

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 16 August 2010

Public Authority: Foreign and Commonwealth Office
(The 'FCO')

Address: Information Management Group
Information and Technology Directorate
Old Admiralty Building
London
SW1A 2PA

Summary

The complainant requested recorded information about her late husband's death. The public authority replied that it held no relevant recorded information. It maintained its position in its internal review.

The Commissioner has carefully considered this case and has found, on the balance of probabilities, that no relevant recorded information was held at the date of the request. He therefore upholds the public authority's position.

He has however found a procedural breach of section 10(1) as the public authority failed to provide a response within the statutory timescales, but requires no remedial steps to be taken.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. The complainant's husband died in June 1990 in Riyadh, Saudi Arabia.
3. An inquest was held shortly afterwards that found an open verdict.
4. The complainant has requested information in this case in order to uncover the truth behind his death and to understand the investigations that may have been conducted by the public authority.

The Request

5. On 17 November 2009 the complainant explained the background of her late husband's death to the public authority and made the following request for information to be processed in accordance with section 1(1) of the Act:

'Under the Freedom of Information Act, I wish to apply for the release of any documents held by the Foreign Office or other government bodies relating to the death of my late husband.'

6. She also specified that this request should embrace the following four categories of documents:

(1) *'Police reports from Malaz Police Station in Riyadh, including [a] statement by Leica's local agent, Mr Fahmy, and police doctor's report.'*

(2) *'Documents from the office of Mr Patrick Owens, British Consul in Riyadh, relating to the death of my late husband and also to my discussions with Mr Owens on 31.12.90.'*

(3) *'Any documents detailing Foreign Office investigations into the events surrounding my late husband's death.'*

(4) *'Despite my specific request that toxicology tests be carried out prior to release of the body for burial, it was not until the Inquest that I learnt such tests had not been performed. Any documentation relating to the reasons for this are also requested.'*

7. On 22 December 2009 the public authority issued its response. It explained that it had conducted a full search of its records, including

those at its embassies in Riyadh and Jeddah, but was unable to locate any information that was relevant to the request. It explained that had it retained information, because of its age, it would have been transferred to its archives. It confirmed that it had checked both its paper and electronic files and had not found any information. It confirmed that its retention policy only required it to hold information for three years after the last action.

8. On 27 December 2009 the complainant requested that the public authority conduct an internal review. She explained that:

- She was unhappy with the service that she received;
- She found the public authority's retention policy incomprehensible in the circumstances;
- An open verdict was decreed at the Inquest, the cause of death still needed to be established;
- The way the public authority acted in December 1990 upset her and that she believes that this was an injustice; and
- She does not believe the public authority's veracity in saying that no relevant recorded information is held.

9. On 24 February 2010 the public authority communicated the results of its internal review. It explained that a full examination of how the request was handled was undertaken. It said that it had conducted a reasonable search in both London and its embassies in Riyadh and Jeddah. It confirmed that its retention policy was as stated in its response, but that it had searched its archives just in case. It explained that it could not find any relevant recorded information about her late husband and apologised that this was so. It then provided the Commissioner's details as a further right of appeal.

The Investigation

Scope of the case

10. On 27 February 2010 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:

- That she did not believe that the information had been destroyed in light of the open verdict that was recorded at the Inquest;
 - That the Commissioner should take into account her submissions in her request for an internal review dated 27 December 2009;
 - That the Commissioner should take all possible steps to locate the documents relating to this matter and release them to her without further delay; and
 - That the information was required in order to ascertain the true circumstances of her late husband's death.
11. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act. In particular the Commissioner can only consider information access matters and cannot adjudicate on the quality of investigations or actions that occurred in 1990. The complainant has confirmed that she understood that this was so on 14 May 2010.
12. In addition on 14 May 2010 the complainant confirmed that she was content that the scope of this case would be:
- *To determine, on the balance of probabilities, whether relevant recorded information is held by the FCO for your request dated 20 November 2009 and, if so, whether this information can be disclosed to the public.*
13. For clarity, the Commissioner believes that it is important to note that he can only consider what relevant recorded information the public authority holds in this case (and not other public authorities). This is because the obligation imposed under section 1(1) of the Act is placed upon the public authority that receives the request.

Chronology

14. 29 March 2010: The Commissioner wrote to the complainant to explain that he required one further document to take this case forward.
15. 6 April 2010: The complainant provided this document and explained that she did not want the Commissioner to cause her further delays.

16. 8 April 2010: The Commissioner confirmed to the complainant and the public authority that he had received an eligible complaint that he would be taking forward.
17. 28 April 2010: The complainant wrote to the Commissioner to complain about the delay that she had experienced in this case.
18. 14 May 2010: The Commissioner responded to the complainant. He apologised for the delay, confirmed the Commissioner's remit, explained the proposed scope of this investigation and asked for any further evidence that the complainant wished for him to take into account.
19. On the same day, the complainant replied. She confirmed that she understood the Commissioner's remit, explained that she accepted the Commissioner's proposed scope of the investigation and that she had no further evidence that she wished the Commissioner to consider. The Commissioner acknowledged receipt of the complainant's email.
20. 17 May 2010: The Commissioner wrote to the public authority making a number of enquiries to understand how it holds information, what it had searched, what its retention policy was and to obtain further evidence about why it believed that it held no relevant recorded information in this case. He also provided an update to the complainant.
21. 21 June 2010: The Commissioner telephoned the public authority to chase a response to his letter. The public authority then provided the Commissioner with a response to his enquiries.
22. 22 June 2010: The Commissioner wrote to the complainant to ask for clarification about the circumstances in 1990.
23. 23 June 2010: The complainant provided appropriate clarification.

Findings of fact

24. The public authority has the following premises in Saudi Arabia:
 - An embassy in Riyadh.
 - An embassy in Jeddah.
 - A trading office in Al Khobar.
25. The public authority has provided the Commissioner with a copy of its present retention policy. This states that the public authority only retains consular case files for three years from the date of last action.

26. In addition the Commissioner has also been informed about the history of this policy. The public authority explained that it came into operation on November 2004 and before that consular case files were retained for six years.
27. In 1982 the Court of Appeal ruled that it was the duty of the Coroner to conduct an Inquest for Britons who died abroad in violent or unnatural circumstances once their bodies were returned.¹ In this case, the Commissioner has confirmed that the body was returned to England and the Inquest was conducted there.

Analysis

Substantive Procedural Matters

Is relevant recorded information held?

28. It is important to note that the Commissioner is limited to considering whether or not recorded information exists at the time of the request (or requests) for information. This is the only information that a public authority is obliged to provide. This is made clear in section 1(4) of the Act. The time of the request is 17 November 2009 in this case.
29. The public authority's position is that it does not hold any relevant recorded information in this case. It has undertaken the relevant searches and has not found any.
30. The complainant's position is that the public authority must hold relevant recorded information. She explained that the inquest recorded an open verdict and in her view this means that the case remained live and information must be held for it.
31. When investigating cases involving a disagreement as to whether or not further information is in fact held by a public authority, the Commissioner has been guided by the approach adopted by the Information Tribunal in the case of *Linda Bromley & Others v Information Commissioner and Environment Agency* (EA/2006/0072). In this case the Tribunal indicated that the test for establishing

¹ *R v Her Majesty's Coroner for the Eastern District of the Metropolitan County of West Yorkshire ex parte Ronald Smith* [1982]

whether information was held by a public authority was not one of certainty, but rather the balance of probabilities.

32. He has also been assisted by the Tribunal's explanation of the application of the 'balance of probabilities' test in the same case. It explained that to determine whether information is held requires a consideration of a number of factors including the quality, scope and thoroughness of the search or searches conducted. It also requires considering, where appropriate, any other reasons offered by the public authority to explain why the information is not held.
33. The standard of proof has been recently confirmed by the Tribunal decision of *Innes v Information Commissioner* (EA/2009/0046). It stated at paragraph 41 that:

"This Tribunal is not prepared to introduce any kind of sliding scale in terms of the standard of proof beyond the balance of probabilities. The House of Lords and other senior courts in recent decisions have confirmed the importance of maintaining the core principle -- in civil proceedings -- that the correct test is the balance of probabilities. It is only in relation to Asylum and childcare and child safety issues that there is any kind of variation."

34. The Commissioner has applied this standard of proof to this case and has moved to consider each of the factors identified in paragraph 32 in turn:

- *The quality of the search*

35. The Commissioner accepts that the public authority has read the request correctly. In the Commissioner's view, it was correct to search for any information that it holds that relates to the complainant's late husband and he is satisfied that this is what the public authority has done.

- *The scope and thoroughness of the search*

36. The Commissioner has asked the public authority to detail the searches that have been undertaken for it to come to the view that it did not hold any relevant recorded information in this case.
37. It explained that it had first searched its embassies in Riyadh and Jeddah. These were its only embassies in Saudi Arabia and were the only places where information would have been likely to be, had it been held. It explained that it also had a trading office in Al Khobar,

but that this office only holds information about trade and would not hold anything about this kind of situation.

38. The Commissioner accepts that the embassies in Riyadh and Jeddah were the appropriate locations to search first.
39. The public authority also explained how it had conducted this search. It explained that its intranet held guidance about where one needs to search to look for information and it provided the Commissioner with that guidance.
40. This guidance explained how members of staff can search the electronic files that are held. It details how to use the search facilities to check their personal area (the files that they use routinely), the shared area (the files used by their department) and their own MS Outlook boxes (the emails that they send). The Commissioner is satisfied that this guidance is accurate and proportionate in this case.
41. The public authority also explained that for files of this age, the only other possibility, if they had been kept, would be that they had been transferred to its archive in London. However, it explained that it only tended to store files that it regarded as high profile.
42. The public authority consulted its archives department. It conducted the following manual searches:
 - The head of the Retrieval Section checked lists of files returned from the diplomatic posts in Riyadh and Jeddah, but no relevant files were listed. It explained that posts only return archive files where they contain material not already registered in London and that there were few files to check;
 - They also checked the registers relating to Saudi Arabia for the years 1990-1992 belonging to the Middle East Department;
 - From those registers, some files were identified because they may have contained relevant recorded information. They were requested from the archive and checked manually, but contained no information about the complainant's deceased husband; and
 - They also checked an index of file names for any other references to the complainant's deceased husband, but found nothing.

43. The public authority confirmed that it had no electronic documents in respect of that period and so electronic searches could not be carried out.
44. However, it did introduce an electronic casework system in 2003 and for completeness, it searched the system it to see if it held any new records created since then in relation to the requested information. Its searches were not successful.
45. The public authority also confirmed that all these searches were conducted by full time members of staff with considerable experience in working with its archives. They had full access to the finding aids that the public authority had at that time – file registers, nominal indexes, subject indexes and access to its electronic records management system.
46. The Commissioner considers that all in all the public authority has evidenced that it has undertaken a rigorous and well focused search in this case. The Commissioner believes that this provides robust evidence that the recorded information is no longer held.
 - *Other reasons offered by the public authority to explain why the information is not held*
47. The public authority explained that its retention policy required it only to hold its consular files for three years after the date of last action. Prior to November 2004, its old retention policy only required it to hold its consular files for six years.
48. In this case it explained that the request was over 19 years after the date when it viewed its involvement was over. While it could provide no evidence of the file being destroyed, it was highly likely that it would have been destroyed in line with its retention policy.
49. The Commissioner believes that this argument is highly persuasive in this case and strongly points to the fact that no relevant recorded information is held.
50. The complainant has raised the issue that the Coroner's Inquest on her late husband recorded an open verdict in 1990 and therefore the case should have been regarded as live since it may be necessary to reconvene the Inquest to find out the cause of the death. The Commissioner appreciates that the issue is objectively serious, but has not been convinced that it would be likely to warrant the retention of the information for this length of time.

51. It may help to clarify the Coroner's role. He is responsible for investigating any death reported to him and must hold an inquest where he is not sure that the death was caused by natural causes.²
52. He has an option to come to an open verdict where there is insufficient evidence to come to any other verdict. It is possible, although rare, that police and the Coroner can reopen investigations where an open verdict has arisen.
53. The Commissioner has asked the public authority whether it believed it had any legal requirement to hold the information after the passage of time in this case. It explained that it did not.
54. The Commissioner asked the public authority whether it would have any business purpose to hold information where an open verdict was arrived at beyond three years. It explained that it was not normally told the outcome of an Inquest, and even when it was, it would not keep the file open solely on that basis. It stated that it did keep some reports on open verdicts, but only when it had another reason to hold them, such as where they are very high profile. It explained that the only time it believed that it had a business purpose to hold onto the file was where it was made aware of a fresh inquest or further legal inquiry within the retention period. In this case, although it could not be certain, as it holds no recorded information about it, it believed it was not. It also confirmed that it had no procedures manual or anything similar about what its approach would be in these circumstances.
55. The Commissioner also notes that the public authority's website confirms that it does not see its role as being to investigate deaths abroad, although they will consider making representations on behalf of its citizens in the event that the country appears to be failing to carry out an investigation in accord with its own procedures³. The Commissioner believes that this offers further evidence that the public authority did not have a business purpose to retain the information from 1990 about the complainant's deceased husband.
56. Overall, the Commissioner finds that the public authority did not have either a legal or business reason to hold recorded information at the date of the request. He believes that this is further persuasive evidence that it did not hold any recorded information in this case at that date.

² Section 8 of the Coroner's Act 1988

³ <http://www.fco.gov.uk/en/travel-and-living-abroad/when-things-go-wrong/death-abroad>

▪ *Conclusion*

57. In conclusion, the Commissioner is satisfied that the searches that have been conducted are reasonable and the public authority's reasoning about why it does not hold any relevant recorded information is convincing. He is satisfied on the balance of probabilities that there was no recorded information held at the date of the request about the complainant's deceased husband.
58. He therefore finds that the public authority has complied with its obligations in section 1(1)(a) in correctly denying that it held relevant recorded information in this case.

Procedural Requirements

59. Section 10(1) (full copy in the attached legal annex) provides that a response must be issued that accords with section 1(1) within twenty working days of receipt of the request.
60. In this case the public authority took more than twenty working days to issue a response that accorded with section 1(1)(a) [to deny that relevant recorded information was held in this case] and the Commissioner confirms that this was a breach of section 10(1).

The Decision

61. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- *On the balance of probabilities it correctly denied that it held any relevant recorded information in respect to the request that it received on 17 November 2009.*
62. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- *It failed to deny that it held relevant recorded information in twenty working days and therefore breached section 10(1).*

Steps Required

63. The Commissioner requires no steps to be taken.

Right of Appeal

64. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 16th day of August 2010

Signed

**Anne Jones
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

The Freedom of Information Act 2000

Section 1 - General right of access to information held by public authorities

(1) 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.

(2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.

(3) Where a public authority—

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.

...

Section 10 - Time for compliance with request

(1) Subject to subsections (2) and (3), 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.

(2) Where the authority has given a fees notice to the applicant and the fee is paid in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.

(3) If, and to the extent that—

(a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or

(b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.

...