

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 July 2018

Public Authority: The 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 it held about the death of her husband overseas. The FCO provided the complainant with some information under FOIA, and also made a number of additional disclosures to her under the Data Protection Act 1998. Under FOIA, the FCO sought to withhold further information on the basis of the exemption contained at section 40(2) (third party personal data) of FOIA. The complainant questioned the FCO's reliance on this exemption and also argued that the FCO was likely to withhold further information falling within the scope of her request. The Commissioner is satisfied that the information which the FCO has withheld in response to this request is exempt from disclosure on the basis of section 40(2) of FOIA. The only exception to this is a small portion of withheld information which the Commissioner considers to be the complainant's own personal data and thus is instead exempt from disclosure under FOIA on the basis of section 40(1). The Commissioner has concluded that on the balance of probabilities the FCO does not hold any further information falling within the scope of this request beyond the information previously disclosed to the complainant and that further information which it continues to withhold.

Request and response

2. The Commissioner understands that the complainant submitted the following request to the FCO on 25 March 2017:

'I am writing to request again for the file containing all correspondence relating to my husband [name redacted] death in June 2009'.

3. The FCO responded on 26 April 2017 and explained that it held information falling within the scope of the request but it considered section 27 (international relations) of FOIA to apply and it needed additional time to consider the balance of the public interest test.
4. The FCO provided the complainant with a substantive response to her request on 7 June 2017 and disclosed information to her. However, the FCO explained that some information had been redacted on the basis of section 40(2) (personal data) and section 27(1)(a) of FOIA.
5. The complainant contacted the FCO on 31 July 2017 in order to ask for an internal review of this response.
6. The FCO informed her of the outcome of the internal review on 4 September 2017. The review upheld the application of the exemptions cited in the refusal notice.

Scope of the case

7. The complainant contacted the Commissioner on 25 January 2018 in order to complain about the FCO's handling of her request. She asked the Commissioner to consider the following issues:
 - She sought to dispute the FCO's reliance on the exemptions contained at sections 27 and 40 of FOIA to withhold information falling within the scope of her request.
 - She also questioned the adequacy of the FCO's searches for information falling within the scope of this request. She emphasised that she was particularly interested in correspondence relating to the return of her husband's body and that information on this topic appeared to be absent from the disclosed material.
8. During the course of the Commissioner's investigation the FCO disclosed two further batches of information to the complainant. The FCO also confirmed to the Commissioner that it was no longer seeking to withhold any information from the complainant on the basis of section 27 of FOIA. Rather it was only seeking to rely on section 40(2) of FOIA.

9. During the course of the Commissioner's investigation, the FCO provided her with 199 separate documents which it said fell within the scope of this request. Some of these documents were provided to the complainant without any redactions; some were disclosed with redactions and a further set of documents have been withheld in full by the FCO.
10. The Commissioner's investigation of the first ground of complaint therefore focuses on whether the redactions made to this second set of documents, and whether the decision to withhold all of third set of documents, is permissible under FOIA.
11. It should be noted at this stage, of the information disclosed to the complainant by the FCO in response to this request, significant amounts of it constituted her own personal data as defined by the Data Protection Act 1998 (DPA). Such information is therefore exempt from disclosure on the basis of section 40(1) of FOIA. The FCO explained to the Commissioner that in processing this FOI request in order to be helpful to the complainant it had '*considered [the complainant's] personal information in the scope of the FOI request under the provisions of the DPA*'.

Reasons for decision

Section 40 – personal data

Section 40(2) – third party personal data

12. As noted above, the FCO continues to withhold information falling within the scope of this request on the basis of section 40(2) of FOIA. This section states that personal data is exempt from disclosure under FOIA if it is not exempt on the basis of section 40(1) of FOIA (ie if it is the requester's own personal data) and its disclosure would breach any of the data protection principles contained within the DPA.
13. 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.'
14. The information which the FCO is seeking to withhold on the basis of section 40(2) of FOIA consists of the names of junior staff within the FCO, the names of third parties eg lawyers or police family liaison

officers, and information about family members other than the complainant.

15. The Commissioner is satisfied that all of this information constitutes personal data and therefore is potentially exempt from disclosure on the basis of section 40(2) of FOIA.

16. The FCO argued that disclosure of this personal data would breach the first data protection principle. This 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.'

17. The relevant Schedule 2 condition in this case is the sixth one which states that:

'The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.'

18. 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?
19. 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.
20. 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.

The FCO's position

21. With regard to the redaction of the names of junior officials, the FCO noted that this was in line with its established custom and practice of removing such names from any FOI disclosures and therefore the staff in question would have had a reasonable expectation that their names would not be disclosed under FOIA.
22. With regard to the names of third parties, the FCO argued that they would also not expect their names – and thus their involvement in this matter – to be disclosed under FOIA.
23. Finally, the FCO argued that it had withheld the names of family members, other than the complainant, and additional personal data about these family members as they would have a clear expectation that such information would not be disclosed under FOIA. Moreover, the FCO argued that given the nature of information withheld, and the circumstances of the case ie involving the death of a family member abroad, disclosure of the information under FOIA could cause considerable distress to the individuals in question.
24. The FCO emphasised that given the circumstances of this request it had endeavoured to provide the complainant with as much information as

possible, hence its proactive provision of her own personal data falling within the scope of this FOI request under the provisions of the DPA.

The complainant's position

25. The complainant noted the FCO's reference to the reasonable expectations of the officials involved in this case but argued that they were doing important work on behalf of public authorities, and in particular, should have been acting in the interests of the deceased's family. The complainant therefore questioned why they would expect secrecy about their correspondence on this matter.
26. The complainant suggested that the FCO's other argument, that disclosure would cause distress, was also questionable and saw no evidence for this. The complainant argued if what the FCO meant that disclosure would cause embarrassment and discomfort, then that is no basis for withholding it, rather it would further the case for disclosing it in furtherance of transparency and accountability.
27. The complainant argued that the FCO appeared to have taken no account of the fact that countervailing factors can justify the disclosure of third party personal data under FOIA. The complainant drew the Commissioner's attention to the case of *Colleen Foster* which she argued confirmed that the private interests of the requester can constitute legitimate grounds for disclosure under FOIA.¹ She argued that she had a very compelling private interest in disclosure of this information.
28. In support of this she explained that her husband had died abroad in June 2009 as a result of his injuries following an attack by locals; the assailants were given minimal sentences by the local courts. She explained that given the circumstances, the UK public authorities, including the FCO liaised with the authorities in the country where her husband had died, and in all likelihood with each other, about matters such as the release of her husband's body and about the UK inquest into his death. The complainant explained that her husband's death was obviously incredibly traumatic for her and her family. However, this was compounded by the inexplicable and distressing delays they suffered in getting her husband's body released; it was only released to the family for cremation almost seven years after his death and the UK inquest only concluded in 2017.

¹ Upper Tribunal (Administrative Appeals Chamber), August 10, 2015, [2015] UKUT 449 (AAC)

29. The complainant argued that such delays were attributable, at least to a significant extent, to failures on the part of the UK authorities. She argued that she therefore had a very strong legitimate interest in finding out what information passed between the relevant UK authorities and their counterparts abroad, but also between the UK authorities themselves. The complainant argued that the case for such disclosure was not limited to her private interests alone; rather there was a broader public interest in transparency about the acts (or failures to act) of UK authorities. The complainant argued that transparency in this instance would not only help her family understand what happened but it would also help in holding UK authorities to account for their failures to act which would in turn help to ensure that future incidents of this type are handled better.

The Commissioner's position

30. With regard to the redactions of the names and contact details of junior officials at the FCO, the Commissioner accepts that it is the established custom and practice of the FCO, and indeed other central government departments, to redact the names and contact information of such officials from disclosures under FOIA. The Commissioner therefore accepts that the individuals in question would have had a clear, and indeed reasonable, expectation that their names and contact details would not be disclosed under FOIA. As a consequence, the Commissioner's accepts that some harm, albeit quite limited, would occur if such information was disclosed.
31. Nevertheless, the Commissioner recognises that the complainant has firmly argued that there is a compelling legitimate interest, both a private and public one, in the disclosure of the information that the FCO is seeking to withhold on the basis of section 40(2). The Commissioner obviously has considerable sympathy for the position that the complainant and her family have been placed in, not only in losing a family member in the manner in which they did, but the significant delay in them being able to arrange a cremation and for the UK inquest to be concluded.
32. However, in terms of balancing the legitimate interests under Schedule 2 of the DPA in respect of names/contact details of the junior officials within the FCO, the Commissioner is not persuaded that disclosure of such information is necessary in order to meet the legitimate interest identified by the complainant. In reaching this view, the Commissioner has taken into account the fact that it is the FCO as an organisation which is accountable for any decisions or actions, or indeed as the complainant has alleged inactions, in respect of this case. The junior officials named in the information itself are not solely or personally responsible for decisions they took; rather it is their superiors and the FCO which are accountable. Furthermore, the Commissioner would

emphasise that the information redacted is limited to names and contact details and thus the extent to which disclosure of such information would genuinely inform the complainant, and indeed the wider public, about the decision making in respect of this case is arguably limited. Moreover, the Commissioner would also note that the complainant is likely to be aware of the names of some of these officials anyway given that she has been in personal contact with them; in her view this further reduces the need for the disclosure of such names under FOIA.

33. In terms of the names and contact details of the junior officials then, the Commissioner is satisfied that disclosure would be unfair given their clear expectations that their names would not be disclosed under FOIA, and whilst there would arguably be a limited invasion of their privacy if these names were disclosed, disclosure of this particular information is not necessary despite the arguments advanced by the complainant. Such information is therefore exempt from disclosure on the basis of section 40(2) of FOIA.
34. In relation to the names of the third parties redacted from the information which has been disclosed, the Commissioner's decision is very similar to the findings in respect of junior officials. The names redacted include the names of lawyers and also the names of, what the Commissioner understands, to be junior officials at other public authorities. Again, in the Commissioner's view the individuals in question would have a reasonable expectation that their names and contact details would not be released under FOIA. She bases this primarily on established practice in relation to similar disclosures in the past and has also taken into account the age and subject matter of the information. Again, whilst the Commissioner accepts that the impact on the individuals in question may be relatively limited, for similar reasons she is not persuaded that disclosure of it is necessary to meet the interests identified by the complainant. Such information is also therefore exempt from disclosure on the basis of section 40(2) of FOIA.
35. Finally, in relation to the third party personal data concerning the complainant's family members, the Commissioner is satisfied that the individuals concerned would have a very clear expectation that their personal data would not be disclosed under FOIA in response to this request. Moreover, having examined this category of information the Commissioner is also satisfied that disclosure of it would be likely to have a distressing and/or damaging impact on the individuals in question. With regard to the legitimate interests in disclosure, given that the nature of information withheld extends beyond simply names and contact details, disclosure of this information would arguably increase the complainant's, and the public's, understanding of the FCO's actions in relation to the death of the complainant's husband. However, the Commissioner would stress that that in her view the disclosure of such information, given its content, would not aid the complainant in

understanding of the delays which occurred in this case. In light of this, and given cumulative weight of both the reasonable expectations of the family members and the consequences of disclosure, the Commissioner has also concluded that disclosure of this set of third party personal data would breach the first data protection principle and thus is exempt from disclosure on the basis of FOIA.

Section 40(1) – first party personal data

36. As explained above, information is exempt from disclosure on the basis of section 40(1) if it constitutes the personal data of the requester. There is a significant amount of information falling within the scope of this request which constitutes the personal data of the complainant, albeit that this information has been disclosed to the complainant and thus does not fall to be considered by the Commissioner in this notice. However, the Commissioner has identified a very small portion of information which the FCO has not disclosed to the complainant and which she considers to be the complainant's personal data. For the purposes of this notice, the Commissioner's decision is that this information is exempt from disclosure on the basis of section 40(1) of FOIA.

Does the FCO hold any further information?

37. As explained above, the complainant also asked the Commissioner to consider the adequacy of the FCO's searches for information falling within the scope of this request. She emphasised that she was particularly interested in correspondence relating to the return of her husband's body and that information on this topic would appear to be absent from the disclosed material. The complainant suggested that it must surely have been the case that the FCO corresponded with other UK authorities and/or authorities abroad on this topic.
38. In cases such as this where there is some dispute as to whether information falling within the scope of the request is held, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
39. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request.
40. In applying this test the Commissioner will consider the scope, quality, thoroughness and results of the searches, or as in the circumstances of this complaint, other explanations offered as to why the information is not held.
41. The Commissioner asked the FCO to explain the nature of the searches it had undertaken for information falling within the scope of the

complainant's request and to explain why such searches would have been likely to locate all relevant information.

42. In response the FCO explained that consular records are normally held on a system known as 'Casebook'. The FCO explained that this system was searched using the deceased's name as a search term. The FCO explained that searches of personal file areas and shared file areas were also undertaken by the team handling consular cases in the country where her husband had died. The FCO confirmed that no information about this matter had been deleted or destroyed.
43. The Commissioner is satisfied that the searches undertaken by the FCO were reasonable ones and on the balance of probabilities she is satisfied that the FCO does not hold any further information falling within the scope of this request beyond the information previously disclosed to the complainant and that further information which it continues to withhold.

Right of appeal

44. 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

45. 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.
46. 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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