First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2019/0089

Before
Judge Stephen Cragg Q.C.

Tribunal Members
Andrew Whetnall
and
Alison Lowton

Between

Phil Miller

Appellant

And

The Information Commissioner

The Foreign and Commonwealth Office

Respondents

Determined, by consent, on written evidence and submissions
Considered on the papers on 17 February 2020.

DECISION AND REASONS

INTRODUCTION

1. The Appellant submitted the following requests to the Foreign and Commonwealth Office (FCO) on 9 November 2017:

> 'Under the FOIA 2000, please will the department confirm the following:
>
> 1. FCO sensitivity reviewer Bruce Cleghorn helped locate and identify FCO papers for Sir Jeremy Heywood's review in 2014 into allegations of UK involvement in the Indian Army's Operation Bluestar.
>
> 2. FCO officials who were involved in UK-India affairs in 1984 helped locate and identify FCO papers in 2014 for Sir Jeremy Heywood's review into allegations of UK involvement in the Indian Army's operation Bluestar.'

2. The FCO initially told the Appellant that it was relying upon s36 FOIA (prejudice to the effective conduct of public affairs), and then s40(2) FOIA (personal data), to withhold the information.

3. The Appellant contacted the Commissioner on 3 September 2018 in order to complain about the FCO's failure to provide him with the information he requested. The Commissioner clarified with the Appellant the nature of the information his two requests were seeking. As the Commissioner states, the Appellant :-

> ….explained that in response to request 1 he was simply seeking a yes/no answer to the question as to whether Mr Cleghorn helped locate and identify FCO papers for the Heywood Review in 2014. Similarly, the complainant explained that in relation to request 2 he was simply seeking a yes/no answer as to whether any officials had a) helped locate and identify FCO papers for the Heywood Review *and* b) were involved in UK-India affairs in 1984.

9. In light of this clarification, the FCO explained in its submissions to the Commissioner that it was now seeking to rely on section 40(5)(b)(i) of FOIA to refuse to confirm or deny whether it held information falling within the scope of either request. In other words, it was seeking to rely on this exemption to refuse to provide a yes/no answer to each request.

THE LAW AND COMMISSIONER'S DECISION

4. Section 40 FOIA, materially, reads as follows:-

> **40.— Personal information.**
> (1) …
> (2) Any information to which a request for information relates is also exempt information if—
> (a) it constitutes personal data which do not fall within subsection (1), and
> (b) either the first or the second condition below is satisfied.
> (3) The first condition is—
>
> (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—
>
> (i) any of the data protection principles, or
> (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
>
> (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.
>
> (4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).
>
> (5) The duty to confirm or deny—
>
> (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
> (b) does not arise in relation to other information if or to the extent that either—
>
> (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data

> Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
> (ii) …

5. The first question in determining whether the exemption is engaged is to decide whether confirmation or denial alone that information is held would involve the disclosure of personal data. The relevant definition of personal data is set out in section 1 of the Data Protection Act 1998:

> "…data which relate to a living individual who can be identified
>
> (a) from those data, or
>
> (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual."

6. The Commissioner's approach was to say that the Appellant has named an individual, Mr Cleghorn, in his first request and that the request is worded in such a way that any information within its scope must relate to him. It therefore follows that, in relation to request 1, any confirmation or denial of the information held will, by definition, reveal the personal data of Mr Cleghorn. In relation to request 2, the Commissioner reasoned as follows:-

> 15….the FCO argued that the complainant would be able to use information in the public domain, e.g. information at The National Archives (TNA) to identify staff who were involved in UK-India affairs in 1984. It noted that it was also in the public domain that Mr Cleghorn was a sensitivity reviewer. Therefore, the FCO argued that if it complied with section 1(1)(a) of FOIA in respect of this request then it could be inferred (correctly or not) that Mr Cleghorn was involved in the review. The Commissioner notes that the request 2, unlike request 1, did not identify any specific individuals. However, the Commissioner acknowledges that it is the public domain that Mr Cleghorn worked in UK-India affairs in 1984 and is now a sensitivity reviewer. She is therefore persuaded by the FCO's line of argument that complying with section

1(1)(a) in respect of request 2 would be likely to have the same effect of complying with request 1.

7. If it is accepted that confirmation or denial in response to the request would mean the disclosure of personal data, then the issue is whether the disclosure of the personal data would contravene any of the data protection principles.

8. Materially, for the purposes of s40(3)(a)(i) FOIA, the first data protection principle requires that personal data is processed (which includes disclosure) fairly and lawfully and in particular, shall not be processed unless at least one of the conditions in Schedule 2 is met.

9. The requirement for personal data to be processed fairly is a general one, and may be assessed first before the Schedule 2 requirements are considered. Nevertheless, in relation to interpreting the first principle, the disclosure must also not breach the material conditions in Schedule 2 to the DPA 1998 'relevant for purposes of the first principle'. Processing is permitted if the data subject has consented to it (Sch 2, first condition), but if not then for the purposes of the sixth condition in Sch 2 (which appears to be the only condition relevant in the present case) it must be established that the disclosure is necessary in order to meet the legitimate interests pursued by the Appellant (or others who are not relevant in this case).

10. Further for the purposes of the sixth condition, there is an exception to disclosure even where disclosure has been established as for the purposes of the Appellant's legitimate interests. Thus, that exception covers a situation where the processing (disclosure) is unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

11. The Commissioner's decision notice explains the approach that the Commissioner took as follows:-

20. In deciding whether complying with section 1(1)(a) would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:

- The reasonable expectations of the individual in terms of what Would happen to their personal data. Such expectations could be shaped by:

  o what the public authority may have told them about what would happen to their personal data;
  o their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights;
  o the nature or content of the information itself (if held);
  o the circumstances in which the personal data was obtained;
  o particular circumstances of the case, e.g. established custom or practice within the public authority; and
  o whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.

- The consequences of confirming whether information is held, i.e. what damage or distress would the individual suffer if the public authority confirmed whether or not it held the requested information? In consideration of this factor the Commissioner may take into account:

  o whether information of the nature requested is already in the public domain;
  o if so the source of such a confirmation; and even if the information has previously been in the public domain does the passage of time mean that confirmation now could still cause damage or distress?

21. Furthermore, notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to confirm whether or not the information is held if it can be argued that there is a more compelling public interest in disclosure. In considering 'legitimate interests' in order to establish if there is such a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests.

23. The Commissioner concluded as follows:-

(a) The Commissioner accepted that the fact that Mr Cleghorn was a sensitivity reviewer at the FCO was something that was in the public domain, and that

the Appellant had located a record at TNA for which a 'B Cleghorn' was the sensitivity reviewer for a record concerning UK-Indian relations.

(b) However, she also accepted that the FCO did not routinely disclose details about the files a particular reviewer had been involved in when considering a response to an FOI request.

(c) Therefore, the Commissioner accepted that Mr Cleghorn would have a reasonable expectation that the FCO would not confirm whether or not he was involved in reviewing particularly files, and that this extends to whether he was locating and identifying papers for the Heywood Review.

(d) The sensitive nature of the Heywood Review lent weight to that expectation, and the Commissioner accepted that confirmation of involvement could lead to repercussions and distress.

(e) In relation to legitimate interests in the FCO complying with s1(1)(a) FOIA, then there was a legitimate interest in the government being open and transparent about the processes it followed in conducting the Heywood Review given the sensitivity of the subject matter.

(f) Even the perception of a possible conflict of interest adds weight to the argument that there is a legitimate interest in the FCO complying with section 1(1)(a) of FOIA.

(g) However, the Commissioner concluded that Mr Cleghorn's legitimate interests outweigh the legitimate interests in confirming or denying whether the requested information in request 1 is held.

(h) In relation to request 2, the Commissioner was persuaded by the FCO's line of argument that complying with section 1(1)(a) in respect of request 2 would

be likely to have the same effect of complying with request 1 (as set out above).

THE APPEAL

24. The Appellant filed an appeal to the decision notice on 25 March 2019. The Appellant explains that the background to his request is that he had previously discovered TNA documents that showed that an SAS officer had advised the Indian Army how to assault the Golden Temple in Amritsar in February 1984. A subsequent raid on the temple in June 1984 led to the death of at least hundreds of Sikh pilgrims. As a result, the prime minister ordered an investigation by the then Cabinet Secretary, Sir Jeremy Heywood, which led to the 2014 Heywood Review. We have not read the review, but the Appellant says that it played down the role of the SAS, and he is unsatisfied with the outcome.

25. The essence of the Appellant's concern, and the basis for request 1, is that Mr Cleghorn worked as a diplomat in the FCO South Asia Department (SAD) in 1984 (which is known to be true), but then also worked as a sensitivity reviewer. Amongst other things sensitivity reviewers are tasked with checking FCO files prior to release to TNA under the 30year rule. The Appellant claims that in 2015 Mr Cleghorn 'censored records about India from 1984' (the year of temple raid and massacre), and he says he provided the Commissioner with such a record from FCO file 37/3606, in relation to the material collated for the Heywood Review. The Appellant says, therefore, that information about Mr Cleghorn, including specific information about his work was in the public domain in any event.

26. Following on from this, the Appellant says that there is a strong 'legitimate interest' in knowing whether those with vested interests 'were allowed to influence the Review'. He also says that it is wrong to say that there was a possibility that Mr Cleghorn might face social media abuse if his involvement was revealed, and he calls this a slur on the Sikh community. He pointed out that a newspaper had already published information which linked Mr Cleghorn's work in 1984 in relation to

Amritsar and his subsequent role as a sensitivity reviewer, and mentions another piece in Private Eye, written by the Appellant, and says there is no evidence that these caused Mr Cleghorn 'undue distress'.

27. In relation to request 2, the Appellant said that he was not asking for the names of the sensitivity reviewers when he asked the FCO to confirm 'FCO officials who were involved in UK-India affairs in 1984…' and, as referred to above he was just asking for a yes or no answer. He also claimed that if the FCO answered in the affirmative that there were 1984 FCO officials of the type described, involved in the Heywood Review then this would not lead to an inference that Mr Cleghorn was involved, as there could have been such officials other than Mr Cleghorn.

28. The Appellant goes on to emphasise the important public interest in discovering whether there was potential bias by those involved with the Heywood Review, and whether there was a prospect that the Review did not see all the relevant documents.

29. He also makes a claim that Mr Cleghorn's name would have appeared as a sensitivity reviewer in TNA in files where sensitive material had been withheld and a dummy card inserted instead, as the relevant guidance tells the sensitivity reviewer to sign the dummy card.

30. In response the Commissioner and the FCO re-iterate the points made in the decision notice.

31. The FCO seeks to rebut the point about dummy cards made by the Appellant in his appeal. The FCO points out that the relevant guidance makes no specific reference to a sensitivity reviewer signing the dummy cards (as opposed to another official), and this is borne out by reviewing the copy of the guidance '*Preparing records for the National Archives*' (2017) which is included the bundle. The FCO states that 'at least in the FCO, sensitivity reviewers do not complete dummy cards', and this is because sensitivity reviewers do not actually make redaction decisions (about this, see

further below). Subsequently, the Appellant has said that he does not wish to dispute this point.

32. The FCO also disputes that the records show that Mr Cleghorn censored records about India in 2015 (the Appellant provided a file reference). The FCO says that from reviewing the file it can be seen that Mr Cleghorn signed a minute in 1984 in the course of his employment, but there is nothing to show who was responsible for redaction of that minute, and certainly not that it was Mr Cleghorn.

33. In relation to request 2, the FCO's skeleton argument sets out the final position of the FCO. The FCO says that any motivated requestor would be aware (and it would be common sense), that the pool of employees at the FCO who both (i) worked on the SAD in 1984; and (ii) were still employees of the FCO thirty years later would be very small. The FCO then say:-

> Where there are only one or two publicly identifiable individuals who meet both of these criteria, the inevitable assumption, and consequent processing, will be that a confirmation or denial is the processing of that individual's personal data.

34. The FCO argue that the Appellant does not seem to dispute this line of argument and that in his response of 29 July 2019 he has identified 29 sensitivity reviewers, and that he is aware of just two (Mr Cleghorn and one other) who would have worked in the SAD in the 1980s. In fact, what the Appellant says is that he would have expected 'more than one sensitivity reviewer' with institutional knowledge of Anglo-Indian relations in the 1980s, and then says he has identified one other and 'this gave me the impression that it was rather common for diplomats with experience of this period to be brought back….'.

THE EVIDENCE

35. In this case we have the witness statement of Graham Hand who is the Senior Sensitivity Reviewer for FCO Services (FCOS). He is responsible for reviewing

disclosure of public records and information under FOIA, and has a senior diplomatic background.

36. Mr Hand explains the role of sensitivity reviewers, who are employed at a junior grade (although they might have had a lot of previous experience), and that he has a supervisory role after a reviewer has made recommendations about material that should not be disclosed, or disclosed on a restricted basis. When he has completed his check of the reviewer's recommendations, the retention schedules are sent to the Advisory Council on National Records and Archives (ACNRA) where further questions and checks are made before sign-off by the Secretary of State. Mr Hand explains that the fact that someone works as a sensitivity reviewer is not confidential, but the files worked on by a reviewer are not made public as the reviewer is simply making recommendations and is not a decision-maker.

37. He notes also that given the strong feelings around Operation Bluestar, it is prudent not to identify the reviewer making recommendations, given the possibility of reprisals if it is thought that material has been wrongly withheld. Given the system of supervision and review of a sensitivity reviewers work, Mr Hand denies that there is the opportunity for a reviewer to 'weed out' material which may reflect badly on the reviewer's previous work in the diplomatic field. He also explains that reviewers do not sign dummy cards which are inserted into folios removed from a file which has otherwise been transferred to the TNA (see above).

38. Mr Hand goes on to explain that in relation to the Heywood Review many officers from across different parts of the FCO would have been involved in locating and providing relevant files for the Review.

39. Mr Hand addresses the Appellant's concern that Mr Cleghorn, in 2015 and while working as a sensitivity reviewer, censored records about India from 1984. Mr Hands accepted that Mr Cleghorn had been a desk officer in 1984 in the SAD, and was the originator or recipient of some of the relevant documents, but he also explains that

there was nothing in the files to show who then reviewed the relevant records from 1984 for sensitivity.

40. In relation to the specific document for which the Appellant claims that Mr Cleghorn was the reviewer because there is a sensitivity review with Mr Cleghorn 'named as the user', Mr Hands says that there is indeed a sensitivity review record on the relevant file which should have been removed before the case was transferred to TNA, but in any event the reviewer is referred to as SR5, and does not name Mr Cleghorn as the Appellant claimed.

41. In response to this last point, Mr Miller points out in his final submissions dated 11 September 2019, that on the document with the SR5 reference on it (which is not, as we understand, a document which has direct reference to the 1984 events in Amritsar, although it was generated in 1984), in the 'metadata' at the bottom of the page there is a reference to the user as 'BCleghorn' which indicates that Mr Cleghorn had 'some role in censoring at least one Foreign Office file from 1984'. But as the Appellant says, this is not central to his request, which is 'whether Mr Cleghorn was allowed to influence the selection of which files were seen by the Heywood Review…'.

42. The Appellant has also provided a witness statement from Tanmanjeet Singh Dhesi MP. This explains some more background about the 1984 events in Amritsar and the Heywood Review. He explains the concerns of the Sikh community that the Heywood Review had limitations due to the speed of its production and the limited period it covered. He criticises the FCO reliance on possible social media 'reprisals' from the Sikh community, as 'thinly concealed racism'. He emphases the point that British officials, active in Anglo-Asian affairs in the 1980s should not, in 2014, be able to 'select which files investigators had access to'. If that proved to be the case, there would not be criticism of the individuals, but there would be a call for an independent inquiry 'to rectify the apparent inadequacy of the Heywood Review'.

DISCUSSION AND DECISION

43. As the Tribunal considers the matter afresh, then we can take on board, when considering the appeal, any points that the Appellant feels that he was unable to make to the Commissioner. This is a case which has been determined without a hearing, upon the agreement of the parties, and we have taken account of all the information made available to us.

44. In relation to request 1, we agree with the Commissioner that s40(5) FOIA is the appropriate exemption to apply and that to confirm or deny that the requested information is held would in itself involve the disclosure of Mr Cleghorn's personal data as described in s1 of the Data Protection Act 1998, because the request is about Mr Cleghorn's specific role.

45. Having considered the evidence of Mr Hand it seems to us that sensitivity reviewers, although they may well have been senior FCO officials in the past, are only the initial step in a process which decides what information will be withheld, and Mr Hand explains this process in his statement. As such, we accept that sensitivity reviewers are not decision-makers and are limited to making recommendations which are supervised and considered by others. In that role, a sensitivity reviewer has a reasonable expectation that their personal data will not be disclosed. We accept the points made by the FCO that sensitivity reviewers do not sign dummy cards and their names to not appear on redaction records and the like, albeit that it may be possible to identify some role if their name appears in the metadata of a document. To a very large extent, at least, a sensitivity reviewer's name as linked to a particular piece of work is not in the public domain. Although we accept the points made by the Appellant that 'reprisals' against a sensitivity reviewer are unlikely and the risk should not be overstated, it does seem to us that distress can be caused where personal data is disclosed, which would not be reasonably expected by a person, which might link a person to controversial issues and decisions.

46. In relation to the 'legitimate interest' in disclosure in any event, we accept that there should be transparency of all relevant issues about a matter such as the Heywood Review. But taking into account the limited role played by a sensitivity reviewer as described by Mr Hand, it does not seem to us that, seen in that light, the information sought in request 1 by the Appellant will significantly advance that legitimate interest, certainly not sufficiently to justify the otherwise unfair disclosure of a person's personal data.

47. In relation to the second request, we take a different approach to the FCO and the Commissioner. We accept that the aim of this request is more general than the first request, and simply asks for a yes or no answer as to whether any officials had a) helped locate and identify FCO papers for the Heywood Review and b) were involved in UK-India affairs in 1984. We note that the request is not limited to 'sensitivity advisers' and that Mr Hand's evidence is that 'many officers from across different parts of the FCO would have been involved in locating and providing relevant files for the Review'.

48. Although the Appellant has identified one other sensitivity adviser as a potential candidate, he does not indicate that he believes that this is the total number of officials (sensitivity advisers or other officials), and the FCO's skeleton does not give a figure to the number of 1980s SAD officials who were still employed in some role by the FCO thirty years later. It may be a small number but there appears to consensus that there is certainly more than one.

49. The FCO says that to confirm or deny whether there are FCO officials who were involved in UK-India affairs in 1984 who also helped locate and identify FCO papers for the Heywood Review would itself be a disclosure of Mr Cleghorn's personal data. But as the Appellant says, confirmation (if that were to be the response) will not tell him whether Mr Cleghorn was involved, and would not add to the pool of knowledge about Mr Cleghorn, which is that he is a sensitivity reviewer who was also worked as a SAD official in the 1980s. On that basis a confirmation or denial in relation to request

2 by the FCO would not itself contravene any of the data protection principles or section 10 of the Data Protection Act 1998.

CONCLUSION

50. For the reasons set out above we are satisfied that that FCO was entitled to rely on s40(5) FOIA to decline to confirm or deny that the information is held in relation to the first request, but not in relation to the second request.

51. Therefore, the appeal is allowed in part.

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 12 March 2020.

Date Promulgated: 17 March 2020.