

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 2 February 2011

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

Summary

The complainant requested copies of all communications between the Foreign and Commonwealth Office (FCO) in London and British diplomatic posts in the US which referred to Abdelbaset al-Megrahi for the period 1 January 2009 to the date of her request, 30 September 2009. The FCO provided the complainant with a digest of a small amount of information falling within the scope of her request which it considered to be in the public domain but withheld the remainder of the information on the basis of sections 27(1)(a), 27(2) and 42(1). The Commissioner has concluded that this remaining information is exempt from disclosure on the basis of section 27(1)(a) and in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing 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 the Scottish Executive on compassionate grounds.

The Request

7. The complainant submitted the following request to the Foreign and Commonwealth Office (FCO) on 30 September 2009:

'Please provide copies under the Freedom of Information Act of all communications between the Foreign Office in London and British diplomatic posts in the USA which refer to Abdelbaset al-Megrahi since 1 January 2009.

Please send me copies of the actual documents. If it is necessary for any reason to redact any part of the document, please only redact the relevant part (explaining the legal grounds on which this is done) and send me the rest of the document.'

8. The FCO responded on 26 November 2009 and confirmed that it held some information falling within the scope of the request. It provided the complainant with what it described as a 'digest of information found in the public domain and was forwarded to the FCO by the British Embassy in Washington'. This digest consisted of a list of four documents and website addresses where this information could be accessed. The response explained that the remainder of the information was exempt from disclosure on the basis of sections 27(1)(a), 27(2) and 42(1).

¹ See the comments in Alex Salmond's open letter to Senator Kerry:
<http://politics.caledonianmercury.com/2010/07/22/alex-salmonds-letter-to-senator-kerry/>

9. The complainant contacted the FCO on 14 December 2009 and asked for an internal review to be conducted into the decision to withhold the information on the basis of section 27. (The complainant's correspondence did not mention the FCO's reliance on section 42).
10. The FCO informed the complainant of the outcome of the internal review on 27 January 2010; the review upheld the application of sections 27(1)(a) and 27(2).

The Investigation

Scope of the case

11. The complainant contacted the Commissioner on 25 February 2010 in order to complain about the FCO's application of the exemptions contained at section 27 of the Act. The complainant set out a number of reasons why she believed that disclosure of the information she requested should be in the public domain. The Commissioner has not included these arguments here but has made reference to them in the Analysis section below.
12. The Commissioner contacted the complainant on 17 May 2010 in order to clarify the scope of her complaint. The Commissioner asked the complainant to confirm whether she was only disputing the FCO's application of sections 27(1)(a) and 27(2) or whether she also wished the Commissioner to consider the application of section 42(1). The Commissioner also noted that it was his understanding that the complaint did not extend to the manner in which the FCO had provided her with the information it described as being in the public domain. (That is to say in the original request the complainant specified a preference by which she wanted the requested information disclosed, namely, copies of original documents. Obviously in providing website links to some of the information it held, rather than providing copies of these documents, the FCO did not comply with this preference.) The Commissioner therefore asked the complainant to confirm whether his understanding of this latter point was correct.
13. The complainant contacted the Commissioner on 18 May 2010 and confirmed that she did not want him to consider the FCO's reliance on section 42(1) nor did she wish the Commissioner to consider the manner in which FCO had provided her with the information that it described as being in the public domain. Therefore the scope of the Commissioner's investigation was simply to determine whether

information falling within the scope of the request was correctly withheld on the basis of sections 27(1)(a) and 27(2).

Chronology

14. The Commissioner contacted the FCO on 19 May 2010 and asked to be provided with detailed submissions to support the FCO's reliance on sections 27(1)(a) and 27(2). The Commissioner also asked to be provided with a copy of the information falling within the scope of the request.
15. Having received no response from the FCO, the Commissioner contacted the FCO again on 6 July 2010 and asked for a response to be provided promptly, and in any event, within a further 10 working days.
16. The FCO responded on 7 July 2010, apologised for the delay and confirmed that it would provide a response as soon as possible and certainly within the deadline suggested.
17. In a letter dated 21 July 2010 the FCO provided the Commissioner with an explanation as to why it believed that **all** of the withheld information was exempt from disclosure on the basis of section 27(1)(a). (The response did not mention section 27(2)). The FCO's letter also explained that it had received 18 similar requests for information and when considering these requests it had taken 'over a week' to go through the large number of files in order to establish whether any information could be disclosed. Therefore it would be likely to take a lot of 'time, effort, and money' to provide the Commissioner with a copy of the files by courier. Instead the FCO suggested that if the Commissioner really needed to see the files, it would be more financially feasible for him to visit the FCO and view the information in situ.
18. The Commissioner's case officer telephoned the FCO on 29 July 2010 and explained that the Commissioner's preference was to be provided with copies of the information, rather than view them at the FCO, because simply viewing the files at the FCO made investigating the case and drafting any decision notice difficult. The Commissioner's case officer also noted that the request was narrower in scope than seeking all information about the release of al-Megrahi. Rather it simply asked for communications between London and diplomatic posts in the US for a 9 month period and thus the volume of information falling within the scope of the request was presumably less than all of the FCO files on this issue. The Commissioner's case officer also asked whether it was possible for the withheld information to be provided electronically. The FCO's representative explained that progress on this and associated

cases had been stalled because resource had been diverted to deal with the Cabinet Secretary's review into the possible disclosure of information about the release of al-Megrahi. Therefore the FCO explained that it was not in a position to provide the Commissioner with a copy of the withheld information at this stage. The Commissioner's case officer agreed to contact the FCO again in two weeks once progress would hopefully have been made on the Cabinet Secretary's review.

19. Representatives of the Commissioner's office met with representatives of the FCO on 25 August 2010 in order to discuss a number of complaints the Commissioner had received concerning information requests submitted to the FCO; this case was briefly mentioned during the meeting. The Commissioner emailed the FCO on 26 August 2010 and confirmed that in respect of this case he still needed to be provided with a copy of the withheld information. The Commissioner again noted that as the request only sought communications between the FCO in London and British diplomatic posts in the US, presumably the majority of communications would have been sent electronically. If so, voluminous as it may be, the Commissioner suggested that this information could be sent to him electronically (e.g. in the form of an encrypted memory stick). The Commissioner therefore repeated his request to be provided with the information or clear confirmation from the FCO that it could not be sent to him so that arrangements could be made to view the information at the FCO.
20. The Commissioner contacted the FCO on 21 September, 6 October and 18 October 2010 in order to chase up the continuing non-provision of the withheld information.
21. The FCO contacted the Commissioner on 19 October 2010 and informed him that it would not be possible to provide him with an electronic version of the withheld information but it would arrange to provide him with hard copies very shortly.
22. The FCO provided the Commissioner with hard copies of the withheld information on 21 October 2010. This information was organised into 22 separate batches of information with a post it-note on the front of each batch indicating which exemptions had been applied. These notes indicated that all 22 batches had been withheld on the basis of section 27(1)(a) and some batches had been withheld on the basis of section 27(2).

Analysis

Exemptions

Section 27 – international relations

23. The FCO has argued that all of the withheld information is exempt from disclosure on the basis of section 27(1)(a) and that some of the information is exempt from disclosure on the basis of section 27(2). The Commissioner has initially considered the application of section 27(1)(a).
24. 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.
25. 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.
26. 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

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

The FCO's position

27. Based upon the refusal notice, internal review and letter to him dated 21 July 2010, the Commissioner understands that the FCO believes that disclosure of the withheld information could prejudice its relations with both the US and Libya. In respect of the US, the FCO argued that disclosure of information which detailed the UK's relationship with the US government could damage this bilateral relationship. Furthermore the withheld information contained information which had been provided to the UK by the US on the basis that it would be kept confidential and it was therefore reasonable to conclude that disclosure of such information would damage the UK's relationship with the US. The FCO also argued that as a consequence of disclosing such information the US would be more reluctant to share confidential information with the UK again. The FCO also emphasised the particular sensitivity of the subject-matter in this case.
28. In respect of the UK's relations with Libya the FCO suggested that the content of the withheld information could damage its relationship with this State. The FCO highlighted Libya's recent dispute with Switzerland over the treatment of one of Colonel Gaddafi's sons as an example of how Libya is not afraid to take reprisals, however excessive and unjustified the outside world may consider them.³

The Commissioner's position

29. The Commissioner accepts the FCO's argument that disclosure of the information could harm the UK's relations with the US and Libya are clearly applicable interests falling within the scope of section 27(1)(a). The first criterion set out at paragraph 25 is therefore clearly met.
30. With regard to the second criterion, and the UK's relations with the US, the Commissioner accepts that it is logical to argue that disclosure of the parts of the withheld information which the US had provided in confidence would be likely to harm the UK's relations with that State. Furthermore the Commissioner accepts that even for the parts of the withheld information which were not provided to the UK by the US, disclosure could well prejudice the relationship given that they contain a candid and detailed portrayal of this bilateral relationship on a particularly sensitive issue. With regard to the UK's relations with Libya, having considered the content of the withheld information and the sensitivities surrounding the case of al-Megrahi, the Commissioner

³ In 2008 in Geneva one of Colonel Gaddafi's sons was briefly arrested which escalated into the barring of two Swiss citizens from leaving Libya, the withdrawal of \$5bn from Swiss banks and the banning of entry to Libya of all Schengen citizens in February 2010.

accepts that its disclosure has the potential to prejudice the UK's with Libya.

31. 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 both the US and Libya. Furthermore, the Commissioner is satisfied that the resultant prejudice, in respect of both countries, which the FCO 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.
32. In relation to the third limb of the test set out at paragraph 25, 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. In his letter of 19 May 2010 the Commissioner explicitly asked the FCO to specify which limb of the prejudice test it was seeking to rely on in this case. However the FCO's responses of 21 July 2010 and 21 October 2010 failed to do so. In circumstances where a public authority has failed to specify the level of prejudice at which an exemption has been engaged, the Commissioner believes that the lower threshold of 'likely to prejudice' should be applied, unless there is clear evidence that it should be engaged at the higher level.
34. The Commissioner has considered the particular circumstances of this case very carefully. Having done so he is satisfied that the exemption, in respect of the UK's relations with both the US and Libya, is engaged at the higher level of likelihood. In respect of the UK's relationship with the US the 'clear evidence' that the Commissioner has found persuasive is the fact that prejudice could occur for two separate reasons: Firstly, a specific diplomatic response could be needed because disclosure of the information would involve the disclosure of information which the US had provided to the UK in confidence; it is

clear that the US places significant weight on its bilateral discussions with other States remaining confidential. Secondly, disclosure of the withheld information would involve the disclosure of information which was clearly only intended for the internal distribution within the UK government. Public disclosure would undermine the confidence of the US in its relationship with the UK as its expectation of confidentiality would not have been met. For these reasons alone the Commissioner would conclude that not only would prejudice to international relations be likely to occur, but on the facts of this case, applying the appropriate test for the purposes of the Act, such prejudice would occur.

35. In respect of the UK's relations with Libya, the Commissioner is somewhat sceptical about the relevance of the incident referred to by the FCO to highlight the potential reaction of the Libyan government. 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 and it would not be appropriate to draw too direct a parallel between the two. Nevertheless, the Commissioner is prepared to accept that the higher threshold of prejudice occurring is met because of the nature and dynamics of the UK's relationship with the Libyan regime and the offence the Libyan regime would be very likely to take if this information about the al-Megrahi case was disclosed.

Public interest test

36. 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

37. The FCO acknowledged that disclosure of the information could increase public knowledge about relations between the UK and US and about relations between the UK and Libya.
38. The complainant argued that there was an overwhelming public interest in disclosure of the requested information in order to inform the public debate on the significant issue of the Lockerbie bombing, and the arrest and subsequent release of al-Megrahi, and to adequately scrutinise the decision making processes of the British government. The complainant also argued that the public had a right to

know what information was exchanged between the British government and Libya and the US relating to al-Megrahi.

Public interest arguments in favour of maintaining the exemption

39. The FCO argued that the effective conduct of international relations depended upon maintaining trust and confidence between governments and organisations. If the UK did not maintain this trust and confidence its ability to protect and promote UK interests through effective international relations would be hampered, which is clearly not in the public interest.

Balance of the public interest arguments

40. With regard to attributing weight to the public interest arguments in favour of disclosure the Commissioner recognises that issues of accountability and transparency, furthering the public debate and scrutinising government decision making are often cited when applying the public interest test. However, this does not diminish their relevance. 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.
41. Furthermore, in the Commissioner's opinion, the specific arguments identified by the complainant deserve to be given notable weight in this case. As the complainant argues, at the time of the request there was significant public interest in the events surrounding the release of al-Megrahi, not least because of concerns expressed from a number of independent and different sources 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.
42. 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 withheld information in detail the Commissioner believes that its disclosure could provide a very detailed insight into the British government's handling of the al-Megrahi case, particularly its relations with the US over this issue, but also as regards the degree to which the UK's relations with Libya was an influential factor. The withheld information is reasonably voluminous in nature, contains a variety of different types of information, spanning a nine month period.

43. With regard to attributing weight to the public interest factors 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. In the circumstances of this case the Commissioner accepts that this is particularly true of relationships with key partners, such as the US, or with States such as Libya given its strategic position in Northern Africa and the Middle East and the relatively recent improvement in UK and Libyan relations. In respect of the US, the UK's maintenance of good relations relationship with this State is central to the well-being of British citizens and the security of British trade, investments and citizens at home and abroad. In respect of Libya, the UK's strong relationship with this State is important not just in respect of the al-Megrahi case but for wider bilateral issues such as trade, migration and counter-terrorism. Furthermore, in the particular circumstances of this case as the Commissioner has concluded that prejudice to the UK's relations with both countries would occur, not simply be likely to, he accepts that this adds further weight to the arguments in favour of maintaining the exemption.
44. In conclusion the Commissioner recognises the strength of the arguments on both sides of the public interest test; however, the Commissioner has concluded that the public interest favours maintaining the exemption. This is because although disclosure of the withheld information would significantly serve the legitimate public interests identified above, the consequences of disclosure have to be seen in a broader context. In the Commissioner's opinion disclosure of the withheld information would have such a profoundly negative effect on the UK's international relations primarily with the US, but also with Libya, not just in relation to the case of al-Megrahi but on all issues and topics central to the UK's relationship with these two countries such that the public interest must favour maintaining the exemption.
45. 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.
46. In light of this conclusion the Commissioner has not gone on to consider the FCO's application of section 27(2) as a basis to withhold some of the requested information.

Procedural Requirements

47. Section 1(1) of the Act provides the right of access to information and is in two parts, both of which are subject to the application of 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.'

48. 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).
49. In this case the complainant submitted her request to the FCO on 30 September 2009 but the FCO did not respond until 26 November 2009. The FCO therefore breached section 17(1) of the Act by failing to provide a refusal notice within 20 working days. Furthermore as the FCO's response of 26 November 2009 also disclosed some information to the complainant it also breached section 10(1) of the Act by failing to provide this information within the same 20 working day period.

The Decision

50. 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:

(i) The requested information that the FCO has not provided to the complainant is exempt from disclosure 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 exemption outweighs the public interest in disclosure of the information.

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

(ii) The FCO breached section 17(1) of the Act by failing to issue its refusal notice within 20 working days following the receipt of the request.

(ii) The FCO also breached section 10(1) of the Act by failing to provide the information that it did not consider to be exempt from disclosure within the same 20 working day period.

Steps Required

52. The Commissioner requires no steps to be taken.

Right of Appeal

53. 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 2nd day of February 2011

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.”

Section 10(3) provides that –

“If, and to the extent that –

- (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
- (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.”

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.”

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.”

Legal Professional Privilege

Section 42(1) provides that –

“Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”