

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 December 2018

Public Authority: Foreign and Commonwealth Office
Address: King Charles Street
London
SW1A 2AH

Decision (including any steps ordered)

1. The complainant submitted a request to the Foreign and Commonwealth Office (FCO) seeking communications between the FCO in London and the British embassy in Washington concerning General Michael Flynn. The FCO provided the complainant with some information falling within the scope of his request but sought to withhold further information on the basis of sections 27(1)(a), (c) and (d) (international relations); 31(1)(c) (law enforcement) and 40(2) (personal data) of FOIA. The Commissioner has concluded that the withheld information is exempt from disclosure on the basis of sections 27(1)(a), (b) and (d) and that in all the circumstances of the case the public interest favours maintaining the exemptions. The Commissioner has also concluded that the FCO has correctly applied section 40(2) to some of the withheld information.

Request and response

2. The complainant submitted the following request to the FCO on 2 December 2017:

'Please provide a copy of all communications between the Foreign and Commonwealth Office and the British embassy in Washington

concerning General Michael Flynn, from 19th November 2017 and December 2nd 2017.¹

3. The FCO contacted the complainant on 4 January 2018 and confirmed that it held information falling within the scope of his request but it considered this to be exempt from disclosure on the basis of sections 27 and 31 of FOIA and needed additional time to consider the balance of the public interest.
4. The FCO sent him several similar letters at monthly intervals until it provided him with a substantive response to his request on 21 May 2018. The response provided the complainant with a copy of one redacted document falling within the scope of his request. The FCO explained that the remaining information falling within the scope of request had been withheld on the basis of sections 27(1)(a), (c) and (d), section 31(1)(c) and section 40(2) of FOIA. In relation to the qualified exemptions the FCO concluded that the public interest favoured maintaining these exemptions.
5. The complainant contacted the FCO on 25 May 2018 and asked it to conduct an internal review.
6. The FCO informed him of the outcome of the review on 25 June 2018. The review upheld the application of the exemptions cited in the refusal notice.

Scope of the case

7. The complainant contacted the Commissioner on 2 July 2018 in order to complain about the FCO's decision to withhold information falling within the scope of his request.
 8. During the course of the Commissioner's investigation the FCO provided the complainant with some further information which it had previously sought to withhold. It also explained that it no longer considered section 31 to apply to any of the remaining withheld information. At the point that this decision notice is being issued, the FCO is seeking to withhold the remaining information on the basis of sections 27(1)(a), (c) and (d)
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¹ Michael Flynn was President Trump's National Security Adviser for a period of 23 days in January and February 2017. In December 2017 he pleaded guilty to charges that he had lied to the FBI about his contacts with Russia. The charges were brought by the Special Counsel Robert Mueller as part of his investigation into alleged Russian involvement in the 2016 US election.

and a small portion of information on the basis of section 40(2) of FOIA. The Commissioner has therefore only considered the application of these exemptions to this remaining information in this decision notice.

Reasons for decision

Section 27 – International relations

9. Section 27(1) of FOIA states 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.'*

The FCO's position

10. In its responses to the complainant the FCO argued that the effective conduct of the UK's international relations depends upon maintaining trust and confidence with other governments and international organisations. It argued that to do this there must be good working relationships with other governments and international organisations based on confidence and trust. This relationship of trust allows for the free and frank exchange of information on the understanding that it will be treated in confidence. The FCO argued that if the UK does not maintain this trust and confidence, its ability to act as a significant player in the international arena, and protect and promote UK interests through international relations, will be hampered. More specifically, it explained that the withheld information contained free and frank discussions between FCO officials of developments in the US regarding Michael Flynn and it in its view disclosure of this information would be likely to damage the bilateral relationship between the UK and US.
11. The FCO provided the Commissioner with further detailed submissions, which made direct reference to the content of the withheld information itself, to support its reliance on these exemptions. Clearly, the Commissioner cannot include such submissions in this decision notice. However, the FCO's submissions emphasised that the withheld information remained sensitive because although Michael Flynn was no longer President Trump's National Security Adviser during the dates covered by the request, the issue and the wider Mueller investigation remained very contemporary and continued to be the subject of media and political commentary in the US.

The complainant's position

12. The complainant argued that although the FCO had argued that releasing the withheld information could harm UK-US relations, it seemed unlikely that given Mr Flynn's exit from the American administration that information concerning him can now be considered overly sensitive. The complainant noted that Mr Flynn is no longer a confidant to the Trump government, and indeed the two are estranged, so the release of further information on the British government's approach to him seemed unlikely to be realistically prejudicial to UK-US relations. Furthermore, the complainant argued that given the fast-news pace of the Trump presidency given that this information is now 6 months old release is unlikely to be prejudicial to US-UK relations, and much of it can be safely released.

The Commissioner's position

13. In order for a prejudice based exemption, such as 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; 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. The anticipated prejudice must be more likely than not.
14. 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*'.
15. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the FCO clearly relates to the interests which the exemptions contained at

sections 27(1)(a), (c) and (d) are designed to protect. With regard to the second criterion having considered the content of the withheld information which contains candid comments and assessments about Mr Flynn's decision to plead guilty, and taking into account the FCO's submissions to her, the Commissioner is satisfied that there is a causal link between disclosure of this information and prejudice occurring to the UK's relations with the US. Furthermore, she is satisfied that the resultant prejudice would be real and of substance. Moreover, the Commissioner is satisfied that there is a more than a hypothetical risk of prejudice occurring and therefore the third criterion is met. In reaching this conclusion, she has acknowledges the complainant's points about Mr Flynn no longer being part of the US Administration and moreover the fast news pace nature of the Trump presidency. However, having had the benefit of examining the withheld information the Commissioner is satisfied that the information clearly remains sensitive. Firstly, because as the FCO notes, the Mueller investigation remains a contemporary issue; and, secondly because despite the passage of time and even taking account the fast news pace nature of the Trump presidency, the free and frank nature of the information makes it inherently sensitive.

16. Sections 27(1)(a), (c) and (d) are therefore engaged.

Public interest test

17. However, section 27(1) is a qualified exemption and therefore subject to the public interest test set out in section 2(2)(b) of the FOIA. The Commissioner has therefore considered whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.

18. The FCO acknowledged that there was a strong public interest in accountability and transparency. The complainant argued that there is a strong public interest in the FCO being as open as possible about the process of assessing and understanding Mr Flynn's decision to plead guilty within the FCO.

19. The FCO argued that that it was firmly against the public interest to harm the UK's relations with one of its closest allies. It argued that this is particularly the case at the present time given that UK's relationship with the US is at a pivotal stage in the light of Brexit and the corresponding opportunity for the UK to secure a trade deal with the US. Moreover, the FCO argued that disclosure of the withheld information would also undermine the UK's ability to work with the US on a range of bilateral issues such as counter-terrorism, defence and security issues which remain fundamental to the UK's national security.

20. With regard to the public interest in disclosing the information the Commissioner acknowledges that the decision of Mr Flynn to plead guilty

to charges that he lied to the FBI attracted considerable public attention, not only in the US but also in the UK. Moreover, the Commissioner accepts, as the complainant suggests, that there is a particular public interest in understanding how the FCO assessed and understood such a development. Disclosure of the withheld information would provide a detailed insight into the initial reactions of FCO staff on this issue. However, the Commissioner also believes that there is very strong public interest in ensuring that the UK's relationship with the US is not harmed given that the US is one the UK's key allies. The Commissioner accepts that this is particularly the case at this present time as the FCO has argued. In view of these factors, the Commissioner has concluded that the public interest favours maintaining the exemptions contained at sections 27(1)(a), (c) and (d) in respect of the remaining withheld information.

Section 40(2) – personal data

21. Section 40(2) of FOIA states that personal data is exempt from disclosure if its disclosure would breach any of the data protection principles contained within the Data Protection Act 1998 (DPA).²

22. Personal data is defined in section (1)(a) of the DPA as:

'.....data which relate to a living individual who can be identified from those data or from those data and other information which is in the possession of, or likely to come into the possession of, the data controller; and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any person in respect of the individual.'

23. The FCO withheld the names and contact details of junior staff on the basis of section 40(2) of FOIA. The Commissioner is satisfied that such information clearly constitutes personal data.

24. The FCO argued that disclosure of the information it had redacted would breach the first data protection principle. This states that:

'Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

² On 25 May 2018 the General Data Protection Regulation and Data Protection Act 2018 came into force. However, in line with the provisions contained within the Data Protection Act 2018 under FOIA for any request where a public authority has responded before 25 May 2018 the DPA 1998 applies.

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.'

25. The relevant condition in this case is the sixth condition in schedule 2 which states that:

'The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject'.

26. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:

- The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
 - what the public authority may have told them about what would happen to their personal data;
 - their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights (ECHR);
 - the nature or content of the information itself;
 - the circumstances in which the personal data was obtained;
 - any particular circumstances of the case, eg established custom or practice within the public authority; and
 - whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.
- The consequences of disclosing the information, ie what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor the Commissioner may take into account:
 - whether information of the nature requested is already in the public domain;
 - if so, the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?

27. Furthermore, notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling legitimate interest in disclosure to the public.
28. In considering 'legitimate interests', in order to establish if there is a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sake, as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to consider a proportionate approach.
29. The Commissioner accepts that it is established custom and practice for the FCO, and other public authorities, to redact the names of junior staff and non-front line staff from any disclosures under FOIA. In light of this, she accepts that disclosure of such information would be against the reasonable expectations of these individuals. Furthermore, the Commissioner is not persuaded that there is a particularly strong or compelling legitimate interest in the disclosure of these names. Disclosure of this category of information would therefore breach the first data protection principle and such information is thus exempt from disclosure on the basis of section 40(2) of FOIA.

Right of appeal

30. 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

31. 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.
32. 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

Jonathan Slee
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