

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 8 November 2010

Public Authority: The Cabinet Office
Address: 70 Whitehall
London
SW1A 2AS

Summary

The complainant submitted a request to the Cabinet Office which asked for documents concerning discussions between a particular Foreign Office official and a particular Iraqi minister in 2003. The Cabinet Office refused to confirm or deny whether it held information of the nature requested on the basis of sections 23(5) and 24(2) of the Act. Having investigated the circumstances of this request the Commissioner is satisfied that the Cabinet Office complied with the requirements of the Act in refusing this request on this basis. The Commissioner does not require the Cabinet Office to take any steps in order to ensure compliance with the Act.

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.

The Request

2. The complainant submitted the following request to the Cabinet Office on 28 November 2008:

'I would like to see any documents from 2003 that refer to the meetings and talks between Foreign Office official (named person A) and Iraqi minister (named person B) of 2003'.

3. On 30 December 2008 the Cabinet Office contacted the complainant and explained that it considered section 24(2) to apply to this request. In considering this exemption there was a need to balance whether the public interest in maintaining the exclusion of the duty to confirm or deny outweighed the public interest in disclosing whether the department holds information falling within the terms of this request. The response further explained that by virtue of section 10(3) when public authorities have to consider the balance of the public interest test, they do not have to comply with the request until such time as is reasonable in the circumstances. The Cabinet Office estimated that it needed an additional fifteen working days in order to reach a decision on the balance of the public interest.
4. The Cabinet Office provided the complainant with a further response on 12 January 2009 in which it refused to confirm or deny whether it held information falling within the scope of his request on the basis of sections 23(5) and 24(2) of the Act. The response explained that with regard to the application of the public interest in relation section 24(2), the Cabinet Office was satisfied that the public interest favoured maintaining the exemption for the following reasons:

'Where a case is subject to media speculation on the alleged role of the intelligence organisations, and in respect of which assumptions (mistaken or otherwise) might have been made that information relating to national security may include information supplied by the security bodies covered by section 23 of the Act, to confirm or deny that information covered by section 24 of the Act was held could, in itself, cause harm to national security. Furthermore, if we were to confirm or deny that that information existed in one case, inferences (mistaken or otherwise) might be drawn in cases where we were unable to do so. This could also harm national security operations by effectively confirming the involvement of one or more section 23 bodies in the investigation. This response is consistent with the convention that the Government does not comment on security and

intelligence operations and should not be taken as evidence that any such information does or does not exist'.

5. The complainant contacted the Cabinet Office on 26 January 2009 and asked it to conduct an internal review into this decision. In asking for this review the complainant argued that in his opinion the comments regarding harm to national security were not credible. This was because the media reports were not based on speculation but on interviews by a journalist Ron Suskind with former senior UK intelligence officials. The complainant argued that if such interviews had been published without any apparent damage to national security then the Cabinet Office could release any information it may hold which fell within the scope of his request. Furthermore the complainant argued that there was clearly a pressing public interest in disclosure of information concerning Iraq and matters of intelligence.
6. The Cabinet Office informed the complainant of the outcome of the internal review on 15 April 2009; the review upheld the application of sections 23(5) and 24(2) on the basis of the reasoning set out in the refusal notice. The Cabinet Office's internal review response also noted that it was the policy of successive governments not to comment on the veracity of unauthorised disclosures or the comments and opinion of former personnel.

The Investigation

Scope of the case

7. The complainant contacted the Commissioner on 20 May 2009 in order to complain about the Cabinet Office's decision to refuse to confirm whether it held information falling within scope of his request, and if it held such information, the Cabinet Office's failure to disclose it. In his submission to the Commissioner the complainant highlighted the points he had made in his request for an internal review, i.e. the fact that details of the talks between (named person A) and (named person B) had been published in a book by the author Ron Suskind based on interviews with Sir Richard Dearlove and Nigel Inkster. (The book in question was entitled *The Way of the World*.) It was therefore illogical for the Cabinet Office to argue that simply confirming whether it held information falling with the scope of his request would harm national security.

Chronology

8. Unfortunately, due to a backlog of complaints about public authorities' compliance with the Act, it was not until 15 January 2010 that the Commissioner contacted the Cabinet Office with regard to this complaint. In this letter the Commissioner asked the Cabinet Office to provide further detailed arguments to support its reliance on the exemptions contained at sections 23(2) and 24(5). The Commissioner also asked the Cabinet Office to confirm to him whether it held information falling within the scope of the request, and if so, to provide him with a copy.
9. The Cabinet Office responded on 14 April 2010 and provided some further reasoning to support its reliance on sections 23(2) and 24(5). However, the Cabinet Office emphasised that in response to a request for information of this nature it would always refuse to confirm or deny whether it held information, regardless of whether or not it did in fact hold information relevant to the request in question. On this basis it assumed that such knowledge was not necessary for the purposes of the Commissioner's investigation, although the Cabinet Office confirmed that it had established whether or not it held information relevant to the request.
10. The Commissioner wrote to the Cabinet Office again on 5 May 2010 and explained that he accepted that he could possibly reach a conclusion on the application of the two exemptions without knowledge of whether information was actually held. However, in order to be in such a position the Commissioner explained that he needed to be provided with clarification on a number of specific issues concerning the relevant background to this request. The Commissioner therefore set out a number of further questions to which he asked the Cabinet Office to respond.
11. At the invitation of the Cabinet Office, representatives of the Commissioner's office (namely the Deputy Commissioner and the Head of Policy Delivery) attended a meeting on 9 July 2010 in order to discuss the Commissioner's letter of 5 May 2010 and other issues pertinent to this request.
12. The Cabinet Office wrote to the Commissioner on 28 July 2010 in order to confirm a number of issues which had been discussed at the meeting which had taken place earlier that month.

Analysis

Exemptions

13. Section 1(1) of the Act provides a right of access to information held by public authorities. It states 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.’

14. In this case the Cabinet Office has argued that it is exempt from having to comply with the duty contained at section 1(1)(a) by virtue of the application of section 23(5) and section 24(2).

15. Section 23(5) states 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).’

16. The full list of the bodies contained in section 23(3) is included in the legal annex appended to this notice.

17. Sections 24(1) and (2) states that:

‘(1) 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.

(2) 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.’

18. Section 23 and 24 are obviously closely linked provisions and, as the above quotes suggest, are mutually exclusive. That is to say if information is exempt from disclosure on the basis of the exemption contained at section 23, it cannot also be exempt under section 24.

Indeed, in such circumstances exemption of the information cannot be required for the purposes of safeguarding national security because it is already exempt by virtue of the provisions of the previous section.

19. However, in respect of the application of sections 23(5) and 24(2), i.e. when a public authority believes it is exempt from the duty contained at section 1(1)(a), it is accepted practice to rely on both provisions without specifically stating which of the two actually applies. Such an approach is calculated to avoid disclosure of the fact that a section 23 body is or isn't involved in the scenario described in a particular request and was approved by the Information Tribunal in *Baker v Information Commissioner and the Cabinet Office* (EA/2006/0045). Obviously for such an approach to be effective, public authorities have to consistently cite both exemptions when responding to any similar requests.
20. At the meeting with the Cabinet Office on 9 July 2010 the representatives of the Commissioner's office were informed as to which of the two exemptions the Cabinet Office was actually seeking to rely on in this case. The Cabinet Office also provided sufficient explanation to support its application of the exemption in question. Clearly in this Decision Notice the Commissioner cannot reveal which exemption the Cabinet Office is seeking to rely on. However, the Commissioner is fully satisfied that based that on the discussions with the Cabinet Office, this exemption has been correctly relied upon and in the circumstances of this case the Cabinet Office was not required to comply with the requirements of section 1(1)(a) when responding to this request.
21. In the Commissioner's opinion to include any further details in this Decision Notice explaining the basis upon which he has reached this conclusion risks revealing the exemption that has in fact been cited by the Cabinet Office and/or revealing whether the Cabinet Office actually holds information falling within the scope of this request. The Commissioner recognises that the brevity of his reasoning may prove to be frustrating to the complainant, particularly in light of the specific arguments he has advanced in support of his complaint. However, in cases of this nature the Commissioner believes that this is an inevitable consequence of the required approach.
22. Furthermore, in setting out his conclusion in this way, the Commissioner wishes to emphasise that it should not be inferred that one exemption is more likely to have been relied upon than another, nor should any inference be made as to whether the Cabinet Office actually holds any information falling within the scope of this request.

Procedural Requirements

23. Section 17(1) requires that when a public authority refuses a request by relying on any of the exemptions contained in Part II of the Act it must provide the applicant with a refusal notice which cites the particular exemptions upon which it is seeking to rely. Such a notice must be issued in line with the time for compliance with section 10(1) of the Act, i.e. not later than the twentieth working day following the date of receipt of the request. Although section 10(3) of the Act allows a public authority to extend the time it needs to consider the public interest test, this section also makes it clear that such an extension does not extend to the time by which a refusal notice must be sent.
24. In this case, although the Cabinet Office issued a refusal notice on 30 December 2009 within the time limit required by section 10(1) of the Act, and this refusal notice cited section 24(2), this notice did not cite section 23(5). By failing to issue a refusal notice within 20 working days which cited all of the exemptions upon which it was seeking to rely, the Cabinet Office breached section 17(1) of the Act.

The Decision

25. 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:
 - (i) In responding to this request the Cabinet Office was correct to cite both sections 23(5) and 24(2) as basis to refuse to comply with the duty contained at section 1(1)(a) of the Act.
26. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
 - (ii) By failing to issue a refusal notice within 20 workings which cited section 23(5), the Cabinet Office breached section 17(1) of the Act.

Steps Required

27. The Commissioner requires no steps to be taken.

Other matters

28. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
29. The Commissioner has issued guidance on the time limits on carrying out internal reviews under the Act.¹ This guidance explains that in the Commissioner's opinion 20 working days constitutes a reasonable amount of time to conduct an internal review. In exceptional circumstances it may be reasonable to take longer but in no circumstances should the total time taken exceed 40 working days. In this case, the Cabinet Office received correspondence from the complainant on 26 January 2009 asking it to conduct an internal review of its handling of his request. The Cabinet Office did not inform the complainant of the outcome of this review until 15 April 2009, outside of the 40 working day guideline.
30. In the future when then the Cabinet Office conducts internal reviews the Commissioner expects it to adhere to the timelines set out in his guidance paper.

¹ [Freedom of Information Good Practice Guidance No. 5](#)

Right of Appeal

31. 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 8th day of November 2010

Signed

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

Legal Annex

Freedom of Information Act 2000

General Right of Access

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."

Effect of Exemptions

Section 2(1) provides that –

"Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that either –

(a) the provision confers absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information

section 1(1)(a) does not apply."

Time for Compliance

Section 10(1) provides that –

"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."

Section 10(3) provides that –

"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."

Information supplied by, or relating to, bodies dealing with security matters

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(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)."

National Security

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(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."