

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 June 2017

Public Authority: Ministry of Justice
Address: 102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant requested an electronic copy of the Memorandum of Understanding ('MoU') between the Ministry of Justice (the 'MOJ') and the Saudi MOJ. The MOJ confirmed that it held the requested information but refused to provide it citing sections 27(1) and 27(2), (international relations), of the FOIA.
2. The Commissioner's decision is that the requested information is exempt on the basis of section 27(1)(a) of FOIA, and that in all the circumstances of the case, the public interest favours maintaining the exemption. As she has found section 27(1) to be engaged, the Commissioner did not proceed to consider the MOJ's application of section 27(2) to the same information.
3. However, by failing to issue its refusal notice within 20 working days, the MOJ has breached section 17 of the FOIA. The Commissioner does not require the MOJ to take any steps as a result of this notice.

Background

4. Although the Commissioner must, and indeed does, consider each complaint on its individual merits and associated circumstances, she has noted her earlier decision in *FS50579089*¹. In that case, the request was almost identically worded; the Commissioner found that the MOJ was entitled to rely on section 27(1).
5. In addition, the Commissioner has considered her earlier decision in *FS50628791*² where a similarly worded request for the MoU was submitted to the MOJ. In that case, the Commissioner also found that the MOJ was entitled to rely on section 27(1).

Request and response

6. On 11 October 2016 the complainant wrote to the MOJ and requested information in the following terms:

"Disclose an electronic copy of the MoU between the MoJ and the Saudi Ministry of Justice on justice cooperation signed on 11 September 2014, including any appendix and all schedules, annexes and enclosures, redacted of exempt information."

7. The MOJ responded on 23 November 2016. It refused to provide the requested information citing sections 27(1) and 27(2) (international relations) of the FOIA.
8. The complainant requested an internal review on 28 November 2016 and asked the MOJ to disclose a redacted copy of the MoU. He cited the following public interest factor in favour of disclosure: *"The Kingdom of Saudi Arabia is one of the worst human rights offenders in the world. It is an absolute monarchy government by a strict interpretation of Sharia law where ultra puritanical judges regularly preside over beheadings for nebulous crimes such as apostasy, witchcraft and sorcery, while granting lenience to wife beaters and rapists. There is a clear public interest in knowing the details and extent of 'justice cooperation'*

¹ https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1432375/fs_50579089.pdf

² https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1624717/fs_50628791.pdf

between the Ministry of Justice and the Kingdom of Saudi Arabia, and this overrides any possible or likely harm to international relations."

9. The MOJ provided the outcome of its internal review on 13 December 2016. Having re-examined the exemptions and the related public interest tests, the MOJ upheld its original position.

Scope of the case

10. The complainant contacted the Commissioner on 23 December 2016 to complain about the way his request for information had been handled.
11. The following analysis covers the MOJ's application of section 27 to the withheld information.

Reasons for decision

Section 27 international relations

12. Section 27(1) provides 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,

(b) relations between the United Kingdom and any international organisation or international court,

(c) the interests of the United Kingdom abroad, or

(d) the promotion or protection by the United Kingdom of its interests abroad."

13. Section 27(2) provides that –

"Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court."

14. In other words, section 27(1) focuses on the effects of the disclosure of the information, while section 27(2) relates to the circumstances under which it was obtained and the conditions placed on it by its supplier, and does not relate primarily to the subject of the information or the harm that may result from its disclosure. In the Commissioner's view, such information is confidential for as long as the state, organisation or court expects it to be so held.

15. In correspondence with the complainant, the MOJ said:

"A UK Government Department is not obliged to provide information requested if its release would prejudice international relations. Specifically, the document which you have requested is one that is confidential between the UK Government and the Government of the Kingdom of Saudi Arabia. This type of document is covered by the provisions of Section 27(2) of the Act, which deal with confidential information obtained from another State. In addition, as the disclosure of confidential material obtained from another State would be likely to prejudice future relations between the UK Government and the Government of the Kingdom of Saudi Arabia, Section 27(1) of the Act is also engaged".

16. During the course of the Commissioner's investigation the MOJ confirmed that it is relying on both subsections (1) and (2) of Section 27 to withhold the requested information. It advised that it wished to rely on the arguments it had previously submitted to the Commissioner in response to her investigation of FS50579089. The Commissioner has first considered its application of section 27(1).

Section 27(1) – is the exemption engaged?

17. In order for a prejudice based exemption, such as that set out in section 27(1), 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;
- 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; there must be a real and significant risk. With regard to the higher threshold, this places a stronger evidential burden on the public authority.

18. With the above in mind, the Commissioner has considered the withheld information and the MOJ's submissions in support of its reliance on section 27(1).

19. In correspondence with the complainant, the MOJ told him:

"The Memorandum of Understanding was agreed to be confidential between the two Governments and as the UK Government engaged in the preparation and signing of this document on a confidential basis, it is reasonable for the Government of the Kingdom of Saudi Arabia to expect that the UK Government would not share its contents with a third party. If the UK did share this information it would harm future relations with the Kingdom of Saudi Arabia, and would discourage them from entering into agreements or sharing information with the Department in future. In my view this risk extends across all areas of Government not just the Ministry of Justice".

20. The MOJ provided the Commissioner with further arguments identifying the particular harm it considers may arise from disclosure of the withheld information in this case. These were provided to her 'in confidence' and the Commissioner is therefore unable to reproduce them in this notice.
21. From the evidence she has seen, the Commissioner is satisfied that there is a causal link between the potential disclosure of the withheld information and the interests which section 27(1)(a) is designed to protect.
22. With respect to the likelihood of prejudice occurring, the MOJ told the complainant that it considered that disclosure in this case '*would be likely*' to prejudice future relations between the UK Government and the Government of the Kingdom of Saudi Arabia. In other words, it considered that the lower level of prejudice applied.
23. Having duly considered the arguments put forward by the MOJ, and having viewed the withheld information, the Commissioner is satisfied that it is likely there would be a real and significant risk of prejudice if the withheld information were to be disclosed. Acknowledging that prejudice to the relationship between the UK and the Kingdom of Saudi Arabia - in the way predicted by MOJ - would be likely to occur, the Commissioner accepts that, in the circumstances of this case, the lower threshold of likelihood is met.
24. She therefore finds the exemption engaged in relation to the information withheld by virtue of section 27(1)(a) and has carried the lower level of likelihood through to the public interest test.

The public interest test

25. Section 27(1) is a qualified exemption and is subject to a public interest test. This means that, even where its provisions are engaged, it is necessary to decide whether it serves the public interest better to

disclose the requested information or to withhold it because of the interests served by maintaining the relevant exemption. If the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information in question must be disclosed.

26. When dealing with a complaint that information has been wrongly withheld, the Commissioner will consider the situation at the time of the request or within the statutory time for compliance. The MOJ confirmed that it considered the public interest at the time of the request and reconsidered it at the internal review stage. It advised that it had again reconsidered the public interest during this investigation but concluded that, despite the passage of time, that there were no changes in circumstances which would lead it to alter its previous decisions.

Public interest arguments in favour of disclosing the requested information

27. In favour of disclosure in this case, the complainant highlighted his concerns about Saudi Arabia's approach to 'human rights' as set out in paragraph 8 of this notice.
28. In correspondence with the Commissioner, the MOJ acknowledged the complainant's argument in respect of the protection of human rights and the proper administration of justice.
29. Recognising the public interest in disclosure in this case, the MOJ told the complainant:

"Disclosure would support the wider Government commitment to transparency and may encourage greater understanding of the general public about the Ministry's policies, activities and agreements with foreign nations. It would also promote accountability of the decisions taken by Government."

30. The MOJ also recognised that that the UK's agreement with the Kingdom of Saudi Arabia has been subject to debate, with questions in the media about the agreement and a level of public interest. It accepts that disclosure of the requested information could assist in a wider public understanding of the way in which governments operate internationally, and would contribute to the accountability of Ministers and public officials.

Public interest arguments in favour of maintaining the exemption

31. In favour of maintaining the exemption, MOJ explained to the complainant that it considers it important for non-UK governments or bodies to know that they can discuss and agree issues with the UK Government in an atmosphere of confidentiality. In support of its withholding of the memorandum, it told the complainant:

"The impact of disclosure has wider implications. This is not just a decision that would affect the Ministry of Justice and its relationship with the Kingdom of Saudi Arabia, the potential release of this information could affect a number of other Government [sic] departments and their relationships with other Governments or bodies, it therefore goes wider than the document in question... To release information provided in confidence would make it less likely for other Governments to share confidential information with the UK Government in the future. If the UK does not maintain this trust and confidence, its ability to protect and promote UK interests through international relations will be hampered, which will not be in the public interest".

Balance of the public interest arguments

32. When balancing the opposing public interests in a case, the Commissioner is deciding whether it serves the public interest better to disclose the requested information or to withhold it because of the interests served by maintaining the relevant exemption. If the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information in question must be disclosed.
33. Although the FOIA does not list the factors that would favour disclosure, the Commissioner has suggested that among the factors that would weigh in favour of disclosure are:
 - furthering the understanding and participation in the public debate of issues of the day;
 - promoting accountability and transparency of public authorities for decisions taken by them; and
 - promoting accountability and transparency in the spending of public money.
34. She has also taken into account the presumption running through the FOIA that openness is, in itself, to be regarded as something which is in the public interest.
35. In the Commissioner's view, there are a number of powerful public interest arguments in favour of disclosure in this case. In that respect she accepts that there is a public interest in the transparency of the MOJ with respect to the way in which it works with other states, such as the Kingdom of Saudi Arabia.
36. The Commissioner also recognises the strength of the public interest in matters concerning human rights in general and aspects of Saudi Arabia's justice system in particular.

37. The Commissioner also notes that as part of its internal review the MOJ provided the complainant with a digest of the scope of the MoU in that it advised:

"The Government has been open about its aim to enhance the relationship between the legal service industries of the United Kingdom and the Kingdom of Saudi Arabia. The Memorandum of Understanding seeks to support the efforts being made by the Saudi Justice Minister in respect of judicial modernisation; and is a mechanism for dialogue and expertise-exchange on justice, legal and human rights matters."

38. The MOJ considers that the above was a helpful indication to the complainant of the content and met the public interest in this case, without causing damage to the international relationship that it has with the Kingdom of Saudi Arabia.
39. In this case, the public interest against disclosure is that in avoiding prejudice to international relations, specifically UK/Kingdom of Saudi Arabia relations. However, the relevant considerations in reaching a judgement on the balance of the public interest also extend beyond the actual content of the withheld information itself as the detriment relates to UK international relations in general.
40. The Commissioner places considerable weight to the argument that it is in the public interest that the UK maintains good international relations with both Saudi Arabia and other nations. She considers that it would not be in the public interest if there were to be any negative impact on the effective conduct of international relations as a result of the release of the information at issue in this case.
41. From the evidence she has seen, the Commissioner is satisfied that disclosure of the withheld information represents a real and significant risk to the UK's relations with the Kingdom of Saudi Arabia - it is of particular note that the MoU remains a 'live' document. In her view, it is clear that disclosure in this case would not only damage the UK's relationship with Saudi Arabia on this issue, but has the potential to harm the relationship between the two Governments across a range of issues. Additionally, release of the MoU could impact on other non-UK Governments' relationships with the UK.
42. The Commissioner is satisfied that such a broad prejudicial outcome weighs firmly against the public interest in disclosure and she has therefore concluded that the public interest in maintaining the exemption clearly outweighs the public interest in disclosing the information.
43. In light of that conclusion, the Commissioner has not gone on to consider the MOJ's application of section 27(2) to the same information.

She accepts, however, that the issue of any breach of confidentiality in this case is very closely related to the damage which would be caused to relations between the UK and the Kingdom of Saudi Arabia.

Procedural issues – section 17(1) breach – late refusal notice

44. Section 1(1) of the FOIA states:

(1) Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

45. Section 10 of the FOIA states:

(1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.

...

(3) If, and to the extent that –

(a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or

(b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.

46. Section 17(1) of the FOIA states:

(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which –

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.

47. If, as in this case, the MOJ decides that information should be withheld it has an obligation to provide a requester with a refusal notice within 20 working days of receipt of the request. The MOJ failed to issue its refusal notice within the statutory timeframe, thereby breaching section 17(1) of the FOIA.

Other matters

48. As part of his complaint to the Commissioner, the complainant said he would like to make "*additional representations*" once his complaint was allocated for investigation. The Commissioner requested these submissions on two occasions; to date she has not received anything from him.
49. As well as finding above that the MOJ is in breach of the FOIA, the Commissioner has also made a record of the delay in this case. This may form evidence in future enforcement action against the MOJ should evidence from other cases suggest that there are systemic issues within the MOJ that are causing delays.

Right of appeal

50. 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 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

51. 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.
52. 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

Carolyn Howes
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