

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 15 August 2011**

**Public Authority:** Home Office  
**Address:** Seacole Building  
2 Marsham Street  
London SW1P 4DF

### Summary

---

The complainant requested information relating to the abolition of the Assets Recovery Agency. The public authority refused to provide this information citing exemptions at section 23 (Security bodies), section 35 (Formulation/Development of Government policy) and section 21 (Reasonably accessible to the requester). It upheld this position on internal review. The Commissioner has decided that the withheld information is exempt under section 23 of the Act. However, he has identified a number of procedural shortcomings in the way the public authority handled this request.

### 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.

### Background

---

2. The Assets Recovery Agency was established under the Proceeds of Crime Act 2002 and became operational in February 2003. Its aim was to disrupt organised criminal enterprises through the recovery of criminal assets. It also aimed to promote financial investigation as a part of criminal investigation. On 1 April 2008,

it was formally merged with the Serious Organised Crime Agency ("SOCA")<sup>1</sup>.

## The Request

---

3. On 30 March 2009, the complainant requested information of the following description:
  1. *the decision and the reasoning which lay behind the abolition of the Assets Recovery Agency,*
  2. *the incorporation of its functions in SOCA*
  3. *the extension of civil recovery functions to mainstream prosecuting authorities.*
4. On 1 July 2009, the public authority sent its response. It refused to disclose the requested information on the basis of the exemptions contained in section 23(1) (Security bodies information) and section 35(1)(a) and (b) (Formulation /Development of Government Policy, etc.) (these sections are set out in a Legal Annex to this Notice). It also argued that some information within the scope of the request was reasonably accessible to the complainant and therefore exempt from disclosure under section 1 of the Act by virtue of section 21. To demonstrate this, it provided a number of hyperlinks to websites which contained relevant information. This included links to the Hansard pages of the UK Parliament website, to pages on its own website and to pages on SOCA's website.
5. On 10 July 2009, the complainant requested an internal review of this in which he queried the extent to which section 23 had been applied. He also queried the public authority's consideration of the public interest test, where applicable.
6. On 19 April 2010, the public authority provided the outcome of its internal review. It upheld its original position.

---

<sup>1</sup> [www.soca.gov.uk/.../53-serious-organised-crime-agency-annual-report-2008-2009.pdf](http://www.soca.gov.uk/.../53-serious-organised-crime-agency-annual-report-2008-2009.pdf)

## The Investigation

---

### Scope of the case

7. On 20 July 2010, the complainant contacted the Commissioner to complain about the way his request for information had been handled. However, the Commissioner decided that there had been undue delay on the complainant's part in bringing the complaint to his attention and did not agree to take the case forward.
8. On 2 September 2010, the complainant re-submitted his complaint and argued in mitigation that the delay was due to the fact that he was awaiting the outcome of another complaint to the Commissioner. Where he had been successful in that case, the complainant said that he would not have proceeded with the complaint which is now the subject of this notice. He did not achieve the outcome he had hoped for on the other case and so he wished to proceed with a complaint about the request made in this case. Taking these factors into account, the Commissioner agreed to take the complaint forward.
9. The complainant specifically asked the Commissioner to consider the following points:
  - Some but not all of the information may be exempt under section 23. However, not all the remainder would be exempt under section 35. Even if the remainder was exempt information under section 35, the balance of public interest favoured disclosure.

### Chronology

10. In an email of 8 September 2010, the Commissioner wrote to the complainant to advise that he would now proceed with an investigation of the complaint.
11. On the same day, he wrote to the public authority to advise receipt of the complaint and to request a copy of the withheld information.
12. Regrettably, due to a large number of cases that had accumulated into a backlog during the period, the Commissioner was unable to proceed with a substantive investigation until 21 February 2011.

On this date, he wrote to both parties setting out the scope of his investigation.

13. In his letter to the public authority, he set out a series of questions as to the application of exemptions. He asked for a copy of the withheld information or for a list of dates in March 2011 when one of his officers might come to view the withheld information in situ.
14. He also drew attention to the complainant's explicit interest in "organisational design material". He asked the public authority to consider whether any of the requested information fell within this characterisation and whether any of it could now be disclosed to the complainant in the interests of informally resolving this matter. Finally, he asked for an explanation as to why the public authority had failed to respond to the complainant's initial request and his request for internal review in a timely manner.
15. After some further delay on the part of the public authority, the Commissioner received its response on 1 April 2011. The detail of the response will be analysed later in this Notice.
16. However, at this point, it is worth noting that the public authority addressed the Commissioner's suggestion as to informal resolution of the matter, namely the disclosure of "organisational design material" as suggested by the complainant. It advised that it had carefully considered this point but had concluded that it could not do so in this case given the nature of the information and the fact that, in its view, all of the withheld information was exempt under section 23

## **Analysis**

---

### **Exemptions**

#### **Section 23 - information supplied by or relating to bodies dealing with security matters**

17. 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).'

18. Those bodies in subsection (3) include SOCA, the body which is explicitly named in the request. SOCA was added to the list of section 23(3) bodies by Schedule 4 (paragraph 159) of the Serious Organised Crime and Police Act 2005<sup>2</sup>.
19. In its letter of 1 April 2011, the public authority advised that

*"Having analysed the information in detail, [it] would like to amend [its position at internal review] by stating that all of the information falls under s23(1) because it is impossible to separate and redact the s23(1) information from the s35(1)(a) and (b) information because of the nature of the subject. If redactions were made, it would render the remaining information meaningless.*
20. It commented that it was mindful of the Tribunal's decision in *Beam*<sup>3</sup> and said that it understood that the Commissioner must be as fully briefed as possible. To that end, it included a letter from one of its senior officials with its correspondence. It explained that the senior official was unconnected with the public authority's request handling process under the Act. However, this person had relevant experience and authority to validate the provenance of the requested material. This Notice will now refer to the senior official's letter as the "section 23 letter". The section 23 letter included more detail about its reliance on section 23(1). Its contents are considered in a Confidential Annex to this Notice.

### **Section 23 letter**

21. The Commissioner is prepared, in limited circumstances, to accept the assurance of a senior official that information withheld under section 23(1) has indeed been supplied by or is related to security bodies specified in section 23(3). In the Commissioner's view, this accords with the provisions of Annex 2 of the Memorandum of

---

<sup>2</sup>

<http://www.legislation.gov.uk/ukpga/2005/15/schedule/4/paragraph/159/prospective>

<sup>3</sup>

[http://www.informationtribunal.gov.uk/DBFiles/Decision/i308/Beam%20v%20ICO%20&%20FCO%20\(EA-2008-0079\)%20Decision%2012-05-09.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i308/Beam%20v%20ICO%20&%20FCO%20(EA-2008-0079)%20Decision%2012-05-09.pdf)

Understanding between the Commissioner and the Secretary of State for Constitutional Affairs (on behalf of Central Government Departments) signed on 24 February 2005<sup>4</sup>.

22. The Commissioner will only accept such a letter where the senior official occupies a position in relation to the security bodies which allows them genuinely to validate the provenance of the information, and where the official is independent of the public authority's process for dealing with freedom of information requests.
23. The Commissioner is satisfied that the senior official who wrote the section 23 letter occupied such a position in this case. For reasons set out in the Confidential Annex to this Notice, the Commissioner has concluded that the information that was withheld by the public authority engaged the exemption under section 23(1). Since section 23(1) is an absolute exemption, there is no public interest test.
24. The Commissioner would add that given the legal and factual background explained at paragraph 2 above, it is highly likely that information falling within the scope of this request will relate to SOCA.

### **Section 23 – Conclusion**

25. In light of the above, the Commissioner has concluded that the requested information is exempt in its entirety from disclosure under the Act by virtue of section 23(1) of the Act.
26. In reaching this conclusion, the Commissioner would observe that the effect of the section 23(1) exemption is that it can apply to information that may be innocuous or might otherwise be disclosable in the public interest.
27. Given that he is satisfied that all the withheld information is exempt from disclosure by virtue of section 23(1), he has not gone on to consider the application of other exemptions cited by the public authority.

---

4

[http://www.ico.gov.uk/~media/documents/library/memo\\_of\\_understanding/Documents/mou\\_secretary\\_of\\_state\\_for\\_constitutional\\_affairs.ashx](http://www.ico.gov.uk/~media/documents/library/memo_of_understanding/Documents/mou_secretary_of_state_for_constitutional_affairs.ashx)

## Procedural Requirements

28. In his letter of 21 February 2011, the Commissioner asked the public authority to explain how and why significant delays arose in the public authority's handling of the complainant's request and his request for an internal review. The chronology of events is described earlier in this Notice.
29. The public authority admitted that there was a delay in allocation of the initial request and observed that it had apologised to the complainant for this in its letter of 1 July 2009. It accepted that the delay that arose in the handling of the complainant's request for an internal review was also unacceptable. It commented, in mitigation, that it had originally undertaken to provide an internal review within 40 working days, i.e., by 4 September 2009. When it was unable to meet its own target it had updated the complainant as to the progress of the matter on 4 September 2009 and 16 March 2010.
30. In failing to respond to the complainant's request within 20 working days, the public authority contravened the requirements of section 1(1)(a), section 10(1) and section 17(3). These provisions are set out in a legal annex to this Notice. Further comment is set out in the Other Matters section of this Notice.

## The Decision

---

31. 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:
  - It was entitled to rely on section 23(1) as a basis for withholding the information caught by the scope of the request.
32. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
  - In failing to provide a timely response to the request, the public authority contravened the requirements of sections 1(1)(a), 10(1) and 17(3) of the Act.

## Steps Required

---

33. The Commissioner requires no steps to be taken.

## Other matters

---

34. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
35. The Commissioner would agree with the public authority that the delays that arose in providing a response to this request and in conducting an internal review are wholly unacceptable. The Commissioner's published guidance<sup>5</sup> notes that, in exceptional circumstances, a public authority may take 40 working days to process a request for an internal review. In this case, the delay lasted several months.

---

5

[http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/time\\_limits\\_internal\\_reviews.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/time_limits_internal_reviews.pdf)



## Right of Appeal

---

36. 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: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

37. 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.
38. 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 15<sup>th</sup> day of August 2011**

**Signed .....**

**Graham Smith**

**Deputy Commissioner**

**Information Commissioner's Office**

**Wycliffe House**

**Water Lane**

**Wilmslow**

**Cheshire**

**SK9 5AF**

## Legal Annex

---

### 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 2(3) provides that –**

“For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

- (a) section 21
- (b) section 23
- (c) section 32
- (d) section 34
- (e) section 36 so far as relating to information held by the House of Commons or the House of Lords
- (f) in section 40 –
  - (i) subsection (1), and
  - (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
  - (iii) section 41, and
  - (iv) section 44”

## **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(2) provides that –**

“Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.”

### **Section 10(3) provides that –**

“If, and to the extent that –

(g) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or

(h) 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.”

...

## **Refusal of Request**

### **Section 17(1) provides that -**

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (i) states that fact,
- (j) specifies the exemption in question, and
- (k) states (if that would not otherwise be apparent) why the exemption applies."

**Section 17(2) states –**

"Where–

- (l) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
  - 39. that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
  - 40. that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (m) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached."

**Section 17(3) provides that -**

"A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (n) that, 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 authority holds the information, or

(o) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

...

**Section 21(1) provides that –**

"Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information."

**Section 21(2) provides that –**

"For the purposes of subsection (1)-

(p) information may be reasonably accessible to the applicant even though it is accessible only on payment, and

(q) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment."

**Section 21(3) provides that –**

"For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme."

**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(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-

- (r) the Security Service,
- (s) the Secret Intelligence Service,
- (t) the Government Communications Headquarters,
- (u) the special forces,
- (v) the Tribunal established under section 65 of the Regulation of Investigatory Powers Act 2000,
- (w) the Tribunal established under section 7 of the Interception of Communications Act 1985,
- (x) the Tribunal established under section 5 of the Security Service Act 1989,
- (y) the Tribunal established under section 9 of the Intelligence Services Act 1994,
- (z) the Security Vetting Appeals Panel,
- (aa) the Security Commission,
- (bb) the National Criminal Intelligence Service, and
- (cc) 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."

...

## **Formulation of Government Policy, etc**

### **Section 35(1) provides that –**

“Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (dd) the formulation or development of government policy,
- (ee) Ministerial communications,
- (ff) the provision of advice by any of the Law Officers or any request or the provision of such advice, or
- (gg) the operation of any Ministerial private office.”

### **Section 35(2) provides that –**

“Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded-

- (hh) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or
- (ii) for the purposes of subsection (1)(b), as relating to Ministerial communications.”

### **Section 35(3) provides that –**

“The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).”

### **Section 35(4) provides that –**

“In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking.”

### **Section 35(5) provides that –**

“In this section-

"government policy" includes the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the National Assembly for Wales;

"the Law Officers" means the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for

Scotland and the Attorney General for Northern Ireland;

"Ministerial communications" means any communications-

(jj) between Ministers of the Crown,

(kk) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or

(ll) between Assembly Secretaries, including the Assembly First Secretary, and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly, and proceedings of the executive committee of the National Assembly for Wales;

"Ministerial private office" means any part of a government department which provides personal administrative support to a Minister of the Crown, to a Northern Ireland Minister or a Northern Ireland junior Minister or any part of the administration of the National Assembly for Wales providing personal administrative support to the Assembly First Secretary or an Assembly Secretary;

"Northern Ireland junior Minister" means a member of the Northern Ireland Assembly appointed as a junior Minister under section 19 of the Northern Ireland Act 1998."