

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 August 2019

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 information concerning the use of the Union flag during the First Minister of Scotland's, Nicola Sturgeon, trips abroad. The FCO disclosed some information but sought to withhold further information on the basis of section 28(1) (relations within the UK) and section 35(1)(a) (formulation and development of government policy). The Commissioner has concluded that these exemptions provide a basis to withhold the information in question and that for both exemptions the public interest favours withholding the information.

Request and response

2. The complainant submitted the following request to the FCO on 25 October 2018 asking it:

'To provide the content of all documents including emails, briefings and the minutes of meetings regarding the use / non-use of the Union flag during Nicola Sturgeon's trips abroad.'

3. The FCO responded to the request on 14 December 2018 and confirmed that it did hold information falling within the scope of the request. The FCO provided the complainant with a brief digest of this information and explained that the remaining information was exempt from disclosure on the basis of sections 28 (relations within the UK) and 35(1)(a) (formulation and development of government policy) of FOIA.
4. The complainant contacted the FCO on 21 December 2018 and asked the FCO to conduct an internal review of this response.

5. The FCO informed him of the outcome of the internal review on 22 January 2019. The review upheld the application of the exemptions cited in the refusal notice.

Scope of the case

6. The complainant contacted the Commissioner on 5 February 2019 in order to complain about the FCO's reliance on both exemptions to withhold information falling within the scope of his request.

Reasons for decision

Section 28 – Relations within the United Kingdom

7. The FCO argued that part of the withheld information was exempt from disclosure on the basis of section 28(1) of FOIA. This states that:

'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice relations between any administration in the United Kingdom and any other such administration.'

The FCO's position

8. In its initial response to the complainant the FCO noted that as the Concordat on International Relations between the Government in Westminster and the Scottish Government explains, the Secretary of State for Foreign and Commonwealth Affairs is responsible for the foreign policy of the UK. However, the FCO is also tasked with the promotion of the international interests of the UK and all its constituent parts. The FCO explained the withheld information contains comments on a Scottish Government position and discussion about how to balance the competing interests of the UK and Scottish Government. The FCO explained that the effective conduct of internal UK relations depends upon maintaining trust and confidence between the UK Government and the Devolved Administrations. The FCO argued that disclosure of the information in question would be likely to undermine this trust and confidence.
9. The FCO provided the Commissioner with more detailed submissions, which referenced the content of the withheld information itself, in order to support its position that the disclosure would be prejudicial to these relations. In light of this the Commissioner cannot refer to these

submissions in detail in the decision notice as to do so would reveal the nature of the withheld information itself. However, the Commissioner can confirm that the FCO noted that the withheld information includes details of exchanges between Scottish officials and their counterparts in the FCO, details of which the FCO argued such officials would have reasonably expected to be treated in confidence. The FCO noted that the information also included internal discussions about this issue. The FCO also emphasised that this was a sensitive issue. In response to the complainant's suggestion (detailed below) that disclosure of the information would be unlikely to make relations between the UK and Scottish governments worse, the FCO argued that it did not accept this characterisation of current relations. Furthermore, the FCO suggested that the argument seemed a strange one to make; on the contrary, it suggested that should there be tensions in an important relationship, then Her Majesty's Government should arguably be even more careful to avoid unjustified problems and rather maintain good relations at both official and ministerial level.

The complainant's position

10. The complainant noted that the information that had been disclosed by the FCO consisted of two extremely brief excerpts and he found it difficult to believe that more information could not have been disclosed without prejudicing relations within the UK. Furthermore, as noted above, he argued that there appeared to be no recognition by the FCO of the current state of relations between the UK and Scottish governments, which he suggested are already extremely poor. He argued that it was hard to believe that the disclosure that Nicola Sturgeon did not want the Union flag present during her trips abroad could make any material difference to that relationship.

The Commissioner's position

11. In order for a prejudice based exemption, such as section 28(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.
12. 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 exemption contained at section 28(1) is designed to protect. With regard to the second criterion, the Commissioner is satisfied that there is a causal link between disclosure of the information and prejudice occurring given that the information references discussions between the administrations which were, implicitly at least, considered to be confidential, and also includes internal FCO discussion about such communications. Given such expectations, the Commissioner is persuaded that it is plausible to argue that disclosure of the information could harm relations. Moreover, the Commissioner is satisfied that the third criterion is met given the content of the withheld information itself, allied to ongoing sensitivities surrounding this issue. In reaching this conclusion the Commissioner has taken into account the complainant's point regarding the current position of UK-Scottish relations. However, she is persuaded by the FCO's line of argument that even if that were to be the case, then there would be merit in ensuring that relations do not deteriorate further. Furthermore, in reaching this conclusion, the Commissioner considers it important to emphasise that relations at a Ministerial level are only one aspect of the relations between the two administrations; relations between officials of the two administrations are also essential to the effectiveness of the relationship. In the circumstances of this case, it is the impact on the relations between officials that the Commissioner considers to be particularly at risk should information withheld on the basis of section 28(1) be disclosed.
13. Section 28(1) of FOIA is therefore engaged.

Public interest test

14. Section 28 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 28(1) outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the information

15. The complainant argued that the exemptions within FOIA were not intended to prevent the disclosure of information that is embarrassing or contentious and he argued that they had been applied erroneously in this case as the public interest should be given greater weight. More specifically, he argued that the arrangements surrounding the First Minister's visits abroad are clearly a matter of public interest, given they are funded by and conducted on behalf of the people of Scotland. The complainant acknowledged that there are obviously issues around security that should be kept out of the public domain but that does not apply to the information sought by his request.

Public interest arguments in favour of maintaining the exemption

16. The FCO argued that if the UK government did not maintain the trust and confidence of the Devolved Administrations then its ability to protect and promote UK interests would be hampered which was firmly against the public interest. In the particular circumstances of this case the FCO emphasised that the issue of flag flying remained a sensitive one and that this added weight to the public interest in ensuring that the relations in respect of this issue were not undermined. The FCO also argued that the withheld information in question was quite limited in nature and that the degree to which it would serve any public interest in disclosure was limited.

Balance of the public interest arguments

17. The Commissioner accepts that there is a public interest in the UK being open and transparent with regard to how it conducts itself with the Devolved Administrations. However, in her view disclosure of the withheld information would provide only a limited insight into the UK's discussions with the Scottish government in respect of this particular issue. Disclosure of the information however risks undermining any further discussions between the two governments and also risks prejudicing the UK's relations with the Scottish government on other topics. On balance the Commissioner has therefore concluded that the public interest favours maintaining the exemption contained at section 28(1) of FOIA.

Section 35(1)(a) – formulation and development of government policy

18. The FCO withheld the remaining parts of the information falling within the scope of the request on the basis of section 35(1)(a) of FOIA. This exemption states 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'

19. 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.
20. 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.
21. 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 content of the information in question and its context.
22. 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.
23. The FCO explained that the policy in question related to the flying of subnational flags and that decisions in respect of this policy had involved Ministers. Given the involvement of Ministers and the consequences of the policy, ie potentially affecting relations between the UK and Scottish governments, the Commissioner is satisfied that the withheld information falls within the scope of section 35(1)(a) of FOIA.

Public interest test

24. 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

25. The complainant's public interest arguments in respect of disclosing the information are set out above.

Public interest arguments in favour of maintaining the exemption

26. The FCO acknowledged that there is public interest in transparency in the formulation and implementation of government policy. However, the FCO argued that Ministers and officials need to be able to consider, discuss and challenge policy in a safe space. This confidentiality is particularly important when considering issues which have a strong political element, relating to issues of identity, and on which people may have strong feelings.
27. Furthermore, the FCO argued that there is a strong public interest in ensuring high quality policy making and implementation. It argued that for government to succeed in upholding the public interest, Ministers and officials need to be able to consider, debate and fully understand the implications of the policy and how it is presented. Their candour in doing so will be affected by their assessment of whether the content of such discussions will be disclosed in the near future. The FCO argued that in its view disclosure of the information falling within the scope of this request would risk undermining any future decision making and discussions on this subject.

Balance of the public interest arguments

28. As discussed above, the Commissioner accepts that there is a public interest in the UK being open and transparent with regard to how it conducts itself with the Devolved Administrations and in the context of section 35, this extends to there being a public interest in understanding how government policy is made in relation to the Devolved Administrations. The Commissioner accepts that disclosure of this information would go some way to meeting this interest. However, in the Commissioner's view disclosure of the withheld information presents a significant risk of undermining the confidential space needed by the FCO to discuss policy making in this area, and moreover presents a genuine risk of encroaching on the candour of any future discussions in respect of such policy making. The Commissioner has therefore

concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Right of appeal

29. 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@justice.gov.uk

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

30. 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.
31. 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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