

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 30 June 2009

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

Summary

The complainant made a freedom of information request to the Foreign & Commonwealth Office ("the public authority") for a copy of the 2007 US/UK Military Talks regarding the British Indian Ocean Territory. In response the public authority confirmed it held the requested information but refused to disclose the information under section 26(1)(a) and (b) (Defence) and section 27(1)(a) (International relations). The public authority also cited section 42(1) (Legal professional privilege) but only after the Commissioner had commenced his investigation. Having carefully considered the complaint the Commissioner has decided that the information is exempt under section 27(1)(a) and the public interest favours maintaining the exemption. The Commissioner has not considered the application of the other exemptions but has found that in its handling of the request the public authority breached section 17(1) and 17(3)(b) (Refusal of a request). The Commissioner requires no steps to be taken.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 30 October 2007 the complainant wrote to the public authority to request a copy of the '2007 US/UK Political Military Talks' held in Washington D.C on 11 and 13 September 2007 and which the complainant said were referred to in a written parliamentary answer.

3. The written answer referred to in the request was given in response to a question from the complainant regarding the nature of assurances provided by the USA that the island of Diego Garcia had not been used in the rendition of terrorist suspects. The response explained that the USA authorities had given repeated assurances that no detainees, prisoners of war or other persons falling within this category are being held on Diego Garcia or have passed through the island, its territorial waters or airspace. The written answer explained that the latest assurances were given at the 2007 US/UK Political Military Talks.
4. The public authority responded to the request on 26 November 2007 at which point it confirmed it held the requested information. However, it explained that the minutes of the talks were being withheld under, firstly, section 26(1)(a) and (b) as disclosure would or would be likely to prejudice the defence of the British Islands or of any colony; or the capability, effectiveness or security of any relevant forces. The public authority explained that the exemption was engaged as disclosure of the requested information would prejudice the defence of the British Indian Ocean Territory (BIOT) by exposing plans to counter possible terrorist attacks.
5. The public authority also cited section 27(1)(a) of the Act which provides that the information is exempt if disclosure would or would be likely to prejudice the relations between the United Kingdom and any other State. The public authority explained that this exemption was a qualified exemption and therefore it had had to balance the public interest before deciding whether to maintain the exemption. It said that it had identified factors in favour of disclosure, including increasing public knowledge of the issues and informing debate. However, it concluded that the public interest in maintaining the exemption outweighed the public interest in disclosure because the effective conduct of the UK's international relations depends upon maintaining trust and confidence with other governments which allows for the free and frank exchange of information on the understanding that it will be treated in confidence. In this case it said that it considered that disclosure may lead to US governments being more reluctant to share information with the UK Government and less likely to respect the confidentiality of information supplied by the UK Government, to the detriment of UK interest.
6. On 17 January 2008 the complainant wrote to the public authority to ask that it undertake an internal review of its handling of his request. As regards the public authority's application of section 26 the complainant said that any parts of the documents which deal with plans to counter possible terrorist attacks on the BIOT could be omitted and the rest of the information disclosed. The complainant asked the public authority to consider his suggestion.
7. The complainant also went on to question the public authority's application of section 27 and noted that no evidence was cited by the public authority that disclosure of the requested information would prejudice relations between the UK and USA anymore than any other document referring to discussions between the two countries.
8. The public authority presented the findings of its internal review on 27 March 2008. In response to the complainant's suggestion that information referring to plans to counter possible terrorist attacks on the BIOT could be omitted and the

rest published, the public authority sought to clarify its earlier response. It said that whilst the section 26 exemption applied to only certain sections of the document, section 27(1)(a) applied to the whole document. It upheld its application of both exemptions.

The Investigation

Scope of the case

9. On 15 May 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant said that he was concerned that the requested information was wrongly withheld. He suggested that the public authority may have failed to provide adequate explanations for the reliance on the exemptions it cited and failed to apply the public interest test appropriately.
10. In particular the complainant said that the public authority did not apply the public interest test when relying on section 26, a qualified exemption. The complainant argued that the public authority had failed to take account of, what he saw as, the strong public interest in disclosure. These arguments are addressed elsewhere in this notice.
11. The complainant also said that the public authority's internal review was not a prompt determination of his complaint and failed to comply with the Commissioner's guidance on time limits for carrying out internal reviews. These issues are not requirements of part 1 of the Act. However, the Commissioner considers this to be a freedom of information good practice matter and therefore he has addressed the complainant's concerns in the 'other matters' section at the end of this decision notice.
12. On 29 January 2009 the complainant contacted the Commissioner to update him on some developments which were relevant to his complaint. He explained that following a separate freedom of information request the public authority had disclosed to him a passage from the minutes of the 2007 UK/US Political Military Talks regarding the BIOT – the information requested in this case. The complainant suggested that this raised doubts on the public authority's refusal to disclose the minutes in response to his original freedom of information request.

Chronology

13. The Commissioner commenced his investigation on 17 February 2009 when he contacted the public authority to ask for further information regarding its handling of the complainant's request. The Commissioner asked the public authority to provide him with copies of the requested information, clearly marked to show where the different exemptions had been applied. As regards its application of section 26(1) the Commissioner asked the public authority to clarify why this exemption applies and why disclosure would, or would be likely to, prejudice the defence of the BIOT. The Commissioner noted that the public authority had failed

- to address the public interest test, either at the refusal notice or internal review stages and he now asked it to outline its reasons for concluding that the public interest in maintaining the exemption outweighed the public interest in disclosure.
14. For section 27(1)(a) the Commissioner asked the public authority to explain why, with direct reference to the information, disclosure would prejudice the relationship between the UK and USA. The Commissioner asked if it had any evidence that would demonstrate that disclosure would result in real and significant prejudice to the UK's international relations.
 15. The Commissioner also asked for the public authority's comments on the complainant's suggestion that its decision to release a passage from the minutes he requested, in response to another freedom of information request, raised doubts about its response to the request in this case. Finally, the Commissioner invited the public authority to make any additional representations in support of its handling of the complainant's request.
 16. The public authority contacted the Commissioner on 19 March 2009 with its response to the complaint and the Commissioner's questions. A copy of the requested information was sent to the Commissioner in hard copy and arrived a few days later. The public authority maintained that the requested information was exempt from disclosure under section 27(1)(a) and that some of the information was additionally exempt under section 26(1)(a) and (b).
 17. For section 26 the public authority provided the Commissioner with specific reasons why disclosure would prejudice the defence of the BIOT. It added that in response to the complaint it had contacted the Ministry of Defence and its view was that the information to which section 26 applied should continue to be withheld. It concluded that the public interest in maintaining the exemption outweighed the public interest in disclosure.
 18. As regards section 27(1)(a) the public authority provided further information on the nature of the talks between the UK and US governments of which the complainant had requested the minutes and said that the US government had a legitimate expectation of confidence when entering into those talks. It went on to say that it had consulted the US over the release of the minutes both at the time of the request and at the internal review. It also said that it had contacted the US authorities again after receipt of the complaint and they had confirmed that they strongly opposed the release of the minutes as this would have the potential to harm its strategic foreign policy interests.
 19. The public authority rejected the complainant's suggestion that its decision to release a passage from the minutes in response to another freedom of information request undermined its response to this request. It said that in that particular case it had taken the decision to disclose this information after again contacting the US authorities and securing their agreement to release a specific extract of the minutes because of the ongoing public debate on the issue of rendition. It maintained that it was correct to withhold the entire report in this case.
 20. Finally the public authority said that having reviewed the requested information again it believed that the exemption in section 42 of the Act (legal professional

privilege) also applied to certain passages within the minutes. It concluded that the public interest in maintaining the exemption outweighed the public interest in disclosure and it referred to several decisions by the Information Tribunal in support of its position.

Findings of fact

21. Diego Garcia is the largest island of the British Indian Ocean Territory, a British Overseas Territory. It is the site of a joint military facility of the UK and USA.
22. The Commissioner understands that allegations have been made about the use of Diego Garcia in the US rendition programme. The UK Government had previously said that it had sought assurances from the US Government on this point and it had confirmed that Diego Garcia had not been used in the rendition programme. On 11 October 2007 the Government, in a written answer to a parliamentary question, made the following statement:

“Under the 1966 Exchange of Notes between the US and UK, of non-US and non-UK nationals who are not serving members of the US military cannot be detained without notification to the Government.

There is no US facility for foreign detainees on Diego Garcia. The only civilian detention centre is at the small UK-run police station.

The US authorities have repeatedly given us assurances that no detainees, prisoners of war or any other persons in this category are being held on Diego Garcia, or have at any time passed in transit through Diego Garcia or its territorial waters or airspace. This was most recently confirmed during the 2007 US/UK Political Military Talks held in Washington on 11 and 13 September.

The Government co-operated fully with the Council of Europe’s inquiry last year, together with an inquiry on similar issues by the European Parliament. At that time the Government explained that we had carried out extensive searches of official records and found no evidence of detainees being rendered through the UK, or Overseas Territories, since 1997, where there were substantial grounds to believe there was a real risk of torture.”¹

23. On 21 February 2008 the Foreign Secretary confirmed to Parliament that despite these assurances two rendition flights had refuelled on Diego Garcia in 2002.²
24. On 2 September 2008 the public authority, in response to a separate freedom of information request, provided the complainant with details of all assurances it had received from the US authorities regarding the non-use of Diego Garcia in rendition flights since 11 September 2001. Included within this disclosure was the following extract from the 2007 US/UK Political Military Talks regarding the BIOT:

¹ Written answer, 11 October, Column 703W

<http://www.publications.parliament.uk/pa/cm200607/cmhansrd/cm071011/text/71011w0006.htm>

² Debates, 21 February, Column 547

<http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080221/debtext/80221-0007.htm#08022198000007>

“The U.S. Government has, at no time, held on the island or transited through the territorial seas or airspace surrounding Diego Garcia any detainees, prisoners of war or any other persons of that nature or status.”¹

¹ *Although this is what was said at the time of the meeting, the issue has subsequently become subject to discussion.*

25. The US/UK Military Talks on the BIOT are conducted up to the level of 'US-SECRET' and the minutes of the talks carry the same security classification.

Analysis

26. A full text of the provisions of the Act which are referred to in this section are contained within the legal annex.

Procedural matters

Section 17 – Refusal of a request

27. When the public authority responded to the request it cited the exemption in section 26(1)(a) and (b) of the Act, which is a qualified exemption. However, the public authority did not address the public interest test. Consequently the public authority breached section 17(3)(b) of the Act by failing to state its reasons for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.
28. When contacted by the Commissioner the public authority said that it also believed that section 42(1) applied to certain parts of the requested information. By failing to cite this exemption within 20 working days the public authority breached section 17(1) of the Act.

Exemption

Section 27(1)(a) – International relations

29. The public authority has said that the whole of the document is exempt from disclosure under section 27(1)(a) of the Act which provides that information is exempt if its disclosure would, or would be likely to, prejudice the relations between the United Kingdom and any other state. In this case the public authority has confirmed that disclosure would, or would be likely to, prejudice relations with the USA.
 30. The public authority has argued that disclosure would or would be likely to prejudice relations between the two countries as it would undermine the UK's credibility as a responsible partner of the USA. This would discourage free and
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frank discussion at future talks as the USA would be more reluctant to share information with the UK if there was a possibility of it being disclosed. The public authority also argued that the USA would be less likely to treat information supplied to it by the UK in confidence if the requested information was disclosed.

31. To support this assertion the public authority has explained that it approached the US authorities several times to discuss the prospect of the information being disclosed. The response from the US was that it was strongly opposed to disclosure of the requested information because, given the sensitive nature of the minutes this would have the potential to harm its strategic foreign policy interests.
32. The public authority has not explicitly stated whether disclosure would or would be likely to prejudice the UK's relations with the USA and therefore the Commissioner has considered which is the appropriate test to apply. In doing so the Commissioner is mindful of the findings of the Information Tribunal when it considered the meaning of 'would be likely to prejudice'. It stated that for this test to apply:

*"the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk."*³
33. This interpretation follows the Judgement of Mr Justice Munby in the High Court in which the view was expressed that:

*"Likely connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there 'may very well' be prejudice to those interests, even if the risk falls short of being more probable than not."*⁴
34. Therefore the Commissioner considers that for the alternative test of 'would prejudice' to apply the likelihood of prejudice occurring must at least be more probable than not.
35. Whichever test is applied the Commissioner considers that there is an evidential burden on the public authority to demonstrate that the nature of the prejudice claimed can be linked back to the disclosure of the information in question. Where an exemption is engaged on a 'would prejudice' basis then there is clearly a greater evidential burden on the public authority.
36. Having reviewed the information and the public authority's submissions, the Commissioner has decided that in this case the arguments advanced by the public authority are sufficiently strong as to warrant applying the higher test, namely, the exemption is engaged where disclosure *would* prejudice relations between the UK and the USA.
37. In reaching his decision the Commissioner is mindful of the public authority's assertion that the US/UK Political Military Talks regarding the BIOT are

³ John Connor Press Associates v Information Commissioner [EA/2005/005], para. 15.

⁴ R (on the application of Lord) v Secretary of State for the Home Office [2003] EWHC 2073 Admin

conducted with an expectation that they will be treated in confidence. The Commissioner has also had regard to the fact that the talks are classified as secret and the minutes record a number of highly sensitive discussions including issues related to the defence and security arrangements of the island. Taking this into account the Commissioner is prepared to accept that disclosure would inhibit future discussions regarding the BIOT which would make international relations between the two countries more difficult.

38. The Information Tribunal has commented on the nature of the prejudice which the section 27(1)(a) exemption is designed to protect. It stated that:

“Prejudice is not defined, but we accept that it imports something of detriment in the sense of impairing relations or interests or their promotion or protection and further we accept that the prejudice must be ‘real, actual or of substance’...”⁵

39. The Tribunal went on to say that:

“...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. We do not consider that prejudice necessarily requires demonstration of actual harm to the relevant interests in terms of quantifiable loss or damage.”⁶

40. Of particular importance in this case is the sensitivity and importance which the USA attached to the talks and the related minutes and the fact that they were opposed to the release of the information. For the purposes of section 27(1)(a) it does not matter whether or not there was a strict common law obligation of confidence on the part of the UK Government. The Information Tribunal has considered this point and has concluded that the test of confidentiality should be judged against what would have been reasonable in the mind of the confider.⁷ The fact that the USA view the information as confidential is crucial and in light of this the Commissioner is satisfied that the section 27(1)(a) exemption is engaged.
41. The extract referred to at paragraph 24 has already been disclosed to the complainant. Therefore the Commissioner has not looked at whether or not the public authority was correct to withhold this information in response to this particular request.

Public Interest Test

42. Section 27(1)(a) is a qualified exemption and is therefore subject to the public interest test. Section 2(2)(b) of the Act provides that such an exemption will only justify non-disclosure if in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

⁵ Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence [EA/206/0040], para. 80.

⁶ *Ibid*, para. 81.

⁷ *Ibid*, para. 75.

43. The complainant has made a detailed submission to the Commissioner setting out why he believes the public interest favours disclosure of the requested information. These arguments can be summarised as follows:
- There is a public interest in ensuring that allegations of UK involvement in torture are properly examined.
 - Disclosure would allow the examination of the Government's policy of relying on US assurances about the non-use of Diego Garcia in extraordinary rendition.
 - US assurances were inaccurate. Disclosure may discourage the USA from giving inaccurate or misleading information at any future talks.
44. The Commissioner accepts that these arguments have merit in respect of those parts of the minutes that relate to the US assurances regarding the non-use of Diego Garcia in extraordinary rendition. However, this information amounts to only a tiny fraction of the minutes and in any event the relevant extract has now been disclosed to the complainant. The remainder of the information contained within the minutes deals with various wide ranging issues concerning the joint UK and US management of the island. Disclosure of this remaining information would shed no light on the issue of the use of Diego Garcia in extraordinary rendition flights. Therefore the arguments advanced by the complainant are in effect irrelevant.
45. Having said this, the Commissioner does accept that there is a public interest in disclosure of the remaining information. Disclosure would serve the public interest in a general sense in promoting transparency and accountability and would shed some important light on the nature of the relationship between the UK and USA governments when it comes to the management of Diego Garcia and issues affecting its administration.
46. However, the Commissioner has also found that there are specific and compelling reasons for maintaining the exemption. Diego Garcia is important to the security strategies of both the UK and the USA and the efficient operation of the island depends on both countries being able to share information and conduct talks in the expectation that the information will not be disclosed. Any reluctance on the part of the USA to share information or to co-operate with the UK would adversely affect the running of the island and this would not be in the public interest.
47. As noted above, the Commissioner is satisfied, particularly in the light of the repeated statements by the US authorities that it strongly opposed releasing the requested information, that disclosure would prejudice, rather than would be likely to prejudice, the UK's international relations.
48. The Commissioner considers that where another country has specifically objected to the disclosure of requested information, that is something which ought to be taken into account when considering both the likelihood of prejudice to international relations and the public interest in maintaining the exemption in the particular case. There would need to be strong and specific public interest factors

to tip the balance in favour of disclosure in such circumstances. The Commissioner does not consider such factors to be present in this case.

49. The Commissioner accepts that there is a public interest in the information being disclosed. However, he considers that the specific public interest in protecting UK and US relations with regard to the management of the British Indian Ocean Territory including the island of Diego Garcia, is more compelling. The Commissioner is satisfied that in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure.

Other exemptions cited

50. The public authority has also applied the section 26 (Defence) and section 42 (Legal professional privilege) exemptions to a significant number of paragraphs within the minutes. However, the Commissioner is satisfied that all of the minutes, with the exception of the single extract already disclosed to the complainant, are exempt under section 27(1)(a). Therefore the Commissioner has not gone on to consider the application of these additional exemptions.

The Decision

51. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- The public authority dealt with the request in accordance with the Act by correctly withholding the requested information under section 27(1)(a) of the Act.
52. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- The public authority breached section 17(3)(b) of the Act by failing to state its reasons for claiming that, in all the circumstances of the case, the public interest in maintaining the section 26(1)(a) and 26(1)(b) exemptions outweighed the public interest in disclosure.
 - The public authority breached section 17(1) of the Act by failing to cite its reliance on section 42(1) within 20 working days of receiving the request.

Steps Required

53. The Commissioner requires no steps to be taken.

Other matters

54. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

The Code of Practice issued under section 45 of the Act provides guidance on the desirable practice which public authorities should aim to follow in discharging their functions under part I of the Act. The Code does not have statutory force. Part VI of the Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. In this case the Commissioner is concerned that it took approximately 50 working days for an internal review to be completed.

Right of Appeal

55. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 30th day of June 2009

Signed

**Graham Smith
Deputy Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 17(1) provides that –

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 17(2) states –

“Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.”

Section 17(3) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

Section 27(1) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) relations between the United Kingdom and any other State,
- (b) relations between the United Kingdom and any international organisation or international court,
- (c) the interests of the United Kingdom abroad, or
- (d) the promotion or protection by the United Kingdom of its interests abroad.”