

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 February 2016

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

Decision (including any steps ordered)

1. The complainant submitted a request to the Foreign and Commonwealth Office (FCO) for information about the late Sir Peter Hayman. The FCO disclosed some information to the complainant but withheld the remainder on the basis of sections 23(1) (security bodies), 40(2) (personal data) and 41 (information provided in confidence) of FOIA. The Commissioner has concluded that the withheld information is exempt from disclosure under sections 23(1) and 40(2) of FOIA. He has also concluded that the FCO breached section 17(1) of FOIA by failing to provide the complainant with a refusal notice which cited these exemptions within 20 working days of his request.

Request and response

2. The complainant submitted the following request to the FCO on 9 March 2015:

'My request relates to the late Sir Peter Hayman who was born on 14 June 1914 and who died on 9 April 1992...

...1...Does the Foreign Office hold a personnel file or similar for Sir Peter.

2...If the answer is yes please provide a copy of this document and its contents. Please feel free to redact any documents or correspondence from the file which could have implications for national security or the intelligence services. But please do not redact or remove any documents which relate to Sir Peter's private life and or his

membership of the Paedophile Information Exchange and or any police investigations sparked by his sexual preferences.

3...Between 5 May 1979 and 5 April 1982 did Lord Carrington exchange correspondence and communications with Margaret Thatcher which in any way touched upon Sir Peter's private life and or his sexual preferences and or his membership of the Paedophile Information Exchange and or any police enquiries into him. If the answer is yes then please can you provide copies of this correspondence and communications.

4... Between 5 May 1979 and 5 April 1982 did Lord Carrington meet with the Prime Minister to discuss Sir Peter's private life and or his sexual preferences and or his membership of the of Paedophile Information Exchange and or any police enquiries into him. If the answer is yes can you please provide details of these meetings including venues and dates. Can you please provide copies of any relevant documents which specifically relate to these particular meetings.

5... Between 5 May 1979 and 5 April 1982 did the Foreign Office exchange correspondence and communications with the Cabinet Secretary and or Mrs Thatcher's Private Secretary which in any way relates to Sir Peter's private life and or his sexual preferences and or his membership of the Paedophile Information Exchange and or any police enquiries into him. If the answer is yes then please can you provide copies of this correspondence and communications'.

3. The FCO contacted the complainant on 9 April 2015 and confirmed that it held information falling within the scope of his request but it need further time to consider the balance of the public interest in relation to the exemptions contained at sections 38(1)(a) (health and safety) and 37(1)(b) (honours) of FOIA. The FCO sent a similar public interest extension letter to the complainant on 6 May 2015.
4. The FCO issued a substantive response on 15 May 2015. It provided the complainant with some of the information falling within the scope of his request but explained that further information had been withheld on the basis of the exemptions contained at sections 23 (security bodies), 40(2) (personal data) and 41 (information provided in confidence) of FOIA. The FCO also confirmed that it was no longer seeking to rely on the exemptions contained at sections 38(1)(a) and 37(1)(b).
5. The complainant contacted the FCO on 20 May 2015 in order to ask for an internal review of this request.

6. The FCO informed him of the outcome of the review on 18 June 2015. The review upheld the application of the exemptions cited in the refusal notice.

Scope of the case

7. The complainant contacted the Commissioner on 23 June 2015 in order to complain about the FCO's decision to withhold information falling within the scope of his request on the basis of the exemptions contained at sections 23(1), 40(2) and 41(1) of FOIA. The complainant has argued that there are strong public interest grounds for disclosing the withheld information given the significant public concern about how figures in authority in the 1970s and 1980s may have covered up allegations of child abuse. The complainant also noted that the material disclosed to him by the FCO revealed that Margaret Thatcher allowed Sir Peter Hayman to keep his knighthood despite concerns about his sexual preferences. Consequently, in the interests of transparency the complainant argued that the FCO should disclose all of the information that it holds.
8. The complainant was also dissatisfied with the length of time it took the FCO to process his request.

Reasons for decision

Section 23(1) – information supplied by or relating to bodies dealing with security matters

9. The FCO sought to withhold some of the requested information on the basis of section 23(1) of FOIA. This provides an exemption which states that:

'Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).'

10. To successfully engage the exemption at section 23(1), a public authority needs only to demonstrate that the relevant information was *directly or indirectly* supplied to it by, or *relates to* any of the bodies

listed at section 23(3).¹ This means that if the requested information falls within this class it is absolutely exempt from disclosure under the FOIA. There is no requirement on the public authority to demonstrate that disclosure of the requested information would result in some sort of harm. This exemption is not subject to a balance of public interests test.

11. When investigating complaints about the application of section 23(1), the Commissioner will need to be satisfied that the information was in fact supplied by a security body or relates to such a body, if he is to find in favour of the public authority. In certain circumstances the Commissioner is able to be so satisfied without himself examining the withheld information. Where it appears likely that the information would engage the exemption, the Commissioner may accept a written assurance from the public authority provided by someone who, because of their seniority and responsibilities, has regular access to information relating to the security bodies and who has first-hand knowledge of the relationship between the public authority and those bodies. Furthermore, they must themselves have reviewed the disputed information in the particular case.
12. In the circumstances of this case, the FCO provided the Commissioner with a letter of assurance from a relevant senior official within the department which confirmed that he had examined the information withheld under section 23(1) and was satisfied that all of it relates to, or was supplied by, one of the bodies specified in section 23(3) of FOIA. This official occupies a senior position at the FCO and meets the Commissioner's criteria outlined in paragraph 11.
13. The Commissioner recognises that a number of online sources indicate that Sir Peter Hayman was associated with the Security Intelligence Service.²

¹ A full list of the bodies detailed in section 23(3) is available here:
<http://www.legislation.gov.uk/ukpga/2000/36/section/23>

² <http://www.independent.co.uk/news/uk/politics/westminster-paedophile-ring-investigation-mi6-spy-sir-peter-hayman-named-in-dossier-10014295.html>

<http://www.telegraph.co.uk/news/politics/11380078/Westminster-paedophile-ring-Sir-Peter-Hayman-named-in-secret-file.html>

<http://www.bbc.co.uk/news/uk-31062904>

14. Accordingly, the Commissioner accepts that, in the circumstances of this case, the assurance he has received from the senior official at the FCO regarding the nature of the information withheld under section 23(1), coupled with Sir Peter Hayman's apparent links with one of the bodies listed in section 23(3), is sufficient for him to conclude that this information is exempt from disclosure on the basis of section 23(1) of FOIA.

Section 40 – personal data

15. The FCO redacted two sentences of information from the documents disclosed to the complainant on the basis of sections 40(2) and 41(1) of FOIA.
16. Section 40(2) states that personal data is exempt from disclosure if its disclosure would breach any of the data protection principles contained within the Data Protection Act 1998 (DPA).
17. Personal data is defined in section (1)(a) of the DPA as:

'...data which relate to a living individual who can be identified from those data or from those data and other information which is in the possession of, or likely to come into the possession of, the data controller; and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any person in respect of the individual.'

18. The Commissioner is satisfied that the redacted information constitutes the personal data of a living individual.
19. The FCO argued that disclosure would breach the first data protection principle which states that:

'Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

- (a) at least one of the conditions in Schedule 2 is met, and*
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.'*

20. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:

- The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:

- what the public authority may have told them about what would happen to their personal data;
 - their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights (ECHR);
 - the nature or content of the information itself;
 - the circumstances in which the personal data was obtained;
 - any particular circumstances of the case, eg established custom or practice within the public authority; and
 - whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.
 - The consequences of disclosing the information, ie what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor the Commissioner may take into account:
 - whether information of the nature requested is already in the public domain;
 - if so the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?
21. Furthermore, notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling legitimate interest in disclosure to the public.
22. In considering 'legitimate interests', in order to establish if there is a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sake, as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to consider a proportionate approach.
23. The FCO provided the Commissioner with detailed submissions to support its view that the disclosure of the information withheld on the basis of section 40(2) would breach the first data protection principle. The Commissioner is limited about what he can include in this decision notice about the FCO's submissions, and indeed his view of them, because detailed reference to the submissions would effectively result in the disclosure of the withheld information itself.

24. However, the Commissioner can confirm that the FCO has argued that the data subject would have a clear, and reasonable, expectation that their personal data would not be publically disclosed. Its disclosure would therefore be unfair. Furthermore, the FCO argued that the outcome of the process which led to Sir Peter Hayman retaining his knighthood is publically known; disclosure of the withheld information would not add to the public's understanding of the decisions taken in respect of his honour. Consequently, in the FCO's opinion there was no compelling legitimate interest in disclosure of the withheld information that would outweigh the legitimate interests of the data subject.
25. The Commissioner agrees with the FCO's analysis. It is clear from the information available to him that the data subject would have no expectation that their personal data would be made public. The Commissioner acknowledges the public interest arguments advanced by the complainant and accepts that these should not be dismissed lightly given the gravity of the issues upon which they touch. Disclosure of the redacted information would add further to the transparency concerning Sir Peter Hayman retaining his knighthood. However, having had the benefit of examining the information that has been withheld on the basis of section 40(2), the Commissioner accepts that its disclosure would not add to the public's understanding of this process. In any event, in the Commissioner's view any legitimate interest in the disclosure of the redacted information is outweighed by the legitimate interests of the data subject.
26. Therefore the Commissioner has concluded that disclosure of the redacted information would be unfair and thus breach the first data protection principle. Such information is therefore exempt from disclosure on the basis of section 40(2) of FOIA.
27. In light of this finding he has not gone on to consider whether the redacted information is also exempt from disclosure on the basis of section 41(1) of FOIA.

Time taken to respond to the request

28. Section 1(1) of the FOIA 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.'*
29. Section 10(1) of the FOIA provides that 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.

30. If a public authority wishes to rely on an exemption in order not to comply with either of the duties contained section 1(1) then under section 17(1) it must provide the requester with a refusal notice within 20 working days.
31. However, section 10(3) of FOIA further provides that if a public authority is seeking to rely on a qualified exemption it does not need to comply with the requirements of section 1(1) until such time as is reasonable in the circumstances. Similarly, section 17(3) confirms that a public authority does not need to inform the complainant of the outcome of its public interest considerations until such time as is reasonable in the circumstances.
32. Although the term 'reasonable' is not defined in the legislation, in the Commissioner's view this additional time taken should not normally exceed an additional 20 working days, which is therefore 40 working days in total to deal with the request. In the Commissioner's view, any extension beyond this time should be exceptional.
33. The complainant has complained about the amount of time the FCO took to process his request. The request was sent on 9 March 2015. The FCO contacted the complainant on 9 April 2015 and explained that it needed additional time to consider the balance of the public interest in respect of the exemptions contained at sections 37(1)(b) and 38(1)(a) of FOIA. It informed him of the outcome of its considerations on 15 May 2015; it decided to no longer rely on these qualified exemptions - and also disclosed some information.
34. The FCO issued its public interest extension notice within 20 working days of the request, citing exemptions 37(1)(b) and 38(1)(a). However, it took a total of 46 working days to complete its public interest considerations and also disclose some of the requested information. Nevertheless, in the circumstances of this case (some of which the complainant is not aware of as they relate to the content of the withheld information) the Commissioner is satisfied that the short period of time taken beyond 40 working days is not unreasonable. The FCO has not therefore breached section 17(3) of FOIA and nor has it breached 10(1).
35. However, the FCO ultimately decided to rely on the absolute exemptions contained at sections 23(1), 40(2) and 41(1) of FOIA to withhold some of the requested information. Under section 17(1) the FCO was under a duty to inform that complainant that it was relying on these exemptions within 20 working days of his request. As it failed to do so it therefore breached section 17(1) of FOIA.

Right of appeal

36. 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 123 4504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

37. 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.
38. 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

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