

# Decision Notice



Decision 190/2010 Thomas Smith of the Daily Mirror and the Scottish Ministers

Doctors responsible for diagnosis and prognosis of Abdelbaset Ali Mohamed Al-Megrahi's medical condition

Reference No: 201000330  
Decision Date: 18 November 2010

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## Summary

Thomas Smith (Mr Smith), a reporter with the Daily Mirror, requested from the Scottish Ministers (the Ministers) the names and workplaces of the physicians who had diagnosed the condition and prognosis of only weeks or months to live concerning Abdelbaset Ali Mohmed Al-Megrahi (Mr Al-Megrahi). The Ministers advised Mr Smith where the doctors were based and provided him with a link to the medical report compiled by Dr Andrew Fraser, Director of Health and Care at the Scottish Prison Service which they had published on their website.

However, the Ministers withheld the names of other doctors on the basis that the names were the doctors' personal data, disclosure of which would breach the data protection principles (and accordingly exempt under section 38(1)(b) of FOISA). Following a review, Mr Smith remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Ministers had been entitled to withhold the names of the doctors in question.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and (2)(e)(ii) (Effect of exemptions); 38(1)(b), (2)(a)(i) and (b) and (5) (definitions of "data protection principles", "data subject" and "personal data") (Personal information)

Data Protection Act 1998 (the DPA) sections 1(1) (Basic interpretative provisions) (definition of personal data) 2(e) (Sensitive personal data) and Schedule 1 (The data protection principles - the first principle)

European Convention on Human Rights (ECHR) article 8 (Right to respect for private and family life)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.



## Background

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1. Before setting out the terms of Mr Smith's information request, it may be helpful to set out some background information to explain the context of this case.
2. On 31 January 2001, Mr Al-Megrahi was convicted of the murder of the 270 people who died following the bombing of Pan Am Flight 103 over Lockerbie in December 1988. He was subsequently sentenced to life imprisonment, with a minimum term of 27 years.
3. On 20 August 2009, Kenny MacAskill, Cabinet Secretary for Justice, announced his decision that Mr Al-Megrahi, who is terminally ill with prostate cancer, should be released on compassionate grounds and allowed to return to Libya. The Cabinet Secretary's statement included the following comments:

"In order to consider the application for compassionate release, I was provided with reports and recommendations by the Governor of Greenock Prison, the doctors and prison social work staff. Also, as laid out in statute, I have consulted the Parole Board. This is the normal process for consideration of an application for compassionate release and my decision is in accordance with all the advice given to me.

"It is the opinion of his Scottish Prison Service doctors who have dealt with him prior to, during and following the diagnosis of prostate cancer, and having seen him during each of these stages, that his clinical condition has declined significantly. Assessment by a range of specialists has reached the firm consensus that his disease is, after several different trials of treatment, "hormone resistant" - that is resistant to any treatment options of known effectiveness. Consensus on prognosis therefore has moved to the lower end of expectations.

"Mr Al-Megrahi was examined by Scottish Prison Service doctors on 3 August. A report dated 10 August from the Director of Health and Care for the Scottish Prison Service indicates that a 3 month prognosis is now a reasonable estimate. The advice they have provided is based not only on their own physical examination but draws on the opinion of other specialists and consultants who have been involved in his care and treatment. He may die sooner - he may live longer. I can only base my decision on the medical advice I have before me. That medical advice has been made available to the United States Government at their request and has been published on grounds of public interest."

4. On 26 November 2009, Mr Smith wrote to the Ministers requesting the names and workplaces of the physicians (the doctors) who delivered the diagnosis and prognosis that Mr Al-Megrahi was suffering from terminal prostate cancer which would lead to his death within a matter of weeks or months. Mr Smith also requested sight of the medical reports detailing this medical assessment.



5. The Ministers responded on 21 December 2009, directing Mr Smith to the medical report by Dr Andrew Fraser, Director of Health and Care at the Scottish Prison Service (SPS), which had been referred to in the Cabinet Secretary's statement, and which had been published on the Scottish Government website. The Ministers also provided Mr Smith with some general information regarding the specialisms of the doctors involved, and identified two of the hospitals where they were based. However, the Ministers refused to provide the other information Mr Smith had requested, indicating that it was exempt from disclosure in accordance with section 38(1) of FOISA.
6. On 13 January 2010, Mr Smith wrote to the Ministers, requesting a review of their decision. Mr Smith drew the Ministers' attention to the public interest in the release of Mr Al-Megrahi on compassionate grounds based upon the expert opinion of the doctors. He indicated that the elected representatives of the Scottish people had made a decision to release Mr Al-Megrahi based on this opinion, and that it was unacceptable to ask the people of Scotland to believe this medical opinion while protecting the doctors involved from any scrutiny.
7. The Ministers notified Mr Smith of the outcome of their review on 28 January 2010. The Ministers upheld, without modification, the decision to withhold the names of the doctors and the medical reports, indicating that all of the information withheld amounted to personal medical information. The Ministers also confirmed that they considered the information to be exempt under section 38(1) of FOISA.
8. On 16 February 2010, Mr Smith wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Ministers' review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. He stated that he accepted that Mr Al-Megrahi's medical records should remain confidential, and that he only wished the Commissioner to consider the Ministers' refusal to provide him with the names and contact details of the medical team which examined Mr Al-Megrahi.
9. The application was validated by establishing that Mr Smith had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

## Investigation

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10. On 19 May 2010, the Ministers were notified in writing that an application had been received from Mr Smith, and were asked to provide the Commissioner with the information withheld from him. The Ministers provided the information, and the case was then allocated to an investigating officer.
11. The investigating officer subsequently contacted the Ministers, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions.



12. In their submissions, the Ministers confirmed that they wished to rely on section 38(1)(b) of FOISA to withhold the information requested by Mr Smith, as they considered that disclosure would breach the first data protection principle of the DPA. The Ministers' arguments, insofar as relevant, will be considered fully in the Commissioner's analysis and findings below.

## Commissioner's analysis and findings

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13. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr Smith and the Ministers, and is satisfied that no matter of relevance has been overlooked.
14. As noted above, Mr Smith sought a determination from the Commissioner only on the first part of his request, which sought the names and workplaces of the doctors who delivered the diagnosis and prognosis that Mr Al-Megrahi was suffering from terminal prostate cancer, which would lead to his death within a matter of weeks or months.
15. Since details of the doctors' workplaces have been supplied to Mr Smith, the remaining parts of this decision focus on the question of whether the names of the doctors should be disclosed.
16. The Commissioner would note that his consideration of the Ministers' handling of Mr Smith's information request must focus on the circumstances as at the date when they notified Mr Smith of the outcome of their review. The relevant date in this case is 28 January 2010. The Commissioner is aware that developments have taken place since that date, with a national newspaper reportedly naming the doctors. However, he must base his decision on the circumstances prevailing on 28 January 2010. Accordingly, he has not taken into consideration any developments which have taken place in the period since that point.

### Consideration of section 38(1)(b) – personal information

17. Section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i), exempts information from disclosure if it is "personal data" as defined by section 1(1) of the DPA, and if its disclosure would contravene one or more of the data protection principles set out in Schedule 1 to the DPA.
18. The Ministers have submitted that the information is the doctors' personal data, and that disclosure of the names would breach the first data protection principle.

*Is the information personal data?*

19. Section 1(1) of the DPA defines personal data 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 is likely to come into the possession of, the data controller (the full definition is set out in the Appendix).



20. The Commissioner is satisfied that the information under consideration is personal data – it relates to the doctors (confirming that they had been involved with the treatment and care of a particular patient), and these doctors could be identified from the information either alone or in conjunction with other information in the possession of the Ministers.

*Consideration of the first data protection principle*

21. The first data protection principle states that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 to the DPA and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 to the DPA, is also met. (The Commissioner has considered the definition of sensitive personal data set out in section 2 of the DPA, and he is satisfied that the personal data in this case, *insofar as it relates to the doctors*, does not fall into this category. He has therefore not found it necessary to consider the conditions in Schedule 3 of the DPA in this case when considering the issue of fairness insofar as it amounts to the personal data of the doctors. The Commissioner does, however, briefly consider the information in the context of it amounting to Mr Al-Megrahi's personal data in paragraphs 35 and 36 below.
22. There are, therefore, three separate aspects to the first data protection principle: (i) fairness, (ii) lawfulness and (iii) the conditions in the schedules. In considering this case, the Commissioner will initially examine the aspect of fairness before going on, if necessary, to consider the other two aspects.

Fairness

23. In his request for review, Mr Smith noted that the decision to free Mr Al-Megrahi was made by elected representatives of the Scottish people, based on expert advice from a number of medical professionals. He indicated that it was simply unacceptable to ask the people of Scotland to believe the medical opinion of these doctors on such a sensitive issue and then protect them from further scrutiny. He stated that absolute transparency on issues such as these was vital in a democracy.
24. In his subsequent application to the Commissioner, Mr Smith stated that the decision to release Mr Al-Megrahi from custody had been widely criticised, particularly by the families of American victims who lost their lives. He indicated that the Scottish Government had justified its decision in the strongest possible terms based almost entirely on a medical report which indicated Mr Al-Megrahi had just months to live.
25. He stated that the doctors who had delivered this diagnosis and prognosis to the world should be answerable to the public, in this case by the scrutiny of the media.

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26. The Ministers accepted that the decision to liberate Mr Al-Megrahi on compassionate grounds was a topic of considerable interest to the public and the media. However, the Ministers argued strongly that the disclosure of the doctors' names would cause unwarranted distress to both the doctors involved and their families, would be contrary to their legitimate expectations of privacy and, accordingly, would be unfair. The Ministers further indicated that the release of the names of the doctors was likely to have serious consequences for the doctors themselves (including significant prejudice to their livelihoods and to their right to privacy) as well as for their families and patients (no doubt as a result of the media interest if the names of the doctors were to be disclosed). The Ministers commented that disclosure would lead to serious consequences for the SPS, who require to be able to call upon medical professionals to obtain medical care, treatment recommendations and prognoses for its inmates in the future. The Ministers also indicated that Article 8 of the European Convention on Human Rights (ECHR) and the general law of confidentiality should all take precedence over any possible interest in disclosure.
27. As the Ministers have, in particular, raised the issue of Article 8 of ECHR, the Commissioner has considered what, if any, impact Article 8 might have on assessing the fairness of disclosing the doctors' names to Mr Smith.
28. The Commissioner is mindful that Article 8 (the full text of which is set out in the Appendix), relates to the private and family life of an individual and would not always extend to the professional life of the individual, especially if the professional life involved public service. However, in some circumstances, there will be a direct connection between an individual's private and family life and their professional life, which means that consideration has to be given to the impact on their private and family life of the release of information relating to their professional life.
29. Given that the release of Mr Al-Megrahi is an event of international significance, attracting the continued attention of foreign powers and worldwide media reporting, the Commissioner considers that release of the names of the doctors is a clear example of where there is a direct overlap between an individual's professional and private lives.
30. The provisions of Article 8 do, therefore, have an influence in assessing the competing interests of Mr Smith and the doctors in assessing overall the fairness of disclosure. The Ministers have already provided Mr Smith with details of where the doctors work; details of their specialisms are contained in the publicly available version of the early release form<sup>1</sup>. The only remaining piece of information withheld, in effect the last piece of the jigsaw, is the name of each doctor. An individual's name, except in rare circumstances where an individual operates under a pseudonym, is common to both their professional and private lives. It follows, therefore, that the disclosure of an individual's name may have an impact, to a greater or lesser extent, on both their public and private lives.

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<sup>1</sup> <http://www.scotland.gov.uk/Resource/Doc/925/0085864.pdf>



31. The Information Commissioner, who has statutory responsibility for oversight of the DPA throughout the UK, has issued guidance<sup>2</sup> on the release of names in response to an information request. The guidance identifies a number of factors which should be taken into consideration when considering the release of an employee's name, including the sensitivity of the information and whether the disclosure of the name would be damaging to the employee. While, as noted above, in the context of the doctors themselves, the doctors' names are not in themselves sensitive personal data, the doctors are directly associated with the treatment of Mr Al-Megrahi's medical condition. Accordingly, the Commissioner considers that this direct association between the doctors and Mr Al-Megrahi greatly enhances the sensitivity concerning the disclosure of the doctors' names and would impact negatively on them and on their families.
32. The Commissioner is mindful that Mr Smith's stated aim in obtaining the names of the doctors is to make them answerable to the public for their diagnosis and prognosis by being subject to the scrutiny of the media. While the Commissioner accepts that expecting a public servant to be accountable for their actions is, in general terms, legitimate, he considers that the disclosure of the names of the doctors in this case would lead to an irreconcilable tension between the demands of the media and the professional and legal obligations of the doctors, which is likely to cause the doctors unwarranted distress, given that the doctors would not be able to discuss Mr Al-Megrahi's physical or mental health without breaching the DPA and doctor/patient confidentiality. (The Commissioner understands that Mr Al-Megrahi has not consented to the release of any medical information, other than that already published by the Ministers, and does not consider that there is any other condition in schedule 3 of the DPA that would permit such information to be disclosed.)
33. The Commissioner therefore considers that it was reasonable for the Ministers to conclude that disclosure of the doctors' names would cause the doctors unwarranted distress. As he also considers that it is impossible to separate the public and private lives of the doctors in the context of this case, he also finds it was reasonable to assume that the distress and compromise to their legitimate expectations of privacy (as a result of the media interest) would impact on both the public and family lives of the doctors.
34. In all the circumstances of the case, the Commissioner finds that disclosure of the doctors' names would be unfair. As such, he must find that disclosure would breach the first data protection principle and that the names are accordingly exempt from disclosure under section 38(1)(b) of FOISA.

#### Mr Al-Megrahi's personal data

35. The Commissioner has focussed on the names of the doctors in so far as the names are the personal data of the doctors, given that this was the focus of the submissions made by the Ministers. However, given that the disclosure of the names would involve the processing of information relating to Mr Al-Megrahi's health (which, by virtue of section 2(e) of the DPA is sensitive personal data for the purpose of the DPA), the Commissioner also considers that the doctors' names amount to Mr Al-Megrahi's sensitive personal data.

<sup>2</sup> [http://www.ico.gov.uk/upload/documents/library/data\\_protection/detailed\\_specialist\\_guides/public\\_authority\\_staff\\_info\\_v2.0\\_final.pdf](http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/public_authority_staff_info_v2.0_final.pdf)





36. While, in the circumstances, the Commissioner has not found it necessary to consider in any great detail the disclosure of the doctors' names in this context, he is not aware of any condition in schedule 3 of the DPA which could be met in order to render their disclosure lawful. Information as to the health of Mr Al-Megrahi has already been made publicly available with his express consent (which would satisfy condition 1 of each of Schedule 2 and Schedule 3 to the DPA), but in the lack of such express consent for the disclosure of other such information, the Commissioner is of the view that none of the conditions in Schedule 3 could be satisfied.

## DECISION

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

## Appeal

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Should either Mr Smith or the Ministers wish to appeal against this decision, there is an 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 notice.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**18 November 2010**



## Appendix

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### Relevant statutory provisions

#### Freedom of Information (Scotland) Act 2002

##### 1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

##### 2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

- (a) the provision does not confer absolute exemption; and
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

- (e) in subsection (1) of section 38 –

...

- (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied by virtue of subsection (2)(a)(i) or (b) of that section.



**38 Personal information**

- (1) Information is exempt information if it constitutes-
- ...
- (b) personal data and either the condition mentioned in subsection (2) (the "first condition") or that mentioned in subsection (3) (the "second condition") is satisfied;
- ...
- (2) The first condition is-
- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 (c.29), that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
- (i) any of the data protection principles; or
- ...
- (b) in any other case, that such disclosure would contravene any of the data protection principles if the exemptions in section 33A(1) of that Act (which relate to manual data held) were disregarded.
- ...
- (5) In this section –
- “the data protection principles” means the principles set out in Part I of Schedule 1 to the Act, as read subject to Part II of that Schedule and to section 27(1) of that Act;
- “data subject” and “personal data” have the meanings respectively assigned to those terms by section 1(1) of that Act
- ...



## Data Protection Act 1998

### 1 Basic interpretative provisions

(1) In this Act, unless the context otherwise requires –

...

“personal data” means data which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is 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 other person in respect of the individual;

...

### 2 Sensitive personal data

In this Act “sensitive personal data” means personal data consisting of information as to –

...

(e) [the data subject's] physical or mental health or condition,

...

## Schedule 1 – The data protection principles

### Part I – The principles

1. 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.
  
6. Personal data shall be processed in accordance with the rights of data subjects under this Act.



## European Convention on Human Rights

### Article 8: Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.