

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 December 2022

Public Authority: Foreign, Commonwealth and Development Office

Address: King Charles Street
London
SW1A 2AH

Decision (including any steps ordered)

1. The complainant has requested information from the Foreign, Commonwealth and Development Office (FCDO) containing records of contacts between a named lawyer and the UK Government/Libya regarding the bombing of Pan Am Flight 103 over Lockerbie. The FCDO confirmed information was held but considered it exempt from disclosure under section 41(1) of FOIA.
2. The Commissioner's decision is that the FCDO has correctly engaged the exemption and there is not sufficient public interest in disclosure to override the duty of confidence. Section 41(1) therefore provides a basis for withholding the information and the FCDO is not required to take any steps.

Request and response

3. On 23 April 2022 the complainant made a request to the FCDO for information in the following terms:

"I understand that the FCO has the following folder in it's possession:

<https://discovery.nationalarchives.gov.uk/details/r/C17487356>

Reference: FCO 93/6784

Description: Contacts between Peter James, lawyer, and the UK and Libya regarding the bombing of Pan Am Flight 103 over Lockerbie,

December 1988

Date: 1992 Jan 1 - 1992 Dec 31

Held by: Creating government department or its successor, not available at The National Archives

Former reference in its original department: NFB 051/7

Legal status: Public Record(s)

I would like a copy of these documents to be released to me. I understand that some of it's contents were made public in 2009."

4. The FCDO responded on 24 May 2022 confirming it held the requested information but refusing to provide it under section 41 of FOIA.
5. The complainant requested an internal review on 24 May 2022 arguing that Colonel Gaddafi's regime no longer existed so the information could be disclosed. The complainant also referred to a link to a news report¹ which he stated showed some of the contents of the document had been made public in 2009.
6. The FCDO conducted an internal review and responded on 18 August 2022. The FCDO confirmed it had taken into account the fact the regime was no longer in place when responding and it considered the new report did not detail the origin of its information so the FCDO did not consider this proved some of the document was already in the public domain.

Scope of the case

7. The complainant contacted the Commissioner on 27 August 2022 to complain about the way their request for information had been handled.
8. The Commissioner considers the scope of his investigation to be to determine if the FCDO has correctly refused to provide the documents in the specified folder under section 41 of FOIA.

Reasons for decision

9. Section 41(1) of FOIA states that information is exempt information if it was obtained by a public authority from any other person and if its
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¹ [Gaddafi offered to hand over WPC's killers 17 years ago | Daily Mail Online](#)

disclosure to the public would constitute an actionable breach of confidence by that or any other person.

10. In this case the FCDO has used this exemption to withhold the contents of a folder containing any contacts between the lawyer Peter James and the UK and Libya regarding the bombing of Pan Am Flight 103.
11. The Commissioner accepts this information would have been received by the FCDO by another party. Having accepted this the Commissioner must next determine whether disclosure of that information would constitute a breach of confidence.
12. For a breach of confidence to occur the Commissioner must consider a three step test:
 - The information must have the necessary quality of confidence
 - It must have been imparted in circumstances importing an obligation of confidence, and
 - There must have been an unauthorised use of the information to the detriment of the confider.
13. Information will have the necessary quality of confidence if it is not already in the public domain and it is not trivial. In this case the information is clearly not trivial as it relates to the Lockerbie bombing and the FCDO states it is not in the public domain. The Commissioner has considered the news article the complainant linked to and whilst it does refer to minutes compiled by Peter James from a meeting with an adviser to the Gaddafi regime, as the FCDO points out it is unclear what the source of this information is and what exactly this information is but it appears to be related to different matter than the Lockerbie disaster. As such the Commissioner accepts the information has the necessary quality of confidence.
14. The Commissioner recognises that FOIA did not exist at the time this information was obtained so there would have been little expectation the information would be disclosed to the world at large. However, this is not the same as an expectation of confidence.
15. That being said, the Commissioner recognises that any discussions taking place regarding this incident with representative of the UK and Libyan governments would have taken place with an implicit expectation of confidence given the sensitivity of the discussions. Whilst Peter James may have expected the information to be shared within certain circles for security purposes it is highly unlikely there would have been any expectation the information would be disseminated more widely.

16. The Commissioner is therefore satisfied that any records of contacts between Peter James and the UK/Libya on this subject would contain information imparted in circumstances importing an obligation of confidence.
17. Finally, for the conditions to be met, the Commissioner must consider whether disclosure would cause detriment. The FCDO has provided the Commissioner with some additional explanations on this point that have not been included in this notice as they may reveal information that is not widely known by the public. The FCDO did indicate that it considered there would be detriment to Peter James if the information were to be disclosed; particularly there may be an impact to his reputation as a lawyer given the confidential nature of the discussions. The FCDO also considered that there could be detriment to the UK Government as disclosure may affect the willingness of other third parties to share information with the UK Government, particularly as the matter is still subject to criminal investigation.
18. It seems clear to the Commissioner that if the information were to be disclosed there could be an actionable breach of confidence brought against the FCDO by Peter James or the UK Government and as such the Commissioner is satisfied the exemption is engaged.
19. Section 41 is an absolute exemption not subject to the public interest test. However the common law duty of confidence contains an inherent public interest test.
20. The complainant's public interest arguments centre around the fact that Colonel Gaddafi's regime is no more and the [newspaper article](#) he has referred to shows that some information is already in the public domain so there is a public interest in releasing information to find out if the newspaper article provides an accurate report of what the document holds.
21. The FCDO and the Commissioner are fully aware that the regime is no longer in place but there is still a duty to protect information passed to the UK Government in confidence. Again the FCDO stresses that the leaked documents referred to in the newspaper article are not described in detail and the FCDO has no way of verifying where these documents came from, who holds the information or how this was obtained. As such the Commissioner cannot agree that there is a public interest in disclosing the information to ascertain if the article provides accurate descriptions of what was actually discussed as it is not clear what documents the article is referring to and whether this is the same information that is held by the FCDO.

22. Whilst there will be some wider public interest in the disclosure of records of any discussions between Peter James and the UK/Libya regarding Lockerbie the Commissioner accepts that as this is still an ongoing criminal matter there is not sufficient public interest to warrant the FCDO breaking the obligation of confidence.
23. The Commissioner is therefore satisfied that the requested information would meet the conditions under section 41(1) and that the FCDO is therefore entitled to rely on section 41 to withhold the information.

Right of appeal

24. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

25. 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.
26. 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

Jill Hulley
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF