

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 8 July 2014

**Public Authority:** Foreign and Commonwealth Office (FCO)  
**Address:** King Charles Street  
London  
SW1A 2AH  
(Email: [foi-dpa.imd@fco.gov.uk](mailto:foi-dpa.imd@fco.gov.uk))

### Decision (including any steps ordered)

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1. The complainant requested correspondence, including email, between the FCO and other named parties in relation to Libya during the first part of 2011.
2. The Commissioner decided that FCO had correctly applied the section 31(1) and 42(1) FOIA exemptions in withholding relevant information; also, with one exception, the section 41(1) FOIA exemption. He further decided that FCO had acted in breach of section 17(1) FOIA.
3. The Commissioner requires FCO to disclose one document to the complainant to ensure compliance with the legislation.
4. The FCO must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

### Request and response

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5. On 2 August 2011, the complainant wrote to FCO and requested information in the following terms:

*I would like to know what contact employees of the FCO, including ministers, have had this year with representatives of*

*the PR firm [named] and the law firm [named], including [named lawyer], in relation to Libya.*

*I would also like:*

- *All documentary records arising from such contact, including correspondence (including emails), notes of telephone conversations and minutes of meetings.*
- *Any internal FCO correspondence arising from such contact, such as emails and memos.*

6. On 8 February 2012, following correspondence with FCO, the complainant submitted a narrower request saying:

*I would like to narrow down my request to correspondence, including email, between the FCO and the organisations and individual named in my request.*

7. Following further correspondence and significant delay, the FCO responded with a refusal notice dated 13 July 2012. For reasons which are still unclear, the complainant did not receive this letter at the time; following intervention by the Information Commissioner, FCO re-sent its 13 July 2012 refusal notice on 21 January 2013. FCO stated that information falling within the scope of the request was held and was being withheld relying on the section 41 FOIA exemption (Information provided in confidence). FCO also made clear that it was not relying on the section 27 FOIA exemption (International relations).
8. Following an internal review, FCO wrote to the complainant on 15 March 2013 upholding the decision in its refusal notice of 13 July 2012.

## **Scope of the case**

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9. The complainant contacted the Commissioner on 22 May 2013 to complain about the way his request for information had been handled. He said that, in his view, what he said was FCO's involvement with and apparent support for the parties he had identified should be open to public scrutiny.
10. During the Commissioner's investigation, FCO identified to him a set of withheld documents that FCO said fell within the scope of the narrowed information request. The Commissioner, for the purpose of his investigation, refers to these as documents B – H for identification

purposes. A confidential annex to this notice, provided to FCO only, identifies each document. The Commissioner decided that each of the documents B - H was within the scope of the narrowed information request of 8 February 2012. For the avoidance of doubt, the Commissioner makes clear that during his investigation he has seen no evidence to suggest that FCO may hold any additional documents falling within the scope of the request and which have not been declared to him.

11. During his investigation, the Commissioner reviewed the withheld information. He has received and considered detailed confidential representations from FCO itself as well as representations from the complainant. In addition, he has considered confidential representations made to FCO, and representations submitted to him in confidence through FCO, by other interested parties.
12. During the Commissioner's investigation, FCO continued to rely upon the section 41(1) FOIA exemption in respect of some of the withheld information. FCO additionally now relies upon the exemption at section 31(1)(b) FOIA (Law enforcement) to withhold information in two of the identified documents. FCO also relies upon the exemption at section 42(1) FOIA (Legal professional privilege) to withhold the information in one document.
13. In summary, documents B, C, H are being withheld by FCO relying on the section 41(1) FOIA exemption. Documents D and E are withheld by FCO relying on the section 31(1) FOIA exemption. Document G is being withheld by FCO relying on the section 42(1) FOIA exemption. During the Commissioner's investigation, FCO ceased to apply the section 41(1) FOIA exemption to document F. It is in the public domain and should be disclosed to the complainant.
14. The Commissioner considered whether any of the withheld information could properly be disclosed in redacted form but decided that it could not.

## **Reasons for decision**

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### **Section 31(1)(b) – Law enforcement**

15. Section 31(1)(b) of FOIA states that:

*Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice – ...*

*(b) the apprehension or prosecution of offenders.*

16. The exemption at section 31(1)(b) FOIA applies where disclosure would, or would be likely to, prejudice the apprehension or prosecution of offenders. In the Commissioner's view, three criteria must be met in order to engage a prejudice based exemption.

Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the disputed 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 disputed information 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 – ie disclosure *'would be likely'* to result in prejudice or disclosure *'would'* result in prejudice. In relation to the lower threshold (*would be likely*), the Commissioner believes that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. The Commissioner considers that the higher threshold places a stronger evidential burden on a public authority to discharge. The chances of the prejudice occurring should be more probable than not.

17. FCO told the Commissioner, on behalf of Police Scotland, that:

*'officers of Police Scotland under direction of Crown Office continue to investigate the Lockerbie Air Disaster and have received commitments from the Libyan authorities that they will cooperate to allow our enquiries to be completed successfully (see joint statement issued on 25<sup>th</sup> anniversary of the disaster, <https://www.gov.uk/government/news/25th-anniversary-of-lockerbie-joint-uk-us-libya-statement>). The cooperation of the Libyan authorities is very much welcomed and is viewed as essential to allow investigations to be carried out in Libya'.*

18. In the light of this evidence and other evidence provided to him in confidence by FCO, the Commissioner is satisfied that relevant enquiries were in progress at the time of the information request. He accepts that the applicable interests protected by section 31(1)(b) relating to the apprehension or prosecution of offenders would be prejudiced by disclosure of the withheld information.
19. The Commissioner therefore finds that the exemption at section 31(1)(b) FOIA was correctly engaged in relation to the disputed information. The Commissioner proceeded to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure.

*Public interest arguments in favour of disclosure*

20. There is a general public interest in openness and transparency regarding unpublished information including that relating to the pre-2011 Libyan regime and its alleged affiliations.

*Public interest arguments in favour of maintaining the exemption*

21. The Commissioner is satisfied that relevant enquiries were still 'live' at the time of the request. There is a strong public interest in avoiding damage to the integrity of those enquiries by disclosing the disputed information.
22. There is too a strong public interest in protecting the right to a fair trial for any individuals who might be accused of offences following the conclusion of the enquiries. Disclosure of the disputed information would be very likely to undermine any future prosecution that might be contemplated and would therefore not be in the public interest.

*Balance of the public interest*

23. The Commissioner has decided on balance that, since disclosure would compromise the authorities' continuing efforts to apprehend and prosecute relevant offenders, it would not be in the public interest. He is therefore satisfied that on balance, the public interest in maintaining the section 31(1)(b) exemption outweighs that in disclosing the information.

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

24. Section 41(1) of FOIA states that:

*"Information is exempt information if-*

*(a) It was obtained by the public authority from any other person (including another public authority), and*

*(b) The disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."*

25. As section 41 FOIA is an absolute exemption, it is not subject to the public interest test under section 2 FOIA. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner considers the following:

whether the information has the necessary quality of confidence;

whether the information was imparted in circumstances importing an obligation of confidence; and

whether disclosure would be an unauthorised use of the information and to the detriment of the confider.

26. The Commissioner considers that information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial.

27. From his inspection of the relevant withheld information, the Commissioner is satisfied that the information has been provided to FCO by another person. He has been told that it relates to matters that are sensitive and important to the provider, and that it had been shared with FCO with the intention and expectation of confidence. During the course of the Commissioner's investigation FCO confirmed with the provider that the information was important to him and remains so and that the expectation of confidence still applied at the date of the narrowed down information request.

28. The Commissioner has received representations from FCO confirming that there was an obligation of confidence placed on FCO arising from the circumstances in which the information had been shared. FCO confirmed that it had held the information in strict confidence and had provided it only to those staff whose work meant that they had a need to know. The Commissioner has seen no evidence that the withheld

information is, or has been, made accessible to members of the public.

29. The Commissioner went on to consider whether disclosure of the information would be detrimental to the confider. FCO said that unauthorised disclosure could cause detriment to the provider by damaging core professional relationships. In FCO's view, which the Commissioner accepted after due consideration, disclosure would therefore be very likely to be actionable.
30. The Commissioner then considered whether there would be a public interest defence for a breach of confidence. Disclosure of confidential information will not constitute an actionable breach of confidence if there is a public interest in disclosing the information which outweighs the public interest in keeping the information confidential. In weighing any common law public interest in disclosure against the public interest in keeping the information confidential, the Commissioner has had regard to the public interest that there is in transparency and accountability of FCO and in fostering a better public understanding of UK-Libya relationships. The Commissioner has also noted the complainant's view that there should be an opportunity for public scrutiny of what he said was "FCO's involvement with - and apparent support for", private initiatives and companies which were reported to have been active in Libya early in 2011. For the avoidance of doubt, the Commissioner makes clear that he has seen nothing in the withheld information to suggest that there may have been any wrongdoing by FCO, nor any need for disclosure in order to avoid misleading the public about the course of events there.
31. The Commissioner has been mindful of the wider public interest in preserving the principle that it is in the public interest that confidences made should be respected. He saw that the work of FCO would be hindered if its trustworthiness were to be called into question, something which would not be in the public interest. The encouragement of respect for confidences made may in itself constitute sufficient ground for recognising and enforcing the obligation of confidence. The Commissioner is mindful of the need to protect the relationship of trust between confider and confidant; and the need for assurance that confidences shared will be respected by FCO.
32. In this matter FCO claimed, and the Commissioner accepts, that the damage that could be caused in disclosing the information would be likely to form an actionable breach of confidence, and outweigh any public interest in disclosure, which might be offered as a defence to any such action. Accordingly the Commissioner concluded that the

section 41(1) FOIA exemption had been correctly applied to the relevant information.

33. During the course of the Commissioner's investigation, it became apparent that document F was available to the public on the internet. FCO acknowledged this and withdrew its reliance on the section 41(1) FOIA exemption in respect of that document. The Commissioner therefore decided that FCO should disclose document F to the complainant.

## **Section 42 – Legal professional privilege**

34. Section 42(1) FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings.
35. There are two categories of legal professional privilege: advice privilege and litigation privilege. In this case the FCO is relying on litigation privilege. For this exemption to apply there must be a real prospect or likelihood of litigation, rather than just a fear or possibility of it. For information to be covered by litigation privilege, it must have been created for the dominant (main) purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation. It can cover communications between lawyers and third parties so long as they are made for the purposes of the litigation.
36. To determine whether legal professional privilege applies, a public authority needs to be clear who are the parties to the confidential communication. A lawyer's communications with third parties are only covered by litigation privilege if they have been made for the purposes of litigation. This will depend on the facts of the case.
37. In this matter, FCO relied upon the section 42(1) FOIA exemption to withhold document G. FCO said that, although it was not a party to the relevant proceedings, nevertheless litigation privilege applied.
38. The Commissioner has seen from his examination of document G, and from related representations made to FCO which he has seen, that the withheld information related to the involvement of the originator of the information in novel legal proceedings being conducted on behalf of clients in another jurisdiction, a matter that was live at the time of the information request. The withheld information comprises lawyer to third party correspondence directly related to the litigation. The Commissioner has seen no evidence of waiver of privilege. Accordingly the Commissioner decided that the legal professional privilege exemption applied to document G.



*Public interest test*

39. Section 42 is a qualified exemption and therefore the Commissioner must consider the public interest test and 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 in favour disclosure*

40. There is a general public interest in openness and transparency regarding unpublished information relating to the pre-2011 Libyan regime.
41. The complainant said that in his view FCO's involvement with, and what he said was apparent FCO support for, private initiatives and companies in the Libyan setting during the relevant period of 2011 should be open to public scrutiny. The Commissioner accepts that this is a factor favouring disclosure.
42. The Commissioner noted that FCO is not itself directly a party in the relevant litigation, something which could weaken the force of legal professional privilege arguments.

*Public interest in favour maintaining the exemption*

43. There is a strong element of public interest inbuilt into legal professional privilege.
44. The Commissioner saw that the withheld information was still recent at the time of the request and that the litigation matter was still live then.
45. The Commissioner has seen evidence from FCO of concerns on the part of the provider of the withheld information that disclosure under FOIA would damage his litigation strategy as any disclosed information could then be used by others to undermine his case or assist his litigation opponents.

*Balance of the public interest*

46. In considering the balance of the public interest under section 42, although the Commissioner accepts that there is a strong element of public interest built into legal professional privilege, he does not accept that the factors in favour of disclosure need to be exceptional for the public interest to favour disclosure. The Information Tribunal in *Pugh v Information Commissioner* (EA/2007/0055) was clear:

*'The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty than those in favour of maintaining the exemption'* (para 41).

47. Consequently, although there will always be an initial weighting in terms of maintaining the exemption, the Commissioner recognises that there will sometimes be circumstances where the public interest will favour disclosing the information.
48. Having considered the content of the withheld information the Commissioner is satisfied that disclosure would add little or nothing of significance to public knowledge of FCO's role in the contemporaneous Libyan context. He does not consider that there are any significant factors in this case which are sufficient to warrant disclosure when weighed against the in-built public interest in maintaining legal professional privilege .

### **Decision summary**

49. In summary the Commissioner's decision is that FCO acted correctly in relying on:
  - the section 31 FOIA exemption to withhold documents D and E
  - the section 41 FOIA exemption to withhold documents B, C and H
  - the section 42 FOIA exemption to withhold document G.
50. FCO did not comply with FOIA in withholding document F and should now disclose it.

### **Other matters**

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51. The complainant submitted his narrowed information request to FCO on 2 February 2012 but FCO did not provide its refusal notice until 13 July 2012. The refusal notice referred to the section 27 and 41 FOIA exemptions but did not cite the section 31 and 42 FOIA exemptions that FCO later relied upon. FCO did not disclose document F as it should have done. This was a breach of section 17(1) FOIA.
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## Right of appeal

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- 52. FCO did not comply with FOIA in withholding document F and should now disclose it.
- 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,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

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

- 54. 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.
- 55. 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 .....**

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