

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 May 2021

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

Decision (including any steps ordered)

1. The complainant submitted a request to the Department for International Development (now part of the Foreign, Commonwealth & Development Office, FCDO) seeking audits, evaluations and reports into the Ebola response in the Democratic Republic of the Congo. The FCDO explained that it did not hold any audits. It also explained that it held one report which was exempt from disclosure on the basis of section 21 (information reasonably accessible) of FOIA and a further report which was exempt from disclosure on the basis of sections 27(1)(a) to (d) and 27(2) (international relations) of FOIA. The complainant disputed the FCDO's reliance on these latter exemptions and also its position that it did not hold any audits about the response.
2. The Commissioner has concluded that, on the balance of probabilities, the FCDO does not hold any audits falling within the scope of the complainant's request. The Commissioner has also concluded that the FCDO is entitled to rely on section 27(2) of FOIA to withhold the second report and that in the circumstances of the case the public interest favours maintaining this exemption.
3. No steps are required.

Request and response

4. The complainant submitted the following request to the Department for International Development (DFID)¹ on 1 July 2020:

'I would like the following documents:

- all audits that pertained to the Ebola response in DRC [Democratic Republic of the Congo] (internal and external audits) since 10th September*
- all evaluations and/or reviews pertaining to the Ebola response in DRC (internal or external) since 1st August 2018.*

I have done a similar request previously (F2019-322) but this one is different because I hadn't asked for the evaluations and I didn't ask for audits after 10th September.

To clarify, audits are all of the documents that inspect the accounts/finances of the response to the 10th Ebola epidemic while evaluation/reviews are all the documents that look at its impacts and outcomes. Basically, I'm asking for any document that inspects the Ebola response to the 10th Ebola epidemic in DRC (not planning documents).

This could also be sections of audits and evaluations that contain a section relevant to the Ebola response while the rest of the audit/evaluation isn't about the Ebola response. In this case, in the case this would render the request too wide, I only request the relevant section as well as the cover page of the document (so I can see the context).'

5. DFID responded on 12 August 2020. It explained that it did not hold any information falling within the scope of part 1 of this request. With regard part 2 of the request, DFID explained that some of this information was exempt from disclosure on the basis of section 21 (information reasonably accessible to the requestor) of FOIA, namely the Annual review of the Ebola Virus Disease Outbreak - UK Response. However, DFID explained that the remaining information it held falling within the

¹ Although the complainant originally submitted his request to DFID, on 2 September 2020 DFID merged with the Foreign and Commonwealth Office (FCO) to become the Foreign, Commonwealth & Development Office (FCDO). This decision notice is therefore served on the FCDO.

scope of this part of the request was considered to be exempt from disclosure on the basis of the following exemptions within FOIA:

- Sections 27(1)(a) to (d) and 27(2) – international relations
 - Section 35(1)(a) – formulation and development of government policy
 - Section 35(1)(b) – Ministerial communications
 - Section 40(2) – personal data
 - Section 43(2) – commercial interests
6. The complainant contacted DFID on 13 August 2020 and asked it to conduct an internal review of this refusal.
7. The FCDO responded on 3 September 2020 and explained that section 35(1)(b) did not apply to the withheld information. However, the review concluded that the information remained exempt from disclosure on the basis of sections 27(1), 27(2) and 35(1)(a) of FOIA. The FCDO's response did not make any reference to the application of sections 40(2) and 43(2).

Scope of the case

8. The complainant contacted the Commissioner on 3 September 2020 in order to complain about the FCDO's handling of his information request. He raised the following grounds of complaint:
9. Firstly, in relation to part 1 of his request, he questioned the FCDO's position that it held no audit whatsoever of the Ebola response.
10. Secondly, the complainant argued that there is compelling public interest in the disclosure of the information falling within the scope of his request which the FCDO confirmed that it did hold but was seeking to withhold. The complainant did not seek to contest the FCDO's reliance on section 21 of FOIA to withhold the 'Annual review of the Ebola Virus Disease Outbreak - UK Response' document. Rather his complaint focused on the FCDO's reliance on the other exemptions it cited to the additional information falling within the scope of this part of his request.
11. During the course of the Commissioner's investigation the FCDO explained that the additional information it was seeking to withhold was a document entitled 'DR Congo: Ebola Virus Disease Response Operational Peer Review' which had been carried out by Inter-Agency Standing Committee, a humanitarian coordination forum of the UN. The FCDO explained that it considered this document, the 'OPR', to be

exempt from disclosure on the basis of sections 27(1)(a) to (d), 27(2) and 27(3) of FOIA. It also explained that certain names within the document were considered to be exempt from disclosure on the basis of section 40(2) of FOIA. The FCDO explained that it was no longer seeking to rely on sections 35(1)(a) or 43(2) to withhold this document.

Reasons for decision

Complaint 1

12. In scenarios such as this where there is some dispute as to whether information falling within the scope of the request is held, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
13. 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 which falls within the scope of the request.
14. In applying this test the Commissioner will consider the scope, quality, thoroughness and results of the searches, or other explanations offered as to why the information is not held.

The complainant's position

15. The complainant noted that in its 'Business Case Summary Sheet' in relation to this project, DFID had estimated the fiduciary risks of this project to be 'Major'.² He therefore argued that it was therefore surprising that the FCDO did not hold any audit documents whatsoever of the project.
16. The complainant also argued that the process by which DFID (and now the FCDO) consulted the World Health Organisation (WHO) audits without downloading them enabled it to claim that it does not 'hold' them and this is a serious hurdle towards transparency. The complainant explained that he wished the Commissioner to look into whether the FCDO held any documents that fell under that first part of his request, for example if anyone at the FCDO had downloaded or printed any audit.

² <https://devtracker.fcdo.gov.uk/projects/GB-GOV-1-300832/documents>

The FCDO's position

17. In order to investigate this aspect of the complaint the Commissioner asked the FCDO a number of questions about the steps it had taken to locate information falling within the scope of this part of the request. The Commissioner has reproduced these questions, and the FCDO's responses, below.

Question: 'Please explain the nature of the searches undertaken to locate information falling within the scope of part 1 of the request. Why would these searches have been likely to have located information falling within the scope of the request if it were held?'

Answer: The FCDO's Ebola response team carried out a review of the relevant programme folders in our electronic document and records management system (Vault) where all key documentation relating to the Ebola response in DRC would be held. In addition, given the fact that audits and reviews are substantive pieces of work the team working on the response would be fully aware if any were held and where they would be located.

Question: In relation to the complainant's point about the 'Business Case Summary Sheet', would DFID have usually conducted an audit of a project if the fiduciary risks were estimated to be 'Major'?"

Answer: The FCDO (and its predecessor DFID) undertakes an Annual Review of all its programming, regardless of the level of risk. The review relating to the UK's response to the Ebola crisis is published online, and a link was provided to the complainant. It is not unusual for FCDO programmes operating in complex humanitarian settings such as the DRC to be classed as representing major risk and there was no requirement to undertake an independent audit.

Question: would DFID staff have been likely to download or print WHO audits of this project? If so, were copies of any of these reports retained, either in hard or electronic copy?

Answer: WHO provided an audit of their Ebola operations via a link to a secure web browser. FCDO staff were unable to download or print the audit and the access, which we no longer have, was time sensitive.

The Commissioner's position

18. The Commissioner is satisfied that the searches undertaken by the FCDO were sufficient to ensure that if an audit of this project had been undertaken that it would have been located. In reaching this conclusion the Commissioner notes that the searches were undertaken by officials working on the Ebola response and she accepts the FCDO's point that

such staff would have been aware, and been able to locate, an audit of the nature requested if it were held. The Commissioner also notes that the FCDO's point that simply because a project is classed as a major fiduciary risk this does not mean that an independent audit would be undertaken.

19. In terms of the WHO audit on this project, in light of the FCDO's clarification of how its staff accessed this audit, the Commissioner accepts that such information cannot be said to have been held by the FCDO for the purposes of FOIA.
20. In light of the above, the Commissioner is satisfied on the balance of probabilities that the FCDO does not hold any information falling within the scope of the first part of the complainant's request.

Complaint 2

21. Section 27(2) of FOIA states that:

'Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.'

22. Section 27(3) of FOIA explains that:

'For the purposes of this section, any information obtained from a State, organisation or court is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.'

23. Section 27(2) is a class based exemption and is not subject to the prejudice test.

The FCDO's position

24. The FCDO explained that in applying this exemption it had taken note of the Commissioner's guidance which explained that section 27(2) *'relate[s] not primarily to the subject of the information, nor the harm resulting from its disclosure, but to the circumstances under which it was obtained and the conditions placed on it by its supplier.'*³

³ The Commissioner's guidance on section 27 has since been updated and this specific wording no longer appears in the current version of the guidance. However, the

25. The FCDO explained that the OPR was commissioned by the International Inter-Agency Standing Committee forum of the UN and FCDO held a draft version of the report. The FCDO explained that the OPR is an internal, inter-agency management tool which identifies areas for improvement (if applicable) in a response. The FCDO explained that such reviews are designed to be a light, brief and collaborative process, undertaken by a team of senior humanitarian officials (peers to the leadership in the affected country). The OPR is forward-looking and used to determine whether the collective response to the infectious disease event needs to be adjusted or improved to meet its objectives.
26. The FCDO explained that it had consulted the UN and it had stated that they consider the OPR to be an internal document, and while not explicitly labelled as 'confidential', it was created under an expectation of confidentiality. The FCDO explained that the UN's position was very clear that the report which was sent to the FCDO should not be publicly disclosed. In light of these circumstances, the FCDO explained that it was firmly of the view that the information, is, as a matter of fact, confidential information provided by an international organisation and that the UN's reasonable and stated expectation in sharing it with DFID was that it would remain so.

The Commissioner's position

27. The Commissioner is satisfied that the OPR is exempt from disclosure on the basis of section 27(2). The information was clearly obtained by the DFID from an international organisation, namely the UN. Furthermore, based on the FCDO's submissions to her she accepts that the UN provided the information to DFID with the clear expectation that it would be treated confidentially.

Public interest test

28. However, section 27(2) is a qualified exemption and therefore subject to the public interest test set out in section 2(2)(b) of 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 information.

Public interest in disclosing the information

Commissioner's position on how section 27(2) should be interpreted and applied has not altered.

29. The FCDO acknowledged that there is a general public interest in transparency and accountability, and in raising the public's understanding of how the UK government engages with partner governments and international institutions. The FCDO accepted that there was also a clear public interest in demonstrating the effectiveness of its joint partnerships.
30. The FCDO explained that to help meet this public interest, it routinely publishes a wide range of project information on its Development Tracker. This includes the detailed business case and the most recent annual review relating to the Ebola Virus Disease Outbreak - UK Response programme.⁴
31. The complainant noted that DFID had committed over £84m to the Ebola response, about £23m of which was already given to the WHO. He explained that the handling of the Ebola response by the WHO has been criticised, including by DFID itself:
- 'The main UK partner and receiver of funding is WHO. ... WHO's performance in DRC has improved over the course of the programme. Early on in the response DFID had major concerns about their management of risk, delivery, financial management and quality of reporting.'*⁵
32. The complainant explained that the WHO's response was also criticised in a report produced by consultants but funded by DFID⁶ and as well as in several news articles.⁷

⁴ <https://devtracker.fcdo.gov.uk/projects/GB-GOV-1-300832/documents>

⁵ Annual review published in June 2020 available at
<https://devtracker.fcdo.gov.uk/projects/GB-GOV-1-300832/documents>

⁶
https://reliefweb.int/sites/reliefweb.int/files/resources/EN_Operational%20Review%20DRC%20Final%20Report_July.pdf

⁷ https://www.liberation.fr/planete/2020/02/04/en-rdc-la-riposte-de-l-oms-rattrapee-par-l-ebola-business_1776970

<https://www.thenewhumanitarian.org/investigation/2020/06/18/Ebola-corruption-aid-sector>

https://www.washingtonpost.com/world/africa/congo-declares-end-of-worlds-second-largest-ebola-outbreak/2020/06/25/88af8bc2-b4e2-11ea-9a1d-d3db1cbe07ce_story.html

33. The complainant explained that one of the main issues of concern was the poor financial management of the Ebola response, in particular by the WHO. The complainant argued that this had a real impact, as described in DFID's annual review:

*'there is a perception by some communities that response staff (or those associated with the response) are profiting from the Ebola outbreak, through for example unfair hiring practices, payments for activities that were previously voluntary, perverse incentives to prolong the outbreak or high prime payments. This has been termed 'Ebola business' by local communities who believe some elements of society have benefited disproportionately from the response. This perceived 'Ebola business' has the potential to damage humanitarian operations in the region and also feeds into narratives that Ebola is either not real or was brought into eastern DRC for people to make money.'*⁸

34. The complainant argued that the mismanagement of funds reflected poorly on the Ebola response, which led to mistrust by communities, who did not cooperate with the Ebola response and sometimes even attacked it. This meant that the epidemic lasted longer and, as a result, more people died than necessary. The complainant explained that the FCDO is now providing further funds to the WHO to fight against Covid-19, as well as another Ebola outbreak in Equateur province in Congo. However, he argued that it was very doubtful that the WHO's financial processes have improved since the Ebola response, in particular since the WHO has not admitted to any serious mistakes.
35. Furthermore, the complainant noted that the report cited at footnote 6 had also identified the sexual abuse of 50 women employees of the Ebola response and that payments to armed forces had taken place.⁹
36. In light of the above, the complainant argued that there was a compelling public interest in the disclosure of the withheld information as the FCDO (and previously DFID) funding had been convincingly linked with sexual abuse of 50 women by employees of the Ebola response; widespread corruption and financial mismanagement in the Ebola

⁸ Annual review published in June 2020 available at <https://devtracker.fcdo.gov.uk/projects/GB-GOV-1-300832/documents>

⁹ The complainant also cited this news report about the sexual abuse of Ebola response employees: <https://www.thenewhumanitarian.org/2020/09/29/exclusive-more-50-women-accuse-aid-workers-sex-abuse-congo-ebola-crisis>

response; payment to security forces that have a very bad human rights record, with no due diligence; and, payment to non-state armed groups.

37. He emphasised that the response to the Ebola crisis was the subject of current Parliamentary debate in the UK. However, the complainant argued that the public interest in the disclosure of this information was not limited to the interests and concerns of UK taxpayers but also extended to Congolese citizens in Congo and everywhere the WHO is operating.
38. He argued that disclosure of the withheld information would hopefully shed more light on the nature of the Ebola response and in particular the issues that occurred in delivering this response as detailed above.

Public interest in maintaining the exemption

39. The FCDO argued that there is a very strong public interest in the UK being able to maintain good international relations.
40. The FCDO argued that the public interest would be harmed by any negative impact on the exchange of information between the UK and its international partners. It emphasised that the UN are a key international partner for the UK with relations extending to a very broad and deep range of interests (for example, trade, regional stability, climate change, migration). The FCDO argued that a breakdown in trust between the UK and the UN caused by the disclosure of confidential information would have an adverse effect on the UK's ability to pursue these wide-ranging and significant areas of policy interest as well as making it much more difficult for the FCDO to carry out the public policy objectives of reducing poverty.
41. Similarly, the FCDO argued that there is a very strong public interest in the UK being able to support partner organisations such as the UN in preserving good working relations and essential information flows with their clients and international partners. The FCDO argued that disclosing the withheld information would undermine the UN's commitments and obligations to protect information provided to them in confidence. In turn this would be likely to damage the UN's relationships with key partners and impede their ability to promote international development. The FCDO explained that it considered such outcomes to be clearly against the public interest.
42. More broadly, the FCDO argued that the public interest would be harmed by any negative impact on the exchange of information between the UK and its international partners. This could be either through information no longer being provided in future or by a failure by the FCDO's partners to respect the confidentiality of the information that

they received from the UK government. The FCDO argued that such an outcome would reduce the likelihood of open and effective dialogue in future and would significantly undermine the UK's ability to respond to international development needs.

Balance of the public interest test

43. In the Commissioner's opinion there is an inherent public interest in protecting confidentiality. This is because disclosure of confidential information undermines the principle of confidentiality, which depends on a relationship of trust between the confider and the confidant. Furthermore, in the Commissioner's view there is a public interest in respecting international confidences to ensure that states, international organisations or courts are not deterred from providing information.
44. In terms of the weight that should be applied to the public interest arguments both for and against disclosure consideration has to be given to the likelihood and severity of any harm, the age of the information, how far the requested information will help public understanding and whether similar information is already in the public domain.
45. In relation to the specifics of this case the Commissioner accepts that there is a clear public interest in the disclosure of information about the response to the Ebola outbreak in the DRC, and in particular WHO's response to it. The Commissioner has reached this position in light of the findings of both DFID's own report, the report produced by the consultants contracted by DFID, and also more broadly in relation to the various media articles cited by the complainant. Given the issues that these various sources identify, the Commissioner accepts that there is a public interest in disclosing information which would reveal what areas for improvement a forum of the UN had identified in relation to the response to the crisis. Consequently the Commissioner believes that significant and considerable weight should be given to the public interest in disclosing the withheld information.
46. However, the Commissioner acknowledges that there is already some information in the public domain which provides an assessment of the response. Whilst the disclosure of the withheld information would provide a different perspective on the response to the crisis, namely from within the UN, in the Commissioner's opinion the availability of the information already in the public domain reduces, slightly, the weight that should be attributed in favour of disclosure.
47. Furthermore, in the circumstances of this case the UN provided DFID with the report in question relatively recently, which in the Commissioner's opinion significantly increases the risk of an adverse reaction from the UN should the FCDO disclose this information. The

Commissioner also accepts the FCDO's position that there is very strong public interest in ensuring that the UK maintains effective working relations with the UN and that disclosure of the withheld information risks damaging this relationship, not only in the context of responding to Ebola outbreaks in Africa, but the UK's relations with the UN more broadly.

48. Consequently, on balance the Commissioner has concluded that the public interest favours maintaining the exemption. In reaching this finding the Commissioner wishes to emphasise that she accepts there is a strong public interest in the disclosure of the withheld information. However, in light of the information already in the public domain about the response to crisis, and in particular because of the broader consequence of disclosing the information, the Commissioner has concluded that the public interest tips in favour of maintaining the exemption.

Right of appeal

49. 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

50. 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.
51. 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