

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 June 2016

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

Decision (including any steps ordered)

1. The complainant submitted a request to the Foreign and Commonwealth Office (FCO) for information about the activities and death of British citizen Helen Smith in Saudi Arabia in May 1979 that covered the period June 1981 to December 1981. The FCO argued that the request was vexatious because complying with it would place a grossly oppressive burden on it. It therefore refused the request on the basis of section 14(1) of FOIA. The Commissioner has decided that the FCO is entitled to refuse the request on this basis.

Request and response

2. The complainant sent the following request to the FCO on 11 January 2016:

'This is a follow up to another request that is still under consideration (RE: 1032-13).

I am looking for any documents relating to the activities and death of British citizen Helen Smith in Jeddah on May 1979 that cover the period 1st June 1981 to 31st December, 1981.¹

¹ The complainant's previous request sought information about the same subject matter but covering the preceding six month period, namely 1 January to 1 June, 1981. The complainant has not complained to the Commissioner about the FCO's handling of this previous request.

3. The FCO responded on 15 January 2016 and explained that:

'Please accept our apologies for the delay in replying, but we have been trying to assess if we could accept your request.'

However, taking into account your request 1032-13 on this subject which is ongoing, we assess your request as currently drafted would fall into section 14 where 'Requests which would impose a grossly oppressive burden but are not covered by the section 12 costs limits.'

ICO guide on this point: <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>

We are therefore unable to accept your request.'

4. The complainant contacted the FCO on 18 January 2016 in order to ask for an internal review of the FCO's handling of his request.
5. The Commissioner understands that the FCO did not complete this internal review.

Scope of the case

6. The complainant contacted the Commissioner on 26 February 2016 to complain about the FCO's refusal of his request on the basis of section 14(1) of FOIA.

Reasons for decision

Section 14(1) – vexatious requests

7. Section 14(1) of FOIA allows a public authority to refuse to comply with a request if it is considered to be vexatious.
8. In the Commissioner's view, section 14(1) is designed to protect public authorities by allowing them to refuse any requests which have the potential to cause a disproportionate or unjustified level of disruption, irritation or distress. This will usually involve weighing the evidence about the impact on the authority and balancing this against the purpose and value of the request. This should be judged as objectively as possible; in other words, would a reasonable person think that the purpose and value are enough to justify the impact on the public authority.

9. In particular, the Commissioner accepts that there may be cases where a request could be considered to be vexatious because the amount of time required to review and prepare the information for disclosure would place a grossly oppressive burden on the public authority. This is the position adopted by the FCO in this case.
10. The Commissioner believes that there is a high threshold for refusing a request on such grounds. This means that a public authority is most likely to have a viable case where:
 - The requester has asked for a substantial volume of information **and**
 - The authority has real concerns about potentially exempt information, which it will be able to substantiate if asked to do so by the Commissioner **and**
 - Any potentially exempt information cannot easily be isolated because it is scattered throughout the requested material.

The FCO's position

11. With regard to the first criterion, the FCO explained that the material it held relating to the Helen Smith case is made up of 103 files and 33.5 cms of loose material contained within a total of 19 boxes (box height 26 cms, width 14 cms and length 17 cms) with a date range of 1979 – 1997. The files and loose material originate from different FCO departments so there are therefore several different series of files and loose material and the boxes housing the material are not in date sequence. More specifically, the FCO explained that it held a total of 1,928 pages falling within the date range of the request, ie 1 June 1981 to 31 December 1981, albeit for the reasons discussed below the FCO did not consider all of this information to fall within the scope of the request. In calculating the total of 1,928 pages the FCO explained that it had excluded, where they had been easily identifiable, any duplicate pages and any newspaper articles.
12. With regard to the second criterion, the FCO estimated that it would take over 187 hours to identify, isolate and copy the relevant documents for release in response to this request. It explained that it had based this estimate on a sample exercise of the information falling within the scope of the request. More specifically the FCO explained that it had based its estimate on the following calculations:
 - An initial assessment of the information would take 6.4 hours. This was based on an estimate that it would take 1 minute to assess 5 pages of

information to note the contents and assess whether it was in the scope of the request. $(1928/5) / 60 = 6.4$ hours. The FCO explained that this initial assessment was necessary because although the 1,928 pages fell within the date range of the request, they did not necessarily relate to the specific information requested by the complainant, namely '*the activities and death of...Helen Smith*'. Rather such information related to other aspects of the Helen Smith case. The FCO explained that as a very approximate estimate it thought that about 85% of the material it would need to assess would fall within the scope of the request. That is to say, 85% of the 1,928 pages.

- A sensitivity review of the material to determine whether the information would be exempt in its entirety or redacted on the basis of any exemptions contained at FOIA sections 27 (international relations), 38 (health and safety), 40 (personal data), 41 (information provided in confidence) would have to be undertaken. The FCO explained that the estimated review time included that which would be needed to ensure the protection of certain personal data (section 40) in respect of any individual(s) who are still alive. Furthermore, the FCO explained that given the large proportion of sensitive information scattered throughout the material, consideration would also need to be given to the potential distress that may be caused to any of the remaining family members if material is released (section 38). The FCO explained that the review would also have to consider the potential impact to the UK's bilateral relationship with, and UK interests in, Saudi Arabia (section 27) if any information were released. The FCO estimated that given the content and volume of information this sensitivity review would take 147 hours (or 21 days at 7 hours per day). It explained that it had based this estimate on the average time taken by a sensitivity reviewer to review similar consular information.
- The FCO estimated that it would take 29.88 hours to actually redact particular documents or close an entire folio. It noted that based upon its sample exercise, there were a number of examples of pages where only a particular word or sentence required redacting.

In calculating the figure of 29.88 hours the FCO explained that its sample exercise involved reviewing 242 pages of the requested information. The FCO found that of these pages, 31 would need to be closed in their entirety. A further 7 pages only required a word or a sentence redacting. By applying the results of this sample exercise to the 1,928 pages, the FCO estimated that 247 pages² would require

² Total folio estimated closures = $((1928/242) \times 31) = 247$ folio closures

complete closure, ie being withheld in their entirety and 55 pages³ would require an individual word or sentence redacting. The FCO explained that the time taken to close an entire folio is 5 minutes and the time taken to redact an individual word or sentence is 10 minutes as this involved scanning, electronically marking up redactions, the insertion of redacted copy into file and the filing of original copy. Therefore, it would take 1235 minutes to process the 247 folio closures ($247 \times 5 = 1235$) and 557.7 minutes to process the 55 individual redactions ($55.77 \times 10 = 557.7$). In total this equated to 1792.7 minutes or 29.88 hours.

In providing these calculations, the FCO acknowledged that the proportion of the material of the 1,928 pages that it determined to be relevant to the request would affect the time taken to conduct both the sensitivity review and the redaction time. However, it did not believe that in practice the review and redaction time would differ significantly from the figures provided above.

- Finally the FCO estimated that to despatch the material would take 4.25 hours, ie to prepare paperwork, to complete referral forms and prepare record the material itself for despatch.

13. Furthermore, the FCO explained that additional hours of work, on top of the estimated 187 hours would need to be factored in to allow for:

- Internal stakeholder consultation and review by the FCO's Middle East and North Africa Department as well as by the British Embassy in Riyadh.
- External stakeholder consultation as not all of this material is FCO equity and permission to release (with or without redactions) from the originators would need to be sought.
- The time taken to despatch and transport the material to FCO London and overseas and return.
- If Arabic language documents were to be released or redacted, then time would be required to establish precisely where in the Arabic script the required redactions were needed and formal translations might also be needed.
- An assessment against the information already in the public domain, including reference to previously released official information, media

³ Total estimated redactions = $((1928/242) \times 7 = 55.77$

coverage and books that have subsequently been published on the case.

14. With regard to the third criterion, the FCO emphasised that this case is complex and sensitive in nature. As it concerns a number of individuals, as well as Helen Smith, the material that relates to her directly is scattered throughout the collection of files. The FCO explained that its submissions summarised above at paragraph 11 also sets out the scattered nature of the material in the collection.

The Commissioner's position

15. With regard to the figures provided by the FCO, the Commissioner is not entirely convinced that the initial assessment exercise, estimated to take 6.4 hours, is completely necessary. In the Commissioner's opinion the complainant's request is arguably broader in nature than the interpretation placed upon it by the FCO. The request sought '**any documents relating to the activities and death of British citizen Helen Smith** [emphasis added]'. In the Commissioner's view the examples of the types of information identified by the FCO as falling outside the scope of the request could arguably be said to be information 'relating to' the death of Helen Smith and thus in the scope of the request. However, the 6.4 hours obviously only comprises a relatively small proportion of the overall time the FCO has estimated it would take to fulfil this request. Furthermore, and in relation to the first criterion listed above at paragraph 10, the Commissioner accepts that 1,928 pages of information, or even 85% of such a figure, can correctly be seen as a significant volume of information falling within the scope of the request.
16. With regard to the second criterion, the Commissioner accepts that given the nature of the subject matter a significant amount of the material is likely to be sensitive and thus the FCO's concerns about the need to apply various exemptions are legitimate. For example, it is plausible to assume that disclosure of some of the material could be potentially distressing to the remaining family members. Furthermore, the Commissioner accepts that it is realistic to assume that some of this information will potentially be exempt from disclosure on the basis of section 27 of FOIA. In relation to the FCO's estimate of the time it would take to conduct the sensitivity review and thus determine how such exemptions should be applied, the Commissioner is conscious that this forms the vast majority of the work the FCO would need to undertake to comply with the request. However, the Commissioner notes that the figure of 147 hours is based on a previous sensitivity review of similar consular material and in his opinion this adds considerably credence to the accuracy of this estimate.

17. With regard to the third criterion, the Commissioner is satisfied that the sample redaction exercise conducted by the FCO provides clear evidence that potentially exempt information is distributed throughout the requested information. The FCO would need to identify the 247 pages of information likely to be withheld in their entirety from within the 1,928 pages. The FCO would also have to redact approximately 55 words or sentences from the remaining 1,681 pages before they could be disclosed. Furthermore, the Commissioner is satisfied that the FCO's time estimates for undertaking the redaction process is plausible given that it is based directly on a sample exercise of this process.
18. The Commissioner is therefore satisfied that the FCO has demonstrated that the three criteria are met. Furthermore, the Commissioner is satisfied that the detailed calculations provided by the FCO provide compelling evidence to demonstrate that complying with the request would place a grossly excessive burden on it. In his view, the FCO's estimate of approximately 187 hours to process this request is not exaggerated. Although, as noted above the Commissioner has some concerns about the inclusion of the 6.4 hours in respect of the initial assessment exercise, he recognises that the FCO's estimate did not specifically include a number of activities which the Commissioner accepts would be necessary in order to process the request. The Commissioner has therefore concluded that the FCO can rely on section 14(1) to refuse to comply with this request.
19. In reaching this conclusion, the Commissioner wishes to emphasise that he has taken into account the purpose and value of the request. The Commissioner recognises that disclosure of the information could provide the public with an insight into the Helen Smith case and potentially lead to greater transparency in relation to the FCO's role in the events in question. However, the Commissioner is satisfied that despite the benefits of disclosure, given the very significant burden which complying with the request would place on the FCO, section 14(1) should be upheld.

Other Matters

20. The Commissioner notes that the FCO did not respond to the complainant's email of 18 January 2016 in which he asked it to conduct an internal review of its refusal of his request. The Commissioner would have expected the FCO to conduct an internal review in light of this communication given that the section 45 Code of Practice explains that

any written reply from a requester expressing dissatisfaction with a response should be taken as a request for an internal review.⁴

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235286/0033.pdf see paragraph 38

Right of appeal

21. 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

22. 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.
23. 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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