

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 November 2016

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

Decision (including any steps ordered)

1. The complainant submitted three requests to the Foreign and Commonwealth Office (FCO) seeking information it held about Hemant Lakhani, who was convicted in the United States of attempting to support terrorism and subsequently died in prison. The FCO sought to withhold the information falling within the scope of these requests on the basis of the following sections of FOIA: 27(1)(a) (international relations); 38(1)(a) (health and safety); 40(2) (personal data) and 42(1) (legal professional privilege). The Commissioner is satisfied that the withheld information is exempt from disclosure on the basis of either section 38(1)(a) or section 40(2) of FOIA.

Request and response

2. The complainant submitted three related requests to the FCO between November 2015 and June 2016 all of which sought information about Hemant Lakhani.¹ The Commissioner has set out the FCO's responses to each of these requests below.

¹ Mr Lakhani, a British businessman, was found guilty in April 2005 by a US court of attempting to support terrorism. Mr Lakhani had denied the charges arguing that he was a victim of entrapment. He was given a prison sentence of 47 years and died, in prison, in 2013.

16 November 2015 request

3. The complainant submitted a request to the FCO on 16 November 2015 which sought the following information:

'FCO documents about Mr Lakhani covering the period 2011-2013. I believe he had intermittent contact with the FCO during this period of his incarceration'.

4. The FCO contacted the complainant on the following dates and explained that it needed further time to consider the balance of the public interest test in respect of the exemption contained at section 27 (international relations) of FOIA: 14 December 2015, 13 January, 10 February, 6 March and 8 April 2016.
5. The FCO provided him with a substantive response to this request on 6 May 2016. The response explained that information falling within the scope of the request was considered to be exempt from disclosure on the basis of the exemptions contained at the following sections of FOIA: 21 (information reasonably accessible); 38(1)(a) (health and safety) and 40(2) (personal data) and section 42 (legal professional privilege).
6. The complainant contacted the FCO on 15 May 2016 in order to ask for an internal review of this decision.
7. The FCO informed him of the outcome of the internal review on 9 August 2016. The review upheld the application of the exemptions contained at sections 38, 40 and 42 of FOIA. However, the review concluded that section 21 had been incorrectly applied.

9 May 2016 request

8. The complainant submitted following request to the FCO on 9 May 2016 seeking:

'FCO documents about Mr Lakhani covering the period 2006-08. I believe he had intermittent contact with the FCO during this period of his incarceration'.

9. The FCO responded to the request on 1 June 2016. It explained that it considered the information it held to be exempt from disclosure on the basis of the exemptions contained at the following sections of FOIA: 21, 27, 38, 40 and 42.
10. The complainant contacted the FCO on 2 June 2016 and sought an internal review of this decision.

11. The internal review, issued on 9 August 2016, concluded that sections 27, 38 and 40 had been correctly applied. However, the review found that sections 21 and 42 did not apply.

3 June 2016 request

12. The complainant submitted the following request to the FCO on 3 June 2016:

'I am making a freedom of information request requesting any documents concerning the US imprisonment of UK citizen Hemant Lakhani during the period of 2009-10. A colleague passed on FCO documents covering the period 2003-05, when Lakhani was arrested, charged and then put on trial and your department has responded to my previous requests covering the period of 2006-08 (0474-16) and 2011-13 (1039-15).'

13. The FCO responded on 27 June 2016 and confirmed that it held information falling within the scope of this request but it was seeking to refuse the request on the basis of sections 14(1) (vexatious) and 14(2) (repeated request) of FOIA.
14. The complainant asked for an internal review of this refusal on 10 July 2016.
15. The internal review, issued on 9 August 2016, concluded that both sections 14(1) and 14(2) had been correctly applied.
16. The FCO subsequently withdrew its reliance on the provisions contained within section 14 of FOIA and issued the complainant with a revised response on 31 October 2016. The revised response confirmed that the FCO held information falling within the scope of this request but argued that it was exempt from disclosure on the basis of the exemptions contained at sections 21, 38 and 40 of FOIA.²

Scope of the case

17. The complainant contacted the Commissioner on 10 August 2016. At the point that this decision notice is being issued, the FCO is seeking to rely on the exemptions set out below in relation to each of the three requests:
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² The FCO subsequently provided the complainant with the document which it had initially sought to withhold on the basis of section 21 of FOIA.

- Request of 16 November 2015 – sections 38(1)(a), 40(2) and 42(1)
- Request of 9 May 2016 – sections 38(1)(a), 40(2) and 27(1)(a)
- Request of 3 June 2016 – sections 38(1)(a) and 40(2).

Reasons for decision

Section 38(1)(a) – health and safety

18. As noted above the FCO has relied on this exemption to withhold some of the information which falls within the scope of all three requests. Although this exemption has been applied to three separate requests, the FCO's rationale for applying this exemption to each of the requests is the same.
19. Section 38(1)(a) states that
- 'Information is exempt information if its disclosure under this Act would, or would be likely to—*
- (a) endanger the physical or mental health of any individual,*
20. In order for a prejudice based exemption, such as section 38(1)(a) to be engaged the Commissioner considers 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 – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden

on the public authority. The anticipated prejudice must be more likely than not.

The FCO's position

21. The FCO argued that in considering the disclosure of information about the death of British citizens overseas it has a responsibility to consider the views and feelings of the deceased's next of kin. The FCO noted that in many cases they find it exceptionally difficult to come to terms with the death of a loved one overseas and the disclosure of information about the circumstances of the death, under FOIA and therefore the disclosure of the information to the world at large, can be extremely distressing and traumatic. In the circumstances of this particular case the FCO emphasised that the information in the scope of the three requests was relatively recent, and moreover that Mr Lakhani had only died two years before the complainant had submitted his first request. Furthermore, the FCO emphasised that the information withheld under this exemption was of a personal nature and it was satisfied that disclosure of this type of information in relation to Mr Lakhani's situation would, rather than simply being likely to, cause distress to his family.

The complainant's position

22. The complainant argued that the FCO is simply guessing that the family members may be distressed if this information is disclosed under FOIA because as far as he was aware, the FCO did not contact the family themselves. The complainant noted that the FCO had only recently started to apply section 38 to requests which concerned the death of British citizens abroad. He gave the Commissioner a number of examples of previous requests where he had been provided with information about the death of British citizens abroad. He therefore argued that the FCO were adopting an inconsistent position and he requested that this exemption be removed.

The Commissioner's position

23. With regard to the first criterion, the Commissioner is satisfied that the nature of the harm envisaged by the FCO clearly relates to the applicable interests which section 38(1)(a) is designed to protect. In relation to the second criterion, having considered the content of the withheld information the Commissioner is satisfied that there is a causal relationship between the disclosure of this information and harm and distress potentially occurring to Mr Lakhani's family. Finally, in respect of the third criterion, the Commissioner is satisfied that the likelihood of this harm occurring is clearly one that is more than hypothetical; rather in her view there is a real and significant risk of this occurring. Furthermore, the Commissioner is satisfied that the likelihood of harm

occurring is one that would occur rather than one that would simply being likely to occur. The Commissioner has reached this conclusion given the private and personal nature of information withheld under this exemption and the fact that Mr Lakhani had only died two years before these requests were submitted.

24. In finding that section 38(1)(a) is engaged, the Commissioner acknowledges the point the complainant made in respect of previous disclosures under FOIA by the FCO of information concerning the deaths of British citizens abroad. However, as the Commissioner has reiterated on a number of occasions, each request has to be considered on its own merits. In the circumstances of this case the Commissioner is satisfied that disclosure would be distressing to Mr Lakhani's family for the reasons outlined above.

Public interest test

25. Section 38 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption contained at section 38(1)(a) outweighs the public interest in disclosing the information.
26. The FCO argued that there was a clear – and compelling – public interest in ensuring that the families whose loved ones die when abroad are not caused further distress or harm by the disclosure of information under FOIA by the FCO.
27. The complainant argued that in the particular circumstances of this case there was a compelling case for disclosure of the information given the exceptional nature of Mr Lakhani's predicament.
28. The complainant suggested that since the 9/11 terrorist attacks, US terrorism investigations followed the pattern of the so-called "sting" operation. This is where a suspected terrorist is approached by law enforcement who claim to be terrorists and seeking help for their operations. The complainant suggested that these operations are usually confined to the US but the exceptional nature of the Hemant Lakhani case is that he was the first British citizen targeted by this type of operation.
29. The complainant argued that over the past 7 years, many of these terrorism investigations have come under criticism from other law enforcement professionals such as Mike German (former FBI agent and now at the Brennan Institute), journalists like Trevor Aaronson (author of The Terrorism Industry) and civil libertarian organisations such as the American Civil Liberties Union. The complainant suggested that the criticisms come down to how many of these early "sting" operations,

instead of finding terrorists, were instead targeting individuals who were fantasists or coerced into taking part in these operations by law enforcement informants despite earlier attempts in breaking off contact.

30. The complainant explained that during his research of this subject the Hemant Lakhani case was cited as another example of a situation where a vulnerable individual was manipulated by an informant to take part in a "sting" operation. As evidence of this the complainant cited an interview for National Public Radio where Lakhani claimed to know Tony Blair and the Pope whilst in prison.³ The complainant suggested that Mr Lakhani was therefore more likely a fantasist who may have been manipulated by an FBI informant. Consequently, the FCO argued that there was a public interest in revealing whether the FCO was aware of these issues and how they were considered, and in particular what support the FCO gave, or could have given, to Mr Lakhani.
31. The Commissioner acknowledges that given the circumstances surrounding Mr Lakhani's case, as identified by the complainant, there is understandably some interest in his conviction and imprisonment. Furthermore, the Commissioner accepts that there is some validity to the complainant's view that given these circumstances there is arguably a public interest in disclosing information which would reveal the support offered by the FCO to Mr Lakhani. Moreover, in the Commissioner's opinion it is clear that disclosure of the information withheld under this exemption would provide the public with a clear insight into the FCO's interactions with Mr Lakhani during the period 2006-13. However, in the Commissioner's opinion there is very strong public interest in ensuring that families whose loved ones die overseas are not subject to further unnecessary distress. As explained above, in the circumstances of this case, given the personal and sensitive nature of the withheld information, the Commissioner is satisfied that its disclosure would prove to be distressing to Mr Lakhani's family. Consequently, the Commissioner is satisfied that the public interest clearly favours maintaining the exemption contained at section 38(1)(a).

Section 40 – personal data

32. The FCO also withheld some of the requested information falling within the scope of the three requests on the basis of section 40(2) of FOIA which 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).

³ <http://www.thisamericanlife.org/radio-archives/episode/387/arms-trader-2009>

33. 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.'

34. The FCO explained that the information withheld on the basis of section 40(2) of FOIA consisted of the personal data of Mr Lakhani's family, junior FCO staff and US officials. The Commissioner accepts that such information constitutes personal data within the meaning of section 1 of the DPA as it relates to identifiable individuals.

35. 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.'

36. 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?
37. 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.
38. 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.
39. In relation to the personal data of Mr Lakhani's family, the FCO emphasised that this consisted of private and sensitive information relating to Mr Lakhani's situation and the family members had a high expectation that their privacy would be protected and that this information would not be disclosed. The FCO explained that it was usual practice that personal data on such sensitive issues is kept private unless explicitly agreed to by the individuals. Furthermore, the FCO argued that to disclose this information would result in further distress to the family members and moreover that there was no legitimate interest in the disclosure of this information.
40. In relation to the personal data of FCO officials, the FCO explained that it had a clear policy that the names of junior officials would not be released under FOIA and therefore the individuals in question had a reasonable expectation that their names and contact details would not be released into the public domain. Similarly, the FCO argued that given the context within which their names appear, the US officials would have a reasonable expectation that their names would not be disclosed.
41. The Commissioner accepts that the Mr Lakhani's family would have a clear expectation that their personal data would not be disclosed given

the content of the information, relating as it does to the imprisonment and death of Mr Lakhani, and the FCO's practise of not disclosing the personal data of families whose loved ones have died abroad.

Furthermore the Commissioner is satisfied that disclosure of the information would be distressing for Mr Lakhani's family given the personal and private nature of the information withheld on the basis of section 40(2). Consequently, in the Commissioner's view disclosure of the information which constitutes the personal data of Mr Lakhani's family would clearly be unfair and moreover the legitimate interest in protecting the family's privacy significantly outweighs any legitimate interests in the disclosure of this information.

42. With regard to the personal data of junior FCO officials, the Commissioner is satisfied that such officials would have a reasonable expectation in the circumstances of this case, based upon established custom and practice, of their names being redacted from any disclosures made under FOIA and thus the disclosure of their names would be unfair and breach the first data protection principle. This information is therefore exempt from disclosure on the basis of section 40(2) of FOIA.
43. Furthermore, the Commissioner is also satisfied that the US officials named in the withheld information would have a reasonable expectation that their names would not be released under FOIA given the context within which they appear and thus to do so would be unfair.
44. The FCO also cited sections 27(1)(a) and 42(1) to withhold some of the information falling within the scope of the requests. However, the Commissioner is satisfied that the small amount of information withheld under these exemptions is also exempt from disclosure on the basis of section 38(1)(a) or section 40(2) of FOIA. Therefore,, the Commissioner has not considered the FCO's reliance on sections 27(1)(a) or 42(1) in this decision notice.

Right of appeal

45. 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

46. 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.
47. 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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