

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 February 2017

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

Decision (including any steps ordered)

1. The complainant submitted a request to the Foreign and Commonwealth Office (FCO) for information it held about the death of a British citizen, Bilal Ahmed, in Kashmir in 2000. The FCO provided the complainant with the documents it held which fell within the scope of his request but redacted certain parts on the basis of the exemptions contained at section 23(1) (security bodies), section 27(1)(a) (international relations), section 40(2) (personal data) and section 41(1) (information provided in confidence) of FOIA.
2. The Commissioner has concluded that the FCO has correctly applied sections 23(1), 40(2) and 41(1). However, the Commissioner has also concluded that section 27(1)(a) is not engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - the FCO must provide the complainant with a further copy of the document 'New Delhi Telno 457' with the final sentence of paragraph five unredacted.
4. 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

5. The complainant submitted the following request to the FCO on 22 June 2016:

*'I would like documents and correspondence between the British High Commission in New Delhi and FCO, between December 2000 and December 2001, concerning the death of British citizen Bilal Ahmed (AKA Mohammed Bilal) in India administered Kashmir on 25th December, 2000.'*¹

6. The FCO responded on 20 July 2016 and confirmed that it held information falling within the scope of the request but it considered this to be exempt from disclosure on the basis of section 27(1) (international relations) of FOIA and it needed additional time to consider the balance of the public interest test. The FCO also explained that some of the requested information was exempt from disclosure on the basis of section 23(1) (security bodies).
7. The FCO contacted the complainant again on 5 August 2016. The FCO disclosed some of the requested information but explained that the remainder was exempt from disclosure on the basis of the exemptions contained at sections 27(1)(a), 40(2) (personal data), 23(1) and 41(1) (information provided in confidence) of FOIA. In respect of section 27(1)(a), the FCO confirmed that it had concluded that the public interest favoured maintaining this exemption.
8. The complainant contacted the FCO on 2 October 2016 in order to ask for an internal review of this decision.
9. The FCO informed him of the outcome of the internal review on 28 October 2016. The review upheld the application of the various exemptions cited in the refusal notice.
10. However, during the course of the Commissioner's investigation the FCO contacted the complainant again on 26 January 2017 and disclosed some, but not all, of the information that had been withheld on the basis of section 27(1)(a) of FOIA.

¹ Further details about Bilal Ahmed's death are contained in this news story: http://news.bbc.co.uk/1/hi/world/south_asia/1091056.stm

Scope of the case

11. The complainant contacted the Commissioner on 18 November 2016 in order to complain about the FCO's decision to withhold information falling within the scope of his request.
12. At the point that this notice is being issued the FCO is continuing to withhold information from three documents which fall within the scope of the request.
13. These documents are:
 - 'New Delhi Telno 456' which has been redacted on the basis of sections 23(1) and 41(1);
 - 'New Delhi Telno 457' which has been redacted on the basis of section 27(1)(a); and
 - A letter dated 3 January 2001 from Jonathan Sinclair to Sian Macleod which has been redacted on the basis of section 40(2).
14. The Commissioner's investigation has focused on whether these various exemptions have been applied correctly.

Reasons for decision

Section 23 – security bodies

15. The FCO withheld a small amount of information from the document 'New Delhi Telno 456' on the basis of section 23(1) of FOIA.
16. This provides an exemption which states that:

'Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).'
17. To successfully engage the exemption at section 23(1), a public authority needs only to demonstrate that the relevant information was directly or indirectly supplied to it by, or relates to, any of the bodies listed at section 23(3). This means that if the requested information falls within this class it is absolutely exempt from disclosure under FOIA. This exemption is not subject to a balance of public interests test.

18. When investigating complaints about the application of section 23(1), the Commissioner will need to be satisfied that the information was in fact supplied by a security body or relates to such a body, if she is to find in favour of the public authority. In certain circumstances the Commissioner is able to be so satisfied without herself examining the withheld information. Where it appears likely that the information would engage the exemption, the Commissioner may accept a written assurance from the public authority provided by someone who, because of their seniority and responsibilities, has regular access to information relating to the security bodies and who has first-hand knowledge of the relationship between the public authority and those bodies. Furthermore, they must themselves have reviewed the disputed information in the particular case.
19. In the circumstances of this case, the FCO provided the Commissioner with a letter of assurance from a relevant senior official at the FCO which confirmed that he had examined the withheld information and was satisfied that it contains either information received from one of the bodies listed in section 23(3) or is directly related to them. This official occupies a senior position at the FCO and meets the Commissioner's criteria outlined in the preceding paragraph.
20. Accordingly, the Commissioner accepts that, in the circumstances of this case, the assurance she has received from the senior official at the FCO regarding the nature of the information redacted on the basis of section 23(1) is sufficient for her to conclude that this information is exempt from disclosure on the basis of that exemption.

Section 27 – international relations

21. Section 27(1)(a) states that:

'Information is exempt information if its disclosure would, or would be likely to, prejudice –

(a) relations between the United Kingdom and any other State'

22. In order for a prejudice based exemption, such as that cited by the FCO, 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 to discharge.
23. Furthermore, the Commissioner has been guided by the comments of the Information Tribunal which suggested that, in the context of section 27(1), 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'*.²
24. The FCO argued that disclosure of part of the document 'New Delhi Telno 457' which had been redacted on the basis of section 27(1)(a) would be likely to prejudice its relations with India. The FCO provided the Commissioner with an explanation as to why it believed that this would be the case. However, these submissions make direct reference to the content of the withheld information itself and therefore the Commissioner cannot include these submissions in this notice. Instead these submissions, and the Commissioner's view on them, are discussed in further detail in the confidential annex, a copy of which will be provided to the FCO only.
25. Nevertheless, for the purposes of his notice the Commissioner can confirm that she does not accept that the exemption contained at section 27(1)(a) is engaged. Although it is clear that the first criterion of the three limb test is met, in the Commissioner's view there is no plausible causal link between the disclosure of the redacted information and prejudice occurring to the UK's relations with India for the reasons envisaged by the FCO. The confidential annex explains in further detail why the Commissioner has reached this conclusion.

² [Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence \(EA/2006/0040\)](#), paragraph 81.

26. In light of this decision, the FCO must provide the complainant with a further copy of document 'New Delhi Telno 457' with the final sentence of paragraph five unredacted.

Section 41 – information provided in confidence

27. The FCO has relied on section 41(1) to redact information from paragraphs 1, 2, 3 and 4 of the document 'New Delhi Telno 456'

28. Section 41 of FOIA states that:

'(1) 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.'

29. Therefore for this exemption to be engaged two criteria have to be met; the public authority has to have obtained the information from a third party and the disclosure of that information has to constitute an actionable breach of confidence.

30. With regard to whether disclosure would constitute an actionable breach of confidence the Commissioner follows the test of confidence set out in *Coco v A N Clark (Engineering) Ltd* [1968] FSR 415. This judgment suggested that the following three limbed test should be considered in order to determine if information was confidential:

- Whether the information had the necessary quality of confidence;
- Whether the information was imparted in circumstances importing an obligation of confidence; and
- Whether an unauthorised use of the information would result in detriment to the confider.

31. However, further case law has argued that where the information is of a personal nature it is not necessary to establish whether the confider will suffer a detriment as a result of disclosure.

Was the information obtained from a third party?

32. The FCO explained that the information redacted on the basis of section 41(1) was provided to it by two separate parties. The Commissioner cannot identify the two parties as to do so would result in the disclosure of the withheld information itself. However, the Commissioner can

confirm that the redacted information was clearly provided to the FCO by two third parties and section 41(1)(a) is therefore met.

Does the information have the necessary quality of confidence?

33. The Commissioner considers that information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial; information which is of importance to the confider should not be considered trivial.
34. The Commissioner is satisfied that the information is clearly not otherwise accessible and moreover given its content, focusing as it does on the suicide bomb attack which Bilal Ahmed was suspected of carrying out, is clearly more than trivial.

Was the information obtained in circumstances importing an obligation of confidence?

35. The FCO argued that both parties provided it with the redacted information with the implied expectation that it would be kept confidential. Given the content of the redacted information the Commissioner is satisfied that this is clearly the case and therefore this criterion is met.

Would disclosure be detrimental to the confider?

36. In light of the content of the information the Commissioner accepts that its disclosure would be likely to have detrimental consequences for the two parties that provided the FCO with the information. This is because it would identify the two parties in question as informal sources of information to the FCO about a matter that was clearly sensitive.

Public interest defence

37. However, although section 41 is an absolute exemption, the law of confidence contains its own built in public interest test with one defence to an action being that disclosure is in the public interest.
38. The complainant argued that it was in the public interest to know what cooperation took place between the UK and Indian authorities regarding Bilal Ahmed. The complainant also noted that this attack is frequently cited by terrorism experts as the first instance of a British Muslim suicide bomber. Consequently, the complainant argued that there was a compelling public interest in the disclosure of the withheld information in order to assist with understanding how early radicalisation had taken place in the UK.
39. The Commissioner agrees that there is a public interest in disclosure of information that would inform the public as to how the FCO liaises with

other bodies when incidents such as the one which is the focus of this case occur. However, it is clear that the information provided to the FCO by both third parties was done so on the understanding that it would be kept confidential. The Commissioner accepts that that disclosure of such information would be likely to have detrimental consequences for both of these parties but could also have potentially detrimental consequences for the FCO if third parties reached the view that the FCO could not be trusted to protect confidential information of this nature. In the Commissioner's opinion such an outcome would be firmly against the public interest as it would impact on the UK government's ability to deal with scenarios such as the one which is the focus of this request.

Section 40 – personal data

40. Section 40(2) of FOIA states that personal data is exempt from disclosure if its disclosure would breach any of the data protection principles contained within the Data Protection Act 1998 (DPA).

41. Personal data is defined in section (1)(a) of the DPA as:

'.....data which relate to a living individual who can be identified from those data or from those data and other information which is in the possession of, or likely to come into the possession of, the data controller; and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any person in respect of the individual.'

42. The FCO withheld the names of junior FCO staff whose details are not already in the public domain. The Commissioner accepts that such information constitutes personal data within the meaning of section 1 of the DPA as they clearly relate to identifiable individuals.

43. The FCO argued that disclosure of such information would breach the first data protection principle which states that:

'Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.'

44. In deciding whether disclosure of personal data 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:
 - what the public authority may have told them about what would happen to their personal data;
 - their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights (ECHR);
 - the nature or content of the information itself;
 - the circumstances in which the personal data was obtained;
 - any particular circumstances of the case, eg established custom or practice within the public authority; and
 - whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.
 - The consequences of disclosing the information, ie what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor the Commissioner may take into account:
 - whether information of the nature requested is already in the public domain;
 - if so the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?
45. Furthermore, notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling legitimate interest in disclosure to the public.
46. In considering 'legitimate interests', in order to establish if there is a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sake, as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to consider a proportionate approach.
47. The FCO explained that it had a clear policy that the names of junior officials would not be released under FOIA and therefore the individuals in question had a reasonable expectation that their names and contact details would not be released into the public domain.

48. The Commissioner is satisfied that the junior officials would have a reasonable expectation in the circumstances of this case, based upon established custom and practice, of their names being redacted from any disclosures made under FOIA and thus the disclosure of their names would be unfair and breach the first data protection principle. This information is therefore exempt from disclosure on the basis of section 40(2) of FOIA.

Right of appeal

49. 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@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

50. 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.

51. 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
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF