7. In respect of the information held relating to parts a) and b) the Scotland Office revised its position. The Scotland Office now considered that the exemptions at sections 21, 27(1)(a), 27(2) and 40(2) applied to these parts of the request. The Scotland Office no longer sought to rely on sections 28, 31, 38 and 41.
8. The complainant requested an internal review on 17 June 2015, and the Scotland Office communicated the outcome of that review on 28 July 2015. The Scotland Office upheld its reliance on the

exemptions at sections 21, 27(1)(a), 27(2) and 40(2), and re-asserted reliance on section 38(1)(a).

Scope of the case

9. On 9 August 2015 the complainant contacted the Commissioner. The complainant expressed the view that the withheld information ought to have been disclosed and asked the Commissioner to investigate.
10. The complainant did not raise any issue with the Scotland Office's application of the exemption at section 21 of the FOIA. Therefore the Commissioner's investigation focused on the Scotland Office's reliance on the exemptions at sections 27(1)(a), 27(2), 38(1)(a) and 40(2) of the FOIA.
11. The Commissioner wrote to the Scotland Office on 17 September 2015. The Commissioner requested a copy of the requested information, along with further details of the Scotland Office's reliance on the exemptions cited.
12. Following further exchanges with the Scotland Office the Commissioner issued an information notice on 12 November 2015. The Scotland Office responded to the Commissioner on 11 December 2015.
13. The Commissioner wrote to the Scotland Office again on 1 February 2016 to request further explanation of its position. The Scotland Office responded to the Commissioner in a letter dated 25 February 2016. In this correspondence the Scotland Office identified some of the requested information that it considered might be disclosed to the complainant.
14. The Scotland Office advised the Commissioner on 4 March 2016 that it was awaiting "final clearance" for the information to be disclosed. However the Scotland Office did not issue any further response to the complainant, or to the Commissioner. Consequently the Commissioner has made his decision on the basis of the information available to him, and having inspected all of the withheld information.

Withheld information

15. The Commissioner notes that the Scotland Office confirmed to the complainant in its correspondence of 15 June 2015 that it held

information relevant to parts a) and b) of the request. However the Scotland Office did not specify what information it held.

16. The Scotland Office maintained that government policy was not to comment on documents alleged to have been leaked. The Commissioner notes however that the Cabinet Office has, exceptionally, published a statement following its investigation of the incident. The Cabinet Office stated that the purpose of the inquiry was

"...to establish how this memo came to be written and how it got into the public domain".¹

17. In light of the above the Commissioner wishes to stress that, although he has inspected the withheld information in this case, he has not commented in detail on its content within this decision notice. To do so would defeat the purpose of the Scotland Office's application of the exemptions cited.

Reasons for decision

Section 27(1)(a): prejudice to international relations

18. The Scotland Office claimed reliance on the exemption at section 27(1)(a) and section 27(2) in respect of all of the withheld information relevant to part a) of the request, and some of the withheld information relevant to part b) of the request.
19. The exemption at section 27(1)(a) applies if disclosure of the information in question would, or would be likely to, prejudice relations between the United Kingdom and any other State. In order for a prejudice based exemption 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;

¹ <https://www.gov.uk/government/news/scotland-office-memorandum-leak-cabinet-office-inquiry-statement>

- 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, ie ‘would be likely’, 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.
20. The Commissioner has been guided by the comments of the Information Tribunal which suggested that, in the context of section 27(1), prejudice may 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”.²*
21. The Scotland Office argued that disclosure of the withheld information in this case would be likely to prejudice the UK’s relations with France. The Commissioner is satisfied that this argument relates to the interests which the exemption at section 27(1)(a) is designed to protect (ie international relations).
22. With regard to the second limb of the test set out above, the Commissioner accepts that a conversation between the First Minister of Scotland and the French Ambassador would have been reasonably expected to be held in confidence by both parties, and although it would be appropriate for a record to be made of this conversation, any such record would similarly be considered to be confidential. The Scotland Office pointed out that foreign affairs and international relations were matters reserved to the UK Parliament rather than transferred to the Scottish Government. The primary relationship with the diplomatic community in the UK was with the UK government, although in Scotland this usually operated

² Campaign Against the Arms Trade v Information Commissioner and Ministry of Defence (EA/2006/0040) para 81

through the Scotland Office. The Scotland Office maintained that it was "normal and expected practice" that this relationship would require business to be conducted on a confidential basis.

23. In light of the above the Scotland Office was of the view that disclosure of the withheld information in this case would be likely to result in French government officials being less frank with UK government officials. This would hamper the UK government's ability to manage wider UK-France relations and interests.
24. The Commissioner accepts that disclosure of the withheld information would indeed have the potential to prejudice to the UK's relations with France. When making this assessment the Commissioner has considered whether the prejudice identified can be said to have a real, detrimental effect. He has also considered how the prejudicial effect could be linked back to the disclosure of the information in question. The Scotland Office provided the Commissioner with detailed arguments that disclosure of the withheld information would be likely to harm UK-France relations. The Commissioner is satisfied that this constitutes prejudice in terms of a detrimental effect. As indicated above the Commissioner cannot discuss the Scotland Office's arguments in detail without disclosing the nature and content of the withheld information. However the Commissioner can confirm that he has carefully considered all of the information put forward by the Scotland Office, in addition to inspecting the withheld information.
25. In light of the above the Commissioner is satisfied that the exemption at section 27(1)(a) is engaged. Since the exemption is qualified the Commissioner must next consider where the public interest lies. Section 2(2) provides that exempt information must still be disclosed unless, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosing the information.

Public interest in disclosure of the withheld information

26. The Scotland Office acknowledged that the disclosure of information, and openness generally in government, may increase public trust in and engagement with government. The Scotland Office also acknowledged the public interest in informing the public as to the role of public servants in events. Finally, the Scotland Office identified the public interest in demonstrating that the UK government deals correctly with the French government.
27. The Commissioner recognises that the Cabinet Office statement put a limited amount of information into the public domain, albeit after

the complainant had made his request for information. The Cabinet Office statement will have encouraged the public to be curious about the conversation and the leak to the Daily Telegraph, especially in the context of extensive media coverage of the leaked information. However the Commissioner does not attach significant weight to the argument that information should be disclosed since it has been the subject of a leak.

Public interest in maintaining the exemption

28. The Scotland Office emphasised the importance of avoiding prejudice to UK-France relations. The Scotland Office drew attention to the value of the bilateral relationship between the UK and France, particularly given the range of mutually relevant and important issues. Prejudice to this relationship would have a significant impact on the UK's abilities to manage (ie protect and promote) UK interests in a multilateral context.

Balance of the public interest

29. In accepting that the exemption is engaged in this case the Commissioner has accepted that the disclosure of the withheld information would be likely to harm the UK's relations with France. The acceptance of prejudice carries over into the public interest considerations but this in itself does not mean that the public interest will necessarily favour maintenance of the exemption.
30. The Commissioner has commented above on the impact of the Cabinet Office statement with regard to the public interest. In any event the Commissioner notes that the complainant's request was submitted approximately six weeks before the Cabinet Office statement was published. The Commissioner acknowledges that the outcome of the investigation was not in the public domain at the time the request was received. This in itself does not materially affect the balance of the public interest, especially since the Commissioner attaches substantial weight to the public interest in protecting UK-France relations.
31. The Commissioner recognises that disclosure of the withheld information may assist the public's understanding of a discussion which has been the subject of sustained media interest and public comment. However, the Commissioner must be mindful of the particular importance attached to the relationship between the UK and France. Having inspected the information in question the Commissioner is not satisfied that its disclosure would be likely to provide sufficient benefit to the public to override the harm that would be likely to be caused to UK-France relations. Therefore the

Commissioner finds that the public interest in maintaining the information withheld under section 27(1)(a) outweighs the public interest in disclosure of the information in question.

32. For the reasons set out above the Commissioner concludes that the Scotland Office was entitled to rely on the exemption at section 27(1)(a) in respect of information withheld under that provision. The Commissioner has not gone on to consider the Scotland Office's reliance on section 27(2) because the Scotland Office applied section 27(1)(a) and section 27(2) to the same information.

Section 40(2): personal information of third parties

33. Section 40(2) of the FOIA states that a public authority is not obliged to disclose information if to do so would:

- constitute a disclosure of personal data, and
- this disclosure would breach any of the data protection principles or section 10 of the Data Protection Act 1998 (the DPA).

Would disclosure of the requested information constitute a disclosure of personal data?

34. The Scotland Office relied on section 40(2) in respect of information relating to various individuals, such as names, job titles and contact details. The individuals concerned include junior and senior officials, and one or more special advisers. The Commissioner is satisfied that the information in question is personal data, as these individuals can easily be identified by their names, job titles and contact details.

Would disclosure of the requested information breach any of the data protection principles?

35. The Scotland Office argued that disclosure of the requested information would breach the first data protection principle because it would be unfair to the individuals concerned. In considering whether disclosure would be fair or unfair the Commissioner has taken the following factors into account:

- the individuals' reasonable expectations of what would happen to their information;
- whether disclosure would cause any unnecessary or unjustified damage or distress to the individuals concerned (ie the consequences of disclosure); and

- whether the legitimate interests of the public are sufficient to justify any negative impact to the rights and freedoms of the individuals as data subjects.
36. The Commissioner has first considered individuals' expectations. The Scotland Office argued that none of the junior officials would reasonably expect their personal information to be disclosed. The Scotland Office was of the strong view that officials who held positions below senior management levels and which were not public facing would have a legitimate expectation that their personal information would not be disclosed into the public domain. The Scotland Office confirmed that its practice at that time was to withhold this type of information.
37. The Scotland Office maintained that the disclosure of the withheld information in this case would expose junior staff to unwarranted comment and personal criticism. The Commissioner notes that the Cabinet Office inquiry reached a clear conclusion that there was no evidence of any wrongdoing by the officials in question. However, at the time of the request the Cabinet Office inquiry was ongoing and its findings had not been published. As indicated above the Commissioner recognises that there was substantial media and political interest in the leak incident, including sustained speculation as to who may have been involved or who had knowledge of what had happened.
38. The Commissioner has published guidance on handling requests for personal information relating to public authority staff.³ The guidance sets out the Commissioner's view that
- "Information about an employee's actions or decisions in carrying out their job is still personal data about that employee, but given the need for accountability and transparency about public authorities, there must be some expectation of disclosure."*
39. The Commissioner accepts that junior staff will be more likely to have a reasonable expectation that their personal information will not be disclosed into the public domain. The Commissioner further recognises that disclosure of the withheld information in this case

³ https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

would not significantly assist the public's understanding with regard to the memo or the leak.

40. The Scotland Office argued that senior staff would also have a reasonable expectation that their personal information would not be disclosed in this case. The Scotland Office was concerned that the risks to personal reputations as a result of disclosure of the information was "considerable". As indicated above the Commissioner is mindful that the Cabinet Office had not completed its investigation at the time of the request.
41. The Commissioner accepts that junior staff may have a reasonable expectation that their information would not be disclosed into the public domain. The Commissioner further acknowledges the importance of protecting staff who may be responsible for communicating information rather than making decisions based on it. However the Commissioner expects that more senior staff will understand that their seniority brings with it a greater likelihood that information relating to their work will be disclosable.
42. The Commissioner also recognises that some of the individuals concerned are special advisers. Special advisers are technically temporary civil servants, and their salaries are broadly comparable to those of senior civil servants. However they are not independent but are political appointees. The Commissioner expects that special advisers should understand that the political nature of their work, and the level of remuneration they enjoy, will increase the probability of disclosure of relevant information.
43. There is a legitimate public interest in accountability and transparency, and the public is entitled to be informed about the actions and decisions of senior staff, including special advisers. Nevertheless, the Commissioner recognises that the legitimate interests of the public must be weighed against any unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects in considering how the factors balance.
44. Again the Commissioner considers that a distinction can be made between junior and senior staff. There is a greater risk that junior staff will experience distress, particularly in the context of the circumstances of this case. The Commissioner is less persuaded that senior staff, including special advisers, would be at risk of such distress. However the Commissioner is mindful that his decision

must be based on the circumstances at the time the request was refused, rather than the time the complaint was made to him. This follows the Supreme Court's reasoning in *R (Evans) v Attorney General*.⁴ As indicated above the request was made while the investigation was ongoing. Therefore the Commissioner accepts that even the more senior staff would be more likely to have justified concerns about the impact of disclosure on their reputations. The fact that the Cabinet Office subsequently clarified that none of the officials was to blame in any capacity does not mitigate this since it happened well after the statutory time for responding to the request.

45. Consequently the Commissioner is satisfied that it would have been unfair on all the individuals concerned to disclose their information at the time of the request. The Commissioner finds that disclosure of most of the information withheld under section 40(2) would contravene the first data protection principle. This includes all of the information withheld under section 38(1)(a) of the FOIA, therefore the Commissioner has not made a separate finding with regard to section 38(1)(a).
46. The exception to this finding is the information identified by the Scotland Office in its correspondence to the Commissioner dated 25 February 2016. This information is personal data in that it comprises emails sent and received by identifiable individuals. However some of the information contained within those emails comprises administrative information about the inquiry and general instructions given to staff. It also includes references to "public and press enquiries". Having inspected this information the Commissioner has reached the view that disclosure would not be unfair to the individuals involved. It would help inform the public as to how the Scotland Office communicated with its staff following the announcement of the Cabinet Office inquiry. The Commissioner has not identified any adverse consequences or risks to the individuals in the event of disclosure. Therefore the Commissioner finds that section 40(2) is not engaged in respect of this information, and requires that it be disclosed to the complainant.

⁴ [2015] UKSC 21 at [72]-[73]

Procedural requirements

Section 1: general right of access

Section 10(1): time for compliance

47. Section 1(1)(a) of the FOIA requires a public authority to inform the complainant whether or not the requested information is held (unless an exemption from this duty applies). Section 1(1)(b) requires that if the requested information is held by the public authority it must be disclosed to the complainant unless a valid refusal notice has been issued.
48. Section 10(1) requires that the public authority comply with section 1 promptly and in any event no later than 20 working days after the date of receipt of the request.
49. In this case the request was received on 8 April 2015, and the twentieth working day after the date of receipt was 7 May 2015. However the Scotland Office did not confirm that it held some, but not all, of the requested information until 15 June 2015, which clearly falls outside the 20 working days. The Commissioner therefore finds that the Scotland Office failed to comply with section 1(1)(a) and section 10(1) in this regard.

Section 17: refusal notice

50. As set out above a public authority is generally required to respond to a request for information no later than 20 working days after the date the request is received. Section 17(3) states that the authority may take longer than 20 working days to provide a substantive response if it is relying on a qualified exemption and needs to consider the public interest. However the authority must still reach a decision about whether or not any exemption is actually engaged, and it must communicate this to the applicant, within the statutory time for compliance, ie 20 working days.
51. Consequently, if the authority determines that an exemption is engaged it must issue a refusal notice that complies with section 17(1) within the time for compliance. In order to comply with section 17(1) the refusal notice must:
 - state that an exemption applies,
 - specify the exemption in question, and
 - state (if that would not otherwise be apparent) why the exemption applies.

52. Section 17(2) requires that this notice also explain that no decision as to the public interest test has yet been reached. The authority must provide an estimate of the date by which it expects to have reached a decision.
53. In this case the Scotland Office wrote to the complainant on 8 May 2015, one day outside the statutory time for compliance. The Scotland Office stated that five exemptions applied to the request, and advised that it required additional time to consider the public interest. In order to comply with section 17(1) the Scotland Office ought to have explained how all of the exemptions cited were engaged. In any event two of the exemptions cited were absolute and did not require a public interest test. The Commissioner is obliged to find that the Scotland Office failed to comply with section 17(1) generally, since its correspondence of 8 May 2015 was (just) issued outside the statutory time for compliance. However the Commissioner also finds that the Scotland Office breached the specific requirements of section 17(1)(c) in that its correspondence of 8 May 2015 failed to explain how any of the exemptions cited were engaged.
54. The Commissioner also notes that the Scotland Office changed its position twice with regard to the exemptions claimed. In its substantive response of 15 June 2015 the Scotland Office maintained reliance on one of the five exemptions originally claimed, but stated that it no longer sought to rely on the other four. In addition the Scotland Office now sought to rely on three different exemptions not mentioned in its correspondence of 8 May 2015. Following the internal review the Scotland Office maintained reliance on the four exemptions cited on 15 June 2015 and re-introduced reliance on one of the exemptions originally cited. This also constitutes a technical breach of section 17(1).
55. The Commissioner understands that the particular circumstances and context of this request required careful consideration. The Commissioner also recognises the value of the internal review, since it provides an opportunity for the public authority to review its handling of a request and remedy any procedural errors. However the Commissioner understands that the lack of clarity in the Scotland Office's correspondence will have been confusing for the complainant. The Commissioner would remind public authorities that communications with requesters should be as clear as possible, and should properly explain how the request has been handled in terms of delay or changes to the authority's position.

Right of appeal

56. 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

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

57. 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.
58. 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

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