

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 5 March 2009**

**Public Authority:** Cabinet Office  
**Address:** Admiralty Arch  
North Entrance  
The Mall  
London  
SW1A 2WH

### Summary

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The complainant asked the Cabinet Office for information relating to *'the drawing up of a list of extremist websites, bookshops, centres, networks and particular organisations of concern as described by the Prime Minister in early August 2005'*. The Cabinet Office gave the complainant a website address where the Prime Minister described the work referred to in the request, but stated that it neither confirmed nor denied holding any further information, referring to section 23(5) and section 24(2) of the Freedom of Information Act 2000 ('the Act'). In its internal review decision it stated that it was now confirming that it held the requested information but was withholding it, some by virtue of section 23(1) and the remainder by section 24(1). During the Commissioner's investigation the Cabinet Office confirmed that the reference to section 24(1) had been a mistake. The Commissioner decided that the information had been appropriately withheld by reference to section 23(1).

### The Commissioner's Role

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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.

## The Request

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2. On 5 February 2007 the complainant requested from the Cabinet Office information relating to *'the drawing up of a list of extremist websites, bookshops, centres, networks and particular organisations of concern as described by the Prime Minister in early August 2005'*.
3. The Cabinet Office replied on 3 April 2007. It gave the complainant a website address where the Prime Minister described the work referred to in the request:

<http://www.pm.gov.uk/output/Page8041.asp>.

It stated that it neither confirmed nor denied holding any further information, referring to section 23(5) and section 24(2) of the Act. In relation to section 24 it claimed that there was a very strong public interest in withholding the fact of whether it held the requested information, so as to safeguard national security. The Cabinet Office advised the complainant that he could request an internal review, and complain to the Commissioner.

4. On 5 April 2007 the complainant requested an internal review. He indicated that he did not find very persuasive the Cabinet Office's suggestion that confirmation of whether it held the information would endanger national security.
5. The Cabinet Office provided the complainant with its internal review decision on 17 September 2007, apologising for the delay. It stated that it was now confirming that it held the requested information. However, the information was exempt from disclosure, some of it by virtue of section 23(1) and the remainder by section 24(1). It provided its assessment of the public interest test for section 24. The Cabinet Office reminded the complainant of his right to complain to the Commissioner.

## The Investigation

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### Scope of the case

6. The complainant wrote to the Commissioner on 20 September 2007. He stated that he had no complaint about the length of time taken by the Cabinet Office but disagreed with the decision.

### Chronology

7. The Commissioner wrote to the complainant and the Cabinet Office on 2 June 2008. He asked the Cabinet Office to comment on various issues and to provide him with the withheld information.
8. He sent a reminder on 7 July 2008.

9. The Cabinet Office replied on 25 July 2008. It stated that its previous reliance on section 24 had been 'incorrect' and that all of the information was in fact exempt by virtue of section 23. It stated that it wished to discuss this with a representative of the Commissioner at a meeting on 13 August. The Cabinet Office also sent the Commissioner a letter dated 23 July 2008 from its Director, Security & Intelligence. This letter gave an assurance that the withheld information had been received from one of the security bodies cited in section 23.
10. The Commissioner wrote back to the Cabinet Office on 25 July 2008, asking for further clarification of various issues, including the apparent error in applying section 24, details about the information which engaged section 23, and an explanation of the Cabinet Office's delay in conducting an internal review.
11. A representative of the Commissioner subsequently attended the offices of the Cabinet Office, at which meeting the Cabinet Office provided the requested clarification.
12. On 18 August 2008 the Commissioner asked the Cabinet Office to explain why it had dropped its initial 'neither confirm nor deny' response.
13. The Cabinet Office gave that explanation by letter dated 12 September 2008.

## Findings of fact

14. The website (<http://www.pm.gov.uk/output/Page8041.asp>) identified by the Cabinet Office recorded the Prime Minister's Press Conference of 5 August 2005. During the conference the Prime Minister stated:

*'One other point on deportations, once the new grounds take effect, there will be a list drawn up of specific extremist websites, bookshops, networks, centres and particular organisations of concern. Active engagement with any of these will be a trigger for the Home Secretary to consider the deportation of any foreign national.'*

## Analysis

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### Neither confirm nor deny – sections 23(1) and 24(1)

15. Section 1(1) of the Act gives two rights of access to information: the duty to confirm or deny to the applicant whether the information is held by the authority and, if so, the duty to communicate that information to the applicant. Where the public interest test is appropriate it should be applied to both duties separately, and the outcome of each may differ.
16. In this case the Cabinet Office refused to confirm or deny that it held the requested information by referring to sections 23(5) and 24(2) of the Act. Section 23(5) provides that:

*'The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).'*

Section 24(2) states:

*'The duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security.'*

17. Normally the exemptions in sections 23 and 24 cannot both be applied to the same requested information, because the terms of section 24(1) make it clear that the two exemptions are mutually exclusive:

*'Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security'* (emphasis added).

18. However, in 'neither confirm nor deny' cases the situation is different. In *Baker v the Information Commissioner and the Cabinet Office* (EA/2005/0002) the Information Tribunal confirmed that it was appropriate to claim both section 23(5) and section 24(2) simultaneously. The public authority had pointed out that the requested information – which concerned the telephone tapping of MPs – could, if it were held, relate to the bodies specified in 23(3) or to other bodies (such as the police or Defence Intelligence Staff). The Tribunal agreed with the public authority that a response to a request should not allow any deduction to be made as to the involvement of a section 23 body or any other body, and that:

*'if the Cabinet Office were to rely solely on either section 23(5) or on section 24(2) in neither confirming or denying that information was held, in those cases where section 23(5) was relied upon alone that reliance could itself reveal that one of the bodies listed in section 23(3) was involved. That in itself would constitute the release of exempt information. Thus it is necessary to rely on both sections 23(5) and 24(2) consistently in order not to reveal exempt information in a particular case.'*

Accordingly, it decided that where the holding of information is neither confirmed nor denied for the purpose of safeguarding national security, section 23(5) and section 24(2) can be applied in conjunction.

19. The Commissioner considers that the Cabinet Office was therefore entitled to cite both sections 23 and 24 while it was maintaining a 'neither confirm nor deny' response.

### **Exemption – section 23(1)**

20. Having dropped its 'neither confirm nor deny' response, the Cabinet Office informed the complainant during its internal review that it held information falling

within the request, but was withholding some of it as exempt by virtue of section 23(1) and the remainder by reference to section 24(1). The Commissioner takes the view that, having dropped its 'neither confirm nor deny' response during the internal review stage, the Cabinet Office could no longer apply the exemptions in section 23(1) and section 24(1) simultaneously to the same information, since the terms of section 24(1) make it clear that these exemptions are mutually exclusive.

21. The Cabinet Office subsequently explained to the Commissioner that what the complainant had been told was an error, that the withheld information had never engaged the section 24(1) exemption, and that in fact only section 23(1) was engaged. It explained that the error was an administrative one arising at the time when it had dropped the 'neither confirm nor deny' response, when the dual reference to both sections 23 and 24 should have been amended to apply section 23(1) alone.

22. The Cabinet Office has therefore justified its refusal to disclose the requested information on the basis of the exemption in section 23(1). Section 23(1) states:

*'Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).'*

23. A representative of the Commissioner with the appropriate level of security clearance has had sight of the information withheld in this case. He has confirmed that each element of the information does indeed originate from one or more of the security bodies cited in section 23(3) of the Act. Section 23(1) is therefore engaged in respect of this information. Since it is an absolute exemption no public interest test applies, and the Commissioner has therefore concluded that it was appropriate for the Cabinet Office to have withheld the information.

## The Decision

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24. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

## Steps Required

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25. The Commissioner requires no steps to be taken.

## Other matters

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26. Although the complainant stated in his letter of complaint dated 20 September 2007 that he had no complaint about the length of time taken by the Cabinet Office, the Commissioner wishes to highlight the following matter of concern.

There is no timescale laid down in the Act for a public authority to complete an internal review. However, as he has made clear in his *'Good Practice Guidance No 5'*, the Commissioner considers that internal reviews should be completed as promptly as possible. In the absence of exceptional circumstances, he considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer, but the total time taken should not exceed 40 working days, and as a matter of good practice the public authority should explain to the requester why more time is needed.

27. In this case the complainant's internal review request was made on 5 April 2007 and the Cabinet Office issued its decision on 17 September 2007. The Cabinet Office therefore took 112 working days to complete the review. The Commissioner notes that the Cabinet Office's internal review in this case was conducted after he had issued his *'Good Practice Guidance No 5'* in February 2007, of which it should have been aware. Further, he does not believe that any exceptional circumstances existed in this case to justify the Cabinet Office's delay, and he therefore wishes to register his view that it fell short of the standards of good practice in failing to complete its internal review within a reasonable timescale.

## Right of Appeal

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28. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

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

**Dated the 5th day of March 2009**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

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

## Legal Annex

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### Freedom of Information Act 2000

**Section 1(1)** provides that -

‘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.’

**Section 1(2)** provides that -

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

**Section 1(3)** provides that –

‘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 1(4)** provides that –

‘The information –

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.’



**Section 1(5)** provides that –

‘A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).’

**Section 1(6)** provides that –

‘In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as ‘the duty to confirm or deny’.’

**Section 23(1)** provides that –

‘Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).’

**Section 23(2)** provides that –

‘A certificate signed by a Minister of the Crown certifying that the information to which it applies was directly or indirectly supplied by, or relates to, any of the bodies specified in subsection (3) shall, subject to section 60, be conclusive evidence of that fact.’

**Section 23(3)** provides that –

‘The bodies referred to in subsections (1) and (2) are-

- (a) the Security Service,
- (b) the Secret Intelligence Service,
- (c) the Government Communications Headquarters,
- (d) the special forces,
- (e) the Tribunal established under section 65 of the Regulation of Investigatory Powers Act 2000,
- (f) the Tribunal established under section 7 of the Interception of Communications Act 1985,
- (g) the Tribunal established under section 5 of the Security Service Act 1989,
- (h) the Tribunal established under section 9 of the Intelligence Services Act 1994,
- (i) the Security Vetting Appeals Panel,
- (j) the Security Commission,
- (k) the National Criminal Intelligence Service, and
- (l) the Service Authority for the National Criminal Intelligence Service.’

**Section 23(4)** provides that –

‘In subsection (3)(c) ‘the Government Communications Headquarters’ includes any unit or part of a unit of the armed forces of the Crown which is for the time

being required by the Secretary of State to assist the Government Communications Headquarters in carrying out its functions.'

**Section 23(5)** provides that –

'The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).'

**Section 24(1)** provides that –

'Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security.'

**Section 24(2)** provides that –

'The duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security.'

**Section 24(3)** provides that –

'A certificate signed by a Minister of the Crown certifying that exemption from section 1(1)(b), or from section 1(1)(a) and (b), is, or at any time was, required for the purpose of safeguarding national security shall, subject to section 60, be conclusive evidence of that fact.'

**Section 24(4)** provides that –

'A certificate under subsection (3) may identify the information to which it applies by means of a general description and may be expressed to have prospective effect.'