

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 November 2022

Public Authority: Ministry of Defence

Address: Whitehall
London
SW1A 2HB

Decision (including any steps ordered)

1. The complainant submitted a two part request to the Ministry of Defence (MOD) seeking firstly the number of loan service personnel overseas broken down by country between April 2018 and March 2021, and secondly, the total sum received by the MOD for such personnel. The MOD provided the information sought by the first part of the request but withheld the information sought by the second part of the request on the basis of section 27(1)(a) (international relations) of FOIA.
2. The Commissioner's decision is that the information falling within the scope of the second part of the request is exempt from disclosure on the basis of section 27(1)(a) and that in all the circumstances of the case the public interest favours maintaining the exemption.
3. No steps are required.

Request and response

4. The complainant submitted the following request to the MOD on 22 June 2021:

'Please provide the following information broken down over the financial periods 2018-19, 2019-20, and 2020-21:

- The total number of loan service personnel currently overseas broken down by each country

- The total sum received by the MoD (or any other relevant UK government department) for the loan of service personnel. If possible, please provide a breakdown by each country.'
5. The MOD responded on 25 July 2021 and provided the information falling within the part 1 of the request. However, in relation to part 2 of the request the MOD confirmed it held the requested information but considered this to be exempt from disclosure on the basis of section 27(1)(a) of FOIA.
 6. The complainant contacted the MOD on 2 July 2021 and asked it to conduct an internal review of its refusal to provide this information. She argued that 'I do not see any way in which releasing the total sum paid to the MoD by 13 countries over a three year period could possibly have the "same effect" as releasing a country specific breakdown which would identify the financial amount paid by individual countries'.
 7. The MOD informed her of the outcome of the internal review on 16 September 2021. The MOD provided her with an updated set of data in relation to part 1 of her request. However, in relation to part 2 of the request it explained that it remained of the view that the total sums received by the MOD were exempt from disclosure on the basis of section 27(1)(a) of FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 24 November 2021 to complain about the MOD's failure to provide her with the total figure for the three year period covered by her request that the UK received from all of the states in question in respect of loan service personnel. She argued that this total figure could be disclosed without prejudice occurring to international relations, and in any event, argued that there was a public interest in the disclosure of this figure.

Reasons for decision

Section 27(1)(a) – international relations

9. The MOD relied on section 27(1)(a) which states that information is exempt if its disclosure would, or would be likely to, prejudice 'relations between the United Kingdom and any other State.'

The complainant's position

10. The complainant acknowledged that there was an argument to be made that providing a country-specific financial breakdown would be likely to prejudice international relations. However, she did not see how that argument could be made against providing an overall figure for the total amount received by the UK over 3 years by all countries. She argued that disclosure of such a figure could not possibly adversely affect relations with UK allies at either a 'would' or 'would be likely to' level as this would be an overall, anonymised financial figure that does not identify those individual allies. The complainant noted that the number of countries listed in answer to her question was greater than five (there were 13 in total), so the risk of jigsaw identification was a non-issue.

The MOD's position

11. The MOD explained that in its view disclosure of even the total figure received for all three years from all 13 states would still prejudice the UK's relations with the states in question. The MOD explained that in reaching this conclusion it had taken into account the comments of the Information Tribunal in the case Campaign Against the Arms Trade v The Information Commissioner and MOD (EA/2007/0040) which explained that in the context of section 27(1) prejudice can be real or 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'. The MOD was satisfied that in this case the risk of prejudice was real. It noted that disclosure of the information would be a breach of trust and confidence and would prejudice relationships between the UK Government and the countries involved. In order to support its position the MOD provided the Commissioner with further detailed submissions to support its application of this exemption to the total figure. However, as such submissions refer to information which is itself exempt the Commissioner has not included them in this decision notice.

The Commissioner's position

12. In order for a prejudice based exemption, such as section 27, to be engaged the Commissioner believes 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.
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e., disclosure 'would be likely to' result in prejudice or disclosure 'would result' in prejudice. The higher level 'would' means the possible harm caused by release is more probable than not. In other words, there is a more than 50% chance of the disclosure causing the prejudice, even though it is not absolutely certain that it would do so. Case law has determined that the lower level of prejudice 'would be likely to' means that the chance of harm being suffered is more than a hypothetical or remote possibility. That is to say, there must still be a real and significant risk even if it is less likely.
13. With regard to the first criterion of the test set out above, the Commissioner accepts that the type of harm that the MOD believes would occur if the information was disclosed is applicable to the interests protected by section 27(1)(a). With regard to the second and third criteria, the Commissioner has taken into careful consideration the detailed submissions provided to him by the MOD. Having done so he is satisfied that there is a causal relationship between disclosure of the information and prejudice occurring, and that the risk of this occurring is more than a hypothetical possibility. Furthermore, the Commissioner accepts that disclosure of the information would, rather than simply be likely to, prejudice the UK's relations with the other states. Given the nature of the MOD's confidential submissions he is unable to provide any further details as to why he has come to this conclusion.
14. The Commissioner acknowledges that this is likely to be frustrating for the complainant but in some scenarios such an approach is unavoidable. Indeed, FOIA acknowledges that such situations may occur as section 17(4) provides that public authorities do not have to set out in a refusal notice why they consider an exemption to apply if to do so would in itself result in the disclosure of the information that is considered to be exempt.

Public interest test

15. Section 27 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 27(1)(a) outweighs the public interest in disclosing the information.
16. The complainant argued that her request was aimed at understanding how much funding the UK government has received for loaning out its military personnel to countries in which the state has been accused of serious human rights abuses. She argued that this was an issue of great public interest and one which outweighed any public interest in the withholding the information.
17. The MOD acknowledged that disclosure of the information would demonstrate its commitment to transparency and accountability. It also acknowledged that disclosure of the information would provide a better understanding, accountability and justification of how the MOD uses assets and public money. Furthermore, the MOD acknowledged that release would also provide a greater understanding of defence activity and better inform the public on the strength of the international partnership between the UK and other states.
18. However, the MOD argued that this was outweighed by the greater public interest in ensuring that the UK can maintain effective relations with the states in question.
19. The Commissioner agrees that there is a public interest in the disclosure of information which would inform the public about the level of funds the UK Government has received for loan personnel. Disclosure, even of just the total amount received for the period covered by the request, would provide some insight into the funds amount received from the 13 countries in question. The Commissioner accepts that there is therefore a clear public interest in the disclosure of the information and this should not be underestimated.
20. However, the Commissioner recognises the importance of the UK being able to maintain effective international relations with other states. As a result in the Commissioner's view it would be firmly against the public interest if the UK's ability to maintain such relations were damaged. In the particular circumstances of this case, the Commissioner recognises that disclosure of the information risks prejudicing the UK's relations with a number of different states, rather than just one particular state. In the Commissioner's opinion this broad prejudicial impact adds weight to the public interest in maintaining the exemption. Furthermore, as does the fact that disclosure of information would have such a prejudicial effect, rather than simply being likely to. For these reasons the Commissioner has concluded that the balance of public interest

favours maintaining the exemption contained at section 27(1)(a) of FOIA.

Right of appeal

21. 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

22. 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.
23. 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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