

Decision Notice



Decision 075/2010 Lucy Adams of The Herald and the Scottish Criminal
Cases Review Commission

Case review concerning Abdelbaset Ali Mohamed Al-Megrahi

Reference No: 201000588
Decision Date: 26 May 2010

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Kevin Dunion

Scottish Information Commissioner

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Summary

Lucy Adams of The Herald (Ms Adams) requested from the Scottish Criminal Cases Review Commission (the SCCRC) information pertaining to the case review of Abdelbaset Ali Mohmed Al-Megrahi (Mr Al-Megrahi).

The SCCRC responded by withholding the information in terms of several exemptions in FOISA. Following a review, Ms Adams remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, the SCCRC indicated that it only wished to apply the exemption at section 26(a) of FOISA to the withheld information, and it no longer sought to apply any other exemptions. It maintained that the exemption in section 26(a) applied because section 194J of the Criminal Procedure (Scotland) Act 1995 prohibits disclosure of the information.

The Commissioner accepted that the SRCC was prohibited from disclosing the information requested by Ms Adams, and so had correctly applied the exemption in section 26(a) of FOISA to the information.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(b) (Effect of exemptions) and 26(a) (Prohibitions on disclosure)

Criminal Procedure (Scotland) Act 1995 (the CPSA) sections 194J (Offence of disclosure) and 194K (Exceptions from obligations of non-disclosure)

The Scottish Criminal Cases Review Commission (Permitted Disclosure of Information) Order 2009 (the 2009 Order) preamble and article 2 (Permitted disclosure of information)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.



Background

1. On 1 February 2010, Ms Adams wrote to the SCCRC requesting information relating to the SCCRC's referral of Mr Al-Megrahi's case. Ms Adams stated that she would like to request the information within the Commission's full report and statement of reasons. She stated that, if this was not possible, then she would like the information contained in all documents relating to three other individuals involved in the case.
2. The SCCRC responded on 12 February 2010, stating that it was withholding the information in the terms of several exemptions under FOISA, with the primary one being section 26(a). This provides an absolute exemption from disclosure where disclosure is prohibited by law. The SCCRC indicated that disclosure in this case is prohibited under section 194J of the Criminal Procedure (Scotland) Act 1995 (the CPSA).
3. On 15 February 2010, Ms Adams wrote to the SCCRC requesting a review of its decision. Ms Adams referred to the Scottish Criminal Cases Review Commission (Permitted Disclosure of Information) Order 2009 (the 2009 Order), and noted that the SCCRC's report had been lodged with the court, and parts had been discussed and referred to in open court. She indicated that she believed that some of the information should now be published. Ms Adams also stated that she hoped that by the time the review was conducted that some of the key parties would have granted their consent for information relating to them to be released.
4. The SCCRC notified Ms Adams of the outcome of its review, which was to uphold the initial decision without modification, on 9 March 2010. The SCCRC stated that it had not received the requisite consent to disclose the information from any of the main parties concerned, but was continuing to correspond with them on the matter.
5. On 18 March 2010, Ms Adams wrote to the Commissioner, stating that she was dissatisfied with the outcome of the SCCRC's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Ms Adams had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. The SCCRC was notified in writing that an application had been received from Ms Adams and its comments were invited on the application in terms of section 49(3)(a) of FOISA.
8. The SCCRC responded to this letter, indicating that it now wished to rely solely on the exemption at section 26(a) of FOISA in withholding the information. The SCCRC provided details of its reasoning with respect to this exemption and this is addressed below.



9. The investigating officer contacted Ms Adams on 18 May 2010, noting that, it was unlikely that the Commissioner would order disclosure of information in this case.
10. Ms Adams responded on 18 May 2010, stating that she would welcome the Commissioner's written findings on the case.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to him by both Ms Adams and the SCCRC and is satisfied that no matter of relevance has been overlooked.

Section 26(a) of FOISA

12. Section 26(a) of FOISA exempts information from disclosure under FOISA where disclosure of is prohibited by or under any other enactment. This is an absolute exemption in that it is not subject to the public interest test set down in section 2(1)(b) of FOISA.
13. The SCCRC has argued that the disclosure of the information requested by Ms Adams is prohibited by another enactment, in this case section 194J of the CPSA.
14. The SCCRC has argued that section 194J of the CPSA prohibits the disclosure of any information obtained by the SCCRC in the exercise of any of its functions unless the disclosure of the information is excepted by section 194K of the CPSA. (Sections 194J is set out in full in the Appendix.)
15. The SCCRC noted that the information in question had been obtained by it in the exercise of its functions. It went on to explain that its function under the CPSA is to decide whether to refer an applicant's case to the High Court for determination.
16. In this case, the Commissioner is satisfied that the information which is the subject of Ms Adam's request has been obtained by the SCCRC in the exercise of its functions under the CPSA. It is therefore necessary for the Commissioner to go on to consider whether any of the exceptions contained in section 194K of the CPSA are applicable in the circumstances of this case. (Section 194K is set out in full in the Appendix.)
17. The SCCRC submitted that none of the conditions in section 194K applied in this case. In its submissions, and with reference to the exception specified in section 194K(1)(f), the SCCRC noted the terms of the 2009 Order, which provides that disclosure of information is permitted in the circumstances set out in article 2 of the 2009 Order. (Article 2 is set out in full in the Appendix.)



18. The SCCRC submitted that the information requested by Ms Adams was covered by article 2(a) of the 2009 Order, given that the SCCRC had referred Mr Al-Megrahi's case, in respect of his conviction, to the High Court, under section 194B(1) of CPSA, and given that Mr Al-Megrahi had abandoned his appeal.
19. However, the SCCRC also noted that the 2009 Order does not permit the disclosure of information in these circumstances until the persons who provided the information (whether directly or indirectly) have given their consent to disclosure and the SCCRC has decided the information should be disclosed. The SCCRC indicated that it did not have the consent of the persons who provided the information for it to disclose the information and, therefore, the 2009 Order did not permit the disclosure.
20. In the circumstances, therefore, the SCCRC stated that the section 194J prohibition on disclosure of information applied and that, as such, the information requested by Ms Adams was exempt from disclosure under section 26(a) of FOISA.
21. Having carefully considered section 194K of the CPSA and article 2 of the 2009 Order, the Commissioner has concluded that none of the conditions allowing disclosure set out in section 194K can be met in this case, and that disclosure of the information is therefore prohibited by section 194J of the CPSA.
22. The Commissioner therefore agrees with the SCCRC that the information requested by Ms Adams is exempt from disclosure in terms of section 26(a) of FOISA.
23. In reaching this conclusion, the Commissioner has noted Ms Adams' submission that part of the SCCRC report on Mr Al-Megrahi's case had already been discussed and referred to in open court and that some of the information should therefore now be published.
24. The Commissioner also notes that the SCCRC has released a summary of its main findings in a news release: <http://www.sccrc.org.uk/ViewFile.aspx?id=293>. In this summary, the SCCRC emphasises that it has no power under statute to make copies of its statements of reasons available to the public. The SCCRC states in the news release that it is intended merely to assist in an understanding of the nature of the its main investigations and findings and does not form part of its decision in the case.
25. However, this does not detract from the fact that section 26(a) of FOISA prohibits the disclosure of the information under FOISA.



DECISION

The Commissioner finds that the Scottish Criminal Cases Review Commission complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Ms Adams.

Appeal

Should either Ms Adams or the SCCRC wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision notice.

Margaret Keyse
Head of Enforcement
26 May 2010



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

- (a) the provision does not confer absolute exemption; and

...

- (2) For the purposes of paragraph (a) of subsection (1), the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

- (b) section 26;

...

26 Prohibitions on disclosure

Information is exempt information if its disclosure by a Scottish public authority (otherwise than under this Act)-

- (a) is prohibited by or under an enactment;

...



Criminal Procedure (Scotland) Act 1995

194J Offence of disclosure

- (1) A person who is or has been a member or employee of the Commission shall not disclose any information obtained by the Commission in the exercise of any of their functions unless the disclosure of the information is excepted from this section by section 194K of this Act.
- (2) A member of the Commission shall not authorise the disclosure by an employee of the Commission of any information obtained by the Commission in the exercise of any of their functions unless the authorisation of the disclosure of the information is excepted from this section by section 194K of this Act.
- (3) A person who contravenes this section is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale.

194K Exceptions from obligations of non-disclosure

- (1) The disclosure of information, or the authorisation of the disclosure of information, is excepted from section 194J of this Act by this section if the information is disclosed, or is authorised to be disclosed –
 - (a) for the purposes of any criminal, disciplinary or civil proceedings;
 - (b) in order to assist in dealing with an application made to the secretary of State for compensation for a miscarriage of justice;
 - (c) by a person who is a member or an employee of the Commission to another person who is a member or an employee of the Commission;
 - (d) in any statement or report required by this Act;
 - (e) in or in connection with the exercise of any function under this Act; or
 - (f) in any circumstances in which the disclosure of information is permitted by an order made by the Secretary of State.
- (2) The disclosure of information is also excepted from section 194J of this Act by this section if the information is disclosed by an employee of the Commission who is authorised to disclose the information by a member of the Commission.
- (3) The disclosure of information, or the authorisation of the disclosure of information, is also excepted from section 194J of this Act by this section if the information is disclosed, or is authorised to be disclosed, for the purposes of –
 - (a) the investigation of an offence; or



- (b) deciding whether to prosecute a person for an offence,
unless the disclosure is or would be prevented by an obligation or other limitation on disclosure (including any such obligation or limitation imposed by, under or by virtue of any enactment) arising otherwise than under that section.
- (4) Where the disclosure of information is excepted from section 194J of this Act by subsection (1) or (2) above, the disclosure of the information is not prevented by any obligation of secrecy or other limitation on disclosure (including any such obligation or limitation imposed by, under or by virtue of any enactment) arising otherwise than under that section.
- (5) The power to make an order under subsection 1(f) above is exercisable by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

The Scottish Criminal Cases Review Commission (Permitted Disclosure of Information) Order 2009

The Scottish Ministers make the following Order in exercise of the powers conferred by section 194K(1)(f) of the Criminal Procedure (Scotland) Act 1995 and all other powers enabling them to do so.

...

2. Permitted disclosure of information

The disclosure of information is permitted in the following circumstances—

- (a) the information relates to a case that has been referred to the High Court under section 194B(1) of the Act and—
 - (i) is, or includes, a reference of a conviction, or a finding under section 55(2) of the Act, where
 - (ii) the appeal, consequent on that reference, has been abandoned in terms of sections 116 or 184 of the Act;
- (b) any person who provided the information to the Commission (whether directly or indirectly) has consented to its disclosure; and
- (c) a decision that the information should be disclosed has been taken by the Commission.