

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 February 2018

Public Authority: 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 about the activities and death of British citizen Helen Smith in Saudi Arabia in May 1979 that covered the period January to 1981 to June 1981. The FCO initially sought to refuse to disclose the request on the basis of sections 27(1)(a), (c) and (d) (international relations), section 38(1)(a) (health and safety), section 40 (personal data) and section 41(1) (information provided in confidence). The FCO subsequently argued that the request was vexatious because complying with it would place a grossly oppressive burden on it. It therefore refused the request on the basis of section 14(1) of FOIA. The Commissioner has decided that the FCO is entitled to rely on section 14(1) to refuse the request on this basis.

Request and response

2. The complainant submitted the following request to the FCO on 4 November 2013:

'I am looking for any documents relating to the activities and death of British citizen Helen Smith in Jeddah on May 1979.

My previous request on the Helen Smith case (REF: 0314-13) was to ask for the release of the contents of FCO 8/3766 which was successful but the documents only covered the period of 1980.

I am now looking for any documents that deal with the death of Helen Smith during the period of 1st Jan to 1st June 1981.¹

3. The FCO contacted the complainant on 28 November 2013 and explained that it held information falling within the scope of his request but it needed additional time to consider the balance of the public interest in relation to section 27 of FOIA.
4. The FCO then sent the complainant further letters extending the time it needed to consider the balance of the public interest test at approximately monthly intervals.
5. The FCO provided him with a substantive response to his request on 20 March 2017. The FCO apologised for the length of time it had taken to consider his request and explained that this was a complex case which had required extensive stakeholder consultation. Furthermore, the FCO explained that it had concluded that the information falling within the scope of the request was exempt from disclosure on the basis of sections 27(1)(a), (c) and (d) (international relations), section 38(1)(a) (health and safety), section 40 (personal data) and section 41(1) (information provided in confidence).
6. The complainant contacted the FCO on the same day and asked it to conduct an internal review into its handling of his request.
7. The FCO informed the complainant of the outcome of the internal review on 5 July 2017. The review concluded that the exemptions cited in the refusal notice had been applied correctly. However, the review also found that the request should have been refused on the basis of section 14(1) of FOIA given the burden involved in complying with the request.²

¹ Helen Smith died in Jeddah, Saudi Arabia allegedly as a result of a fall from a balcony flat. Her father insisted that her death had been covered up and until 2009 refused to give his consent for her body to be cremated. The case led to a change in the law to require inquests in Britain where Britons die in violent or unusual circumstances overseas.

² It is relevant to note that the Commissioner has previously issued a decision notice, FS50618433, in which the complainant had submitted a request to the FCO on the same subject matter, albeit for information covering the subsequent six month period, namely 1 June 1981 to 31 December 1981. The FCO also refused to comply with that request on the basis of section 14(1) of FOIA given the burden of the complying with the request. The Commissioner's decision notice upheld the FCO's application of section 14(1) to that request.

Scope of the case

8. The complainant contacted the Commissioner on 4 September 2017 in order to complain about the FCO's handling of his request. He explained that he was unhappy with the FCO's delays in processing this request, its decision to cite section 14(1) and its application of the various exemptions cited in the refusal notice. In light of the FCO's decision to rely on section 14(1), the complainant also argued that it should have provided him with advice and assistance under section 16(1) of FOIA to allow him to submit a refined request.
9. In light of the FCO's view that this request should be refused on the basis of section 14(1) of FOIA, this decision notice focuses simply on whether the FCO can correctly rely on this provision of FOIA. That is to say, the decision notice does not consider the FCO's reliance on the exemptions cited in the refusal notice. However, the Commissioner has considered the FCO's delays in handling this request in the Other Matters section of this notice. In terms section 16(1), if a public authority is relying on section 14(1) to refuse a request then there is no obligation on it to provide advice and assistance. However, the Commissioner has commented on this point further in the Other Matters section.

Reasons for decision

Section 14(1) – vexatious requests

10. Section 14(1) of FOIA allows a public authority to refuse to comply with a request if it is considered to be vexatious.
11. In the Commissioner's view, section 14(1) is designed to protect public authorities by allowing them to refuse any requests which have the potential to cause a disproportionate or unjustified level of disruption, irritation or distress. This will usually involve weighing the evidence about the impact on the authority and balancing this against the purpose and value of the request. This should be judged as objectively as possible; in other words, would a reasonable person think that the purpose and value are enough to justify the impact on the public authority.
12. In particular, the Commissioner accepts that there may be cases where a request could be considered to be vexatious because the amount of time required to review and prepare the information for disclosure would place a grossly oppressive burden on the public authority. This is the position adopted by the FCO in this case.

13. The Commissioner believes that there is a high threshold for refusing a request on such grounds. This means that a public authority is most likely to have a viable case where:
- The requester has asked for a substantial volume of information **and**
 - The authority has real concerns about potentially exempt information, which it will be able to substantiate if asked to do so by the Commissioner **and**
 - Any potentially exempt information cannot easily be isolated because it is scattered throughout the requested material.

The FCO's position

14. With regard to the first criterion, the FCO explained that the material it held relating to the Helen Smith case is made up of 103 files and 33.5 cms of loose material contained within a total of 19 boxes with a date range of 1979 –1997. More specifically, the FCO explained that the amount of information assessed to be in the scope of this particular request was 428 pages.
15. With regard to the second criterion, the FCO explained that in the circumstances of this case, it did not have to rely on an estimate to calculate the time it would take to review the requested information and prepare it for publication. Rather, it was able to use calculations of the actual time spent because it applied section 14 having already undertaken the work to process the request. The FCO explained that where it did not have a record of the time spent it used its standard work rate that it had used in similar cases.
16. The FCO explained that responding to this request involved a number of different processes. Firstly, it had to locate the information falling within the scope of the request by a) assessing each file and then b) if a file was determined to be relevant a more detailed assessment at document level was carried out. In terms of the time involved, the FCO explained that it took 2 minutes per file (103 files x 2 = 206 minutes or 3 hours 26 minutes). There were 3 files in scope, or 428 pages, and it would take 1 minute to assess 5 pages (428/5 = 86 minutes = 1 hour 26 minutes). The initial assessment process of identifying relevant information would therefore take 4 hours 52 minutes.
17. Secondly, the FCO explained that it estimated, based upon a previous sampling exercise for a different case, that a reviewer would take 24.5 hours to review 242 pages. Since the quantity of information in the scope of this request is 1.8 times greater, the FCO estimated that the sensitivity review time was 44.1 hours, or 44 hours 10 minutes. The

FCO therefore explained that the total time taken to assess the material for relevance and conduct a sensitivity review was 49 hours 2 minutes.

18. The FCO emphasised that the key considerations in this case regarding the amount of time spent on this case included the volume of the information and the complex and difficult nature of the sensitivity review. The FCO explained that the requested information contained substantial amounts of sensitive personal data which if disclosed could potentially lead to significant distress to Helen Smith's surviving family members (sections 38 and 40) and furthermore it also had genuine concerns about the disclosure of information affecting the UK's international relations (section 27). In addition, the FCO explained that it also considered some of the information to be exempt from disclosure on the basis of section 41 of FOIA.
19. In addition to the above, the FCO estimated that it had spent 48.5 working days on the following stakeholder consultation, such consultations being an important factor in making this an exceptionally time consuming request to process:
 - Internal stakeholder consultation and review by the FCO's Middle East and North Africa Department as well as by the British Embassy in Riyadh.
 - Consultation with FCO Consular Directorate, Media Office and Legal Advisers regarding the potential impact of disclosure on surviving family members
 - An assessment of the FCO's duty of care to its consular customers and the FCO staff involved. The FCO estimated that up to 40 people could potentially be impacted by disclosure.
 - The time taken to despatch and transport material for review to FCO London and overseas.
 - An assessment of information already in the public domain, including media coverage at the time and books that have been published on the case.
20. The FCO also emphasised that although the list above covered the work actually undertaken on the material, there were significant delays due to resource constraints among stakeholders hence the length of time it took the FCO to complete its public interest test considerations.
21. With regard to the third criterion, the FCO explained that the requested material concerned a number of individuals as well as Helen Smith and that the material that relates directly to her is scattered throughout the 103 files.

The Commissioner's position

22. With regard to the first criterion, the Commissioner accepts that 428 pages can be correctly described as a substantial amount of information.
23. With regard to the second criterion, the Commissioner accepts that given the nature of the subject matter a significant amount of the material is likely to be sensitive, especially in terms of the UK's relations with other states and also in terms of the potential distress caused to individuals. The Commissioner notes that the FCO's estimate that up to 40 individuals could potentially be impacted by disclosure. The Commissioner therefore accepts that the FCO's concerns about the need to apply various exemptions are legitimate. In the Commissioner's view the fact that the FCO has actually undertaken the work to establish how and why these exemptions would apply adds credence to this finding.
24. With regard to the third criterion, the Commissioner is satisfied that the FCO has demonstrated that it would have real difficulties in identifying the exempt information. This difficulty is represented firstly by the time taken to conduct the sensitivity review ie over 44 hours, and secondly by the further significant time the FCO took in liaising with relevant stakeholders.
25. In relation to the FCO's estimate of the time it would take to conduct the sensitivity review and thus determine how such exemptions should be applied, the Commissioner notes that the figure of 44 hours is based on a previous sensitivity review of similar consular material and in her opinion this also adds considerable credence to the accuracy of this estimate. The Commissioner is also conscious that in handling the complainant's related request which sought information on the same topic for the subsequent six month period, the FCO explained that it was likely that for some pages only a particular sentence or word may needed redacting. Given the similarity of the requested material the Commissioner sees no reason why such an approach would not also be necessary in this case.
26. The Commissioner is therefore satisfied that the FCO has demonstrated that the three criteria are met. In reaching this conclusion the Commissioner considers that the FCO's case is supported by the fact that its calculations of the time for complying with the request are based not simply on estimates but on the actual time taken to process this request. Consequently, the Commissioner is satisfied that the detailed calculations provided by the FCO provide compelling evidence to demonstrate that complying with the request would place a grossly excessive burden on it.
27. In reaching this conclusion, the Commissioner wishes to emphasise that she has, as she did with the complainant's similar request, taken into

account the purpose and value of the request. The Commissioner recognises that disclosure of the information could provide the public with an insight into the Helen Smith case and potentially lead to greater transparency in relation to the FCO's role in the case. However, the Commissioner is satisfied that despite the benefits of disclosure, given the very significant burden which complying with the request would place on the FCO, section 14(1) should be upheld.

Other matters

28. Although the Commissioner has concluded that the FCO is entitled to rely on section 14(1) to refuse to comply with this request she has significant concerns about the FCO's handling of this request. Whilst she accepts that public authorities may not always be aware of the work, and thus potentially the burden, involved in processing a request at the point it is received, in the circumstances of this case nearly four years passed between the request being received and the FCO citing section 14(1). Whilst the FCO's delays in citing section 14(1) may have been borne out of a genuine desire to process the request, in the Commissioner's view such an egregious delay in recognising the burden of this request and correctly citing section 14(1) did not in fact assist the complainant, nor indeed the FCO.
29. The Commissioner notes that the FCO has accepted that it did not appreciate at the outset that processing this request would be exceptionally burdensome. The Commissioner also notes that the FCO has explained that it now has a greater understanding of the applicability of section 14 and in light of this improved understanding it acknowledged that this provision could, and should, have been applied much earlier in the process. The Commissioner endorses this view.
30. However, as referenced above, the complainant submitted a very similar request to the FCO in January 2016 and the FCO promptly refused to comply with that request on the basis of section 14(1). The Commissioner's decision notice FS50618433 of June 2016 agreed with that application.³ Given the similarities between the two requests the Commissioner is therefore surprised that having received her decision notice of June 2016, the FCO still took a further 12 months to apply section 14(1) to the request which is the focus of this notice.

³ FS50618433

31. Finally, as noted above, the complainant argued that as the FCO had cited section 14(1) it should have provided him with advice and assistance. As also noted above, if a public authority is relying on section 14(1) then there is no obligation on it to provide advice and assistance. However, the FCO explained to the Commissioner that it did not consider proposing to the complainant that the date range be narrowed because isolating material in this way would give a selective and distorted view of the event and individuals associated with it and as such the collection should be reviewed as a whole.

Right of appeal

32. 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

33. 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.
34. 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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