

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 15 November 2023

**Public Authority:** Foreign, Commonwealth & Development Office

**Address:** King Charles Street  
London  
SW1A 2AH

#### **Decision (including any steps ordered)**

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1. The complainant has submitted a request to the Foreign, Commonwealth & Development Office (FCDO) seeking information relating to a particular part of the Mountbatten archive, namely correspondence between Edwina Mountbatten and Jawaharlal Nehru. The FCDO disclosed some information falling within the scope of the request but withheld further information on the basis of sections 40(2) (personal data) and 41(1) (information provided in confidence) of FOIA.
2. The Commissioner's decision is that the FCDO is entitled to rely on sections 40(2) and 41(1). However, he has also concluded that the FCDO breached section 17(3) of FOIA given its delays in providing a substantive response to the request.
3. The Commissioner does not require further steps.

#### **Request and response**

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4. The complainant submitted the following request to the FCDO on 16 November 2022:

"Under FOI may I have all material you hold relating to the correspondence between Edwina Mountbatten and Nehru, including all agreements relating to it, discussions relating to its sale, storage and release both with other Government departments and the Mountbatten and Nehru families and all requests with response to view such correspondence from other scholars/writers.

In the first instance I can limit all information held for the period 2010 to present day.

A reminder that in your reply to my request for information re the Hanslope visit to Southampton on 15 March 2018 (Ref: FOI2022/17533) mention is made of the Nehru correspondence... [name redacted] email to [name redacted] [Cabinet Office] of 16 March 2018 states that:

'He [name redacted] explained that there is a further collection of correspondence between Edwina Mountbatten and Nehru but this was held elsewhere (Broadlands/The Royal Archives) and any disclosure would be subject to a disclosure agreement with the Indians (FCO would want to be kept aware of this dialogue).'

My request includes any further information held by FCDO relating thereto (including FCDO 'being kept aware of this dialogue')."

5. The FCDO replied on 14 December 2022 and confirmed that it held information falling within the scope of the request but it considered it to be exempt from disclosure on the basis of section 37 (communications with the Royal Household) of FOIA and it needed additional time to consider the balance of the public interest test. The FCDO issued a similar letter on 16 January 2023.
6. The FCDO issued a substantive response to the request on 13 March 2023 and provided the complainant with a digest of information falling within the scope of his request. The FCDO explained that some information had been redacted from the digest and that further information had been withheld on the basis of sections 40 (personal data) and 41 (information provided in confidence) of FOIA.
7. The complainant contacted the FCDO on 15 March 2023 and asked it to conduct an internal review of this response. He sought to challenge the application of both exemptions and suggested that the FCDO was likely to hold a considerable amount of information, not all of which would be subject to FOIA exemptions, given that the had FCDO provided expert

witness for the First-tier Tribunal (Information Rights) proceedings.<sup>1</sup> He also asked for an explanation as to why it took four months to respond to the request.

8. The FCDO did not complete internal review.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 8 June 2023 in order to complain about the FCDO's handling of his request. His grounds of complaint reflected those raised in his request for an internal review.
10. The Commissioner has therefore considered the application of the exemptions cited by the FCDO, whether the FCDO has located all information falling within the scope of the request in light of the complainant's comments, and its delays in processing the request.

### **Reasons for decision**

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#### **Section 41 – information provided in confidence**

11. Section 41(1) of FOIA 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.'
12. 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.

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<sup>1</sup> See EA/2020/0021, EA/2020/0026, EA/2020/0058, EA/2020/0059 & EA/2021/0125 [https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i3033/Lownie%20Andrew-EA-2020-0058-\(15.03.22\).pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i3033/Lownie%20Andrew-EA-2020-0058-(15.03.22).pdf)

13. 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.
14. However, further caselaw 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. Although, it is still necessary to show that disclosure of such information would be an unauthorised use of the information.
15. The Commissioner has assessed each of these criteria in turn. It should be noted however, that the FCDO has requested that parts of its submissions to the Commissioner are not included in the decision notice as to do would reveal details of the withheld information.

Was the information obtained from another person?

16. With regard to the requirements of section 41(1)(a), the Commissioner accepts that the information that has been withheld on the basis of this exemption was provided to the FCDO by a third party.

Does the information have the necessary quality of confidence?

17. 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.
18. The Commissioner is satisfied that the requested information has the quality of confidence. The information is clearly not trivial, nor is it in the public domain.

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

19. The FCDO explained to the Commissioner the circumstances by which the information was provided to it. The Commissioner is satisfied that based upon these circumstance, and indeed from an examination of the information itself, it is clear that the party providing the information expected this to be kept confidential.

Would disclosure be of detriment to the confider?

20. The FCDO provided the Commissioner with specific and focused reasons as to why disclosure of the information would be detrimental to the confider. On the basis of these submissions the Commissioner is satisfied that this criterion is met.

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 FCDO acknowledged that correspondence which is the focus of this request concerns a high profile matter and that as a general position, it endeavours to publish relevant information. However, it explained that it must balance such public interest in releasing the information against the risk of harm caused to third party who provided it. In the circumstances of this case, the FCDO concluded that it did not consider that the public interest was served by breaching this confidence.
24. The Commissioner appreciates that there is an public interest in matters relating to Southampton University's purchase of the Mountbatten archive given the use of public funds to do so. Within this context, the Commissioner also appreciates that there is a public interest in the status of the Nehru correspondence which is the focus of this request. The Commissioner also appreciates that this issue has been the subject of previous information requests to various parties and a Tribunal decision as referenced above. As a result the Commissioner accepts that there is genuine public interest in the disclosure of information which would reveal further details about the actions of public authorities in respect of the archive. Disclosure of the withheld information could contribute, in a some way, to this public interest.
25. However, in the particular circumstances of this case the Commissioner considers there to be a significant interest in ensuring that the detriment identified by the FCDO does not occur. Given this, and the general public

interest in ensuring that confidences are maintained, 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.

## **Section 40 – personal data**

26. The information redacted on the basis of section 40(2) consists of names, job titles and contact details of junior staff members.
27. 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.
28. In this case the relevant condition is contained in section 40(3A)(a).<sup>2</sup> 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 UK General Data Protection Regulation ('UK GDPR').
29. It is common practice for a public authority to argue that the names of junior officials are exempt from disclosure under FOIA on the basis of section 40(2) as disclosure would contravene the principles set out in Article 5 of the GDPR. Furthermore, unless there are very case specific circumstances, the Commissioner accepts that the names of the junior officials are exempt from disclosure on the basis of section 40(2) of FOIA. This is in line with approach taken in the Commissioner's section 40 guidance.<sup>3</sup> Therefore, in this case the Commissioner adopts the reasoning set out in these previous decision notices which found that the personal data of junior officials was exempt from disclosure on the basis of section 40(2) of FOIA.<sup>4</sup>

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<sup>2</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

<sup>3</sup>

[https://ico.org.uk/media/fororganisations/documents/1187/section\\_40\\_requests\\_for\\_personal\\_data\\_about\\_employees.pdf](https://ico.org.uk/media/fororganisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf) - see page 12

<sup>4</sup> IC-114449-B7P7 - <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022310/ic-114449-b7p7.pdf> Paragraphs 49-71 and IC-110922-T9R1 <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022447/ic-110922-t9r1.pdf> paragraphs 39-62.

**Has the FCDO located all of the information falling within the scope of the request?**

30. As noted above the complainant expected the FCDO to hold a large file of information falling within the scope of his request. In support of this position he noted that the FCDO provided expert witnesses for the Tribunal proceedings. He therefore expected the FCDO to hold briefing notes and background documents on this issue which is the focus of this request. Whilst the Commissioner cannot comment on the content of the withheld information it does not amount to a "significant" volume of information. Therefore, in light of the complainant's comments the Commissioner has considered whether the FCDO has located all of the information falling within the scope of the request.
31. In cases where there is some question as to whether information falling within the scope of the request is held, or in this case whether all of the relevant information has been located, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
32. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request, or as in this case, whether it has located all of the information falling within the scope of the request.
33. In applying this test the Commissioner will consider the scope, quality, thoroughness and results of the searches, and/or other explanations offered by a public authority as to why the information is not held, or why it is satisfied that all relevant information has been located.
34. With regard to the complainant's position that the FCDO would hold information as a result of the Tribunal proceedings cited above, the Commissioner notes that the FCO (as it then was) did provide witnesses as part of the appeals. However, the evidence of these witnesses was not related to the Nehru papers. The FCO witness evidence concerned the application of section 27 to certain parts of the withheld information (see paragraph 103 of Tribunal decision). The FCO witnesses did not provide evidence in relation to the issue of the Nehru papers (see paragraphs 134 to 142). Therefore, the Commissioner does not consider it is likely that the FCDO would hold additional information falling within the scope of this request for the reasons identified by the complainant.
35. Nevertheless, the Commissioner asked the FCDO to explain the search terms used to locate information falling within the scope of the request and to explain why such terms would have been likely to have located all relevant information.

36. The FCDO explained that it undertook a search on its electronic records system which covered all electronic information held in the FCDO using the search terms "correspondence", "Edwina Mountbatten" and "Nehru" for the period requested. The FCDO explained that the search uncovered a number of emails which were reviewed to establish their relevance to the specific question. It then narrowed these emails down after the removal of duplicates, parts of email chains that were not relevant and the information the complainant had already received in its response to FOI2022/17533. This resulted in the relevant emails forwarded to the Commissioner. The FCDO explained that this search would have located all electronic records using what it considered to be the most appropriate search terms. The FCDO noted that it had also checked with its historic team who confirmed that there was no likelihood of any further information being held in hard copy files given then period requested.
37. On the basis of the above responses the Commissioner is satisfied the FCDO have conducted sufficiently detailed searches in order to locate all relevant information falling within the scope of the request.

### **Time taken to respond to the request**

38. Section 1(1) of FOIA provides that any person making a request for information to a public authority is entitled, subject to the application of any exemptions:

'(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.'

39. Section 10(1) of FOIA provides that 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. Under section 17(3) a public authority can, where it is citing a qualified exemption, have a 'reasonable' extension of time to consider the balance of the public interest.

40. The Commissioner considers it reasonable to extend the time to provide a full response, including public interest considerations, by up to a further 20 working days, which would allow a public authority 40 working days in total. The Commissioner considers that any extension beyond 40 working days should be exceptional and requires the public authority to fully justify the time taken.

41. In this case the complainant submitted his request on 16 November 2022 and the FCDO issued its substantive response on 13 March 2023, and (presumably) concluded that public interest test did not favour applying section 37, albeit that other exemptions did apply. The Commissioner does not consider this to be a reasonable amount of time in the circumstances of this case and this delay therefore represents a breach of section 17(3).

## Other matters

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42. FOIA does not impose a statutory time within which internal reviews must be completed, albeit that the section 45 Code of Practice explains that such reviews should be completed within a reasonable timeframe.<sup>5</sup> The Commissioner expects that most internal reviews should be completed within 20 working days, and even for more complicated requests, reviews should be completed within a total of 40 working days.<sup>6</sup> In this case, as noted above, the FCDO failed to complete the internal review.

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<sup>5</sup> <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

<sup>6</sup> <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/request-handling-freedom-of-information/#internal>

## Right of appeal

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43. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

44. 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.
45. 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**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
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