

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 March 2014

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

Decision (including any steps ordered)

1. The complainant requested all information, dating from February 2007 to February 2010, relating to the medical condition of Abdelbaset al-Megrahi, who was convicted of responsibility for the Lockerbie bombing. The Foreign and Commonwealth Office (FCO) refused to disclose this information and relied on the exemptions provided by the following sections of the FOIA:
 - 27 (prejudice to international relations)
 - 28 (prejudice to relations within the UK)
 - 40 (personal information of third parties)
 - 41 (information provided in confidence)
2. The Commissioner's decision is that all of the information in question is exempt under either section 27 or section 41. The FCO is not, therefore, required to disclose this information.

Request and response

3. On 28 May 2012, the complainant wrote to the FCO and requested information in the following terms:

"Please release under the FOI Act, all information held relating to the medical condition of Abdel Basset Ali al-Megrahi."
4. This request was refined on 15 June 2012 as follows:

"Please refine your search for information held between February 2007 to February 2010."

5. After an extremely lengthy delay during which a number of holding responses were sent, the FCO responded substantively on 13 March 2013. It stated that some information was already in the public domain as a result of having been released in the Cabinet Secretary's Review of Papers relating to the release of Abdelbaset al-Megrahi. The complainant was provided with a link to that information.
6. In relation to the remainder of the information it held that fell within the scope of the request, the FCO cited the following exemptions from the FOIA:
 - 27 (prejudice to international relations)
 - 28 (prejudice to relations within the UK)
 - 40 (personal information of third parties)
 - 41 (information provided in confidence)
7. The complainant responded on 14 March 2013 and requested an internal review. The complainant stated specifically at this stage that she accepted the use of section 40 in relation to the names of junior staff, but not in relation to any names of senior staff that had been withheld. The complainant also specified that she believed that there was a public interest in the disclosure of the requested information and so the information should not be withheld under the other exemptions cited.
8. The FCO responded with the outcome of the internal review on 15 April 2013. The exemptions cited previously were upheld. In relation to section 41 the FCO stated that it did not believe that there would be a public interest defence to an action for breach of confidence and in relation to section 40 it stated that names of senior staff were not withheld, only names of junior staff.

Background

9. The request refers to Abdelbaset al-Megrahi, who was convicted of responsibility for the destruction on 21 December 1988 of a Pam-Am flight over the town of Lockerbie, killing all 259 passengers and crew and 11 residents of Lockerbie. By international agreement his sentence for this was served in Scotland.

10. After Megrahi was diagnosed as terminally ill, the Scottish Justice Secretary chose to release him on compassionate grounds. After release Megrahi returned to Libya and died on 20 May 2012.

Scope of the case

11. The complainant contacted the Commissioner on 16 April 2013 to complain about the refusal of her information request. The complainant argued that the circumstances of Megrahi's release were highly unusual and that there was a very strong public interest in the disclosure of information relating to those circumstances.
12. In the absence of any indication that the complainant was unable to access the information to which section 21 was applied, that exemption has not been considered by the Commissioner. In relation to section 40 the Commissioner has proceeded on the basis that the complainant was satisfied with the internal review response on that exemption, which indicated that only names of junior officials had been withheld, and so this also has not been considered further.
13. The withheld information consists, for the most part, of extracts from documents and email exchanges. In relation to two email exchanges, the Commissioner disagrees with the FCO that some of the content is not within the scope of the request:

Extract 56 – sentence on assessments

Extract 57 – latter two sentences of paragraph 4.
14. The FCO should take the analysis in this notice on section 41 as covering these extracts, as well as all of the other extracts in relation to which section 41 was cited.
15. The Commissioner has also proactively considered section 41 in relation to one extract where this exemption was not cited by the FCO – Extract 35 – as he believes that the same arguments referred to below also apply to that extract.

Reasons for decision

Section 41

16. The primary exemption relied upon by the FCO is section 41(1), so the Commissioner has considered this exemption first. Section 41(1) of the FOIA provides an exemption for information that was obtained by the public authority from another person and where the disclosure of that information would constitute an actionable breach of confidence. Consideration of this exemption is a two-stage process; first, the information in question must have been provided to the public authority by a third party, referred to here as an A to B transfer. Secondly, the disclosure of this information must constitute an actionable breach of confidence. As a breach of confidence would no longer be actionable if there would be a defence that the breach was in the public interest, the Commissioner has also considered whether there would be any such public interest defence in this case.
17. Covering first whether this information was supplied to the FCO in an A to B transfer, the Commissioner has viewed the information in question here and verified that it was supplied to the FCO by various third parties. The confiders include medical professionals, the Scottish Executive, the Scottish Prison Service and representatives of the then Libyan Government.
18. Turning to whether disclosure of this information would constitute an actionable breach of confidence, the position of the FCO is that disclosure of this information could be actionable by Megrabi's family and representatives. Although this means that the FCO is arguing that the breach of confidence would be actionable by someone other than the parties that provided the information to the FCO, section 41(1)(b) of the FOIA is specific that this exemption can apply on the basis of a breach of confidence that is actionable by *any* party, not only by the confider.
19. The approach of the Commissioner to this exemption is that he will consider the following points:
 - whether the information has the necessary quality of confidence;
 - whether the information was imparted in circumstances importing an obligation of confidence; and
 - whether disclosure of this information would result in detriment to the confider.
20. The approach of the Commissioner is that information will have the necessary quality of confidence if it is not otherwise accessible and is more than trivial. On the issue of whether this information is otherwise

accessible, as referred to above at paragraph 5 a significant amount of information about Megrahi's release was disclosed into the public domain following a review of papers carried out by the Cabinet Secretary. Other papers were also disclosed by the Scottish Executive.

21. The FCO confirmed that the withheld information in question here was cross-referenced with that placed in the public domain as a result of the reviews by the Cabinet Secretary and the Scottish Executive, as well as with information disclosed in response to other information requests. On the basis of the FCO having taken this step and having reviewed the withheld information himself, the Commissioner accepts that the information is not already accessible as a result of having been placed in the public domain.
22. As to whether this information is more than trivial, the question here is whether the confiders would regard this information as such. The Commissioner considers it clear that the various confiders of the information in question here would have regarded it as more than trivial. In any case where the information in question concerns an individual's medical condition, the view of the Commissioner would be that this information could not be characterised as trivial. In this case, with the myriad pressures and sensitivities surrounding the issue of Megrahi's release on the basis of his medical condition, it is even clearer that this information is more than trivial.
23. Turning to whether the information was imparted in circumstances importing an obligation of confidence, the clearest means to show that this was the case would be if there had been an explicit agreement between confider and recipient that this information would be kept confidential. Alternatively, an implied obligation of confidence may be said to exist if, for example, the content of the information suggests that the confider would have expected it to remain confidential.
24. The FCO has stated that the information in question was provided to it "*on the basis of strict confidence*", but has not gone on to confirm that there was a specific undertaking of confidence given. However, the view of the Commissioner is that the nature of this information and the circumstances surrounding its provision to the FCO make it clear that the confiders would have expected it to remain confidential.
25. The Commissioner has already found that this information is not trivial on the basis that it is medical information and due to the great sensitivities surrounding the issue of Megrahi's release. The Commissioner believes that these same factors mean it is clear that the confiders provided this information to the FCO with a firm expectation that it would remain confidential and that there was an obligation upon the FCO to meet that expectation.

26. As to whether disclosure would result in detriment to the confider, it is not always the case that there must be an element of detriment to the confider for a breach of confidence to be actionable, particularly where there is no element of commercial confidentiality involved. In this case the breach of confidence would be actionable by third parties; namely the family and representatives of Abdelbaset al-Megrahi. This means that the issue of detriment to the confiders is not relevant in this case.
27. As referred to above, the final step when considering if this exemption is engaged is to consider whether there would be a public interest defence to the breach of confidence that would result through the disclosure of the information in question.
28. Consideration of the public interest in relation to section 41(1) is not the same as consideration of the public interest test for qualified exemptions. That test is whether the public interest in the maintenance of the relevant exemption outweighs the public interest in disclosure. The test here is whether the public interest in disclosure of the information exceeds the public interest in the maintenance of the confidence.
29. The view of the Commissioner is that an obligation of confidence should not be overridden on public interest grounds lightly and that a balancing test based on the individual circumstances of the case will always be required. There must be specific and clearly stated significant factors in favour of disclosure to outweigh the public interest in the maintenance of confidence.
30. The duty of confidence here protects the principle that medical information should remain private. Information about an individual's medical condition would generally be considered the most private category of information, and that expectation of privacy would continue after death, even though at that point the information would cease to be governed by the Data Protection Act, which covers only information relating to living individuals. The nature of medical information relating to an individual means that it requires a very high level of protection from disclosure; the public interest favouring disclosure would have to be very significant indeed to justify a conclusion that such information should be disclosed.
31. The Commissioner recognises that, as argued by the complainant, the situation surrounding Megrahi's release was at the least unusual, and possibly unique. The complainant recognised that ordinarily medical information about an individual would not be disclosed, even after the death of that individual, but argued that the controversy surrounding the decision to release Megrahi and the public interest in all information

relating to that decision meant that medical information should be disclosed in this case.

32. The Commissioner agrees that there is a very strong public interest in favour of disclosing information relating to Megrahi's release. That decision was and remains highly controversial. However, for the following reasons the Commissioner has concluded that the high threshold for justifying disclosure of the withheld information in the public interest is not reached in this case.
33. First, the Commissioner notes that the UK and Scottish governments had already recognised and acted upon this public interest in disclosing a significant amount of information into the public domain. As a result, the record of the events leading up to the decision to release Megrahi is already for the most part in the public domain.
34. Secondly, the Commissioner has viewed the withheld information. If the withheld information comprised evidence that contradicted the official account as to why Megrahi was released, that would have been a significant factor indicative of a public interest defence. In the event, the Commissioner has verified that the content of the information contains no such evidence. He has therefore concluded that an action for breach of confidence could not be defended on public interest grounds.
35. Based on this analysis and his examination of the withheld information, the Commissioner has concluded that the exemption provided by section 41(1) is engaged in relation to the relevant information.

Section 27

36. In relation to a small minority of the extracts the FCO did not cite section 41, but relied on section 27(1)(a), which states that information is exempt if its disclosure would be likely to prejudice international relations. This exemption is qualified by the public interest, meaning that the information must nevertheless be disclosed unless the public interest in the maintenance of the exemption outweighs the public interest in disclosure.
37. In relation to three extracts, the position of the FCO is that disclosure would be likely to prejudice relations between the UK and Libya. In relation to the one other extract covered here, the concern of the FCO is with the relationship between the UK and USA.
38. In previous cases where section 27(1)(a) has been considered, the Commissioner has taken account of a number of Information Tribunal cases in which it has been accepted that this exemption can be engaged where disclosure would require a "*particular diplomatic response to contain or limit damage which would not otherwise have been*

necessary". The Commissioner has followed this approach in the present case.

39. In relation to Libya, the FCO has referred to the situation there remaining unsettled and to the relationship between the new Libyan regime and the UK being in development. The Commissioner acknowledges that this is a sensitive time for diplomatic relations with Libya, given that it is a country in the aftermath of regime change and that the UK provided support for that change. However, the Commissioner also accepts that other countries are involved, directly or indirectly, with the situation in Libya, so the UK's relations with other countries may also be prejudiced by the disclosure of the withheld information.
40. Having viewed the content of the information in question, the Commissioner recognises that disclosure of this information in this context would be likely to require a diplomatic response. Taking the approach outlined above, the conclusion of the Commissioner is that the exemption provided by section 27(1)(a) is engaged in relation to these extracts.
41. Turning to the extract in relation to which the concern of the FCO is the relationship with the USA, the FCO has stressed that the position of the US is that the UK must keep information from diplomatic channels confidential. By again taking the approach outlined above, the Commissioner is satisfied that this background described by the FCO indicates that disclosure would be likely to necessitate a diplomatic damage limitation exercise. The exemption provided by section 27(1)(a) is, therefore, engaged in relation to this extract.

Public Interest Test

42. Having found that the exemption is engaged, the next step is to consider the balance of the public interest. In forming a conclusion on the public interest in this case, the Commissioner has taken into account, on the one hand, the public interest in avoiding the prejudice that would be likely to occur through disclosure, and on the other, in favour of disclosure, the general public interest in the openness and transparency of the work of the FCO. This is in addition to those factors that apply in relation to this specific information, including the arguments advanced by the complainant and by the FCO.
43. Covering first arguments favouring disclosure, the issues that the Commissioner has taken into account here are similar to those set out above at paragraph 32. Megrahi's release was highly controversial and there is a strong public interest in the release of any background information about the circumstances. However, much information

relating to this matter has been disclosed previously, and the content of the withheld information does not contradict the official account of Megrahi's release.

44. Turning to those factors that favour maintenance of the exemption, the FCO referred to the volatility of the situation in Libya and the importance of the UK being in a position to cultivate a strong relationship with the new regime there. The Commissioner agrees that it is in the public interest for the UK to be in a position to develop a strong relationship with the new Libyan regime. Having found that disclosure would be likely to prejudice the relationship between the UK and Libya, the Commissioner recognises that this is a valid and weighty factor in favour of maintenance of the exemption.
45. The Commissioner also recognises the importance of maintaining the strong relationships with other countries and the sensitivities about disclosure of information exchanged through diplomatic channels with an expectation of confidentiality, not just in the context of this case but also more generally. The Commissioner is aware from other cases that the US, a key strategic ally, has particularly high expectations in this respect. There is a very strong public interest in the maintenance of such diplomatic channels, which favours the maintenance of the exemption in this case.
46. In conclusion, the Commissioner has recognised that there is a strong public interest in favour of disclosure of this information owing to its subject matter. However, he also recognises that the arguments advanced by the FCO concerning prejudice to international relations are compelling and that there is a vital public interest in avoiding detriment to the UK's standing in the international community. The finding of the Commissioner is that the public interest in avoiding the outcome of prejudice to international relations outweighs the public interest in disclosure. The FCO is not, therefore, required to disclose the information in question here.
47. As a result of the findings in this notice the FCO is not required to disclose any of the information in question and it has not been necessary to go on to also consider the other exemptions cited by the FCO.

Other matters

48. As referred to above, there was an extremely lengthy delay in providing a substantive response to the complainant's request. The FCO acknowledged this in the internal review response and stated that a response should have been provided sooner. The Commissioner agrees, welcomes the FCO's acknowledgement and expects an improvement in the timeliness of responses in future.

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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

Website: <http://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

Graham Smith
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