

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 15 November 2010

Public Authority: Department for Business, Innovation & Skills
Address: 1 Victoria Street
London
SW1H 0ET

Summary

The complainant submitted a number of requests to Department for Business, Innovation & Skills (BIS) concerning the meeting between Lord Mandelson and Saif al-Islam Gaddafi which took place in May 2009. The complainant was provided with some information in response to his requests but BIS withheld the minute of the meeting on the basis of section 27(1)(a) of the Act. The Commissioner has concluded that section 27(1)(a) is engaged and in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure of the information.

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.

Background

2. Abdelbaset Ali Mohamed Al Megrahi was convicted in January 2001 of 270 counts of murder for the bombing of Pan Am flight 103 over Lockerbie, Scotland in December 1988 and sentenced to life in prison.
3. In November 2008 the British and Libyan governments signed a Prisoner Transfer Agreement (PTA). Despite the preference of the

Scottish government, the PTA that was signed did not exclude al-Megrahi from making an application under it.

4. In May 2009 al-Megrahi made an application under the PTA to the Scottish Executive. This application was turned down specifically on the basis that the US Government and families of victims in the United States had been led to believe that such a prisoner transfer would not be possible for anyone convicted of the Lockerbie atrocity.¹
5. In July 2009 al-Megrahi's legal team submitted an application to Scottish Executive for him to be released on compassionate grounds.
6. On 20 August 2009 al-Megrahi was released by Scottish Executive on compassionate grounds.

The Request

7. The complainant submitted the following requests to the Department for Business, Innovation & Skills (BIS) on 22 August 2009:

'I would like to request the following information from BIS...Please note that I am only interested in information which relates to the period January 1 2009 [to the date of the request].

1. All internal documents (including emails) held by the department's press office and or marketing team which specifically relate to Lord Mandelson's well publicised meeting with Saif al-Islam Gaddafi in Corfu. This information will include but not be limited to communications Lord Mandelson and the department's press team, briefing notes for press officers dealing with inquiries and notes relating to actual inquiries from journalists. The material could have been generated prior to the meeting taking place or it could have been generated during or after the meeting took place.

2. A list of occasions when Lord Mandelson has met Saif al-Islam Gaddafi. In each case can you say when and where the meeting took place. Can you please provide minutes of any meetings. If no minutes exist can you please state what issues were discussed at the meeting(s)?

¹ See the comments in Alex Salmond's open letter to Senator Kerry.

3. A list of occasions when Lord Mandelson met with Colonel Gaddafi, the Libyan Leader and or any other members of his family. In each case can you say when and where the meeting took place? Can you please provide minutes of any meetings. If no minutes exist can you please state what issue(s) were discussed at the meeting?
4. All correspondence (including emails) between Lord Mandelson and Saif al- Islam Gaddafi.
5. Has any other member of the department's ministerial team met with Saif al-Islam Gaddafi. If so can you please provide details of the minister(s) concerned, the date and the venue and any minutes of the meeting(s). If no minutes exist can you please state the subject under discussion.'
8. BIS contacted the complainant on 14 October 2009 and explained that on 22 September 2009 it should have provided him with 'a public interest extension letter'. BIS' communication of 14 October 2009 contained a copy of the letter which should have been sent. This explained that BIS believed that the requested information was exempt from disclosure on the basis of sections 27(1)(a) and 27(1)(c) but it needed to extend the time it needed to consider the public interest until 21 October 2009.
9. The complainant was contacted by BIS again on 16 January 2010. In this response BIS explained that it held information falling within the scope of request 1 but it considered this to be exempt from disclosure on the basis of section 27(1)(a) and sections 36(2)(b)(i) and (ii) and the public interest favoured maintaining each of the exemptions. In relation to request 2, BIS confirmed that Lord Mandelson had one official meeting with Saif al-Uslam Gaddafi on 26 May 2009 and although it held a note of this meeting it considered it to be exempt from disclosure, also on the basis of sections 27(1)(a), 36(2)(b)(i) and (ii). BIS explained that it did not hold any information in relation to requests 3, 4, or 5.
10. The complainant contacted BIS on 19 January 2010 in order to ask for an internal review of this refusal. The complainant noted that he was unhappy with the decision to withhold the information that had been located and provided a number of reasons why believed that the information should be disclosed. Furthermore the complainant disputed the assertion that it did not hold information falling within the scope of requests 3 to 5.

11. BIS informed the complainant of the outcome of the internal review on 22 March 2010. In relation to the first request BIS confirmed that it was relying on sections 21, 36(2)(b)(i) and (ii) and 40(2) to withhold the information that fell within the scope of this request. In relation to request 2 BIS confirmed that it was still relying on sections 27(1)(a) and 36(2)(b)(i) and (ii) to withhold this information. In relation to the remaining requests, BIS confirmed that it did not hold any information.
12. During the Commissioner's investigation of this complaint, BIS contacted the complainant again on 3 September 2010. In this correspondence BIS provided the complainant with the three email exchanges which fell within the scope of request 1, albeit with staff names redacted on the basis of section 40(2).

The Investigation

Scope of the case

13. The complainant contacted the Commissioner on 6 April 2010 in order to complain about BIS' handling of his requests. The complainant referred the Commissioner to his internal review which set out why he was dissatisfied with BIS' handling of his requests.
14. The Commissioner contacted the complainant on 4 June 2010 in order to clarify the exact nature of his complaint. The complainant confirmed that he did not wish the Commissioner to consider BIS' position that it did not hold any information falling within the scope of requests 3 to 5. Rather he only wished the Commissioner to consider BIS' decision to withhold the information that it had located and which fell within the scope of requests 1 to 2.
15. As detailed above, during the course of the Commissioner's investigation BIS provided the complainant with the information falling within the scope of request 1, the only exception being certain parts which were redacted on the basis of section 40(2). Subsequent to this disclosure the complainant informed the Commissioner that he did not wish to contest the application of section 40(2) to the remaining withheld information falling within request 1. However, the complainant did wish the Commissioner to continue to consider BIS' decision to withhold the information falling within the scope of request 2.

Chronology

16. The Commissioner contacted BIS on 3 June 2010 and asked to be provided with a copy of the information falling within the scope of requests 1 and 2 along with detailed submissions to support the application of the various exemptions cited in the internal review.
17. BIS responded to the Commissioner on 4 August 2010. In this letter BIS explained that it was now prepared to disclose the information falling within the scope of request 1, with the exception of the names of the staff which remained exempt on the basis of section 40(2). BIS also explained that it was only now seeking to rely on section 27(1)(a) to withhold the information falling within the scope of request 2. The Commissioner was provided with a copy of the information falling within the scope of both requests.
18. The Commissioner contacted BIS on 26 August 2010 and asked it to provide the complainant with a copy of the information falling within the scope of the request 1, subject to the proposed redactions on the basis of section 40(2).
19. As noted above, BIS provided the complainant with this information on 3 September 2010.

Analysis

Exemptions

Section 27 – international relations

20. BIS has confirmed that it holds one meeting note relating to Lord Mandelson's meeting with Saif al-Islam Gaddafi on 26 May 2009 but it has argued that this is exempt from disclosure on the basis of section 27(1)(a).
21. This exemption states that information is exempt from disclosure if its disclosure would, or would be likely to prejudice, relations between the United Kingdom and any other State.
22. In order for a prejudice based exemption, such as section 27(1), 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; and
- 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.

23. 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'.²

BIS' position

24. In order to support its application of section 27(1)(a) BIS explained that the meeting note records details of confidential discussions which took place mainly because of the relationship of trust between the UK government and Libya on the understanding that any exchanges of information would be treated in confidence. Disclosing minutes of meetings with Libyan counterparts would – as opposed to simply being likely to - damage this relationship and would be likely to result in Libya being more reluctant to share sensitive information with the UK in the future.
25. In its submissions to the Commissioner, BIS explained that it believed that there was a real and significant risk of prejudice occurring in light of past experience with the Libyan regime. This is because, despite the improvement in the UK's relations with Libya, it remained difficult to predict how Libya may react to 'perceived slights'. BIS highlighted the example of a breakdown in relations between Libya and Switzerland following the arrest of one of Colonel Gaddafi's sons in Geneva (which escalated into the barring of two Swiss citizens from leaving the country, suspending the issue of visas for Swiss nationals, the

² *Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence* (EA/2006/0040), paragraph 81.

withdrawal of \$5bn from Swiss bank, halting oil exports to Switzerland and forcing of Libyan branches of Swiss companies to close) in order to demonstrate the fragile nature of Libya's relations with the West.

26. BIS also highlighted a number of UK interests which it believed could be harmed by the inappropriate release of information, including migration and counter-terrorism co-operation; UK commercial interests; energy security; and the UK education sector.

The complainant's position

27. In his submissions to the Commissioner the complainant emphasised the arguments he made to BIS concerning the application of section 27(1)(a) when asking for an internal review: namely as the discussions between the two individuals were likely to have centred largely on the release of al-Megrahi these were a unique set of circumstances and therefore disclosure would be unlikely to impact on the long term relationship between the UK and Libya.

The Commissioner's position

28. The Commissioner accepts that BIS' argument that disclosure of the information would harm the UK's relations with Libya is clearly an applicable interest falling within the scope of section 27(1)(a). The first criterion set out at paragraph 22 is therefore clearly met.
29. The Commissioner notes that in its submissions BIS made direct reference to how disclosure of the requested information could prejudice the UK's interests. Whilst the Commissioner accepts that prejudice to the UK's interests abroad is a legitimate concern and one that is recognised by the Act, there are specific exemptions designed to protect against such prejudice, namely 27(1)(c) and 27(1)(d). In light of this the Commissioner does not believe that these interests are inherent to section 27(1)(a) and thus should not be taken into account in deciding whether this particular exemption is engaged. (However, the Commissioner does accept that the prejudice to such interests may be relevant, albeit not central to, the balance of the public interest under section 27(1)(a) and he has discussed this point in more detail below.)
30. With regard to the second criterion the Commissioner accepts that it is logical to argue that disclosure of the withheld information could potentially prejudice the UK's relations with Libya in light of the fact that Saif al-Islam Gaddafi considered the meeting to be confidential in nature. The Commissioner is therefore satisfied that there is a causal relationship between the potential disclosure of the withheld

information and prejudice to the UK's relations with Libya. Furthermore, the Commissioner is satisfied that the resultant prejudice which BIS believes would occur is one which can be correctly categorised, in light of the Tribunal's comments above, as real and of substance. In other words, subject to meeting the likelihood test at the third criterion, disclosure could result in making relations more difficult and/or demand a particular diplomatic response.

31. It follows that by reaching this conclusion the Commissioner does not accept the complainant's argument that simply because the meeting may have been restricted to the narrow topic of al-Megrahi, this means that there is little or no likelihood of prejudice occurring. Rather the Commissioner agrees with BIS' suggestion that given the basis upon which the meeting took place, i.e. the expectation of confidentiality, the topic(s) discussed at the meeting was necessarily of primary importance in determining the engagement of the exemption.
32. In relation to the third limb of the test set out at paragraph 21 in the main body of the Notice, the Commissioner has been guided on the interpretation of the phrase 'would, or would be likely to' be a number of Information Tribunal decisions. With regard to likely to prejudice, the Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (Tribunal at paragraph 15). With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026 & 0030) commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (Tribunal at paragraph 36).
33. The Commissioner is somewhat sceptical that the example cited by BIS to highlight the potential reaction of the Libyan government is directly relevant to this case. In the Commissioner's opinion there is a clear distinction between the arrest of one of Colonel Gaddafi's sons and the potential disclosure of information in response to a freedom of information request, even if that information as in this concerned one of Colonel Gaddafi's sons, and it would not be appropriate to draw too direct a parallel between the two. Furthermore the Commissioner notes that the UK's relations with Libya at the time of this request had improved with the signing of four bilateral agreements in November 2008 and the UK making clear, and public, commitments to assisting the Libya's reintegration into the international community. Therefore the likelihood of any prejudice occurring following the disclosure of the withheld information in August 2009 has to be seen in the context the UK's improved relations with Libya.

34. Nevertheless, the Commissioner is prepared to accept that the higher threshold of prejudice occurring is met. This is because despite the improvement in the UK's relations with Libya, the Commissioner accepts that it is difficult to predict how Libya may react to what BIS describes as perceived slights. In this context the Commissioner accepts that disclosure of notes about the meeting, which Saif al-Islam Gaddafi understood to have taken place with the explicit expectation of confidentiality, would result in making the UK's relations with Libya more difficult and/or demand a particular diplomatic response. The exemption contained at section 27(1)(a) is therefore engaged and provides a basis to withhold the meeting note in question.

Public interest test

35. Section 27(1) is a qualified exemption and therefore the Commissioner must consider the public interest test at section 2(2) of the Act. This requires a consideration of whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the requested information

36. BIS acknowledged that there was a public interest in disclosure of information which would inform the public about how the British government conducts its relations with other countries such as Libya. BIS also noted that in addition to the public interest in transparency of government, release of the information can also help to ensure that public authorities are accountable for decisions that they take.

Public interest arguments in favour of maintaining the exemption

37. BIS argued that there was a very strong public interest in the UK maintaining strong relations with Libya because it was not in the public interest that the UK's ability to protect and promote its interests in Libya was undermined.

Balance of the public interest arguments

38. With regard to attributing weight to the public interest arguments in favour of disclosure the Commissioner recognises that issues of accountability and transparency are often cited in any consideration of the public interest test. However, as such concepts are inherent to the Act this should not diminish their relevance to this case and moreover the Commissioner would agree that there is a clear public interest in

the public being informed as to how the UK manages its relations with its international partners.

39. Furthermore the Commissioner recognises that the UK's relations with Libya for the period in question were the subject of intense public concern in light of the release of al-Megrahi and allegations about links between the release and the UK's trade relations with Libya. In light of such concerns the Commissioner believes that the arguments for disclosure should be given further weight.
40. However, as with all cases, the weight that is attributed the particular public interest arguments will depend upon the actual content of the requested information. That is to say, to what extent will disclosure of the requested information actually serve the public interest arguments in question? Having considered the meeting notes, whilst the Commissioner accepts that their disclosure would contribute to the general public interest in openness and transparency and provide some insight into the PTA and the British government's position in respect of al-Megrahi, the level of insight is very limited in this case.
41. With regard to attributing weight to the public interest in favour of maintaining the exemption, the Commissioner accepts that it is very strongly in the public interest that the UK enjoys effective relations with foreign States. The public interest would obviously be harmed by any negative impact on the exchange of information between the UK and its foreign partners, either through information ceasing to be provided or by a failure by these foreign partners to respect the confidentiality of the information that the UK provided to them. The Commissioner accepts that this is particularly true of a partner such as Libya given its strategic position in Northern Africa and the Middle East and the relatively recent improvement in UK and Libyan relations. Moreover, the Commissioner accepts that the UK's strong relationship with Libya is important not just in respect of the al-Megrahi case but for wider bilateral issues such as trade, migration, counter-terrorism and trade. Furthermore, in the particular circumstances of this case, as the Commissioner has concluded that prejudice would occur, not simply be likely to, he accepts that this adds further weight to the arguments in favour of maintaining the exemption.
42. For these reasons the Commissioner has concluded that the maintaining the exemption outweighs the public interest in disclosing the information. In reaching this conclusion the Commissioner acknowledges that some of the points upon which he has placed weight in the above analysis could be seen as factors which are inherent in sections 27(1)(c) and (d) rather than section 27(1)(a) and thus should not be given weight in a public interest balance which focuses solely on

section 27(1)(a). However, in the Commissioner's opinion the public interest in maintaining section 27(1)(a) cannot be seen in isolation; the public interest in the UK having strong relations with other States is in reality a means to an end; the end being the ability of the UK to protect and promote its interests abroad.

Procedural Requirements

43. Part I of the Act includes a number of procedural requirements with which public authorities must comply:
44. Section 10(1) requires a public authority to respond to a request within 20 working days following the date of receipt. If a public authority wishes to rely on an exemption to refuse to provide the information requested, in line with section 17(1) it must issue a refusal notice to the applicant within the time period required by section 10(1). Section 17(3) allows a public authority to extend the time it needs to consider the public interest but it must inform the applicant that it is doing so, again within the time period specified in section 10(1).
45. In this case the complainant submitted his request on 22 August 2009 and BIS did not contact him until 14 October 2009 in order to provide him with a public interest extension letter. By failing to provide this response within 20 working days following the date of the request BIS breached section 17(1) of the Act.

The Decision

46. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

BIS was correct to withhold the meeting note falling within the scope of the request 2 on the basis of section 27(1)(a) of the Act and in all the circumstances of the case the public interest in maintaining the exemptions outweighs the public interest in disclosure.

47. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

BIS breached section 17(1) of the Act by failing to respond to the request within 20 working days.

Steps Required

48. The Commissioner requires no steps to be taken.

Other matters

49. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

50. The Commissioner has issued guidance on the time limits on extending the public interest test considerations.³ Whilst the current version of the Section 45 Code of Practice makes no reference to consideration of the public interest, the Commissioner's guidance suggests that public authorities should aim to respond fully to all requests within 20 working days. In cases where the public interest considerations are exceptionally complex it may be reasonable to take longer but, in the Commissioner's opinion, in no case should the total time exceed 40 working days. In this case, the complainant submitted his request on 22 August 2009 and BIS did not complete its consideration of the public interest test until 16 January 2010, outside of the 40 working days recommended by the Commissioner's guidance.

51. In the future when BIS conducts its consideration of the public interest the Commissioner expects it to adhere to the timelines set out in his guidance paper.

³ [Freedom of Information Good Practice Guidance No. 4](#)

Right of Appeal

52. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

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 sent.

Dated the 15th day of November 2010

Signed

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

Legal Annex

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."

Section 1(2) provides that -

"Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14."

Effect of Exemptions

Section 2(2) provides that –

"In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information"

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."

Refusal of Request

Section 17(1) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies."

Section 17(3) provides that -

"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."

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,
- (b) relations between the United Kingdom and any international organisation or international court,
- (c) the interests of the United Kingdom abroad, or

- (d) the promotion or protection by the United Kingdom of its interests abroad."

Section 27(2) provides that –

"Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court."