

Reference: 2024-082

Thank you for your email dated 25 November 2024 in which you requested the following information under the Freedom of Information Act 2000 (FOIA):

The Financial Times would like to know how much, if any, money ENRC paid to the SFO to cover its legal costs/other costs in relation to ENRC's recent decision to withdraw its civil claim against the agency:
<https://www.ft.com/content/0ca9569d-10b6-46ec-ad90-35f93d37409c>.

Response

This is a request for the SFO to disclose the negotiated terms of the settlement agreement (“the ENRC Settlement Agreement”) which ended the claim brought by ENRC against the SFO and two individuals, John Gibson and Tony Puddick (respectively “D2” and “D3”). The terms of the ENRC Settlement Agreement are confidential to the extent that they are not also included within the related court order (the Tomlin Order), a public document. Confidentiality over the terms is, however, subject to compliance with the law, including compliance with obligations under FOIA.

We confirm that the ENRC Settlement Agreement includes information encompassed by the FOIA request, but we have not provided the information requested for the reasons given below.

I can confirm that the SFO does hold this information. The information you have requested is exempt from release under sections 36(2)(c), 40(2) & (3)(A), 41, and 43(2).

Section 36(2)(c) provides that:

Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

How the exemption is engaged

This exemption applies because in the (reasonable) opinion of the SFO's Director (the “qualified person” for this provision), complying with your request would be likely to prejudice the effective conduct of public affairs.

The Director's position is that the SFO must be able, where appropriate, to enter into confidential agreements to settle on sound terms high-value civil litigation (such as that brought by ENRC against the SFO, D2 and D3); and in that context the SFO must use its best endeavours to maintain confidentiality where lawful to do so. The Director is of the view that if we disclose the terms of the ENRC Settlement Agreement, the SFO will find it that much harder, given the high profile of the ENRC proceedings, to persuade any future claimant in similar proceedings that we will be able to preserve confidentiality over a future settlement agreement into which that claimant may be minded to enter. Realistically, the SFO will be less likely to be able to settle future civil proceedings in circumstances where the claimant requires confidentiality and the SFO does not or cannot effectively preserve confidentiality.

The Director is of the view that the SFO must be able, where appropriate, to enter into confidential agreements to settle on sound terms high-value litigation because such litigation adversely affects the SFO's public functions and therefore the effective conduct of public affairs, by drawing valuable resources away from the SFO's core functions of fighting serious or complex fraud, or away from HM Treasury more generally. If the SFO is placed in a position where in future proceedings it is able to enter into a settlement agreement on favourable terms only if the agreement is confidential, and the claimant in that context believes confidentiality is unrealistic because the SFO provided confidential information from the ENRC Settlement Agreement in response to a FOIA request,

then the outcome would be that the proceedings would have to continue to a costly trial; and the SFO would have to face the litigation risk associated with any adversarial proceedings. This would lead to further expenditure and additional wasted resources for the SFO, and be an ongoing distraction, when the SFO's principal function is to operate as a criminal investigator and prosecutor.

The Information Commissioner's Office notes that "prejudice to the effective conduct of public affairs could refer to an adverse effect on [the government department's] ability to offer an effective public service or to meet [its] wider objectives or purpose".

Public interest test

As explained in our letter of 6 November, the SFO considers that section 36(2)(c) of FOIA is engaged. In the opinion of the SFO's Director, disclosure of the settlement terms would be likely to prejudice the effective conduct of public affairs. The SFO has attached appropriate weight to the Director's opinion when balancing the public interest test, in accordance with [ICO guidance](#).

As a publicly funded government department, the public interest arguments **for** disclosure of the information sought are that there is a need for:

- the SFO to be transparent about its use of public funds (especially where substantial amounts of money are involved) in relation to its criminal investigations and related civil proceedings;
- the SFO to be accountable for its decisions in respect of its use of public funds in civil proceedings brought by a former suspect (the claimant), especially where the criminal investigation into that suspect has not been pursued to a prosecution and there have been relevant findings against and/or criticism of the SFO in other civil proceedings involving the same claimant;
- objective public scrutiny of the SFO's work, particularly in respect of alleged wrongdoing in relation to its core activities (such as the allegations brought by ENRC in the civil proceedings to which your request relates).

The public interest arguments **against** disclosure are that:

- it is the view of the SFO's Director that the terms of the Settlement Agreement should be withheld on the basis that disclosure would be likely to prejudice the effective conduct of public affairs, as explained in our letter of 6 November, and appropriate weight must be given to that opinion for the public interest test;
- it would not be in the public interest to undermine the SFO's ability to enter into confidential settlement agreements with parties in respect of high-value civil litigation, where the SFO considers a settlement agreement requiring confidentiality to be the most appropriate course of action in all the circumstances;
- given the high profile of the ENRC proceedings to which your request relates, in the event of disclosure of the requested information in response to a FOIA request, the SFO would be likely to find it much more difficult to persuade any future claimant in other high-value civil proceedings that it would be able to preserve confidentiality over a settlement agreement that the claimant may be minded to enter into, where that claimant required confidentiality;
- that increased difficulty would be likely to act as a brake on the SFO's discretion to act in the public interest, and would have a significant and detrimental impact on the SFO's conduct of its public affairs, and indeed the public affairs of other government departments engaged in similar adversarial civil

litigation (because they would share the SFO's increased difficulty to settle proceedings on confidential terms);

- it would not be in the public interest for the SFO to be forced (due to an inability to reach confidential settlement agreements) to use its resources to continue to defend costly civil litigation when it would be in the public interest to settle the proceedings on confidential terms;
- not having the option of being able to settle on confidential terms would mean that the SFO could in a given case be compelled to accept ongoing exposure to litigation risks and the deployment of public funds (with adverse public cost implications for the SFO and taxpayers) in cases where the SFO denies all allegations but accepts that there are nevertheless risks because of the very nature of adversarial litigation;
- there is general public interest in promoting the settlement of civil proceedings, which underpins the existence of "without prejudice" privilege and is also enshrined in the overriding objective of the Civil Procedure Rules (CPR 1.1 and 1.4); and promoting the settlement of proceedings in turn requires a willingness on the part of the Courts and other authorities to uphold the bargain negotiated between the parties and reflected in the settlement agreement, including any provisions in relation to confidentiality;
- disclosure of the Settlement Agreement from the ENRC civil proceedings would likely damage third-party trust in the SFO in relation to its willingness and/or ability to maintain confidentiality obligations more generally, including when exercising its core functions as an investigator and prosecutor, and would therefore likely deter third parties from being willing, or as willing, to accept that the SFO would respect confidentiality obligations and try to keep relevant information confidential (in appropriate cases);
- some information about the basis for settling the relevant ENRC civil proceedings is already in the public domain, within the Tomlin Order (a public document).

Decision on public interest

On balance, weighing the above public interest factors for and against disclosure, we have concluded that despite some public interest factors favouring disclosure, the greater public interest lies in maintaining the exemption and withholding the Settlement Agreement in full.

Section 40(2) and (3A) provides that:

Any information to which a request for information relates is also exempt information if the first, second or third condition below is satisfied. The first condition is that the disclosure of the information to a member of the public otherwise than under this Act

- a) would contravene any of the data protection principles, or*
- b) would do so if the exemptions in section 24(1) of the Data Protection Act 2018 (manual unstructured data held by public authorities) were disregarded.*

The details of the ENRC Settlement Agreement relate to legal proceedings involving several different parties, including two individual Defendants (D2 and D3). Necessarily, the information requested by you involves their personal data as identified parties, which data are not in the public domain (save to the extent disclosed in the Tomlin Order referred to above).

To the broad extent that your request requires access to such personal data, the SFO relies on the absolute exemption provided by section 40(2) of FOIA, read with section 40(3A)(a) (the first condition).

Those parties, as parties involved in the ENRC Settlement Agreement, have a reasonable expectation that information within the agreement will not be disclosed to the world at large.

Section 40(2) read with section 40(3A)(a) provide an absolute exemption in relation to personal data where disclosure by the SFO would contravene any of the data protection principles within Article 5 of UK GDPR.

We have considered in relation to complying with your request:

- the potential harm or distress disclosure may cause;
- whether the information is already known to some individuals;
- whether the individual would be concerned; and
- the reasonable expectations of the individual.

The SFO has come to the view that it does not have an appropriate lawful basis on which it can rely to comply with your request. Compliance would be in breach of Article 5 of UK GDPR, the data protection principles, and unlawful.

The SFO takes the view that complying with your request in relation to any such personal data within the ENRC Settlement Agreement would not be legitimate, necessary or fair (especially given reasonable expectations as to confidentiality) and would place the SFO in breach of the data protection principles.

There is an overlap between any personal data and confidential information, but information may be confidential even where it is not personal data. To the extent that any confidential information relevant to your request is obtained from a third party, section 41 is relevant, considered below.

Section 41 provides that:

Information is exempt information if—

- a) it was obtained by the public authority from any other person (including another public authority), and*
- b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.*

How the exemption is engaged

Where complying with your request would necessarily involve an actionable breach of confidence, in cases where there is no common law public interest defence, section 41(1) of FOIA applies. This is an absolute exemption.

The fact of the ENRC Settlement Agreement is public knowledge, as is the fact that it is confidential (see the Tomlin Order referred to above). Any confidential information within the ENRC Settlement Agreement came from the parties in the context of confidential “Without Prejudice” discussions aimed at settling the proceedings brought by ENRC against the SFO, D2 and D3. In that context, much of the confidential information within the ENRC Settlement Agreement did not come from the SFO (or exclusively from the SFO).

Any confidential information provided by third parties to the SFO, and recorded in the ENRC Settlement Agreement, is subject to legally binding confidentiality obligations and we are not required to comply with your request under 41(1) of FOIA.

Sections 40 and 41 are absolute exemptions and we are therefore not required to consider the public interest in releasing the information requested.

Section 43(2) provides that:

Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

How the exemption is engaged

Although the SFO does not have commercial interests of its own for this exemption, at least one of the other parties to the ENRC Settlement Agreement does have commercial interests which we are told would be materially prejudiced if the terms of the ENRC Settlement Agreement were to be disclosed in response to this FOIA request.

The SFO reserves the right to consult with third parties relevant to the requested information. In this instance, the SFO has sought ENRC's position on section 43(2) of FOIA.

The SFO has assessed that disclosure of the requested information risks harming the commercial interests of ENRC. The SFO considers that section 43(2) does not apply to the Settlement Agreement as a whole but only to specified terms ("specified terms") within the Settlement Agreement where it can be demonstrated that the disclosure of such terms, to the extent encompassed by request 1, would be likely to prejudice ENRC's commercial interests.

Public interest test

The public interest arguments **for** disclosure of information comprising specified terms are as set out above for section 36(2)(c).

The additional public interest arguments **against** disclosure of the specified terms (which engage section 43(2)) are that:

- notwithstanding that the SFO is a public body and publicly funded, the SFO is legally entitled to enter into legal obligations of confidence on which counterparties (such as ENRC in this case) are entitled to rely and there are strong public interest arguments why public bodies must be able to continue to rely upon, offer, and provide legally binding obligations of confidence;
- the SFO and other public bodies are able, notwithstanding FOIA, to obtain and provide the benefit of legally binding obligations of confidence which enable such public bodies to obtain and make use of protected information in confidence, which they would not otherwise be able to obtain or use, and which facilitates decision making and actions which would not otherwise be available (including reaching and documenting the settlement of civil proceedings on confidential terms); and any disclosure putting such options, information sharing and resultant outcomes at risk is not in the public interest;
- for obligations of confidentiality to have any meaning and value, and to ensure ongoing trust in the SFO (and indeed other public bodies) when agreeing to keep information confidential (including discussing, negotiating, and concluding settlement agreements for civil proceedings in reliance on a legal obligation of confidence from the public body), there is a very strong presumption that such an obligation must remain valid and binding (notwithstanding FOIA) for otherwise:
 - providers of confidential information will be less trusting of public bodies and so be less likely to provide confidential information to them;
 - the reputation of public bodies and confidence in them will be diminished if they disclose confidential information against the wishes of the provider;

- there will be less cooperation and collaboration with public bodies, if it is thought that public bodies will fail to protect confidential information despite legal obligations of confidence borne by them;
- there is general public interest in promoting the settlement of civil proceedings, which underpins the existence of "without prejudice" privilege and is also enshrined in the overriding objective of the Civil Procedure Rules (CPR 1.1 and 1.4); and promoting the settlement of civil proceedings in turn requires a willingness on the part of the Courts to uphold the bargain negotiated between the parties and reflected in the settlement agreement, including any provisions in relation to confidentiality -- it is therefore well-established that the public interest favours the protection of commercial interests linked to the confidentiality of settlement agreements;
- disclosure of the terms that ENRC agreed to settle on would provide an indication to parties in other current or future proceedings that ENRC is or may be engaged with, as to the terms ENRC (and the ENRC group of companies) would be willing to settle on within a given legal dispute, which would be likely to place ENRC or an ENRC group company at a commercial disadvantage as it would be likely to harm its negotiating position leading to the conclusion of settlement on less favourable terms and may impede the ability to reach a compromise resolution of other proceedings where it may otherwise have been commercially advantageous to do so.

Decision on public interest

On balance, weighing the above public interest factors for and against disclosure, we consider that the greater public interest lies in maintaining the exemption.