

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 December 2022

Public Authority: Foreign, Commonwealth and Development Office

Address: King Charles Street
London
SW1A 2AH

Decision (including any steps ordered)

1. The complainant submitted a request to the Foreign, Commonwealth and Development Office (FCDO) seeking information provided to it by a named individual. The FCDO sought to withhold the information on the basis of sections 38(1) (health and safety) and 41(1) (information provided in confidence) of FOIA.
2. The Commissioner's decision is that the information is exempt from disclosure on the basis of section 41(1) of FOIA.
3. No steps are required.

Request and response

4. The complainant submitted the request to the FCDO on 27 September 2021 seeking the following information:

'A report OR reports provided to the FCDO between October 2020 and January 2021 by activist Natalia Kaliada (Koliada) that recommend imposing economic sanctions on 12 individuals as part of the UK's sanctions regime against the Belarus government.

To facilitate your search for the responsive records, please note that the report/reports were likely submitted to FCDO as a physical copy,

likely to Wendy Morton MP, and likely refer to the 12 individuals as "money bags" and/or "wallets" of the Belarus government'.

5. The FCDO responded on 26 November 2021 and refused to confirm or deny whether it held the information on the basis of sections 38(2) (health and safety) and 41(2) (information provided in confidence) of FOIA.
6. The complainant contacted the FCDO on 29 November 2021 and asked it to conduct an internal review of this response.
7. The FCDO informed him of the outcome of the internal review on 30 December 2021. The FCDO now 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 sections 38(1) and 41(1) of FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 1 January 2022 in order to dispute the FCDO's decision to withhold the information falling within the scope of his request.

Reasons for decision

Section 41 – information provided in confidence

9. The FCDO withheld the information falling within the scope of the request on the basis of section 41(1) of FOIA.
10. This 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.'
11. 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.

12. 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.
13. 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.
14. The Commissioner has assessed each of these criteria in turn, taking into account the submissions provided to him by both the FCDO and the complainant. It should be noted that parts of the FCDO's submissions referred to the content of the withheld information and as a result are not reproduced or referred to in this notice.

Was the information obtained from another person?

15. With regard to the requirements of section 41(1)(a), the Commissioner notes that the complainant's request specifically seeks a copy of a report, or reports, provided to the FCDO by Ms Kaliada. Therefore the Commissioner is satisfied that section 41(1)(a) of FOIA is clearly met.

Does the information have the necessary quality of confidence?

16. In the Commissioner's view information will have the necessary quality of confidence if it is not otherwise accessible and, it is more than trivial.
17. The complainant argued that some details of the requested information were in the public domain as Ms Kaliada had publicly said that she provided a report to the FCDO containing information about sanctions and recommendations.
18. The Commissioner has had sight of the withheld information and accepts that whilst the individual in question may have confirmed that she shared information with the FCDO, the content of that information, as far as the Commissioner understands, is not in the public domain. The Commissioner is therefore satisfied that the information is not otherwise accessible and moreover having reviewed the content of the information he is satisfied that it cannot be said to be trivial. Consequently, the

Commissioner is satisfied that the information has the necessary quality of confidence.

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

19. The FCDO explained that the information was shared with it on the understanding that it would be treated confidentially. Based on the content of the information, and the manner in which it was shared with the FCDO, the Commissioner is satisfied that this criterion is met.

Would disclosure be of detriment to the confider?

20. The FCDO provided the Commissioner with submissions to support its view that disclosure of the withheld information would be detrimental to the confider. Having considered these submissions, and again taking into account the content of the withheld information, the Commissioner is satisfied that disclosure would be detrimental. In reaching this conclusion the Commissioner notes that Ms Kaliada has previously been the subject of death threats as a result of criticising the Belarusian government.¹

Is there a public interest defence to the disclosure of the information?

21. Section 41 is an absolute exemption and so there is no requirement for an application of the conventional public interest test. However, the common law duty of confidence contains an inherent public interest test. This test assumes that information should be withheld unless the public interest in disclosure outweighs the public interest in maintaining the duty of confidence (and is the reverse of that normally applied under FOIA). British courts have historically recognised the importance of maintaining a duty of confidence, so it follows that strong public interest grounds would be required to outweigh such a duty.
22. However, disclosure of confidential information where there is an overriding public interest is a defence to an action for breach of confidentiality. The Commissioner is therefore required to consider whether the FCDO could successfully rely on such a public interest defence to an action for breach of confidence in this case.
23. The complainant argued that there was clear public interest in the disclosure of the information 'as the records were used to impose sanctions' on Belarus. The FCDO acknowledged that sanctions against

¹ <https://www.dailymail.co.uk/news/article-9140233/Belarus-dictator-issues-death-threat-against-two-theatre-directors-fled-UK-ten-years-ago.html>

Belarus are a high profile matter and that, in general, it endeavours to publish relevant information. However, it emphasised that this information was provided to it in confidence and that disclosure of it risked harm to the confider. The FCDO therefore concluded that the public interest was best served by maintaining this confidence.

24. The Commissioner accepts that there is a public interest in disclosure of information relating to the issue of sanctions. However, for the reasons set out above, and taking into account the further points the FCDO has made in confidence to him, the Commissioner has concluded that there is not a sufficiently compelling argument in support of a public interest defence against an action for breach of confidence.
25. The Commissioner has therefore concluded that the information in question is exempt from disclosure on the basis of section 41(1) of FOIA.
26. In reaching this finding the Commissioner appreciates that in his submissions to him the complainant argued that the FCDO had failed to consider whether a redacted or partial version of the information in scope could be disclosed. The FCDO confirmed to the Commissioner that in its view all of the withheld information was exempt from disclosure. Having carefully considered the content of the withheld information, and the context within which it was provided to the FCDO, the Commissioner is satisfied that disclosure of any part of it would constitute a breach of confidence and as a request there is no basis upon which a redacted or partial version of the information could be disclosed.
27. In light of this decision the Commissioner has not considered the FCDO's reliance on section 38 of FOIA.

Right of appeal

28. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

29. 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.

30. 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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