

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 May 2019

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) seeking information dating from 1997 relating to the death of British nurse Helen Smith in Jeddah, Saudi Arabia in 1979. The FCO initially withheld all of the information on the basis of sections 38(1)(a) and (b) (health and safety) and 40(2) (personal data) of FOIA. The FCO subsequently disclosed the requested information to the complainant, albeit with redactions made on the basis of section 40(2) of FOIA. The Commissioner has concluded that the majority of the information redacted is exempt from disclosure on the basis of section 40(2) of FOIA. However, the Commissioner has concluded that a small portion of information is not exempt from disclosure on the basis of section 40(2). The Commissioner has also concluded that the FCO has breached section 10(1) by failing to disclose the information which it accepts is not exempt from disclosure within 20 working days of the request.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Provide the complainant with a further copy of the withheld information with the material identified in the confidential annex unredacted.
3. 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

4. The complainant submitted the following request to the FCO on 21 February 2018:

'I am writing to make an open government request for all the information to which I am entitled under the freedom of information act. In order to assist you with this request, I am outlining my query as specifically as possible. If however this request is too wide or too unclear, I would be grateful if you could contact me as I understand that under the act, you are required to advise and assist requesters.

*I am looking for documents relating to the death of British Nurse Helen Smith in Jeddah, Saudi Arabia. I understand that you have files dated up to 1997. I would like to copies of documents within the period of 1997.'*¹

5. The FCO contacted the complainant on 21 March 2018 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 38 (health and safety) of FOIA and it needed additional time to consider the balance of the public interest test.
6. The FCO sent the complainant further public interest extension letters until it provided him with a substantive response on 15 August 2018. This response explained that the requested information was considered to be exempt from disclosure on the basis of sections 38(1)(a) and (b) and 40(2) (personal data) of FOIA. In relation to section 38 the FCO concluded that the balance of the public interest favoured maintaining the exemption.
7. The complainant contacted the FCO on the same day in order to ask for an internal review of this response.
8. The FCO informed him of the outcome of the internal review on 12 October 2018. The review concluded that the withheld information was

¹ Helen Smith died in Jeddah, Saudi Arabia allegedly as a result of a fall from a balcony flat. Her father, Ronald Smith, 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. In 1997, the period covered by this request, Mr Smith wrote to the then Prime Minister, Tony Blair, asking for a thorough investigation into the circumstances of his daughter's death. The government decided not to launch any further investigation.

exempt from disclosure on the basis of sections 38(1)(a) and 40(2) of FOIA.

Scope of the case

9. The complainant contacted the Commissioner on 18 October 2018 in order to complain about the FCO's decision to withhold the information falling within the scope of his request.
10. During the course of the Commissioner's investigation, the FCO contacted the complainant on 2 May 2019 and explained that it no longer wished to rely on sections 38(1)(a) and (b) of FOIA. It therefore provided the complainant with a copy of the information falling within the scope of his request, albeit with a number of redactions made on the basis of section 40(2) of FOIA.
11. The focus of the Commissioner's investigation has therefore been to determine whether the information which the FCO is still seeking to withhold is exempt on the basis of section 40(2) of FOIA.

Reasons for decision

Section 40 – personal data²

12. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
13. In this case the relevant condition is contained in section 40(3A)(a)³. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').

² On 25 May 2018 the General Data Protection Regulation (GDPR) and Data Protection Act 2018 (DPA18) came into force. In line with the provisions contained within the DPA18, under FOIA for any request where a public authority has responded before 25 May 2018 the Data Protection Act 1998 (DPA98) applies, where a public authority has responded after 25 May 2018, then DPA18 applies. Although the complainant submitted his request on 21 February 2018, the FCO issued its response citing section 40(2) on 12 October 2018. Therefore, DPA18 applies to this request.

³ As amended by Schedule 19 Paragraph 58(3) DPA.

14. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of FOIA cannot apply.
15. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

16. Section 3(2) of the DPA defines personal data as:

'any information relating to an identified or identifiable living individual'.

17. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
18. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
19. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
20. The Commissioner is satisfied that the majority of the information that the FCO are seeking to withhold constitutes personal data as individuals are clearly identifiable from it and moreover such information relates to them. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
21. However, the Commissioner has identified a number of redactions that have been made to the names or personal information of individuals who are deceased. Such information is not therefore personal data and therefore cannot be exempt from disclosure on the basis of section 40(2) of FOIA. The Commissioner has identified these particular redactions in a confidential annex, a copy of which will be provided to the FCO only.
22. In reaching this finding the Commissioner appreciates that when a public authority is considering whether section 40(2) applies, it is not always possible to ascertain whether an individual is still alive, and she accepts that there will be cases where it is appropriate for a public

authority to assume an individual is alive unless it can establish otherwise.

23. However, in the circumstances of this case, the Commissioner considers that it is self-evident from the information itself that one of the individuals in question is deceased, and that with the minimal effort of a simple internet search, she established that three other individuals were deceased.
24. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
25. The most relevant DP principle in this case is principle (a). The Commissioner has therefore considered whether the disclosure of the information which she accepts is personal data would contravene this principle.

Would disclosure contravene principle (a)?

26. Article 5(1)(a) of the GDPR states that:

'Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject'.

27. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
28. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

29. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) of the GDPR which states:

'processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child'⁴.

⁴ Article 6(1) goes on to state that:-

30. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
31. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

32. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
33. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

34. The Commissioner acknowledges that the death of Helen Smith attracted considerable interest at the time, and periodically after that given her father's attempts to have a further investigation established into the death. The Commissioner also accepts that there is a legitimate interest in disclosure of information about the FCO's role following Helen Smith's death, and also given the date range of the request, the decision making process in 1997 which led to the decision not to undertake a further investigation into the case.

Is disclosure necessary?

35. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so a measure would not be necessary if the legitimate aim could be achieved by something less. Disclosure under FOIA must therefore be the least restrictive means of achieving the legitimate aim in question.
36. In considering whether disclosure of the information is necessary, the Commissioner considers it important to recognise that there are different types of personal data which have been withheld. In her view these can be categorised into four broad areas i) the names and contact details of officials from government departments in 1997; ii) the personal data of officials of government departments dating from 1979; iii) the personal data of individuals in other organisations, dating from 1979 and 1980; and, iv) the personal data of a number of other third party individuals dating from 1979.
37. In respect of i) the Commissioner is not persuaded that disclosure of such information, limited as it is, is necessary in order to inform the public either about the circumstances surrounding the death or indeed the decision not to take any further action about the case in 1997. Such information would not bring any greater understanding of such matters, beyond the information already disclosed in to the public domain. Therefore, she does not consider that the disclosure of this information is necessary to meet the legitimate interest in question. As such, article 6(1)(f) is not met in respect of this information.
38. In respect of categories ii) to iv) the Commissioner considers there to be a stronger case for arguing that disclosure of such information is necessary in order to meet the legitimate interests identified. In the Commissioner's view disclosure of such information is necessary in order to provide the public with a greater understanding of the circumstances and subsequent investigation of Helen Smith's death.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

39. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
40. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
41. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
42. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
43. With regard to categories of information ii) and iii), the Commissioner accepts that the officials in question would, given the passage of time, have no realistic expectation that their personal data would be disclosed in response to an FOI request. Whilst disclosure of this information would provide some further insight into the Helen Smith case, in the Commissioner's view such an insight is arguably somewhat limited. Therefore, in respect of the information in categories ii) and iii), the Commissioner has determined that there is insufficient legitimate interests to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of such information would not be lawful.
44. In respect of majority of the information contained within category iv), the Commissioner accepts that this would provide a greater insight into the case. However, having considered the content of the information she accepts that the individuals in question would have a strong and reasonable expectation that such information would not be disclosed and moreover, to do so, would have a notable infringement on their privacy.

45. However, taking into account the information that is in the public domain about this subject, the Commissioner has concluded that disclosing a small amount of information falling into category iv) would not result in any particular or notable harm to the individuals in question. For this information – which the Commissioner has again identified in the confidential annex – she has concluded that there is sufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that for this information alone there is an Article 6 basis for processing and so the disclosure of that particular information would be lawful.

Fairness and transparency

46. Even though it has been demonstrated that disclosure of the requested information under FOIA would be lawful, it is still necessary to show that disclosure would be fair and transparent under the principle (a).
47. In relation to fairness, the Commissioner considers that if the disclosure passes the legitimate interest test for lawful processing, it is highly likely that disclosure will be fair for the same reasons.
48. The requirement for transparency is met because as a public authority, the FCO is subject to FOIA.

The Commissioner's view

49. The Commissioner has therefore decided that the FCO was entitled to withhold the information falling into the categories identified above as i), ii), iii) and some information falling within the scope of category iv) under section 40(2), by way of section 40(3A)(a).
50. However, she has also concluded that the FCO has failed to demonstrate that the exemption at section 40(2) is engaged in respect of the remaining information falling within the scope of category iv) and the names of various individuals who the Commissioner has identified are deceased.

Section 10 – Time for compliance

51. Section 1(1) of FOIA states that:

'Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.'

52. Section 10(1) of FOIA states that a public authority must respond to a request promptly and *'not later than the twentieth working day following the date of receipt.'*

53. As the FCO concluded that some of the information was not exempt from disclosure, but failed to provide this information to the complainant within 20 working days, the Commissioner has concluded that it breached section 10(1) in respect of this information.

Right of appeal

54. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

55. 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.
56. 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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