

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 January 2024

Public Authority: Foreign, Commonwealth & Development Office

Address: King Charles Street
London SW1A 2AH

Decision (including any steps ordered)

1. The complainant requested information from the Foreign Commonwealth and Development Office (FCDO) regarding a deceased person. The FCDO disclosed some information, however it applied sections 23(5), 24(2), 27 and 40(2) of FOIA to the remaining information ("the withheld information").
2. The Commissioner's decision is that the exemptions as set out in sections 23(5), 24(2), 27 and 40(2) of FOIA are engaged and that the public interest favours neither confirming or denying whether part of the requested information is held regarding section 24(2) and, in respect of section 27, non-disclosure.
3. The Commissioner's decision is also that the FCDO has breached sections 1 and 10 of FOIA by failing to respond within the statutory time for compliance.
4. No steps are required as a result of this decision.

Request and response

5. The complainant made a request to the FCDO on 17 June 2021 in terms which have been reproduced in the Annex to this notice.

6. The FCDO responded to the complainant on 5 November 2021. It disclosed some of the requested information and stated that it was applying section 40(2) of FOIA to third party personal data contained within the requested information. It also stated that it was applying section 27 of FOIA (international relations) as a basis for refusing to disclose part of the requested information. It further stated that under sections 23(5) and 24(2) of FOIA it was refusing to confirm or deny whether it held any further information within the terms of the complainant's request.
7. In its internal review response to the complainant on 26 May 2023 the FCDO upheld the original decision, however it did disclose some further information previously redacted under section 40(2).

Reasons for decision

Section 23(5) – Security bodies

8. Under section 1(1)(a) of FOIA, anyone who requests information from a public authority is entitled to be told if the authority holds the information ('the duty to confirm or deny').
9. Section 23(5) of FOIA provides an exemption from the duty to confirm or deny whether information is held if doing so would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied by, or relates to, any of the bodies specified in section 23(3). The list includes the Security Service, the Secret Intelligence Service and other similar bodies. This is a class-based exemption, which means if confirmation or denial would have the result described in section 23(5) of FOIA, the exemption is engaged.
10. The FCDO stated it can neither confirm or deny (NCND) it holds any additional information within scope of part of the request. It considered that to confirm or deny any additional information is held, would on the balance of probabilities, reveal information relating to one or more of the security bodies listed in section 23(3) of FOIA.
11. The issue that the Commissioner has to consider is not one of disclosure of any requested information that may be held, rather it is solely the issue of whether or not the FCDO is entitled to NCND whether it holds any information of the type requested by the complainant.
12. The Commissioner considers it is clear that the subject matter of part of the request is within the area of the work of security bodies.
13. The Commissioner is therefore satisfied that the FCDO has correctly applied section 23(5) of FOIA in this case.

Section 24 – national security

14. The Commissioner has considered the FCDO's reliance on section 24(2) of FOIA. The FCDO has refused to confirm or deny whether it holds information within scope of part of the request, citing section 24(2) of FOIA.
15. Under section 24(2) of FOIA, the duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice national security.
16. Section 24(2) is engaged if the exemption from the duty to confirm or deny is reasonably necessary for the purpose of safeguarding national security. The Commissioner considers that section 24(2) should be interpreted so that it is only necessary for a public authority to show that **either** a confirmation **or** a denial of whether requested information is held would be likely to harm national security. It is not necessary to show that harm would flow from both.
17. The Commissioner has considered the arguments put forward by the FCDO and is satisfied it has evidenced real and specific threats that a confirmation or denial as to whether or not the FCDO holds the specific information would be likely to harm national security. He therefore finds that section 24(2) of FOIA is engaged.

Public interest test

18. Section 24 is subject to the public interest test, as set out in section 2 of FOIA. This means that although section 24 is engaged, confirmation or denial must still be provided unless, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in confirming or denying.

Public interest arguments in favour of confirming or denying whether the requested information is held

19. The complainant considers that the information is of significant public interest due to its subject matter.
20. The Commissioner also accords significant weight to the public interest in transparency and accountability of the FCDO and the more specific public interest in its response to the situation outlined in the request.

Public interest arguments in favour of maintaining the NCND

21. The FCDO said:

"To the extent that section 24(2) applies, the public interest in maintaining exclusion of the duty to confirm or deny outweighs the

public interest in confirming whether or not any additional information is held, and that to give a statement of the reasons why the exemption applies would, in itself, involve the disclosure of exempt information. Therefore, under section 17(4) of the Act, the FCDO is not obliged to give such a statement.”

Balance of the public interest

22. The Commissioner recognises that there is a significant public interest in confirming or denying whether the requested information is held, owing to its subject matter.
23. Turning to the public interest in favour of maintenance of the exemption, in any situation where section 24(2) is found to be engaged, the Commissioner must recognise the public interest inherent in this exemption. Safeguarding national security is a matter of the most fundamental public interest; its weight can be matched only where there are also fundamental public interests in favour of confirmation or denial that the requested information is held.
24. In this case the FCDO has cited section 17(4) of FOIA.

Section 17 of FOIA provides as follows:

- (3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming—
 - (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
 - (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
 - (4) A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.
25. The Commissioner accepts, from his correspondence with the FCDO, that the FCDO has correctly cited section 17(4) of FOIA in this case.

26. In conclusion, given the subject matter of the requested information, the Commissioner has recognised the valid public interest in favour of confirmation or denial. He does not, however, believe that it matches the weight of the public interest in avoiding a disclosure, through confirmation or denial, that could be detrimental to national security. The finding of the Commissioner is, therefore, that the public interest in the maintenance of the exemption outweighs the public interest in confirmation or denial so the FCDO was not obliged to confirm or deny whether the withheld information is held.

Section 27 – international relations

27. The FCDO argued that the majority of the withheld information was exempt from disclosure on the basis of sections 27(1)(a) and (c) of FOIA which state 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...
 - (c) the interests of the United Kingdom abroad.
28. Section 27(5) explains that "State" includes the government of any State and any organ of its government, and references to a State other than the United Kingdom include references to any territory outside the United Kingdom.'

The Commissioner's position

29. In order for a prejudice based exemption, such as section 27, to be engaged the Commissioner believes that three criteria must be met:
- Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption.
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance.
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e., disclosure would be likely to result in prejudice or disclosure would result in prejudice. If the likelihood of prejudice occurring is one that is only hypothetical or remote the exemption will not be engaged.
30. Furthermore, the Commissioner has been guided by the comments of the Information Tribunal which suggested that in the context of section

27(1), prejudice can be real and of substance 'if it makes relations more difficult or calls for a particular damage limitation response to contain or limit damage which would not have otherwise have been necessary'.

31. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the FCDO clearly relates to the interests which the exemptions contained at sections 27(1)(a) and (c) are designed to protect.
32. The Commissioner accepts that the other two criteria are met and that section 27(1)(a) is engaged because the parties involved would have a reasonable expectation that the content of these communications would remain confidential. There is a causal link between release and prejudice to the relations between the UK and other states if the result was a decline in trust. Having considered the arguments put forward by the FCDO, the Commissioner's view is that the higher level of prejudice, 'would occur' has been demonstrated in terms of the wider potential effect of release.

Public interest test

33. Section 27 is subject to the public interest test, as set out in section 2 of FOIA.

Public interest arguments in favour of disclosure

34. The FCDO acknowledges the public interest in raising awareness of how the UK government engages with other states, and of how it promotes and protects the interests of the UK overseas. It also acknowledges the specific public interest in the withheld information due to the subject matter of the request.

Public interest arguments in favour of maintaining the exemption

35. The FCDO argues that the public interest in withholding the information concerned outweighed that in its disclosure for the small amount of information in the digest that is exempt from release under section 27(1)(a)(c) and (d) of the FOIA. Its release would prejudice the UK's relations with other states (in this case South Africa and Libya), the interests of the UK abroad, and the ability of the UK to promote and protect those interests.

Balance of public interest

36. The Commissioner accords significant weight to the public interest in transparency and accountability in this matter. He also considers that there is a significant public interest in raising awareness of how the UK government interacts with other states in situations such as this one,

and what the FCDO does to promote and protect the UK's interests abroad.

37. However, the Commissioner also considers that there would not be a public interest in prejudicing the UK's relations with other states, which would be impacted upon by disclosure of the withheld information. Disclosure may provide an opportunity to malign parties wishing to undermine the UK's relationship with other states and would not assist in advancing the interests of the UK abroad.
38. On balance, the Commissioner considers that the public interest in protecting the UK's relationship with other states is paramount and that the public interest in disclosure, while significant, does not outweigh this. Therefore the Commissioner considers that, in all the circumstances of the case, the public interest lies in favour of maintaining the exemption.

Section 40 - personal information

39. Section 40(2) of the 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.
40. In this case the relevant condition is contained in section 40(3A)(a). 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').
41. 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 the FOIA cannot apply.
42. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

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

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

44. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

45. 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.
46. 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.
47. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the data subject(s) as it consists of the names and details of the data subjects (FCDO staff) so quite obviously is information that both relates to and identifies those concerned.
48. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
49. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
50. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

51. 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".

52. 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.
53. 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

54. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) 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"¹.

55. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the 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.
56. 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

57. In considering any legitimate interest(s) in the disclosure of the requested information under the 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.
58. 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.
59. The Commissioner considers that the complainant and the public have a legitimate interest in the names of FCDO staff included in the requested

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

"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".

information as these were the authors and recipients of that information and there is also a general interest in transparency by the FCDO.

Is disclosure necessary?

60. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
61. The Commissioner can see no argument that disclosing the names and contact details of non-senior FCDO staff, whose contact details are not in the public domain in connection with this matter, is necessary to meet the interests of transparency. Their details would add nothing to the public's or the complainant's understanding of the matter or its handling by the FCDO, and the information in scope of the complainant's request is not diminished by their details being omitted.
62. The Commissioner is therefore satisfied that disclosure of the names and contact details of the relevant FCDO staff is not necessary to meet the legitimate interest in the requested information.

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

63. 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 the 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.
64. 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.

65. 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.
66. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
67. As non-senior grade staff, the individuals concerned in this case would have a reasonable expectation that their names and details would not be disclosed to the public and disclosure would be likely to cause distress at the loss of privacy.
68. Based on the above, the Commissioner has determined that there is insufficient legitimate interest 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 the information would not be lawful.
69. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.

Procedural requirements

70. The FCDO exceeded the 20 working day time for compliance when responding to the request. This is a breach of sections 1 (General right of access) and 10 (Time for compliance) of FOIA.
71. The Commissioner has logged this breach for monitoring purposes

Other matters

72. There is no obligation under FOIA for a public authority to provide an internal review process. However, it is good practice to do so and, where an authority chooses to offer one, the section 45 Code of Practice sets out, in general terms, the procedure that should be followed. The code states that reviews should be conducted promptly and within reasonable timescales. The Commissioner has interpreted this to mean that internal reviews should take no longer than 20 working days in most cases, or 40 in exceptional circumstances.
73. In this case the complainant waited a year and four months for an internal review response. The Commissioner reminds the FCDO of the Code of Practice and urges it to respond in a timely manner.

Right of appeal

74. 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

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

75. 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.

76. 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

Deirdre Collins
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex

Re: Anton Hammerl, Deceased

Please provide the following:

1. All information and data concerning Mr Hammerl, or persons believed to be Mr Hammerl from 28th March 2011 to the present day held by, or processed by, the UK Government and/or its agents.

2. All information and data concerning Mr Hammerl and his circumstances on or after 5th April 2011 to 25th April 2011, the date on which his family were told that he was detained in the custody of pro- al-Qadhafi forces in Libya and alive and well;

3. All information and data concerning Mr Hammerl on or after 25th April 2011 following the announcement of Mr Hammerl's detention by the Libyan authorities to 19th May 2011, 2 the point of release of fellow journalists and confirmation that Mr Hammerl was believed to be dead and was shot in the desert by pro-al-Qadhafi forces;

4. All information and data relating to Mr Hammerl and his case, in or around the visit of the South African delegation to Libya between 19th May 2011- 2nd June 2011;

5. All information and data relating to Mr Hammerl and the whereabouts or location of any personal property, DNA, and his remains, including e.g. in relation to:
 - a. 3rd May 2012 – 30th May 2012: the exhumation of a mass grave of 170 bodies in Bin Jawwad in which a corpse suspected to be that of Mr Hammerl was found together with a lens; and access to and identification of DNA samples of the deceased;

b. 30th May 2012 – 28th July 2016: relating to the recovery of Mr Hammerl's passport and/or his remains or their whereabouts;

6. Information and data and/or copies of communications from 5th April 2011 to the present concerning Mr Hammerl or persons believed to be Mr Hammerl, between UK officials and:

a. Moussa Ibrahim, spokesman for the Libyan government, to the Austrian government regarding Mr Hammerl;

b. The Ministry of Martyrs, Wounded and the Missing;

c. Any other officials or persons acting on behalf of the Libyan government;

d. South African or Austrian officials;

e. Other State officials, including the United States, Hungary , Bosnia and Herzegovina, and Spain;

f. International Commission of Missing Persons (including Dr Mhani);

g. International Committee of the Red Cross;

h. International Criminal Court;

i. Human Rights Watch.

7. Any information as to the names, office/rank, position of sources in the Libyan government including sources of information that:

- a. Mr Hammerl was detained, alive and well;
- b. Mr Hammerl was disappeared;
- c. Mr Hammerl was deceased;
- d. Remains had been located that were likely those of Mr Hammerl; If so, please provides dates and details for each.

8. Dates of investigations if any in relation to Mr Hammerl including:

a. the circumstances of Mr Hammerl's

- (i) disappearance;
- (ii) alleged detention;
- (iii) death,
- (iv) remains;
- (v) DNA;

b. any ongoing investigation(s);

c. details of any such investigation(s) (identified in 8(a) or (b) including the investigative: (i) country(ies), (ii) body(ies); (iii) authority(ies); (iv) official(s); and the terms of reference and/or outcome(s)."

77.

78.

