

Freedom of Information Act 2000 (Section 50)

Decision Notice

3 March 2009

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

Summary

In October 2007 the complainant asked the Foreign and Commonwealth Office (FCO) for information concerning communications between the then Ambassador to Portugal John Buck and the Portuguese police on the subject of the disappearance of the child Madeleine McCann.

FCO released some information straight away but also withheld some.

Since that time FCO have released most, but not all, of the relevant information held.

The Commissioner decided that for the withheld information, FCO had complied with section 1(1)(a) of the Act.

For the information which FCO initially withheld but released following his intervention, the Commissioner decided that FCO had breached section 1(1)(b) of the Act and had also breached section 17(1) by failing to provide the information within the specified time limit.

The Commissioner upheld FCO's decision to withhold some information under the section 27(1)(a) exemption. He also decided that the public interest in maintaining the section 27(1)(a) exemption outweighed the public interest in disclosing that information. As regards application of section 40 of the Act, the Commissioner decided that relevant personal information had been withheld correctly under the exemptions in sections 40(2) and (3) of the Act.

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 9 October 2007 the complainant asked the Foreign and Commonwealth Office (FCO) for information concerning communications between the then Ambassador to Portugal John Buck and the Portuguese police on the subject of the disappearance of Madeleine McCann.
3. On 6 November 2007 FCO told the complainant that relevant information was held but that the request raised complex public interest considerations. FCO indicated that the section 27 and 31 exemptions from the Act applied and said that they needed to extend the time limit for response by 20 working days.
4. On 3 December 2007 FCO replied to the complainant providing some information that came within the scope of the request but refusing to disclose some other information which was withheld under the exemptions contained in section 27(1)(a), section 31(1)(c) and section 40(2) and (3) of the Act.
5. On 10 December 2007 the complainant requested a review of the decision. On 21 December 2007 FCO replied confirming the earlier decision to withhold some information.

The Investigation

Scope of the case

6. The complainant asked for information concerning communications between the then British Ambassador to Portugal and the Portuguese police on the subject of the disappearance of a child, Madeleine McCann. FCO disclosed some information immediately and disclosed further information following the Commissioner's intervention. However some further information continued to be withheld; it was this refusal to provide information that the Commissioner investigated.
7. During his investigation, the Commissioner considered the application of the exemption in section 27 of the Act and the balance of the public interest. The Commissioner did not consider information that was later released to the complainant during his investigation. He did however consider the application of the section 40 exemption to some relevant personal information being withheld by FCO.

Chronology

8. On 21 December 2007 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
9. On 14 October 2008 the Commissioner asked FCO for a current view of the matter. On 12 November 2008 FCO replied maintaining the section 27, 31 and

40 exemptions for some information held. FCO added that, at the time of the internal review (December 2007), the investigation into the disappearance of Madeleine McCann had been ongoing and that, for legal reasons, it had not been possible to disclose further information then. However in the interim, the Portuguese authorities had themselves released a very substantial amount of information which meant that FCO could now release further information without prejudice. Accordingly FCO provided the complainant with further information, a development the Commissioner welcomed. FCO continued to withhold some relevant communications along with a small amount of personal information.

10. The Commissioner's staff examined the information being withheld on 13 November 2008.
11. On 24 November 2008 FCO disclosed some additional information to the complainant but continued to withhold other information relying on the section 27(1)(a) exemption.
12. On 1 December 2008 an update of the Commissioner's analysis was provided to the complainant to ensure that a formal outcome was still required. On 10 December 2008 the complainant indicated that he still wished the Commissioner to provide him with a formal Decision Notice setting out his decision and the reasoning for it.

Findings of fact

13. On 3 May 2007 the child Madeleine McCann went missing; at the time of the information request the investigation into her disappearance was high profile and continuing. In determining to withhold certain information under the section 27 exemption, FCO consulted with the British Embassy in Lisbon and with two relevant authorities in the UK – Leicestershire Police and the Association of Chief Police Officers (ACPO).
14. FCO told the Commissioner that a family member had made clear to FCO staff that all comments made by that individual to FCO had been made in strict confidence and were not intended for disclosure to third parties. FCO did not approach the family member again during the Commissioner's investigation but told the Commissioner that they were confident the individual would not appreciate being contacted regarding disclosure of the relevant personal information, a position the Commissioner accepted.

Analysis

Procedural matters

Section 10

15. FCO responded to the request within the statutory time limits; section 10(3) of the Act allows the time for compliance to be extended where necessary for consideration of the public interest.

Exemptions

Section 27 – International relations

16. FCO told the Commissioner that, although the Portuguese authorities had released many documents about the investigation into the disappearance of Madeleine McCann, sensitivities remained and FCO believed that the section 27(1)(a) exemption still applied. If FCO were to disclose all the details about HM Ambassador's contact with the Portuguese police they would risk damaging the relationship on which good inter-governmental co-operation was based. FCO recognised the public interest in knowing the extent of UK government involvement in the investigation but believed that the reasons for exemption outweighed those that favoured release.
17. The complainant did not question the engagement of the section 27 exemption but did comment on the public interest issues.
18. The Commissioner notes that the exemption in section 27(1) of the Act provides that information is exempt if its disclosure under the Act *would, or would be likely to, prejudice (a) relations between the United Kingdom and any other State, ...*
19. In considering whether prejudice would or would be likely to arise in this instance, the Commissioner has taken into account the content of the information being withheld as well as the arguments put by FCO about how and why damage would result from disclosure. He decided that FCO's concerns were soundly based and that damage to the relationship with the Portuguese authorities would have resulted at the time of the request, and at all times while the investigation was continuing. He also considers that prejudice to the interests of the UK would result from disclosure of the information still being withheld because inappropriate disclosure of information would cause overseas governments and public authorities in Portugal and elsewhere to lose trust in the reliability and discretion of the UK government and UK public authorities. He is therefore satisfied that the exemption is engaged and proceeded to consider the balance of the public interest.

Public interest

20. The complainant said that disclosing the information was in the public interest in order to:
- uphold public confidence that the British authorities do all that is possible to help find missing British children abroad;
 - provide reassurance that the authorities maintain close communications with the police services of countries where children have gone missing; and,
 - ensure that public funds are spent correctly dealing with helping find missing children abroad.
21. FCO agreed that there was a public interest in knowing the extent of UK Government involvement in the investigation of Madeleine McCann's disappearance, but believed that the reasons for exemption outweighed those that favoured release as disclosing details of HM Ambassador's contact with the Portuguese police about an investigation which had been subject to Portuguese judicial secrecy, risked damaging the relationship on which good police to police cooperation was based.
22. The Commissioner has had full regard for the reasons put forward by the complainant, all of which the Commissioner accepts, and which demonstrate why publication of the fullest possible appropriate information about this matter is in the public interest. He has also had regard to the evidence from FCO that the investigation was ongoing at the time of the internal review and that sensitivities remain even now, also that disclosure would offend the Portuguese authorities, including the Portuguese police forces, and which had applied at the time of FCO's decision to withhold some of the relevant information and of the subsequent internal review. He has also seen that some of these considerable sensitivities have lessened with the passage of time since the internal review in December 2007, and that FCO have released further information accordingly, but that some sensitivities remain and appear likely to remain for the foreseeable future. The Commissioner found persuasive FCO's evidence that were FCO, even now, to disclose full information about the then Ambassador's communications with the Portuguese authorities then, on a balance of probabilities, substantial damage to the international relationship would result.
23. The Commissioner has seen that the Information Tribunal found persuasive concerns closely related to those raised by FCO in the Tribunal's decision in the CAAT case (*CAAT v ICO & Ministry of Defence EA/2006/0040*). In CAAT, the Tribunal interpreted prejudice to international relations broadly, accepting that:

“prejudice can be real and of substance if it makes relations more difficult or calls for particular diplomatic response to contain or limit damage which would not otherwise have been necessary. We do not consider that prejudice necessarily requires demonstration of actual harm to the relevant interests in terms of quantifiable loss or damage. For example, in our view there would or could be prejudice to the interests of the UK abroad or the

promotion of those interests if the consequence of disclosure was to expose those interests to the risk of an adverse reaction The prejudice would lie in the exposure and vulnerability to that risk” (paragraph 81).

24. Also in CAAT, the Tribunal said that there was no justification in the UK imposing on another country our particular customs and principles as to the transparency or democratic accountability. For his part, the Commissioner recognises that there is a strong public interest in not flouting international confidence, a principle which is recognised in the Act at sections 27(2) and (3).
25. In reaching his decision, the Commissioner also had regard for the decision by the Tribunal, supporting the decision in CAAT, in the case of *Gilby (Gilby v Information Commissioner and FCO (EA/2007/ 0071, 0077, 0079))*. In *Gilby*, the Tribunal were in no doubt as to the importance of:

“maintaining our good relations with [another country] and avoiding prejudice to the UK interests in that country or the promotion or protection of those interests” (paragraph 51)

and said that disclosing the then disputed information:

“would be highly likely to result in real and substantial prejudice of that kind, which would be contrary to the public interest” (paragraph 52).

26. The Commissioner is mindful of the need for the UK authorities to be seen to be worthy of trust by their foreign counterparts in Portugal and elsewhere in the world. He sees significant risk that disclosure of confidences or of other sensitive material would have damaging implications for any possible further developments on this matter and any relevant future investigations in Portugal or elsewhere in the world. This would not be in the best interests of the McCann family, including Madeleine, or of other UK citizens travelling to Portugal or elsewhere outside the UK.
27. Having considered carefully the complainant’s arguments and those of the FCO, the content of the withheld information, and the decisions by the Tribunal in CAAT and *Gilby*, the Commissioner decided that the public interest in maintaining the section 27(1)(a) exemption outweighed the public interest in disclosing the information. Annex 2 sets out the detail of his decision.

Section 31 – Law enforcement

28. The Commissioner decided that the information set out at annex 2 to this Notice was correctly withheld under the section 27 exemption. He therefore did not proceed to consider the section 31 exemption which had also been relied upon by FCO in refusing to disclose the information to the complainant.

Section 40 – Personal information

29. FCO held a small amount of personal information which had been provided to FCO staff in strict confidence. FCO said that the provider did not wish the information to be disclosed to third parties and that disclosure would be unfair and so would breach the second data protection principle. It would thereby be exempt under section 40 of the Act.
30. Section 40(2) of the Act provides an exemption for information that constitutes the personal data of third parties:

'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 the second condition below is satisfied.'

31. In this case FCO stated that the requested information constituted the personal data of third parties and was therefore exempt under section 40(2) of the Act. In order to reach a view on FCO's arguments the Commissioner has first considered whether the withheld information is the personal data of the third party. Section 1 of the Data Protection Act 1998 defines personal data as information which relates to a living individual who can be identified:
- from that data, or
 - from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.

In this instance the Commissioner believes that the third party would be identifiable from this information, and therefore he is satisfied that it is the personal data of the provider.

32. Such information is exempt if either of the conditions set out in sections 40(3) or 40(4) are met. The relevant condition in this case is at section 40(3)(a)(i), where disclosure would breach any of the Data Protection Principles. The Data Protection Principles are set out in schedule 1 of the Data Protection Act 1998. The Commissioner considers that disclosure of the personal data would breach the first data protection principle, which states that:
- 'Personal data shall be processed fairly and lawfully...'*

33. In reaching the conclusion that disclosure of the requested information would contravene the first data protection principle the Commissioner has considered the circumstances in which the information was provided to FCO and the expectations of the individual when providing it. He found that its disclosure would be unfair and therefore the Commissioner decided that the personal information had been withheld correctly under exemption set out in sections 40(2) and (3) of the Act.

Section 41 – Information provided in confidence

34. As he had decided that FCO had correctly withheld, under section 40 exemptions, expressions of opinion provided to it in confidence, he did not proceed to consider whether the section 41 exemption did or did not apply.

The Decision

35. For the withheld information, the Commissioner found that FCO had complied with section 1(1)(a) of the Act.
36. The Commissioner decided that, for the information that continues to be withheld under it (specified at annex 2 of this Notice), the exemption in section 27(1)(a) of the Act was engaged. He also decided that the public interest in maintaining the section 27(1)(a) exemption outweighed the public interest in disclosing the information.
37. As regards application of section 40 of the Act, the Commissioner decided that the relevant personal information (specified at annex 2 of this Notice) had been withheld correctly under the exemption set out in sections 40(2) and (3) of the Act.

Steps Required

38. The Commissioner requires no steps to be taken.

Right of Appeal

39. 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@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

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 3rd day of March 2009

Signed

**Richard Thomas
Information Commissioner**

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

General Right of Access

Section 1(1) provides 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.”

Time for Compliance

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

International Relations

Section 27(1) provides that –

“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, ... “

Law enforcement

Section 31(1) provides that –

“Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice, ... “

Personal information

Section 40(2) provides that –

“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 the second condition below is satisfied.”

Section 40(3) provides that –

“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
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.” ...

Information provided in confidence.

Section 41(1) provides that –

“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.”

Annex 2

The Commissioner's decision concerning the information still being withheld by FCO is set out in the following table:

Document ref:	Reference to the information	The Commissioner's decision
12a	Extract from email between Portimao and Lisbon of 9 May 2007 (section 40)	To be withheld, section 40
12a	Extract from internal FCO email of 10 May 2007 (section 27/ 31)	To be withheld, section 27
13aa	Extract from internal FCO email of 10 May 2007 (section 27/ 31)	To be withheld, section 27
13b	Extract from email between FCO and John Buck of 11 May 2007 (section 27/ 31)	To be withheld, section 27
13d	Extract from email between John Buck and FCO/ Lisbon of 11 May 2007 (section 27/ 31)	To be withheld, section 27
13e	Extract from internal FCO email of 11 May 2007 (section 27/ 31)	To be withheld, section 27
15a	Extract from email between Lisbon and FCO of 15 May 2007 (section 27/ 31)	To be withheld, section 27
16a	Extract from letter from John Buck to FCO of 16 May 2007 (section 27/ 31)	To be withheld, section 27
16b	Extract from email between Portimao and FCO of 22 May 2007 (section 27/ 31)	To be withheld, section 27
17	Extract from email between Portimao and FCO of 24 May 2007 (section 27/ 31)	To be withheld, section 27
19	Extract from internal email of 18 June 2007 (section 27/ 31)	To be withheld, section 27
19a	Extract from email between John Buck and FCO/ Portimao of 19 June 2007 (section 27/ 31)	To be withheld, section 27
19b	Extract of email between FCO and FCO/ Lisbon of 21 June 2007 (section 40)	To be withheld, section 40