

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 07 November 2017

Public Authority: The National Archives
Address: Kew
Richmond
Surrey
TW9 4DU

Decision (including any steps ordered)

1. The complainant has requested access to the closed document FCO 9/1053. The National Archives (TNA) cited the exemption provided by section 27 – international relations to refuse the withheld information.
2. The Commissioner's decision is that TNA is entitled to rely on the exemption provided by section 27(1) to withhold the information.

Request and response

3. On 2 April 2017 the complainant requested the following information:
'I would like to request access to closed document FCO 9/1053...Gibraltar Dispute – British retaliation'
4. On 25 May 2017 TNA cited section 27(1) (international relations) of FOIA to refuse the information requested.
5. The complainant requested an internal review on 30 May 2017. TNA sent the outcome of its internal review on 19 July 2017 upholding the decision.

Scope of the case

6. On 8 August 2017 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He argued that *'he did not accept that disclosure of an historic document*

will harm Britain's position in the world or have any serious implications for Anglo-Spanish relations'.

7. During the course of the investigation, TNA confirmed that, although it had not been made clear to the applicant in its responses, TNA was withholding the information under the subsections 27(1)(a)(c)(d).
8. Therefore, the Commissioner will focus on whether the information in question can be withheld under the exemption provided by subsections 27(1)(a)(c)(d).

Reasons for decision

Section 27 – international relations

9. 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,

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

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

10. 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 – i.e. 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.

11. With the above in mind, the Commissioner has considered the withheld information and TNA's submissions in support of its reliance on section 27(1).
12. The exemption has been applied to information contained in the file FCO 9/1053 –Gibraltar dispute: British retaliation. In broad terms the correspondence relates to '*frank and candid remarks made by British Foreign Office officials*'. It is not appropriate to reveal more about the contents of this correspondence.
13. TNA provided the Commissioner with arguments identifying the particular harm it considers may arise from disclosure of the withheld information.
 - Foreign Office employees within their official capacity require an open environment where contentious, confidential and delicate matters can be discussed. Within this environment there needs to be a level of certainty that ideas, comments, suggestions or remarks will not be made public.
 - The erosion of the safe, secure, open and frank decision forum which would likely prejudice future confidential decisions which in turn could prejudice relations with another state.
14. Further arguments relating to the specific information within the file were provided to her 'in confidence' and the Commissioner is therefore unable to reproduce them in this notice.
15. 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.
16. In this case TNA, in conjunction with the transferring department the Foreign and Commonwealth Office, is relying on the lower threshold, 'would be likely' to occur. However this still means that TNA needs to satisfy the Commissioner that the chance of international relations being prejudiced is more than a hypothetical possibility; there must be a real and significant risk.
17. The complainant has argued that disclosure of this historic document would not harm '*Britain's position in the world or have any serious implications for Anglo-Spanish relations*'.

18. TNA has argued that disclosing the information would be likely to damage relations with the relevant countries as the fundamental dispute over Gibraltar remains and *'the post-Brexit environment has brought a renewed focus on Spain/Gibraltar border issues'*.
19. This is clearly a prejudice which the exemption provided by section 27(1)(a) is designed to protect against.
20. When considering whether it is likely that relations with the countries in question would be prejudiced the Commissioner has also been guided by the Information Tribunal's observation 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 been necessary."¹
21. Having viewed the withheld information the Commissioner is satisfied that if the contents were disclosed there is a real chance that it would make relations with the countries in question more difficult or require some response from the UK government in order to mitigate any damage.
22. Therefore, 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. She finds the exemption engaged in relation to the information withheld by virtue of section 27(1).

Public interest

23. Section 27 is subject to the public interest test, which means that even where the exemption is engaged the information can only be withheld if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.
24. TNA provided the following arguments to the complainant in favour of the release of the information:
 - Obligations under Freedom of Information and Public Records legislation are taken very seriously, and the principle that there is a public interest in showing a true and open account of the historical record are adhered to strongly.
 - This makes for greater accountability, increases public confidence in government decision-making and helps to encourage greater public engagement with political life. There is a general public

¹ Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence (EA/2006/0040), paragraph 81.

interest in being able to evaluate the foreign and defence policy of the government.

25. TNA provided the following arguments to the complainant against the release of the information:

- An important consideration under Section 27 is the need for UK ministers and officials to be able to comment on, and discuss frankly, international issues and the policies of other governments and organisations.
- If this ability to comment frankly on issues and the policies of other governments is not protected, the UK's ability to conduct its international relations and to influence foreign governments, and thereby to protect and promote UK interests, will be jeopardised.
- It is believed that release of this material would be prejudicial to UK/Spanish relations.

26. The Commissioner accepts that there will always be some public interest in transparency and disclosing information in order to provide as full a picture as possible of the matters to which it relates.

27. However, the Commissioner considers that the greater public interest concerns the safeguarding of the ability of UK government officials to be able to discuss in an open and frank way and the need to limit harm caused to relations with another state (in particular Spain). Even allowing for the passage of time, the Commissioner is satisfied that disclosing the withheld information would damage the UK's relations with these countries.

28. Therefore, the Commissioner finds that the public interest in maintaining the application of section 27(1) is greater than the public interest in disclosing the information. TNA is entitled to withhold this information.

Other matters

29. TNA has confirmed to the Commissioner that although TNA mentioned the exemption under section 27(2) to the complainant in the initial response dated 17 May 2017, it did not find any further evidence within the archived case history that this exemption was considered. TNA formally confirmed *'that section 27(2) of the Freedom of Information Act was not applied to the information held with FCO 9/1053. The information was considered exempt by way of section 27(1)(a)(c)(d) only.'*

30. TNA also apologises to the applicant for not making clear the specific subsections 27(1)(a)(c)(d) of the exemption being relied upon during its correspondence with the applicant. TNA acknowledged '*that the information and service we provided to the applicant fell below our own internal standards and expectations.*'
31. The Commissioner notes the above and expects the TNA to take steps to improve on these matters in the future.

Right of appeal

32. 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

33. 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.
34. 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

Pamela Clements
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF