

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 June 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 Foreign and Commonwealth Office (FCO, now part of the Foreign, Commonwealth & Development Office, FCDO) for correspondence between the European Commission and the UK Representative to the EU about the appointment of a UK Commissioner to the EU. The FCO withheld the information on the basis of the exemptions contained at sections 27(1)(b) and 27(2) (international relations) and section 41(1) (information provided in confidence) of FOIA.
2. The Commissioner is satisfied that the FCO was entitled to rely on section 27(1)(b) to withhold all of the information falling within the scope of the request and that in all of the circumstances of the case the public interest favoured maintaining the exemption.
3. No steps are required.

Request and response

4. The complainant submitted the following request to the FCO¹ on 8 December 2019:

'I am happy to request [following a previous exchange of emails with the FCO about the wording of his request] correspondence passing between the UK Representation to the UK and the EU Commission as you suggest.

1. I wish to know the texts of all letters and notices from the EU Commission to the UK Government, including the recent Enforcement Notice issued by the EU since July 2019?

2. I wish to know the texts of all letters and responses from the UK to the EU Commission since July 2019, excluding the letter from Mr. Tim Barrow dated 23rd August 2019?'

5. He later confirmed that he was happy to proceed with the following wording for his request:

'1. I wish to know the texts of all letters and notices from the EU Commission to the UK Representation to the EU including the recent Enforcement Notice issued by the EU since July 2019?

2. I wish to know the texts of all letters and responses from the UK Representation to the EU to the EU Commission since July 2019, excluding the letter from Mr. Tim Barrow dated 23rd August 2019?'

6. At the request of the FCO he subsequently clarified his request on 19 December 2019 as follows:

'I confirm that all of the parts of my FOI request relate to the appointment of a UK Commissioner to the EU as stated in your email.'

7. The FCO contacted him on 17 January 2020 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

¹ The FCO merged with the Department for International Development on 2 September 2020 to form the FCDO. This decision notice is therefore served on the FCDO but refers to the FCO where it was the body that took certain actions in relation to the request.

relations) of FOIA and it needed additional time to consider the balance of the public interest test.

8. The FCO provided him with a substantive response to his request on 5 February 2020. The FCO explained that the requested information was considered to be exempt from disclosure on the basis of sections 27(1)(b) and 27(2) of FOIA and that in all of the circumstances of the case the public interest favoured maintaining these exemptions. The FCO also explained that some of the information was considered to be exempt from disclosure on the basis of section 41(1) (information provided in confidence) of FOIA.
9. The complainant contacted the FCO on 12 April 2020 and asked it to conduct an internal review of this refusal arguing that there would not be any prejudice to the UK in releasing this information in view of the fact that the UK had left the EU on 31 January 2020.
10. The FCO informed him of the outcome of the internal review on 10 June 2020. The review upheld the application of the exemptions cited in the refusal notice.

Scope of the case

11. The complainant contacted the Commissioner on 14 June 2020 in order to complain about the way his request for information had been handled. He disagreed with the FCO's decision to withhold the information he had requested.
12. For the purposes of this complaint it is important to note that the role of the Commissioner is to consider the application of any exemptions at the point that the request was submitted, or at the time of the public authority's internal review.²

² This reflects the position taken by the Upper Tribunal in [APPGER v ICO and Foreign and Commonwealth Office \(UKUT 0377 \(ACC\), 2 July 2015\)](#).

Reasons for decision

Section 27(1)(b) – international relations

13. The FCO withheld all of the information falling within the scope of the request on the basis of section 27(1)(b). This states that information is exempt *'if its disclosure would, or would be likely to, prejudice relations between the United Kingdom and any international organisation or international court'*.

The FCDO's position

14. In its refusal notice the FCO explained that the information in the scope of this request relates to confidential discussions held between the UK government officials and representatives of the European Commission (EC). (The subject of these discussions was, as specified by the complainant's clarification of 19 December 2019, the appointment of a UK Commissioner to the EU.³) The FCO argued that disclosure of the information in question would damage the UK's relations with the individuals concerned as they would be more guarded and less cooperative in their dealings with the UK. The FCO also argued that the EC may be more reluctant to share sensitive information with the UK government in future and may be less likely to respect the confidentiality of information supplied by the UK Government.
15. In its internal review response, the FCO noted (in response to the points made by the complainant in his internal review) that the UK had indeed left the EU on 31 January 2020. However, the FCO explained that the information within scope of this request was information relating to correspondence between UK Government officials and representatives of the EC. The FCO explained that it remained of the view that the correspondence was confidential and sensitive and that release would impact on the UK's ongoing relationship with the EC and Member States.
16. The FCDO provided the Commissioner with further detailed submissions to support its application of section 27(1)(b) (as well as the other exemptions cited). The Commissioner cannot reproduce all of these submissions in this notice as they relate directly to the content of the withheld information or additional information which the FCDO considers

³ On 14 November 2019 the EC launched infringement proceedings against for UK for its failure to name a candidate for EU Commissioner.

https://ec.europa.eu/commission/presscorner/detail/en/ip_19_6286

to be sensitive. However, the Commissioner can confirm that the FCDO explained that it had consulted the EC about this request as EU Regulation 1049/2001 sets out the procedure for dealing with requests for access to EU documents and that this regulation continued to apply until the end of the transition period (ie 31 January 2020). The FCDO explained that although it took the final decision to withhold requested information in response to this FOI request, it took into account the Commission's view that in light of the legal proceedings which had been initiated against the UK, exceptions in Article 4 of Regulation 1049/2001 applied⁴.

17. The FCDO also explained that at the time of the request there were still ongoing negotiations regarding the UK's departure from the EU and release of information at this time would have been very likely to cause damage to the UK's relationship with the EU, particularly as the documents related to the infringement procedure brought against the UK regarding the UK government not naming a candidate for EU Commissioner.

The complainant's position

18. The complainant argued that the FCDO was wrong to determine that disclosure of the withheld information would be prejudicial in view of the fact that the UK had already left the EU on 31 January 2020. He noted that the EU Withdrawal Agreement had also already been negotiated between the parties and so those negotiations are now completely closed and determined.
19. He also explained that he did not accept that the withheld information was supplied by either the EU or the UK in confidence for the purposes of sections 27(2) or 41(1) of FOIA. He explained that he was unaware of any stipulation either by the UK or the EU that the communications passing between them were required to be confidential and no evidence had been produced by the FCDO to show that the exchanges were made in confidence.
20. He also noted that as the UK has now left the EU it is not clear what the status of the EU enforcement action in relation to the UK not naming a Commissioner is given that it is no longer a member state. In addition, the complainant noted that the Prime Minister had also publicly stated

⁴ Regulation 1049/2001 concerns public access to European Parliament, Council and Commission documents. Article 4 contains a number of exemptions upon which an institution can refuse to disclose a document.

that the UK would not appoint a UK EU Commissioner, as a matter of principle as the UK was leaving the EU, which again was widely reported in the media at the time. He also suggested that he recalled the issue of enforcement action against the UK being publicised on the EU website. In light of these circumstances, the complainant argued that even if it is contended that there was some form of confidentiality, both parties appear to have waived this from the public statements that were made at the time.

21. Furthermore, in his submissions to the Commissioner of June 2020, the complainant argued that in assessing this complaint it would be relevant to take into account whether there had been any trade deal negotiated under the transition arrangement which ended on 31 January 2020, as that must be a factor as to any degree of prejudice which might be caused to either party by disclosure of this information. However, the complainant argued that it is somewhat difficult to see how disclosure of the requested information surrounding the failure of the UK to nominate a UK Commissioner to the EU could have any possible bearing on any future trading arrangement with the EU, or any future political or diplomatic relations, in view of the fact that the UK is now a third party state and no longer partakes in the affairs of the EU at all after 31 January 2020.

The Commissioner's position

22. 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.

23. 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*'.⁵
24. As noted above, the Commissioner's role is to consider the application of any exemptions at the point that the request was submitted (or the point that the internal review was completed.) The clarified request was submitted on 19 December 2019, ie before the UK's departure from the EU; the internal review was completed on 10 June 2020, ie after the UK's departure from the EU.
25. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the FCDO relates to the interests which the exemption contained at section 27(1)(b) is designed to protect.
26. With regard to the second criterion, having considered the content of the withheld information and taking into account the FCDO's submissions to her, the Commissioner is satisfied that there is a causal link between disclosure of this information and prejudice potentially occurring to the UK's relations with both the EC and the EU. In reaching this conclusion she disagrees with the complainant that there is no evidence that the withheld information was considered confidential by either the UK and or the EC. Rather, in the Commissioner's view it is clear that communications between the UK and EC on this matter were exchanged with an expectation that they would be treated confidentially. Furthermore, the Commissioner notes that the EC was consulted in relation to this request and specifically requested that the information was not disclosed given the ongoing legal proceedings instigated against the UK.
27. In light of this the Commissioner is satisfied that there is a clear causal link between disclosure of the information and prejudice potentially occurring to the the UK's relations with the EC. In reaching this conclusion the Commissioner has considered the nature of the information referred to by the complainant that was in the public domain about the infringement proceedings, and having done so she is satisfied that there is nothing in that information which undermines the

⁵ Campaign against Arms Trade v the Information Commissioner and Ministry of Defence EA/2007/0040 (26 August 2008)

confidentiality of the withheld information. Furthermore, the Commissioner accepts that at the time of the request the UK was in ongoing discussions with the EU about the UK's departure from the EU, and given that the information related directly to the UK's failure to appoint a EU Commissioner, the Commissioner also accepts that there is causal link between disclosure of the information and prejudice potentially occurring to the UK's relations with the EU.

28. In addition, having considered all of the circumstances of the case the Commissioner is satisfied that disclosure of the information at the time of the request, as well as at the point of the internal review, would have been likely to have resulted in prejudice that was real and of substance. In reaching this conclusion the Commissioner accepts that by the time of the internal review the UK had left the EU. However, she notes that discussions continued to take place throughout 2020 between the UK and EU in relation to UK/EU's relationship after the transitional period ended. In light of this the Commissioner is satisfied that disclosure of the information in June 2020 would still have been likely to be harmful to this relationship given that the EC had previously specifically requested that such information was not disclosed. As a result, the Commissioner is satisfied that there is more than a hypothetical risk of prejudice occurring and the third criterion is met
29. Section 27(1)(b) is therefore engaged.

Public interest test

30. Section 27(1) 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.
31. The FCDO acknowledged that releasing the withheld information would increase public knowledge about the UK's relations with the EC about this issue.
32. However, the FCDO emphasised that the effective conduct of international relations depends upon maintaining trust and confidence between governments and international organisations. Furthermore, the FCDO argued that the successful conduct of international relations is founded on the ability to influence, persuade, negotiate, build alliances and reach consensus with foreign interlocutors. The FCDO argued that if the UK does not maintain this trust and confidence, its ability to protect and promote UK interests through international relations will be hampered, which will not be in the public interest. In the particular circumstances of this request the FCDO emphasised that for the reasons

set out above it was of the view that disclosure of the information would be likely to harm the UK's relations with the EC, and the EU, and that such outcome would in turn undermine the UK's ability to protect and promote its interests through international relations. It argued that such an outcome would be clearly against the public interest, particularly at a point in time where negotiations regarding the UK's departure from the EU were still ongoing.

33. In the Commissioner's view there is a clear public interest in understanding how the UK conducts its relations with international organisations. In the specific circumstances of this request she accepts that there is a particular, and legitimate, interest from the public in understanding the UK's discussions with the EC about this issue. Disclosure of the withheld information would directly meet this interest.
34. However, the Commissioner accepts that there is very strong public interest in ensuring that the UK's relationship with international organisations is not harmed in order to ensure that the UK can protect and promote its interests. In the context of this request, the Commissioner accepts that disclosure of the information at the point of the request, and by the internal review stage, would have impacted on the UK's ongoing relations with both the EC and the EU. In light of this the Commissioner has concluded that the public interest in maintaining the exemption contained at section 27(1)(b) outweighed the public interest in disclosure of the information.
35. Given this conclusion the Commissioner has not considered the FCDO's reliance on sections 27(2) and 41(1) of FOIA.

Right of appeal

36. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

37. 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.
38. 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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