

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 July 2019

Public Authority: Department for International Development
Address: 22 Whitehall
London
SW1A 2EG

Complainant: Jonathan Turner on behalf of UK Lawyers for Israel
Address: info@uklfi.com

Decision (including any steps ordered)

1. The complainant submitted a request to the Department for International Development (DFID) seeking copies of audit reports concerning the 'Palestinian Recovery and Development Program', a World Bank multi donor trust fund, along with the terms of reference for any such audits. DFID refused to provide the information falling within the scope of the request citing sections 27(1)(a), (c) and (d), section 27(2) (international relations) and section 40(2) (personal data). The Commissioner has concluded that sections 27(1)(a) and 27(2) are not engaged, and that whilst sections 27(1)(c) and (d) are engaged the public interest favours disclosing the withheld information. However, the Commissioner has concluded that the names and signatures of the individuals engaged in the audits are exempt from disclosure on the basis of section 40(2) of FOIA.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with a copy of the information falling within the scope of the request. DFID can redact the names and signatures of the individuals involved in conducting the reports.
3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court

pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. The complainant submitted the following request to DFID on 5 July 2018:

'Please provide the following documents in accordance with the Freedom of Information Act ("the Act"):

1. Audit reports of independent, external auditors in respect of the Palestinian Recovery and Development Program - Multi-Donor Trust Fund (PRDP-MDTF) and/or of any accounts into which its funds were disbursed between 2010 and 2015.

2. The terms of engagement of the auditors under which these audit reports were prepared.¹

5. DFID responded on 2 August 2018 and confirmed that it held information falling within the scope of the request but it considered this information to be exempt from disclosure under section 27 (international relations) of the FOIA and it needed additional time to consider the balance of the public interest. Similar public interest test extension letters were issued on 16 and 31 August 2018.
6. DFID provided a substantive response to the request on 7 September 2018. The response explained that the requested information was considered to be exempt from disclosure on the basis of the exemptions contained at sections 27(1)(a), (b), (c) and (d), 27(2) and 40(2) (personal data) of FOIA. In respect of the qualified exemptions DFID concluded that the balance of the public interest favoured withholding the information.
7. The complainant contacted DFID on 11 September 2018 in order to ask for an internal review of this decision.
8. DFID informed him of the outcome of the internal review on 8 October 2018. The review upheld the application of the exemptions as cited in the refusal notice.

¹ This is a World Bank trust fund, further details of which are available here <https://www.worldbank.org/en/programs/palestinian-recovery-and-development-program-trust-fund>

Scope of the case

9. The complainant contacted the Commissioner on 2 November 2018 in order to complain about DFID's failure to provide him with the information he had requested. The complainant provided the Commissioner with detailed submissions to support his view that the requested information was not exempt from disclosure and these submissions are referred to below.
10. The information which DFID holds and falls within the scope of this request consists of:
 - five independent auditor reports conducted by PwC on the overall Palestinian Recovery and Development Plan Trust Fund (PRDP) operated by the World Bank;
 - six independent auditor reports conducted by a different audit company (company A) on DFID's contributions to the PRDP;
 - one independent auditor report conducted by a further audit company (company B) on the overall PRDP conducted in the name of the Palestinian Authority (PA); and
 - the terms of reference for the six audits conducted by 'company A'.
11. DFID explained to the Commissioner that it did not hold audit reports of any accounts into which funds from the PRDP were disbursed, and nor did it hold the terms of reference for the audits of the overall PRDP, ie PwC's terms of reference or the terms of reference for company B.
12. DFID explained to the Commissioner that it was no longer seeking to rely on section 27(1)(b) of FOIA . It also explained that one of the PwC reports that it held had been published by the World Bank and was available online.² DFID explained that it therefore now considered this document to be exempt from disclosure on the basis of section 21 (information reasonably accessible to the requester) of FOIA, albeit that it remained of the view that the other PwC reports were exempt from disclosure, along with the remainder of the withheld information.
13. The complainant is not seeking to dispute DFID's reliance on section 21 of FOIA. Therefore, the focus of the Commissioner's investigation is to determine whether sections 27(1)(a), (c), (d), 27(2) and 40(2) provide

² <http://documents.worldbank.org/curated/en/821101481284527623/pdf/PRDP-MDTF-Audit-Report-2014-2015.pdf>

a basis to withhold the remaining information falling within the scope of the request.

Reasons for decision

Section 27 – international relations

14. Sections 27(1)(a), (c) and (d) of FOIA state 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...

...(c) the interests of the United Kingdom abroad, or

(d) the promotion or protection by the United Kingdom of its interests abroad'

15. Section 27(2) states:

'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.'

DFID's position

16. DFID argued that the exemptions contained at sections 27(1)(a), (c) and (d) applied because disclosure of the withheld information would be likely to harm the UK's relations with the PA. In his request for an internal review the complainant argued that section 27(1)(a) - and also section 27(2) - could not apply because the PA was neither a 'state' or a 'territory' for the purposes of section 27 of FOIA.

17. In response, DFID pointed towards section 27(5) of FOIA which defines a state as follows:

"State" includes the government of any State and any organ of its government, and references to a State other than the United Kingdom include references to any territory outside the United Kingdom.'

18. DFID noted that the applicability of section 27 was further clarified in the Commissioner's guidance on this exemption as follows:

'States and organs of States: *the government of any state and any organ of its government and will include for example, states with a government structure; the overseas territories of the UK and of other*

countries; and Crown Dependencies such as the Channel Islands. Under section 27(5), 'state' also includes 'any territory', outside the UK which would include territories which are not recognised as states in international law but which may be the subject of international law or international agreements. An example is Antarctica. In addition, the exemption includes the 'organs' of any government, for example, a state's legislature and executive.³

19. DFID explained that in light of this guidance it was satisfied that section 27 can be applied to protect the international relations between the UK and PA.
20. With regard to why, and how, the UK relations with the PA would be likely to be prejudiced following the disclosure of the withheld information, DFID explained to the Commissioner that all of the information in the scope of the request had been provided to it by the PA. Furthermore, DFID explained that it had consulted the PA about the request and the PA had made it clear that it did not consent to this information being disclosed under FOIA. In light of this, DFID argued that disclosure of the withheld information, against the express wishes of the PA, would be likely to cause a breakdown of trust and confidence which would affect not just DFID's relations with the PA but would be likely to prejudice wider UK-PA relations. DFID noted that it, along with other UK government departments, operate in a politically sensitive environment in the Occupied Palestinian Territories (OPTs) and the UK's relations with the PA need to be managed sensitively and carefully in view of this.

³ https://ico.org.uk/media/for-organisations/documents/1184/awareness_guidance_14_-_international_relations.pdf - page 3

The complainant's position

21. As noted above, the complainant argued that section 27(1)(a) could not be relied on by DFID because the PA was neither a 'state' nor a 'territory' for the purposes of section 27. (For the same reasons he also did not accept that section 27(2) could be relied upon by DFID).
22. In support of this position, the complainant argued that the PA has not been recognised by the UK as a State or as the government of a State; it does not satisfy the Montevideo criteria for the existence of a State; and its treatment as a State conflicts with Articles I.1, IX.5 and XVII.1 of the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Washington DC, 28 September 1995, "Oslo Accord II").
23. With regard to whether the PA was a 'territory' for the purposes of section 27, the complainant argued that the phrase '*references to a State other than the United Kingdom include references to any territory outside the United Kingdom*' in section 27(5) clearly relates to section 27(4)(b) of FOIA. That subsection provides that the duty to confirm or deny whether the authority holds information does not arise if compliance with it '*would involve the disclosure of ... confidential information obtained from a State other than the United Kingdom*'. On the other hand, disclosure of confidential information obtained from another UK authority does not bring that exception into play.
24. The complainant argued that in this context, the purpose of the concluding phrase of section 27(5) is to clarify that overseas territories of the UK (for example) are to be treated as '*a State other than the United Kingdom*' for the purposes of section 27(4)(b). Its purpose is not to widen the meaning of the word 'State' generally to cover any territory outside the UK whether constituting a State or not, so that it is effectively meaningless. The complainant suggested that if that had been Parliament's intention, the term '*territory*' would have been used instead of '*State*' throughout the section. The complainant explained that in his view the phrase '*territory outside the United Kingdom*' in section 27(5) refers to a territory that is, or is part of, a State.
25. With regard to the actual information that had been requested, the complainant emphasised that the request had two elements, firstly the audit reports and secondly the terms of reference.
26. With regard to the terms of the reference, the complainant argued that international partners of the British government must expect that the British public would be informed at the very least as to the terms on which audits of the very large funds transferred by the UK government to the PA were carried out. The complainant argued that in such circumstances, the terms of reference cannot properly be regarded as sensitive information whose disclosure would not breach any trust or

confidence, and they could not have been provided to the UK on the expectation that they would be treated confidentially.

27. With regard to the audit reports, the complainant argued that the publication of one of the PwC reports by the World Bank undermined DFID's position that such reports contained sensitive information. He argued that there was nothing sensitive in the contents of the report and nor would its publication prejudice the UK's international relations.
28. Furthermore the complainant drew the Commissioner's attention to Memorandum of Understanding (MoU) between DFID and the PA dated 7 July 2011. The complainant argued that in light of the emphasis in the MoU on the importance of public accountability of the PA, including in respect of budget formulation and implementation, the PA cannot have any legitimate expectation that audit reports regarding the use of the large sums transferred by DFID and the terms of engagement under which they were prepared should be kept confidential. Rather, the complainant argued that far from prejudicing relations with the PA, publishing these audit reports and terms of engagement is mandated by this agreement between the PA and DFID, and not doing so constitutes a failure to implement it.

The Commissioner's position

29. With regard to the application of section 27(1)(a), the Commissioner notes that DFID is not seeking to rely on this exemption on the basis that the PA is a 'state'; rather it has argued that it is 'territory' and it is on this basis, given the wording of section 27(5), that section 27(1)(a) is applicable.
30. The Commissioner has carefully considered the wording of section 27(5), in particular the part which reads "*State*" includes the government of any State and any organ of its government, and references to a State other than the United Kingdom include references to any territory outside the United Kingdom'. In her view this suggests that the territory must be *within* a State given that the reference to a territory is made in connection with defining the meaning of a 'state outside the UK' and that is just a subset of the wider definition of a state as 'the government of any State and any organ of its government'. The Commissioner appreciates that this interpretation of section 27(5) is different to the one set out in her guidance and relied upon by DFID. However, when this guidance was published the Commissioner's understanding of how section 27 should be interpreted and applied was limited. In light of her further experience of regulating FOIA, and in particular on the basis of the particular facts of this request, she has modified on her position with regard to the how 'territory' should be interpreted.

31. In the Commissioner's view it is clear that the PA is not a territory within another state, and therefore cannot be considered to be a territory for the purposes of section 27(1)(a). For completeness, the Commissioner also agrees that the PA is not a state in its own right. On this basis, the Commissioner has concluded that DFID cannot rely on section 27(1)(a) to withhold the information.
32. As the Commissioner has concluded that the PA is neither a state nor a territory for the purposes of section 27(1)(a), it follows that DFID cannot rely on section 27(2) of FOIA. This is on the basis that, the information has not been obtained from another state or territory.
33. Consequently, this only leaves the Commissioner having to decide whether sections 27(1)(c) and (d) are engaged.
34. In order for a prejudice based exemption, such as sections 27(1)(c) and (d), 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.
35. In the Commissioner's opinion it is, in theory, plausible for DFID to argue that the UK's interests in the PA, and the protection and promotion of these interests, will be harmed even if the PA is not considered to be a state or territory for the purposes of section 27(1)(a) and 27(2). She is therefore satisfied that the first limb is met.
36. With regard to the second limb, the Commissioner appreciates that complainant has argued that the PA could not, and should not, have any reasonable expectation that the requested information, in particular the

terms of reference, would be treated confidentially. However, the Commissioner is conscious that when consulted by DFID the PA has been very clear that it did not want the withheld information to be disclosed. In light of this the Commissioner accepts that to do so would be against the express wishes of the PA. Consequently, in light of this the Commissioner accepts that disclosure of the withheld information could risk undermining relations between the PA and DFID. Moreover, on the basis of the PA's submissions to DFID, the Commissioner is persuaded that the consequences of such a disclosure are unlikely to be restricted simply to PA-DFID relations, but could extend to a wider breakdown in trust and confidence which could affect the wider UK-PA relationship. The question in respect of sections 27(1)(c) and (d) is therefore whether such a breakdown in relations could undermine the UK's interests in the region. The Commissioner notes that DFID's stated position in respect of the UK interests in the OPTs is as follows:

'What is being achieved for the UK?

Maintaining stability in the OPTs remains of vital strategic importance to the UK. Risks to stability and the two-state solution have sharply increased and lack of progress on peace talks contributes to wider regional tensions and extremist narratives. DFID's support to the PA is a key element of the UK's overall strategy on the Middle East Peace Process.⁴

37. The Commissioner accepts that in order for the UK to be in a position to achieve such aims it needs to maintain effective relations with the PA. Therefore, the Commissioner accepts that there is a causal relationship between disclosure of the withheld information and an impact on the interests which sections 27(1)(c) and (d) are designed to protect.
38. With regard to third limb, the Commissioner appreciates that as one of the audit reports has been disclosed by the World Bank, the complainant has been able to access this. Having done so, he has argued that there is nothing sensitive in the report that could be said to harm international relations and therefore DFID's reliance on section 27 to withhold such information would appear to be unfounded. However, in the particular circumstances of this case, in the Commissioner's view the risk of prejudice stems less from the content of the withheld information – regardless as to its perceived sensitivity – and rather the PA's clear view that it did not wish the withheld information to be disclosed in

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/723247/DFID-Occupied-Palestinian-Territories-Profile-July-2018.pdf

response to this request. Given the PA's clear position, and the link between the UK needing to maintain effective relations with the PA in order that it can protect and promote its interests in the region, the Commissioner is satisfied that the third limb is met.

39. Sections 27(1)(c) and (d) of FOIA are therefore engaged.

Public interest test

40. 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 exemptions contained at sections 27(1)(c) and (d) outweigh the public interest in disclosing the information.

Public interest arguments in favour of disclosing the information

41. By way of background to his request, and in support of his position that the public interest clearly favoured the disclosure of the information, the complainant explained that the organisation Palestinian Media Watch (PMW) had shown, by reference to official announcements of the PA, statements of Palestinian officials and other evidence, that the PA pays large salaries to convicted Palestinian terrorists. The complainant explained that PMW concluded that the salaries currently constitute about 8% of the PA's total budget and the funds for their payment come out of the PA's Central Treasury account and that the payment of these salaries rewards and encourages terrorism.

42. The complainant noted that British Ministers have claimed that these payments are not salaries but welfare payments to the families of Palestinians imprisoned by the Israeli authorities. The complainant argued that the PMW have shown that these claims are false.⁵

43. The complainant argued that British Ministers have repeated these claims that these payments are welfare payments long after the PMW showed that this was not true.

44. The complainant explained that in the period 2008 – 2015 the main British grant aid to the PA, totalling £430.5 million, was transferred via the World Bank, untied and not earmarked, to the PA Central Treasury Account. Between 2010 and 2015, PwC were appointed to audit the process.

⁵ For example, http://www.palwatch.org/STORAGE/special%20reports/PMW_2nd_report_response_to_Alan_Duncan_FINAL.pdf

45. The complainant noted that DFID Ministers have repeatedly claimed that since the process is audited by independent accountants, the UK knows exactly where British money is going and that it is not going to terrorists.
46. However, the complainant explained that he had raised a complaint that PwC failed to comply with the OECD Guidelines for Multinational Entities by not reporting the use of funds transferred by the World Bank to pay salaries to terrorists. He explained that as part of the investigation of this complaint, PwC stated that the narrow scope of their work did not require them to consider this issue.⁶
47. The complainant argued that if PwC's statement regarding the scope of their work is true, it appears that British Ministers, presumably on the advice of senior DFID officials, have repeatedly lied on this issue. If so, these lies are particularly serious, as they have facilitated the transfer of funds used 'to encourage and reward murder'.
48. The complainant explained that the purpose of his request for disclosure of the terms of engagement and the audit reports is to establish whether British Ministers or PwC have been telling the truth on this matter, and thereby to help to ensure that British public funds are not used to encourage and reward terrorism, and that those who have allowed this to happen and/or covered it up are properly called to account.
49. In light of the above, the complainant argued that the public interest in disclosure is extremely strong in this case, since false information provided by DFID appears to have facilitated the continuation of a policy under which large sums of British public money have been used to encourage and reward murder. Furthermore, he argued that there is a fundamental discrepancy between the claims made by DFID Ministers and the statement by PwC regarding the scope of its auditing.
50. Moreover, the complainant agreed that there is very considerable public concern amongst the British public regarding waste and misuse of foreign aid, in particular by the PA to reward and encourage terrorism. A petition to Parliament on this subject received nearly 236,000

⁶ The complainant cited paragraph 18 of the initial assessment of the OECD National Contact Point (NCP) published by the Department for International Trade on 15 June 2018 at <https://www.gov.uk/government/publications/uk-ncp-initial-assessment-complaint-from-uk-lawyers-for-israel-uklfi-against-ricewaterhousecoopers-global-network-pwc/initial-assessment-by-the-uk-national-contact-point-for-the-oecd-guidelines-for-multinational-enterprises-complaint-from-uklfi-against-pwc>

signatures. A number of the speeches in the ensuing Parliamentary debate on 13 June 2016⁷ drew attention to the PA's payment of salaries to terrorists, and the complainant argued that a DFID Minister made further false statements regarding this issue in the course of the debate.

51. The complainant was also critical of the findings of the internal review in relation to the balance of the public interest test. He argued that the review purported to acknowledge *'the very clear public interest in giving access to information which shows how the UK interacts with overseas states and international partners in tackling the enormous challenges of global poverty and insecurity'*. However, the complainant argued that the review failed to address any of the specific circumstances of this case, which take it well outside the ordinary, and require careful and specific consideration, that does not appear to have been given.
52. Furthermore, the complainant suggested that the internal review's reference to *'global poverty'* is irrelevant in this case and in his view the mention of it is a further indication that the review did not give proper consideration to the specific facts of this case. Rather, he explained that the main purpose of the *'Statebuilding and Service Delivery Grant'* (to which the requested audit reports relate) is not to relieve poverty, but to further the foreign policy objective of developing the capacity of the PA to operate as a State. Moreover, the complainant argued that the Palestinian Territories do not in fact suffer from high levels of poverty in global terms. They are correctly categorised by the World Bank as a lower middle income country, not as a low income country.
53. Similarly, the complainant suggested that the reference in the review to *'information which shows how the UK interacts with overseas states and international partners in tackling the enormous challenges of ... insecurity'* is inapposite in this case, since the information requested relates to how the UK has interacted with the PA to promote insecurity, by encouraging and rewarding terrorism, rather than to tackle it.

Public interest in maintaining the exemptions

54. DFID argued that there was clear public interest in it being able to protect UK interests in the region and that in order to do so it was dependent upon maintaining effective relations with the PA. The Commissioner asked DFID to respond to the complainant's particular grounds of complaint. In response DFID stated that it did not consider that the withheld information contained information relating to the alleged criminal offences by DFID or FCO officials as alleged by the

⁷ <https://hansard.parliament.uk/commons/2016-06-13/debates/ED517776-2FB8-4D2E-A959-4CCDC6ACACB5/ForeignAidExpenditure>

complainant. DFID also stated that the UK government does not provide assistance to the PA with the knowledge or reasonable suspicion that it would or might be used for the purposes of terrorism and that no criminal offences were engaged by the provision of such assistance.

55. More specifically, DFID argued that PwC's statement does not contradict the statements by Ministers and cited by the complainant. DFID explained that the statements referred to were made between 2015 and 2016. In that period separate audits of the UK's contribution to the Trust Fund commissioned by the PA were carried out, in addition to the PwC audits, to show that an amount equal to the UK's contribution was transferred to the bank accounts of individuals named on a list of beneficiaries that the EU had vetted to exclude people who could be known terrorists or criminals. DFID argued that it was therefore unreasonable for the complainant to imply that Ministers' statements were misleading on the grounds that the PwC audits did not show that aid money was not used for prisoner payments because this ignores the existence of the second set of audits.

Balance of the public interest test

56. As a starting point, the Commissioner considers there to be a clear public interest in the disclosure of information which would contribute to the public's understanding of how the taxpayers' money has been used to fund overseas aid, and in particular to provide reassurance that such money had been used appropriately. Given that the withheld information consists of audit reports relating to both the overall PRDP, and more specifically those on DFID's contributions to this fund, the Commissioner is clear that disclosure of this information would contribute towards this aim. As would disclosure of the terms of reference for company A, ie the company which undertook the six audit reports into DFID's contribution to the PRDP.
57. The Commissioner acknowledges that there are quite clearly fundamental difference of opinion between the complainant and DFID with regard to the statements provided by Ministers, and more fundamentally whether UK funds are being used to make payments to terrorists.
58. It is not the role of the Commissioner when considering the balance of the public interest to adjudicate on the veracity or otherwise of such allegations. However, as her guidance on the public interest test makes clear, where there is some suspicion of wrongdoing, this may prove to be a relevant factor that needs to be considered as part of the public interest considerations. The guidance explains that for this to be considered as a factor in the public interest test:

- disclosure must serve the wider public interest rather than the private interests of the requester; and
 - the suspicion of wrongdoing must amount to more than a mere allegation; there must be a plausible basis for the suspicion, even if it is not actually proven.
59. In applying these criteria to this case the Commissioner recognizes that the complainant has cited the PMW report as evidence to support his position. Furthermore, and in the Commissioner's opinion of arguably more significance, is the fact that similar concerns have been raised in Parliament.⁸ In the Commissioner's opinion this suggests that disclosure would serve a wider public interest and that whilst such allegations are clearly not proven, there is a sufficient concern about this matter that parliamentarians have asked questions on this topic.
60. In light of this, the Commissioner considers there to be a significant public interest in the disclosure of the withheld information; disclosure would not only meet the need for general transparency and accountability but also go some way to meeting the more specific needs of transparency regarding the auditing of these funds given the allegations of wrongdoing. Moreover, in the Commissioner's opinion the severity of the allegations arguably increases the public interest in the disclosure of the information.
61. That said, the Commissioner notes that a key argument of the complainant's is that the disclosure of PwC's terms of reference are necessary in order to establish the scope of its role in conducting the overall audits of the fund and whether such a scope of work supports the position adopted by Ministers. As is apparent from paragraph 11 above, DFID does not hold a copy of the PwC's terms of reference. Disclosure of the withheld information would not therefore address that specific point made by the complainant. Furthermore, the Commissioner considers it important to take into account DFID's point that a second set of audits were carried out in order to show that UK funds had only been sent to individuals who had been vetted. Therefore, the Commissioner accepts that disclosure of withheld information would be unlikely to conclusively prove, or indeed disprove, the complainant's allegations that Ministers had lied.
62. With regard to the public interest in maintaining the exemptions, the Commissioner accepts that there is clear public interest in the UK being able to protect and promote its interests abroad, including in the PA. Furthermore, as the Commissioner accepts that disclosure of the

⁸ See the debate cited at footnote 7.

withheld information risks undermining not only DFID's relationship with the PA, but also more broadly the UK's relationship with the PA, this adds considerably to the public interest in maintaining the exemptions. In the Commissioner's view significant weight should therefore be given to the public interest in maintaining these exemptions.

63. However, and by a narrow margin, the Commissioner has concluded that the public interest favours disclosing the withheld information. She has reached this conclusion given the importance of the UK being open and transparent about how it ensures that the aid funds are used appropriately. Whilst disclosure of the withheld information will not provide the full picture regarding the auditing of these particular funds it will contribute towards it, which given the concerns about how such funds may have allegedly been used, the Commissioner considers to be a compelling argument.

Section 40 – personal data

64. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
65. In this case the relevant condition is contained in section 40(3A)(a)⁹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
66. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
67. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

68. Section 3(2) of the DPA defines personal data as:

'any information relating to an identified or identifiable living individual'.

⁹ As amended by Schedule 19 Paragraph 58(3) DPA.

69. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
70. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
71. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
72. DFID has argued the names and signatures of the individuals engaged in the audit reports themselves are exempt from disclosure on the basis of section 40(2) of FOIA. The Commissioner is satisfied that such information is clearly personal data given that it both relates to and identifies the individuals in question. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
73. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
74. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

75. Article 5(1)(a) of the GDPR states that:

'Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject'.

76. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
77. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.
78. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

'processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such

*interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child*¹⁰.

79. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
80. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

81. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
82. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and

¹⁰ Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

83. For the reasons discussed above in relation to the application of section 27, the Commissioner accepts that there is a legitimate interest in the disclosure of information concerning these particular audits.

Is disclosure necessary?

84. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
85. In the Commissioner's view disclosure of the names of the individuals who conducted the audits is not necessary to meet the interests identified above. Rather in the Commissioner's view, disclosure of the remaining parts of the information is sufficient to meet these interests.
86. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, she has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).
87. The Commissioner has therefore decided that DFID is entitled to withhold the names and signatures under section 40(2), by way of section 40(3A)(a).

Right of appeal

88. 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

89. 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.

90. 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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