

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 January 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 concerning communications between it and Tony Blair, Tony Blair Associates or the Office of Tony Blair about the subject of Kazakhstan. The FCO provided the complainant with some of the information falling within the scope of his request but sought to withhold the remainder on the basis of sections 27(1)(a) (international relations), 40(2) (personal data) and 41(1) (information provided in confidence). The Commissioner has concluded that the withheld information is exempt from disclosure on the basis of sections 41(1) and 40(2) of FOIA.

Request and response

2. The complainant submitted a request to the FCO on 6 March 2015 seeking the following information:

'Since January 2010, information concerning communications between, on the one hand, the Foreign and Commonwealth Office and, on the other hand, Tony Blair or Tony Blair Associates or the Office of Tony Blair, about Kazakhstan.'
3. The FCO responded on 9 April 2015 and confirmed that it held information falling within the scope of the request but it considered this to be exempt from disclosure on the basis of sections 27 (international relations) and 43 (commercial interests) of FOIA. However, it needed further time to consider the balance of the public interest test.

4. The FCO issued a similar letter on 11 May 2015.
5. The FCO provided the complainant with a substantive response on 5 June 2015. It provided him with some of the information falling within the scope of his request but explained that other information was being withheld on the basis of sections 40(2) (personal data) and 41(1) (information provided in confidence) of FOIA. The FCO explained that it was no longer seeking to rely on the exemptions contained at sections 27 and 43.
6. The complainant contacted the FCO on 9 June 2015 and asked it to conduct an internal review of this decision.
7. The FCO informed him of the outcome of the review on 4 August 2015. The review upheld the application of the exemptions contained at sections 40(2) and 41(1).

Scope of the case

8. The complainant contacted the Commissioner on 5 August 2015 in order to complain about the FCO's decision to withhold information falling within the scope of his request. During the course of the Commissioner's investigation, the FCO confirmed that in addition to seeking to withhold this information on the basis of sections 40(2) and 41(1), it did in fact consider section 27(1)(a) to apply to some of the withheld information.

Reasons for decision

Section 41 – information provided in confidence

9. Section 41 of FOIA states that:

'(1) 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.'

10. Therefore for this exemption to be engaged two criteria have to be met; the public authority has to have obtained the information from a third party and the disclosure of that information has to constitute an actionable breach of confidence.

11. With regard to whether disclosure would constitute an actionable breach of confidence the Commissioner follows the test of confidence set out in *Coco v A N Clark (Engineering) Ltd* [1968] FSR 415. This judgment suggested that the following three limbed test should be considered in order to determine if information was confidential:

- Whether the information had the necessary quality of confidence;
- Whether the information was imparted in circumstances importing an obligation of confidence; and
- Whether an unauthorised use of the information would result in detriment to the confider.

12. However, further case law has argued that where the information is of a personal nature it is not necessary to establish whether the confider will suffer a detriment as a result of disclosure.

Was the information obtained from a third party?

13. The FCO explained that the information withheld on the basis of section 41(1) concerns information received from Tony Blair Associates (TBA). The Commissioner has reviewed the information in question and is satisfied that this is an accurate description of it. Section 41(1)(a) is therefore met as the FCO clearly received this information from a third party.

Does the information have the necessary quality of confidence?

14. 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; information which is of importance to the confider should not be considered trivial.

15. The Commissioner is satisfied that the information is clearly not otherwise accessible and moreover given its content, focusing as it does on the work of TBA's work in Kazakhstan, is clearly more than trivial.

Was the information obtained in circumstances importing an obligation of confidence?

16. The FCO explained that this information was passed to it with an implied expectation that it would be kept confidential. Given the content of the redacted information the Commissioner is satisfied that this criterion is met.

Would disclosure be detrimental to the confider?

17. The FCO explained that the information reported on the work of TBA in Kazakhstan. The FCO argued that if this information was disclosed it would damage the reputation of TBA because the government of Kazakhstan would be less likely to trust them with confidential information. This would impair their work there and make it less likely for them to gain the access and trust they needed to operate efficiently.
18. In light of the content of the information the Commissioner accepts that its disclosure would be likely to have detrimental consequences for TBA as it would clearly undermine third parties expectations, in this case the government of Kazakhstan, that any frank conversations that they had with the organisation would be treated confidentially.

Public interest defence

19. However, although section 41 is an absolute exemption, the law of confidence contains its own built in public interest test with one defence to an action being that disclosure is in the public interest.
20. The complainant argued that disclosure of the information he requested was in the public interest for the following reasons: Firstly, to uphold public confidence that records are kept of communications which might influence international relations. Secondly, to provide assurance that there is transparency about Britain's relationship with Kazakhstan. Thirdly, to ensure that money is correctly spent in communicating with third parties about relations with foreign countries.
21. The FCO acknowledged that there was a public interest in disclosure for reasons of transparency in the UK-Kazakhstan relationship and furthermore in the relationship between those working on behalf of a former Prime Minister, ie TBA, and the government of Kazakhstan.
22. The Commissioner agrees that there is a public interest in disclosure of information that would inform the public as to how the UK conducts its relations with other states, in this case Kazakhstan. Moreover, the Commissioner acknowledges that given the political situation in Kazakhstan, and as a consequence the apparent controversy of TBA working with the Kazakh government, he agrees that there is a genuine public interest in disclosure of information which would shed light on TBA's work in the country.¹ However, the Commissioner is conscious of

¹ For example: <http://www.telegraph.co.uk/news/politics/tony-blair/11052965/Tony-Blair-gives-Kazakhstans-autocratic-president-tips-on-how-to-defend-a-massacre.html>

the sensitive nature of the discussions to which the information withheld under section 41 relates. In the Commissioner's view, it is clear that disclosure of such information would be likely to have detrimental consequences for TBA's work in Kazakhstan but could also have potentially detrimental consequences for the FCO if third parties reached the view that the FCO could not be trusted to protect confidential information. In the Commissioner's opinion such an outcome would be firmly against the public interest as it would impact on the UK government's ability to maintain effective relations with other States. The Commissioner has therefore concluded that the public interest in disclosing the information does not outweigh the public interest in maintaining the confidence.

Section 40 – personal data

23. Section 40(2) of FOIA 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).
24. 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.'

25. The FCO withheld the names and contacts details of FCO staff whose details are not already in the public domain and the names of staff and contact details of TBA. The Commissioner accepts that such information constitutes personal data within the meaning of section 1 of the DPA as they clearly relate to identifiable individuals.
26. The FCO argued that disclosure of such information 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.'

27. 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?
28. 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.
29. 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.
30. The FCO argued that individuals both in its organisations, and in TBA, would have a reasonable expectation that their name and contact details would not be disclosed in this context. Moreover, the FCO noted that

TBA had requested the redaction of information that could identify their employees.

31. The Commissioner accepts that individuals would have had a reasonable expectation that their names will not be disclosed in the context of the request. In respect of the FCO employees, he accepts that the individuals concerned were carrying out public functions and must therefore have the expectation that their actions in that regard will be subject to a greater scrutiny than would be the case in respect of their private lives. However, he is particularly mindful of the fact that the officials were not in public facing roles.
32. In view of the above, the Commissioner finds that it would have been unfair to disclose the names of the junior officials in question. Disclosure would have contravened the first data protection principle. The FCO was therefore entitled to withhold the names of the officials on the basis of section 40(2).
33. With regard to the personal data of TBA employees, the Commissioner is satisfied from the content of the information that those individuals would all have had a reasonable expectation that their names and contact details would not be disclosed under FOIA. In light of such an expectation the Commissioner accepts that disclosure of the information would breach the first data protection principle and thus such information is exempt from disclosure on the basis of section 40(2) of FOIA. In addition, for completeness, he does not consider that any Schedule 2 condition could apply in the circumstances of this case.
34. In light of his findings in respect of sections 41(1) and 40(2), the Commissioner has not considered whether the withheld information is also exempt from disclosure on the basis of section 27(1)(a) of FOIA.

Right of appeal

35. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

36. 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.
37. 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

Jonathan Slee
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