

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 September 2020

Public Authority: Foreign, Commonwealth & Development Office
Address: King Charles Street
London
SW1A 2AH

Decision (including any steps ordered)

1. The complainant submitted three requests to the Foreign and Commonwealth Office (FCO) seeking information about contracts awarded to the company IN2. The FCO confirmed that it had awarded two contracts to the company and provided details of the payments made to it. However, it explained that it considered the further information about the contracts sought by the complainant to be exempt from disclosure on the basis of sections 24(1) (national security) and 38(1)(b) (health and safety) of FOIA.
2. The Commissioner's decision is that the names of the contracts, a brief description of them, and details of where they took place, including a breakdown of the regions by contract, is information which is all exempt from disclosure on the basis of section 24(1) of FOIA. However, the Commissioner has concluded that the contracts' award, start and end dates, and the individual value of each contract is information which is not exempt from disclosure on the basis of either section 24(1) or 38(1)(b) of FOIA.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Provide the complainant with the contracts' award, start and end dates, and the individual value of each contract.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the

Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

Case reference IC-47551-M2K1

5. The complainant submitted the following request to the FCO¹ on 6 December 2019:

'I would like to request the following information:

A list of all the FCO contracts won by IN2 (both alone and as part of a consortium) over the last 10 years.

Here is a link to their website to help you identify the company:
<https://in2-comms.com/>

For each contract could you include the following information:

- Total value of contract*
- Contract name*
- Brief description of scope*
- Contract start date*
- Contract end date*
- Awarded date'*

6. The FCO responded on 8 January 2020 and confirmed that it held information falling within the scope of the request but it considered section 43(2) (commercial interests) of FOIA to apply and it needed additional time to consider the balance of the public interest test.
7. The FCO provided the complainant with a substantive response on 3 February 2020. It explained that two contracts were awarded to the company in question but explained that the remaining information falling within the scope of the request was considered to be exempt from

¹ This decision notice is served on the Foreign, Commonwealth & Development Office a government which was created on 2 September 2020 following a merger between the FCO and the Department for International Development. As the complainant's requests were submitted to the FCO, rather than FCDO, the decision notice refers to the public authority as the FCO.

disclosure on the basis of sections 24(1) (national security) and 38(1)(b) (health and safety) of FOIA.

8. The complainant contacted the FCO on 6 February 2020 in order to ask for an internal review of this decision.
9. The FCO informed him of the outcome of the review on 4 March 2020. The review upheld the application of both exemptions.

Case reference IC-42807-T0B4

10. The complainant submitted two further requests to the FCO on 1 March 2020:

'This is a follow up request to REQUEST REF: 1173-19 [ie the request he had submitted to the FCO on 6 December 2019]

I would like to request:

*-The total value of the two contracts awarded to IN2 which are mentioned in the previous FOI response
-I would like this to be broken down into the individual values in GBP for each contract'*

11. And:

*'This is another follow up request to REQUEST REF: 1173-19
I would like to request*

*-The regions where work would take place as part of the two contracts awarded to IN2 which are mentioned in the previous FOI response
-I would like this to be broken down into the individual regions for each contract'*

12. The FCO contacted the complainant on 30 March 2020 and confirmed that it held information falling within the scope of both requests but explained that it considered this information to be exempt from disclosure on the basis of sections 24(1) and 38(1)(b) of FOIA.
13. The complainant contacted the FCO on 30 March 2020 and asked it to conduct an internal review in relation to both requests.
14. The FCO informed him of the outcome of the internal review on 4 June 2020. The review upheld the application of both exemptions.

Scope of the case

15. The complainant contacted the Commissioner on 5 March 2020 in order to complain about the FCO's refusal of his request of 6 December 2019. He subsequently complained to the Commissioner on 4 June 2020 about the FCO's refusal of the two additional requests he had submitted to it.
16. During the course of the Commissioner's investigation the FCO amended its position and agreed to release the details of payments made to IN2 over the period 1 October 2018 to 30 June 2020 and thus provided the complainant with the total value for both contracts. The FCO explained that it remained of the view that the further information falling within the scope of the three requests was exempt from disclosure on the basis of sections 24(1) and 38(1)(b) of FOIA.
17. In light of this disclosure, this decision notice focuses on whether the remaining withheld information is exempt from disclosure on the basis of the exemptions cited by the FCO.

Reasons for decision

Section 24 – national security

18. Section 24(1) states that:

'Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security'.

19. FOIA does not define the term 'national security'. However in *Norman Baker v the Information Commissioner and the Cabinet Office* (EA/2006/0045 4 April 2007) the Information Tribunal was guided by a House of Lords case, *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, concerning whether the risk posed by a foreign national provided grounds for his deportation. The Information Tribunal summarised the Lords' observations as follows:
 - 'national security' means the security of the United Kingdom and its people;
 - the interests of national security are not limited to actions by an individual which are targeted at the UK, its system of government or its people;

- the protection of democracy and the legal and constitutional systems of the state are part of national security as well as military defence;
 - action against a foreign state may be capable indirectly of affecting the security of the UK; and,
 - reciprocal co-operation between the UK and other states in combating international terrorism is capable of promoting the United Kingdom's national security.
20. Furthermore, in this context the Commissioner interprets '*required for the purpose of*' to mean '*reasonably necessary*'. Although there has to be a real possibility that the disclosure of requested information would undermine national security, the impact does not need to be direct or immediate.

The FCO's position

21. In its responses to the complainant the FCO explained that the contracts relate to projects of a sensitive nature which have a bearing on national security issues. It argued that disclosure of the withheld information would risk identifying these projects and this in turn would undermine their operation and impact adversely on the UK's national security.
22. The FCO provided the Commissioner with more detailed submissions to support its reliance on section 24(1) of FOIA. However, the FCO explained that it considers these submissions to be sensitive – a position which the Commissioner accepts – and therefore they cannot be reproduced in the decision notice. The Commissioner acknowledges that this may be frustrating for the complainant.

The Commissioner's position

23. Having considered the FCO's submissions the Commissioner has concluded that withholding only *some* of the remaining disputed information is required for the purposes of safeguarding national security. The information which the Commissioner accepts is exempt on the basis of section 24(1) is the following:
- The names of the contracts;
 - A brief description of the contracts; and
 - The regions where the work took place, including a breakdown of the regions by contract.
24. However, the Commissioner is not persuaded that the following information is exempt from disclosure on the basis of section 24(1) of FOIA:

- The contracts' award, start and end dates; and
- The individual value of each contract.

25. The Commissioner has set out in a confidential annex, a copy of which will be shared with the FCO only, why she has reached these findings.

Public interest test

26. Section 24 is a qualified exemption. Therefore, in relation to the information which the Commissioner accepts is exempt from disclosure on the basis of section 24(1), she must consider the public interest test and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing that information.
27. The complainant argued that there was a clear public interest in the FCO being transparent about the nature of contracts it had awarded.
28. The FCO acknowledged that there is a public interest in disclosing information about how it works with partner organisations to achieve its objectives, and in transparency regarding the expenditure of public funds. However, the FCO argued that there is a very strong public interest in the FCO protecting national security. In the circumstances of this request, and taking into account the reasons outlined in its confidential submissions to the Commissioner, the FCO concluded that the public interest in withholding the information concerned outweighs that in its release.
29. The Commissioner agrees that there is a significant public interest in the FCO being open and transparent about its contracts with third parties. Disclosure of the withheld information would provide the public with some, albeit limited, insight into the nature of these contracts. The sums paid to IN2 by the FCO are not insignificant, totalling as they do over £4.5m, and the Commissioner agrees that this adds to the public interest in disclosure of the information.
30. However, the Commissioner agrees that there is very significant public interest in protecting the national security of the UK. In the circumstances of this case, having taken into account the FCO's submissions to her and the content of the withheld information, the Commissioner has concluded that the public interest favours maintaining the exemption contained at section 24(1) of FOIA.

Section 38 – health and safety

31. As explained above the FCO also argued that withheld information was exempt from disclosure on the basis of section 38(1)(b). The Commissioner has considered whether the information which she has

concluded is not exempt from disclosure on the basis of section 24(1) is, alternatively, exempt from disclosure on the basis of section 38(1)(b). The information in question consists of the contracts' award, start and end dates, and the individual value of each contract.

32. Section 38(1)(b) of FOIA states:

'Information is exempt information if its disclosure under this Act would, or would be likely to...

...(b) endanger the safety of any individual.'

33. In section 38 the word 'endanger' is used rather than the word 'prejudice' which is the term used in other similar exemptions in FOIA. However, in the Commissioner's view the term endanger equates to prejudice.

34. In order for a prejudice based exemption, such as section 38(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.

The FCO's position

35. In its responses to the complainant the FCO argued that disclosure of the withheld information could endanger the health and safety of specific individuals.
36. As with section 24(1), the FCO provided the Commissioner with more detailed submissions to support its reliance on section 38(1)(b) but such submissions cannot be included in this decision notice given their sensitivity.

The Commissioner's position

37. With regard to the three limb test set out above, the Commissioner is satisfied that the FCO's arguments relate directly to the interests which section 38(1)(b) of FOIA is designed to protect. The first limb of the test is therefore met. However, she is not persuaded that there is a causal link between disclosure of the contracts' award, start and end dates, and the individual value of each contract, and harm occurring to the health or safety of any individual.
38. The Commissioner has therefore concluded that the contracts' award, start and end dates, and the individual value of each contract is not exempt from disclosure on the basis of section 38(1)(b) of FOIA.
39. The Commissioner has explained her reasons for reaching this conclusion in the confidential annex.

Right of appeal

40. 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

41. 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.
42. 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
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF