

Freedom of Information Act 2000 (Section 50)

Decision Notice

23 July 2007

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

Summary

The complainant sought information from the FCO relating to the death of Iain Hook, a British subject killed while working for the United Nations in Jenin in November 2002. The FCO refused to release the information, citing exemptions 27, 35, 36, 40 and 41, and upheld this decision on review. The Commissioner upheld the decision taken by the FCO in relation to exemptions 40 and 41. In respect of the other exemptions cited, the Commissioner took the view that section 27 was engaged in respect of all the remaining relevant information and that the public interest in maintaining the exemption outweighed the public interest in releasing the information. He did not consider sections 35 and 36.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 26 January 2005 the complainant requested from the Foreign and Commonwealth Office (the FCO) the following information:

"Information on the circumstances of the death of Iain Hook, for example any documents relating to Israel accepting responsibility for the death, or saying action has been taken by Israel with regards to the soldier involved. Information on any settlement considered or agreed between the government and any other persons, such as the family, and the Israeli government."

3. On 18 March 2005 the FCO replied to the complainant to the effect that it would not be releasing the information requested. The FCO said that in its view a number of exemptions could be applied to the information and, in particular, cited the following sections of the Act: section 27(1) (a) and (b) and 27(2) (international relations): section 35(1)(a) (Formulation of government policy etc): section 36 (Prejudice to effective conduct of public affairs): section 40 (2) (Personal information), and section 41(1)(b) (Information provided in confidence). The complainant was invited to apply for an internal review if he remained dissatisfied with the outcome of his application.
4. On 23 March 2005 the complainant sought an internal review. He said that the information should be released *“on the grounds that all the qualified exemptions used in the response should be over-ridden on grounds of the public interest in the events surrounding the death of a British national.”* The FCO, in its response, said that the exemptions had been correctly applied. Full consideration had been given to the arguments supporting the public interest in disclosure where a qualified exemption had been cited but, in spite of those considerations, the view taken was that the public interest in this case lay in maintaining the exemptions rather than in disclosing the information sought.

The Investigation

Scope of the case

5. On 29 June 2005 the Commissioner received a letter from the complainant in which he complained about the FCO's refusal to release the information he had sought. The complainant said that there was a strong public interest in the circumstances surrounding the death of Iain Hook coming into the open and that the public interest in that taking place overrode the concerns that had led the FCO to cite sections 27, 35 and 36 of the Act.

Chronology

6. The Commissioner's staff wrote to the FCO on 31 May 2006 to begin the investigation of this complaint. The FCO was asked to identify the information that it held in relation to the request and to say which particular exemptions applied to which information. The FCO was also invited to consider whether or not a partial release of information might be feasible. In its reply, dated 28 June 2006, the FCO provided an annex listing the six documents it held that, in its view, fell within the boundaries of the request. In relation to those documents the FCO set out, in each case, the exemptions that it thought applicable and the reasoning behind that view. The FCO said that it had considered the possibility of redaction. It took the view that this was not an option at present because of other sensitivities but that this position might alter over time. Subsequently, those six documents were provided in full to the Commissioner's staff for more detailed consideration.

7. Following further correspondence it became apparent that the FCO held much more information relating to the death of Iain Hook than the six documents that it had provided to the Commissioner. However, the FCO said that it had taken a fairly narrow view of the request on the basis of what it perceived to be the complainant's particular areas of interest and that these had been confirmed with the complainant following discussion by both email and telephone. The Commissioner subsequently confirmed with the complainant that he was content for the Commissioner's examination in this case to be restricted to the information contained in those six documents, and this is the approach that the Commissioner has therefore adopted.

Findings of fact

8. Iain Hook, a British citizen and an employee of the United Nations Relief and Works Agency (UNRWA), was shot dead during an Israeli raid on a Palestinian refugee camp in the West Bank city of Jenin in November 2002. Following discussions, the Israeli government agreed a financial settlement with members of Mr Hook's family.

Analysis

9. The FCO has helpfully set out, in relation to the six documents covered by the request, which exemptions it believes apply to which particular pieces of information. Two of the exemptions cited are absolute exemptions which do not engage the public interest test. The Commissioner has therefore felt it appropriate to deal with the application of those two exemptions first.

Exemption

Section 40(2)

10. Section 40(2) of the Act, the full text of which is set out in the Legal Annex, says that personal data which is not the personal data of the applicant is exempt from release if certain conditions are satisfied: these conditions are set out in section 40(3) of the Act and essentially state that information is exempt from release if its disclosure would breach the data protection principles. The first data protection principle states that information must be processed fairly and lawfully. The FCO has argued that release of the personal information which it holds about various members of Mr Hook's family would, given the sensitive nature of the subject matter to which that information relates, constitute unfair processing and therefore be in breach of the first data protection principle.
11. The Commissioner has noted that the Information Tribunal, in its decision in the case of the Corporate Officer of the House of Commons v the Information Commissioner and Norman Baker MP (EA/2006/0015 and 0016), said (paragraph 50):

'The Tribunal finds that once section 40(2) FOIA is engaged that Parliament intended that the request be considered under the DPA without further

consideration of FOIA. This means that information which is protected under the DPA may not be disclosed under FOIA.'

12. The Commissioner has examined the information that has been protected under section 40(2) in this case. He is satisfied that it constitutes personal information about members of Mr Hook's family. He is equally satisfied that the information relates to circumstances of peculiar sensitivity (matters surrounding the death of Mr Hook) and was vouchsafed in situations where there was a clear expectation of confidentiality. In such circumstances the Commissioner is of the view that release of the information would constitute unfair processing contrary to the first data principle and that the information should not, therefore, be released. This is an absolute exemption and the public interest test under section 2 of the Act does not therefore apply.

Section 41(1)

13. Section 41(1) of the Act, the full text of which is set out in the Annex, states that information obtained by the public authority from any other person (including another public authority) is exempt information if its disclosure could be regarded as a breach of confidence actionable by that other person or authority. This is an absolute exemption under the Act. The Commissioner believes that the FCO has correctly applied that exemption to some of the information that it holds and that the exemption is therefore engaged.
14. The Commissioner has examined certain information provided to the FCO, in confidence, by the family of Mr Hook. The Commissioner is satisfied that release of that information could, or could well, result in the taking of legal action. On that basis, the Commissioner accepts that the FCO has correctly applied section 41 to the information and that it should not be released.
15. However, the law of confidence is a common law concept that recognises the existence of the public interest so, although section 41 is an absolute exemption, the Commissioner is nevertheless obliged to consider the question of the public interest in deciding whether or not to recommend release of information covered by it. In this context it is the view of the Commissioner that the grounds for breaking confidence should be strong ones: the law recognises that confidentiality is in itself important and of general value and that, in order to breach it, the public interest in so doing must be substantial. In all the circumstances of this case, it is the Commissioner's view that the public interest is best served by upholding the duty of confidence and, therefore, in not releasing the information requested.

Section 27 (1) (a),(b) & Section 27 (2)

16. The full text of this exemption is set out in the legal annex although it should be noted that Section 27 (1) (b), while cited originally, was not subsequently applied to any specific information. Section 27 (1) (a) exempts from disclosure information which, if released, would, or would be likely to, prejudice relations between the United Kingdom and any other state. Section 27 (2) exempts from disclosure information which is confidential information obtained from a State other than the

United Kingdom or from an international organisation or international court. Having examined all the information under consideration in this case, the Commissioner is satisfied that much of it falls within this section of the Act, including the information to which the FCO had applied sections 35 and 36. Section 27 is however a qualified exemption, which therefore requires consideration of the public interest test.

17. In his comments on the case the complainant took the view, in relation to this and all the other qualified exemptions cited by the FCO, that there was a very strong public interest in knowing as much information as possible about the death of a British citizen in circumstances such as befell Mr Hook. That public interest was sufficient, in the complainant's view, to outweigh any of the various reasons cited by the FCO for suggesting that the public interest should operate in favour of withholding the information.
18. The FCO said that some of the information sought by the complainant was confidential information provided by another State and that some was confidential information provided by an international organisation, thereby falling in both instances within the terms of section 27(2). In respect of information falling within section 27(1), the FCO said that release of this information, which was also covered by an expectation of confidentiality would, or would be likely, to cause harm to the relationship between the United Kingdom and Israel in a number of different ways. In this context the FCO had to consider not only the impact that disclosing this information might have on the broader policies of the United Kingdom government in the Middle East but the effect that it might have on its ability to protect and assist other British citizens and their families who were, or who might in future find themselves, in similar situations: indeed, at and around the time of Mr Hook's death, the FCO was concerned with other, comparable, cases in the same geographical area. In such circumstances it was important to have as free and frank an exchange as possible, and the FCO believed that this would not occur if there was any suggestion that confidentiality might be breached. On that basis, the FCO took the view that the public interest in maintaining the exemption outweighed the public interest in disclosure.
19. The Commissioner has considered very carefully the information covered by this exemption. He accepts that, in a situation where a British citizen working for an international relief organisation in the Middle East has met an untimely death in circumstances that are far from clear, there is a strong and entirely justifiable public interest argument for making available whatever information exists that might throw light on those circumstances, and a public interest in understanding how the government approaches dealing with such matters. He also recognises that there is a public interest in understanding the nature of our relationship with an ally whose policies sometimes attract controversy. However, the Commissioner needs also to recognise the practical political realities of which the government is obliged to take account when conducting its foreign policy and that the unfortunate death of Mr Hook is not a matter that can be viewed in isolation. Such a matter has to be looked at in the light of a wide range of other issues and in the understanding that a decision to disclose information, particularly if it has been provided on an understanding of confidentiality, would have a detrimental effect on the government's ability to conduct that foreign policy effectively in the

future. On that basis it is the Commissioner's view that, in this case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information and that the information should therefore not be released.

Section 35 (1) (a) and Section 36(2) (b) (i) and 2 (c)

20. The complainant's arguments in favour of disclosure are set out in paragraph 17. While accepting that some of the information held by the FCO in relation to this request could fall within one or other of these exemptions (and the Commissioner is grateful to the FCO for having taken the trouble to separate out the information in this way), the Commissioner is satisfied (as noted earlier) that all of this information also falls with section 27. Given that he has concluded that, in respect of section 27, the public interest operates in favour of maintaining the exemption (and is of the view that he would come to the same conclusion were he to consider the applicability of sections 35 and 36), the Commissioner has not considered it appropriate to pursue those exemptions any further.

The Decision

21. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

22. The Commissioner requires no steps to be taken.

Right of Appeal

23. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 23rd day of July 2007

Signed

**Graham Smith
Deputy Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 27

27 (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

(a) relations between the United Kingdom and any other state,

(b) relations between the United Kingdom and any international organisation or international court

(2) Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.

Section 35

35 (1) information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

(a) the formulation or development of government policy,

.....

Section 36

.....

36 (2) 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-

.....

(b) would, or would be likely to, inhibit-

(i) the free and frank provision of advice, or.....

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

Section 40

40 (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 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.....

Section 41

41 (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.