



Scottish Information
Commissioner
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Decision Notice 242/2024

Application concerning Abdelbaset Al-Megrahi

Authority: Scottish Criminal Cases Review Commission
Case Ref: 202400702

Summary

The Applicant asked the Authority for the application that was lodged on behalf of Abdelbaset Al-Megrahi with the Authority in September 2003. The Authority refused to disclose the information requested on the basis that it was prohibited from doing so under section 194J of the Criminal Procedure (Scotland) Act 1995. The Commissioner investigated and found that the Authority had complied with FOISA in responding to the request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 26(a) (Prohibitions on disclosure); 47(1) and (2) (Application for decision by Commissioner)

Criminal Procedure (Scotland) Act 1995 (the CPSA) sections 194J (Offence of disclosure); 194K (Exceptions from obligations of non-disclosure); 194M (Further exception to section 194J)

Background

1. On 23 October 2023, the Applicant requested the application made to the Authority on behalf of Mr Abdelbaset Al-Megrahi in September 2003 for the Authority to consider whether to refer his case to the High Court for determination.
2. The Authority responded on 1 November 2023, stating that it was withholding the information in terms of section 26(a) of FOISA, which provides an absolute exemption from disclosure where disclosure is prohibited by law. The Authority explained that disclosure in this case

was prohibited under section 194J of the Criminal Procedure (Scotland) Act 1995 (the CPSA).

3. On 14 November 2023, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the Authority's decision because he considered section 194J of the CPSA did not apply to the information requested.
4. The Authority notified the Applicant of the outcome of its review on 17 May 2024, which fully upheld its initial decision without modification.
5. On 21 May 2024, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that he was dissatisfied with the outcome of the Authority's review because:
 - the exemption in section 26(a) of FOISA did not apply
 - the Authority's statement of reasons, which set out why it was referring the criminal conviction against Mr Al-Megrahi for determination by the High Court, was published online and that it was in the public interest that Mr Al-Megrahi's application was also disclosed
 - Mr Al-Megrahi did not have privacy rights, as he was now deceased.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 5 June 2024, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information, and the case was subsequently allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions.

Commissioner's analysis and findings

9. The Commissioner has considered the submissions made by the Applicant and the Authority.

Section 26(a) of FOISA – Prohibitions on disclosure

10. Section 26(a) of FOISA exempts information from disclosure under FOISA where disclosure of is prohibited by or under any other enactment. This is an absolute exemption in that it is not subject to the public interest test set down in section 2(1)(b) of FOISA.
11. The Authority argued that the disclosure of the information requested is prohibited by another enactment – in this case section 194J of the CPSA.
12. The Authority submitted that section 194J of the CPSA prohibits the disclosure of any information obtained by the Authority in the exercise of any of its functions unless the disclosure of the information is excepted by sections 194K or 194M of the CPSA.

13. The Authority submitted that none of the exceptions contained in section 194K were applicable in the circumstances of the case.
14. The Authority also submitted that section 194M(2)(b) was not met as the case had not fallen or been abandoned, nor was section 194M(1)(b) as it had not determined that it was appropriate in the whole circumstances of the case in question for the information to be disclosed.
15. In the circumstances, therefore, the Authority stated that the section 194J prohibition on disclosure of information applied and, as such, the information requested was exempt from disclosure under section 26(a) of FOISA.
16. The Applicant explained that Mr Al-Megrahi's application to the Authority was made by Mr Al-Megrahi's legal team alone and noted that he had not asked for any internal correspondence resulting from the submission of the application or from the resulting investigation by the Authority.
17. The Applicant argued that section 194J of the CPSA (and therefore section 26(a) of FOISA) did not apply to the information requested as he had asked for a document that was produced without any assistance by the Authority or its staff.
18. In this case, having fully considered the arguments advanced by the Applicant, the Commissioner is satisfied that the information which is the subject of the request was obtained by the Authority in the exercise of its functions under the CPSA.
19. It is therefore necessary for the Commissioner to go on to consider whether any of the exceptions contained in sections 194K and 194M of the CPSA are applicable in the circumstances of this case.
20. Having carefully considered section 194K of the CPSA, the Commissioner has concluded that none of the conditions allowing disclosure set out in section 194K can be met in this case.
21. The Commissioner has also carefully considered section 194M of the CPSA. Having done so, he has concluded that section 194M(2)(c) is not met as the case has not fallen or been abandoned. The application in question was initially referred to the High Court in June 2007, before being abandoned in August 2009. However, the case was later revived and a subsequent application to the Authority resulted in a referral of the case to the High Court in March 2020.
22. In any event, the Authority has not determined that it is appropriate in the whole circumstances of the case in question for the information be disclosed. The Commissioner therefore concludes that section 194M(1)(b) is also not met.
23. The Commissioner therefore agrees with the Authority that the information requested is exempt from disclosure in terms of section 26(a) of FOISA.

Decision

The Commissioner finds that the Authority complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by the Applicant.

Appeal

Should either the Applicant or the Authority wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Euan McCulloch
Head of Enforcement

31 October 2024