

**Freedom of Information Act 2000 (FOIA)**  
**Environmental Information Regulations 2004 (EIR)**

**Decision notice**

**Date:** 14 December 2021

**Public Authority:** Foreign, Commonwealth and Development Office

**Address:** King Charles Street  
London SW1A 2AH

**Decision (including any steps ordered)**

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1. The complainant has made three linked information requests regarding the treatment of five individuals who have made a legal claim against the Foreign, Commonwealth and Development Office (then called the Foreign and Commonwealth Office) ("FCDO"). The FCDO refused to provide the information citing section 40 (unfair disclosure of personal data), section 32 (court records) and section 42 (legal professional privilege) as its basis for doing so. It also refused to confirm or deny whether it held information within the scope of the request that would be caught by section 24 (national security) or section 23 (security bodies). It upheld this at internal review. During the course of the Commissioner's investigation it also sought to rely on section 31 (prejudice to the administration of justice) as an additional basis for withholding some of the information. It also denied holding information within the scope of the third request.
2. The Commissioner's decision is that the FCDO is entitled to rely on section 32(1)(a) and section 31(1)(c) as its basis for refusing to provide the requested information. It is also entitled to rely on section 23(5) and section 24(2) as its basis for refusing to confirm or deny whether the information it holds within the scope of the request also includes information relating to the security bodies or information which would prejudice the safeguarding of national security. The Commissioner is also satisfied that it held no information within the scope of the third request at the time that request was made.
3. No steps are required.

## **Request and response**

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4. On 23 April 2019, the complainant requested information of the following description:

"Rahmatullah v Ministry of Defence & Anor [2017] EWHC 547 (QB)

I am interested in the treatment of 5 people who have issued a legal claim against you and the MoD, Yunus Rahmatullah and Amanatullah Ali, XYZ, HTF & ZMS.

Request.

1. Provide all information held regarding torture or other forms of ill-treatment of

Yunus Rahmatullah,

Amanatullah Ali

XYZ,

HTF

ZMS: -

a) at the time of their capture and while in British custody

b) by US forces

2. When is this case scheduled for trial?

3. If you have settled any claims provide full details including, damages, costs and consent Orders."

5. For ease of future reference, the Commissioner will refer to these as three individual requests although clearly they are related to each other.
6. On 22 May 2019, the FCDO wrote to say it needed more time to consider the balance of public interest in respect of sections 24 and 42. It did so again on 19 June 2019. The complainant sought a review of this failure to provide him with a refusal notice on 21 June 2019.
7. On 2 July 2019, the FCDO responded. It refused to provide information within the scope of the request citing section 40 (unfair disclosure of personal data), section 32 (court records) and section 42 (legal professional privilege) as its basis for doing so. It also refused to confirm or deny whether it held information that would be caught by section 24 (national security) or section 23 (security bodies).
8. The complainant requested an internal review of this substantive response on 2 July 2019. The FCDO sent him the outcome of its internal review on 29 July 2019. It upheld its original position.

## **Scope of the case**

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9. The complainant contacted the Commissioner on 29 July 2019 to complain about the way his requests for information had been handled.
10. Self-evidently, the investigation of this case has been protracted. In most cases, the Commissioner expects public authorities to provide him with copies of the withheld information along with its arguments regarding its reliance on exemptions. In a very small number of cases, this is not possible for security reasons and the Commissioner, or a senior representative with appropriate security clearance, will view the information held by the public authority in situ. This was the case here. However, due to the restrictions on movement imposed during the height of the 2020 Covid-19 pandemic, this was not possible. Neither the Commissioner's officers nor employees of the FCDO were able to meet to view the information withheld or discuss FCDO's position with regard to this case.
11. Once those restrictions were lifted, a senior representative of the Commissioner was able to view the information in situ. The representative made a second visit to view the information and to seek clarification of certain points which had not been made clear at their first visit.
12. The Commissioner has considered whether the FCDO is entitled to rely on all the exemptions it has cited as its basis for not disclosing the information it has withheld in this case. During the course of the Commissioner's investigation, it also introduced reliance on section 31(1)(c) – administration of justice as its basis for refusing to provide some of the information. The Commissioner has therefore included consideration of this exemption as a basis for non-disclosure in this case. He has also considered whether the FCDO is entitled to refuse to confirm or deny whether it holds information that would be caught by section 24 (national security) or section 23 (security bodies). Finally, he has considered whether the FCDO is correct when it denies holding information caught by the scope of the third request at the time of that request.
13. The Commissioner regrets that the complainant has had to wait such a long time for progress on their complaint. Further information about this is in the Other Matters section of this Notice.

## **Reasons for decision**

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### **Section 32 – court records**

14. Section 32(1) of the FOIA states:

"Information held by a public authority is exempt information if it is held only by virtue of being contained in—

- (a) any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter".

15. The FCDO described the information to which it believes this exemption applies as follows:

"At the time the original request was made the material in scope of the request had been collated by the [FCDO] for the purposes of disclosure in ongoing litigation. The cases in question were High Court civil litigation brought against the Foreign and Commonwealth Office among others, and scheduled for hearing under Closed Material Procedures as specified under Section 6 of the Justice and Security Act 2013 (Case numbers: HQ15P01085 & HQ13X01841). We thus considered that the material concerned was exempt in its entirety under s32(1)(a) of the FOIA."

16. Section 32(1) is a class based exemption. This means that any information falling within the category described is automatically exempt from disclosure, regardless of whether or not there is a likelihood of harm or prejudice if it is disclosed. It is therefore conceivable that the exemption could apply to information which may otherwise be available to an applicant via other means, or to information which is already widely available. It is also not subject to a balance of public interests test.
17. There are two main tests in considering whether information falls within this exemption. First, is the requested information contained within a relevant document? Secondly, is this information held by the public authority only by virtue of being held in such a document?
18. In the Commissioner's view, the phrase 'only by virtue of' implies that if the public authority also holds the information elsewhere it may not rely upon the exemption. Is the information contained in a relevant document created for the purposes of proceedings in a particular cause or matter?
19. What is important in this context is whether the information meets the criteria set out in section 32(1)(a) of the FOIA. As the wording of the exemption implies, it is not only the reason for holding the information which is relevant, but also the type of document it is contained in.

## **Section 32 - conclusion**

20. Having viewed the information and having considered the above, the Commissioner is satisfied that the information to which this exemption has been applied can be withheld by virtue of section 32(1)(a).
21. Section 32 is not subject to a public interest test and therefore the Commissioner is satisfied that the information to which it has been applied can be withheld on that basis.
22. The Commissioner notes that section 40 was also applied to the first request. Given his decision regarding section 32, he has not gone on to set out an analysis of section 40 in respect of this case. However, he is satisfied that the information is the personal data of specific individuals and that disclosure of it would contravene data protection legislation.
23. Similarly, given his decision on the application of section 32, he has not gone on to consider the application of section 42.
24. Before moving on the consideration of requests two and three, the Commissioner will consider whether the FCDO is entitled to rely on section 24 (national security) and section 23 (security bodies) as its basis for refusing to confirm or deny whether it holds other information within the scope of the first request.

**Section 23 – security bodies and Section 24 – national security  
Neither Confirm Nor Deny**

25. The right of access under FOIA is in two parts. Under section 1(1)(a) a public authority must confirm or deny it holds information within the scope of a specific request. Under section 1(1)(b) it must provide that information. Both provisions of section 1 are subject to exemptions.
26. FCDO also explained that it was relying on sections 23(5) and 24(2) of FOIA as a basis to refuse to confirm or deny whether it held any further information falling within the scope of the first request other than that which it had already sought to withhold on the basis of other exemptions of FOIA.
27. Sections 23(5) and 24(2) exclude the duty of a public authority to confirm or deny whether it holds information which, if held, would be exempt under section 23(1) or 24(1) respectively.
28. Information relating to security bodies specified in section 23(3) is exempt information by virtue of section 23(1). Information which does not fall under section 23(1) is exempt from disclosure under section 24(1), if it is required for the purpose of safeguarding national security.
29. By virtue of section 23(5) the duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which

was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in section 23(3).

30. By virtue of section 24(2) the duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security.
31. The Commissioner does not consider the exemptions at sections 23(5) and 24(2) to be mutually exclusive and he accepts that they can be relied on independently or jointly in order to conceal whether or not one or more of the security bodies has been involved in an issue which might impact on national security. However, each exemption must be applied independently on its own merits. In addition, the section 24 exemption is qualified and is therefore subject to the public interest test.
32. The test as to whether a disclosure would relate to a security body is decided on the normal standard of proof, that is, the balance of probabilities. In other words, if it is more likely than not that the disclosure would relate to a security body then the exemption would be engaged.
33. From the above it can be seen that section 23(5) has a very wide application. If the information requested is within what could be described as the ambit of security bodies' operations, section 23(5) is likely to apply. This is consistent with the scheme of FOIA because the security bodies themselves are not subject to its provisions. Factors indicating whether a request is of this nature will include the functions of the public authority receiving the request, the subject area to which the request relates and the actual wording of the request.
34. The Commissioner finds that on the balance of probabilities, further information within the scope of this request, if held, could be related to one or more bodies identified in section 23(3).
35. With regard to section 24(2), the Commissioner again considers that this exemption should be interpreted so that it is only necessary for a public authority to show either a confirmation or a denial of whether requested information is held would be likely to harm national security.
36. In relation to the application of section 24(2) the Commissioner notes that the First Tier Tribunal (Information Rights) has indicated that only a consistent use of a 'neither confirm nor deny' (NCND) response on matters of national security can secure its proper purpose. Therefore, in considering whether the exemption is engaged, and the balance of the public interest, regard has to be given to the need to adopt a consistent NCND position and not simply to the consequences of confirming whether the specific requested information in this case is held or not.

37. In the context of section 24, the Commissioner accepts that withholding information in order to ensure the protection of national security can extend to ensuring that matters which are of interest to the security bodies are not revealed. Moreover, it is not simply the consequences of revealing whether such information is held in respect of a particular request that is relevant to the assessment as to whether the application of the exemption is required for the purposes of safeguarding national security, but the need to maintain a consistent approach to the application of section 24(2).
38. On this occasion the Commissioner is satisfied that complying with the requirements of section 1(1)(a) would be likely to reveal whether or not the security bodies were in any way involved in the subject matter which is the focus of this request. The need for a public authority to adopt a position on a consistent basis is of vital importance in considering the application of an NCND exemption.

### **Sections 23 and 24 - conclusion**

39. The Commissioner is satisfied that the public authority was entitled to rely on sections 23(5) and 24(2) in the circumstances of this case. He accepts that revealing whether or not further information, falling within the scope of the first request, is held by the FCDO would be likely to reveal whether information is held relating to the role of the security bodies. It would also undermine national security and for that reason section 24(2) also applies because neither confirming nor denying if additional information is held is required for the purpose of safeguarding national security.
40. As noted above section 24 is a qualified exemption. However, the Commissioner considers that there is a significant public interest in protecting information required for the purposes of safeguarding national security. This protection can also include neither confirming or denying whether specific information is held. Therefore, in the circumstances of this case the public interest in maintaining the exemption at section 24(2) outweighs the public interest in complying with the duty imposed by section 1(1)(a).

### **Section 31(1)(c) – prejudice to the administration of justice**

41. Section 31(1)(c) provides that: "Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—the administration of justice,"
42. The FCDO applied this to the information caught by the scope of the second request.



43. The FCDO explained that the proceedings were closed and the date was not made available to the public to avoid any disruption of the case caused by protests. It said:

"The case concerned was going to being heard in closed proceedings so the court hearing dates were not made public. We thus considered that this information was exempt under s.31(1)(c) as disclosure was likely to prejudice the administration of justice. The hearing dates were not published in this case in order to prevent any prejudice to the case, or any way interfere with the court's ability to conduct the proceedings fairly. Hearing dates for closed proceedings are not generally released for fear of protests, concerns about attempts to undermine the trial, or intimidate witnesses or counsel."

44. In order for a prejudice based exemption such as section 31 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 public authority confirmed whether or not it withheld information 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 confirmation or denial 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, confirmation or denial '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.

45. The Commissioner is satisfied that the withheld information relates to the administration of justice. The prejudice identified relates to the ability of the court to manage the publication of information about court timetabling. Given that the court had already decided not to disclose the dates, the Commissioner is satisfied that there is a causal link between the disclosure and the prejudice identified. A disclosure of the information would contradict the court's earlier decision not to release that information. Given the decision of the court on this specific point in



advance of court proceedings, the Commissioner considers that the prejudice identified would occur if the information was disclosed.

46. The Commissioner's decision is therefore that the withheld information engages the exemption in section 31(1)(c) of the FOIA. This exemption is subject to a balance of public interest test.

*The public interest in the information being disclosed*

47. There is a clear public interest in transparency in any court process with particular regard to procedure. This is not only important for the parties to the case but also for with wider public. If a case is controversial, there is a public interest in allowing interested third parties to assert their right to free expression and to exercise their right to assembly – subject to whatever public order limitations apply.

*The public interest in maintaining the exemption*

48. The Commissioner recognises that disclosure of the information would effectively undermine the court's management of the case at the time of the request. There is a public interest in upholding the decision of a court with regard to reporting restrictions. The Commissioner considers that the FOIA was not intended to provide an alternative information access regime to the managed disclosure of information relevant to an ongoing case. Allowing it to be used in such a way would undermine the court's ability to manage the cases before it.

*The balance of the public interest*

49. There is a strong public interest in a proper and controlled approach to the disclosure of information between parties during the course of a legal case. This facilitates the smooth administration of justice. There is a very strong public interest in protecting the court's decision in disclosure where it has already made a judgment on the disclosure of information. A disclosure of information which the courts have already decided should not be disclosed would undermine the court's management and administration of justice and potentially tip the balance of a case away from the level playing field it is intended to be. The Commissioner has had particular regard for the timing of the request in respect of this decision.
50. The Commissioner acknowledges the strong public interest in disclosure but he considers that the public interest in maintaining the exemption is stronger in this case. In reaching this view, he has had particular regard for the timing of the request.

**Section 31 - Conclusion**

51. In light of the above, the Commissioner has decided that the FCDO is entitled to rely on section 31(1)(c) as a basis for refusing to provide the information described in the second request.

### **Section 1 - Information not held**

52. The FCDO asserted to the Commissioner that it did not hold information within the scope of the third request at the time the request was made. The Commissioner's representative discussed this assertion with the FCDO when attending its premises to view information caught by the scope of these requests in situ.
53. When considering such an assertion, the Commissioner considers the matter on the balance of probabilities. He considers, among other points, whether the public authority has a business need for such information and what its normal records management processes are for such information. He also considers what searches were carried out before a public authority was able to conclude that it did not hold the information in question.

### **Section 1 - conclusion**

54. The Commissioner is unable to put the detail of discussions with FCDO on the face of this notice because, to do so, would disclose sensitive information. However, following those discussions, the Commissioner is satisfied that, on the balance of probabilities, no information within the scope of the third request was held at the time of the request.

### **Other matters**

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55. The Commissioner has appreciated the patience shown by the complainant in this case. He endeavoured to update the complainant where possible but accepts that it was extremely frustrating for the complainant to have had to wait such a long time for progress on this case.

## **Right of appeal**

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56. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

57. 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.
58. 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 .....**

**Gerrard Tracey**  
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