

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 December 2018

Public Authority: Department for International Development
Address: 22 Whitehall
London
SW1A 2EG

Decision (including any steps ordered)

1. The complainant submitted a request to the Department for International Development (DFID) for copies of correspondence between it and the Foreign and Commonwealth Office (FCO) about the policy review and feasibility study into the resettlement of the Chagos Archipelago. The complainant also requested a list of this correspondence. DFID argued that the correspondence itself was exempt from disclosure on the basis of the following sections of FOIA: 27(1)(a) to (d) (international relations), sections 35(1)(a) and (b) (formulation and development of government policy and Ministerial communications), 40(2) (personal data) and 43(2) (commercial interests). Following an initial decision to withhold the list of the correspondence on basis of the same exemptions, it provided the complainant with a copy of the list during the course of the Commissioner's investigation whilst maintaining its decision to withhold the correspondence itself.
2. The Commissioner has concluded that the correspondence is exempt from disclosure on the basis of section 35(1)(a) and that in all of the circumstances of the case the public interest favours maintaining the exemption. The complainant also raised concerns that DFID has not located all of the information it holds falling within the scope of the request. On this point, the Commissioner has concluded that on the balance of probabilities DFID does not hold any further information falling within the scope the request. However, she has also concluded that by failing to respond to the complainant's request for a list of correspondence within 20 working days DFID breached section 10(1) of FOIA.

Request and response

3. The complainant submitted the following request to DFID on 3 February 2018:

'Please could I be supplied with copies of correspondence between the Department for International Development (DFID) and the FCO (including the British Indian Ocean Territory Administration (BIOTA)) concerning the Policy Review and Feasibility Study into the Resettlement of the Chagos Archipelago (BIOT) between the dates 31 January 2015 and 16 November 2016 inclusive.

'Correspondence' is intended to include e-mails, telegrams, signals, and other electronic messages; letters, internal memoranda, minutes, and other documents; spreadsheets; other attachments. 'DFID' includes the Department itself and any contractor, agent, organisation, or other body or individual working for or on behalf of the Department.

*Please could the document copies be supplied in electronic format if possible and sent to me by e-mail.'*¹

4. DFID contacted the complainant on 5 March 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 section 27 (international relations) of FOIA and it needed additional time to consider the balance of the public interest test. DFID sent the complainant similar letters on 15 and 29 March 2018.
5. DFID then provided him with a substantive response to his request on 16 April 2018 and explained that it considered the information in the scope of the request to be exempt from disclosure on the basis of the following exemptions within FOIA: sections 27(1)(a), (c) and (d), 40(2) (personal data) and 43(2) (commercial interests) of the FOIA and that in relation to the qualified exemptions the public interest favoured withholding the information.

¹ In November 2016 the government announced that following a review and consultation on the resettlement of the Chagossian people to BIOT, it had decided against such a resettlement but instead to support improvements to the livelihoods of Chagossians in the communities where they now live. The government announced a funding package of approximately £40m to achieve this goal.

<https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2016-11-16/HCWS260/>

6. The complainant contacted DFID on 18 April 2018 and asked it to conduct an internal review of its position. He also asked to be provided with a 'List or Schedule of Documents' falling within the scope of his request.
7. DFID informed the complainant of the outcome of the internal review on 26 June 2018. DFID concluded that the exemptions cited in the refusal notice had been correctly applied and also found that the following additional exemptions also applied to some of the withheld information: section 27(1)(b), sections 35(1)(a) and (b) (formulation and development of government policy and Ministerial communications) and 42(1) (legal professional privilege) of FOIA. The internal review also concluded that the information that would constitute a schedule of documents falling within the scope of request would strongly reflect the withheld information itself. Therefore, DFID concluded that the schedule of documents was also exempt on the basis of the same exemptions which applied to the documents themselves.

Scope of the case

8. The complainant initially contacted the Commissioner on 20 June 2018 in order to complain about DFID's failure to complete the internal review and also its failure to respond to his request, contained within his email of 18 April 2018, for a list of documents falling within the scope of his request within 20 working days.
9. Following DFID's completion of the internal review, the complainant contacted the Commissioner again on 27 June 2018 and explained that he was dissatisfied with its decision to withhold the information falling within the scope of his request and also its refusal to provide a list of these documents.
10. During the course of the Commissioner's investigation, DFID provided the complainant with a list of the documents falling within the scope of his request. The complainant argued that this list failed to include each particular email within an email chain and therefore did not fulfil his request for a list of the requested correspondence. In light of this DFID provided him with a more detailed version of this list. The Commissioner therefore considers this aspect of the complainant's request to be resolved and has not considered it any further in this decision notice.
11. Having received the initial list, the complainant also raised concerns with the Commissioner that DFID had failed to identify all of the information falling within the scope of his request that it was likely to hold.

12. Therefore, this decision notice considers whether DFID has located all of the information falling within the scope of this request; whether the information it has located is exempt from disclosure on the basis of the exemptions cited; and whether it complied with the procedural aspects of FOIA when handling these requests.

Reasons for decision

Section 1 – Right of access

13. In cases such as this where there is some dispute as to whether information falling within the scope of the request is held – or whether all of the information falling within the scope of the request has been located – the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
14. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities a public authority holds any information, or as in this case *further* information, which falls within the scope of the request.
13. In applying this test the Commissioner will consider the scope, quality, thoroughness and results of the searches as well as any further explanations offered as to why the information is not held.

The complainant's position

15. The complainant explained to the Commissioner that he considered it very likely that DFID held a greater number of documents which fall within the scope of his request beyond those actually listed on the schedule. The complainant's basis for this allegation stemmed from his detailed knowledge of the policy review and a meeting that he had with a representative of the FCO on 29 April 2015 which, inter alia, dealt with DFID's involvement in the ongoing work about the potential resettlement of the Chagos Archipelago.
16. The complainant also explained to the Commissioner that he had submitted a similar request to the FCO. That request sought a schedule of correspondence between the FCO and MOD covering the same period and subject matter as his request to DFID. The complainant provided the Commissioner with a copy of a schedule of information disclosed to him by the FCO. Although the complainant's request to the FCO sought correspondence between the FCO and MOD, the schedule disclosed by the FCO also included four emails which were sent to or from DFID, but also cc'd to the MOD (listed on the FCO's schedule as numbers 10, 16,

20 and 49). However, these emails did not appear to have been identified by DFID as part of its search for information falling within the scope of the complainant's request to it.

DFID's position

17. The Commissioner initially asked DFID a number of questions in order to establish what searches it had undertaken to locate information falling within the scope of the complainant's request; an explanation as to why such searches should have been sufficient to locate all of the information in scope; and, confirmation as to whether any information relevant to the request may have been deleted prior to the request being received.
18. The Commissioner has reproduced these questions below and summarised DFID's response to them.
 - *What searches have been carried out to locate all information falling within the scope of this request and why would have been sufficient to locate all information falling within the scope of the request?*
 - *Please describe thoroughly any searches of relevant paper/electronic records and include details of any staff consultations.*
 - *If searches included electronic data, which search terms were used and please explain whether the search included information held locally on personal computers used by key officials (including laptop computers) and on networked resources and emails.*
 - *If no or inadequate searches were done at the time, please rectify this now and let me know what you have done.*
19. In response to these questions, DFID explained that it had initial discussions with the relevant policy team regarding the FOI request, who then searched and provided 3 electronic documents and 9 hard copy papers in scope of the request. DFID explained that the team had identified the documents from the information gathered as part of a current Judicial Review relating to the Chagos Archipelago. DFID explained that as a comprehensive search for all documentation relating to that the policy review had been done prior to the FOI request being received a central record of both electronic and hard copy documentation was held by the policy team and the policy team therefore used this central record to identify documentation relevant to the FOI request.
20. DFID explained that its FOI team also carried out searches of its Records Management Electronic filing system (Vault) using the search criteria 'FCO', 'Chagos Archipelago' and 'Policy Review' for the date range 1 January 2015 – 30 November 2016 and nothing further was found to be in scope of the request.

- *Was any recorded information ever held relevant to the scope of the complainant's request but deleted/destroyed?*
- *If recorded information was held but is no longer held, when did DFID cease to retain this information?*
- *Does DFID have a record of the document's destruction?*
- *What does DFID's formal records management policy say about the retention and deletion of records of this type? If there is no relevant policy, can DFID describe the way in which it has handled comparable records or a similar age?*
- *If the information is electronic data which has been deleted, might copies have been made and held in other locations?*

21. DFID explained that it will have held further emails relevant to the request. However, its current policy on the deletion of e-mails was as follows:

'Email messages are automatically deleted from the mailbox after 90 days. To prevent loss of information email messages must be acted upon and moved to an appropriate location as quick as possible if they are to be retained beyond this period.'

22. DFID explained that its definition of which e-mails should be kept for business or historical value was as follows:

'Any relevant or business critical messages must be stored in the Department's formal document and records management system, the retention of which is in line with the Civil Service Code and guidance from The National Archives.'

All documents (including emails) which record a significant action or decision or provide significant evidence of DFID's business must be captured in the corporate record, either by saving to the Department's formal document and records management system or by placing a paper version on the relevant registered file. Such actions or decisions could include policy or procedural decisions, spending or programme commitments, or agreements between departments.'

23. Therefore, DFID explained that any emails received or sent by the policy team, that they had decided not to save into Vault, would have automatically have been deleted from individuals' email accounts. DFID noted that the FOI request was received in February 2018 and the information requested was in relation to the period January 2015 to November 2016. Therefore, any emails that had not been saved to Vault that could possibly have been relevant would have been deleted by February 2017. DFID explained that it did not have a record of the destruction of emails.

24. DFID also explained that the policy team in question confirmed that no information saved to Vault or held in hard copy was deleted/destroyed. DFID explained that its records retention and disposal guide confirms that corporate information should be reviewed 10 years after folder closure so therefore would not apply to the documentation in question.
25. With regard to the Commissioner's query about the four emails included on the FCO's schedule. DFID confirmed that it did not hold documents 10, 16 and 20. It had however located an email with the same title as document 49, but it did not consider it as being in scope of the request based on its content. DFID provided the Commissioner with a copy of its version of this email, noting that it was of an earlier date than the FCO's so maybe there was relevant information later in their email chain, ie the version of the email chain held by the FCO.
26. In response, the Commissioner contacted DFID again and explained why in her view, based on its content, DFID's version of document 49 *did* fall in the scope of the complainant's request. She asked DFID to clarify its position in respect of this document in light of her comments. The Commissioner also asked DFID to establish whether there were any further documents which it had initially considered to be out of scope of the request, but in light of her comments about document 49, could in fact be considered to be in scope.
27. In reply, DFID acknowledged that its version of document 49 was in the scope of the request, albeit exempt on the basis of sections 27(a) to (d), 35(1)(a) and (b) and 40(2) of FOIA. Furthermore, DFID explained that in light of the Commissioner's comments about document 49, it had conducted further searches and located an additional further document which it accepted to be in scope, albeit exempt on the basis of the same exemptions.²

² These two additional documents were listed on the further list of documents provided to the complainant during the course of the Commissioner's investigation.

The Commissioner's position

28. Having taken into account DFID's submissions to her, the Commissioner is satisfied that on the balance of probabilities it has located all of the information falling within the scope of her request. She has reached this finding for the following reasons: Firstly, she is satisfied that DFID's searches have been logical and focused ones; that is to say it looked initially at the files gathered for the judicial review – where the Commissioner accepts it seems likely that any relevant information would be held – but also conducted broader searches on Vault in order to locate any additional information. The Commissioner is satisfied that the search terms used to interrogate this system would have been sufficient to locate any relevant information. Secondly, the Commissioner considers that given DFID's record retention policy this explains why some emails on this topic would no longer be held if they had not transferred to Vault. Thirdly, the Commissioner acknowledges that DFID did not initially consider document 49 to be in the scope of the request thus suggesting that it may have overlooked some documents as part of its initial searches for information. However, during the course of the Commissioner's investigation, and following her clarification as how this request should be interpreted, it has conducted further searches for such documents. The Commissioner is therefore satisfied that the searches conducted by DFID have been based upon an accurate interpretation of the request and have been done with a sufficient understanding of the nature of the information that would be caught by the request.
29. The Commissioner informed the complainant of her findings in relation to this aspect of his complaint during the course of her investigation. In response, the complainant suggested that DFID's practice of auto-deletion of e-mails and its inability now to find these records raises questions about how it implemented its record management during its involvement in the policy review regarding BIOT. The complainant argued that at the time that these emails were sent, the FCO and DFID would have been well aware of the real prospect of a judicial review of the decision.
30. The Commissioner notes the points that the complainant has made but her role within this decision notice is limited to determining whether, on the balance of probabilities, it holds any further information falling within the scope of the request. For the reasons set out above, the Commissioner is satisfied that it does not.

Section 35 – formulation and development of government policy

31. DFID argued that all of the withheld information was exempt from disclosure on the basis of section 35(1)(a) of FOIA. This provides 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'

32. 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.
33. 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.
34. Ultimately 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.
35. 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.
36. DFID argued that the withheld information related to the formulation or development of the UK government's policy on the resettlement of the Chagos Islanders and to the funding and delivery of UK international aid in relation to this policy. The Commissioner is satisfied that the withheld information clearly falls within the scope of the exemption contained at section 35(1)(a) of FOIA. The government's review of the possible resettlement of BIOT, culminating in its decision not to allow such a resettlement, was clearly one with wide ranging consequences with a particular real world outcome. Furthermore, the Commissioner is also satisfied that the withheld information itself clearly relates to the formulation and development of this policy in question.
37. Section 35(1)(a) is therefore engaged.

Public interest test

38. 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 disclosing the information

39. DFID acknowledged that there was a general public interest in transparency and openness around government decision making, which helps to ensure accountability and public understanding of how government works, spends taxpayers' money and encourages public contribution to policy debates.
40. The complainant argued that DFID had sought to apply the exemptions in a blanket manner. Whilst he acknowledged whilst there may be a case to withhold some of the information, DFID had not given consideration to the partial disclosure of some of the information or parts of certain documents. For example, the complainant presumed that there must be routine correspondence between the FCO and DFID which simply asked for views or input by a certain date, without containing any substantive reply or exempt information, yet no such information has been released. The complainant also argued that the language used in both DFID's refusal notice and internal review in respect of the public interest test was no more than a boiler plate formulation and failed to take into account the specific information falling within the scope of the request.

Public interest arguments in favour of maintaining the exemption

41. DFID argued that there is a very significant public interest in ministers and officials being able to discuss and communicate freely and efficiently to develop sound policy decisions. In particular, DFID argued that they need a confidential space to be able to undertake rigorous and candid assessments of the various options under consideration. DFID argued that opening these issues to public gaze is likely to inhibit this free and frank discussion and so severely prejudice the policy development process. This would undermine the very strong public interest in government policy decisions being based on the most candid sharing of information and views between ministers and officials.
42. In the particular circumstances of this case, DFID argued that this was particularly the case given the ongoing complexities and sensitivities relating to the issue of Chagossian resettlement. On this point, DFID emphasised that although it had announced in November 2016 that it would not allow resettlement on BIOT, that decision and the purposes

and adequacy of the aid package announced alongside it was now subject to judicial review. DFID explained that the judicial review hearing was not scheduled to take place until December 2018. Therefore, DFID argued that policy making to which the withheld information relates was very much live and ongoing at the time of the request and remains so at least until the judicial review concludes.

43. As part of its submissions to the Commissioner, DFID made specific reference to the withheld information in order to support its position that the public interest favoured maintaining the exemption. Clearly, the Commissioner cannot refer to such submissions in this notice. However, she can confirm that DFID emphasised the fact that the withheld information contained free and frank exchanges between officials working across government on a very sensitive subject and in a fast paced and evolving environment. DFID also noted that the discussions were of a particularly sensitive nature given the long and challenging history of the BIOT issue.

Balance of the public interest test

44. With regard to the arguments advanced by DFID, the Commissioner considers that these can be categorised as arguments generally known as safe space and chilling effect arguments.
45. With regard to the former, the Commissioner accepts that significant weight should be given to the safe space arguments - ie the concept that the government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction - where the policy making process is live and the requested information relates to that policy making. In the circumstances of this case, at the point that the complainant made his request the Commissioner acknowledges that the government had already made its announcement regarding the decision not to allow the receipt of BIOT. However, she is persuaded that as this decision was subject to challenge in the form of the judicial review she accepts the government's development of this policy was ongoing at the time of the request. Furthermore, the Commissioner recognises that disclosure of the information withheld on the basis of section 35(1)(a) would have been likely to result in public and media attention in DFID's and the government's deliberations on this issue not only because of the pending judicial review and the interest that it generated, but also because of the long history of this particular issue. Consequently, in the circumstances of this case the Commissioner believes that significant weight should be attributed to the safe space arguments.
46. 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. 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 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 considerable weight in relation to the information withheld on the basis of section 35(1)(a).

47. In determining that such weight should be given to the public interest arguments in favour of maintaining the exemption, the Commissioner acknowledges the complainant's line of argument that the exemptions have been applied in a blanket fashion and that there must presumably be routine correspondence between the FCO and DFID which could be disclosed without any particularly harmful effects. The Commissioner has carefully considered the content of each individual document that has been withheld and in her view they do not contain any routine correspondence or more anodyne information which could be released without revealing the substance of the policy discussions in question.
48. With regard to attributing weight to the public interest arguments in favour of disclosure, as the Ministerial statement cited above notes '*The manner in which the Chagossian community was removed from the Territory in the 1960s and 1970s, and the way they were treated, was wrong and we look back with deep regret*'. In light of this history the Commissioner acknowledges that there is clear public interest in the disclosure of information which would reveal how the government came to the conclusion not to resettle BIOT. Disclosure of the withheld information would provide some insight into cross government discussions about this decision and the nature of the aid package that was announced.
49. Nevertheless, the Commissioner has concluded that the public interest favours maintaining the exemption. In reaching this view she fully acknowledges the public interest in this issue. However, given that at the time of the request policy making in relation to this decision remained ongoing and in her view this, allied to the free and frank nature of the information and the overall sensitivity of this issue, tips

the balance of the public interest in favour of maintaining the exemption. The information can therefore be withheld on the basis of section 35(1)(a).

50. In light of this decision the Commissioner has not considered DFID's reliance on the other exemptions it has cited.

Section 10 – Time for compliance

51. Section 10(1) of FOIA requires a public authority to reply promptly and in any event within 20 working days following the receipt of the request.
52. The complainant submitted his request for a list of correspondence to DFID on 18 April 2018 but DFID failed to respond to this within 20 working days. It therefore breached section 10(1) of FOIA.

Other Matters

53. As noted above, FOIA does not contain a time limit within which public authorities have to complete internal reviews. However, the Commissioner's guidance explains that in most cases an internal review should take no longer than 20 working days in most cases, or 40 working days in exceptional circumstances. In this case DFID took 47 working days to complete its internal review. The Commissioner hopes that in the future DFID will conduct such reviews within the timescales set out within her guidance.

Right of appeal

54. 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

55. 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.
56. 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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