

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 January 2013

Public Authority: Foreign and Commonwealth Office
Address: King Charles Street
London SW1A 2AH

Decision (including any steps ordered)

1. The complainant has requested information about the visit of the then Prime Minister, John Major, to Moscow in September 1991, focussing on information about the failed coup in the Soviet Union of August 1991 and matters relating to Estonia, Latvia, Lithuania of the same period. The Foreign and Commonwealth Office ("FCO") refused to provide this relying on the International Relations exemption (section 27 of the FOIA) and the Ministerial Communications exemption (section 35) as its reasons for doing so. It also explained that it was refusing to confirm or deny whether it held other relevant information citing the exclusions at section 23 (Security Bodies) and section 24 (National Security) as its reasons for doing so. It revised its position at internal review and disclosed some information to the complainant. However, it withheld some information reaffirming its reliance on section 27 as its basis for doing so. It also explained to the Commissioner that it continued to refuse to confirm or deny whether it held other relevant information on the basis of the exclusions at section 23 and section 24.
2. The Commissioner's decision is that the FCO is entitled to rely on the exemptions it has cited as a basis for withholding information it holds within the scope of the request. It is also entitled to rely on the exclusions it has cited as a basis for refusing to confirm or deny whether it holds other information within the scope of the request. No steps are required.

Request and response

3. On 3 November 2011, the complainant wrote to the FCO and requested information of the following description:

"I am sending this request under the Freedom of Information Act to ask for the following information: any documents about the visit of the British Prime Minister John Major to Moscow in September 1991.

If you are able to supply some of this information more quickly than other items, please supply each item as soon as it becomes available. If it is necessary for any reason to redact any information, please redact the minimum necessary and send me the rest of the document(s), explaining the legal grounds for each redaction."

4. At the beginning of December 2011, there was an exchange of correspondence between the parties during which time the complainant clarified that he was specifically interested in information of the following description:

*"- All documents about the recognition of the independence of the Baltic States Estonia, Latvia, Lithuania;
- All documents about the failed coup in Soviet Union in August 1991;
- All documents about the economic help for the Soviet Union, Russia and Baltic States Estonia, Latvia, Lithuania;
- All documents about the meetings with the leaders and diplomatic agents of Soviet Union, Russia and Baltic States Estonia, Latvia, Lithuania."*

5. On 22 December 2011, the FCO wrote to explain that it needed further time to consider the balance of public interest in relation to the International Relations exemption (section 27 of the FOIA). It also wrote to the complainant on 24 January 2012 to explain that it needed further time to consider the balance of public interest in relation to the National Security exemption (section 24 of the FOIA) as well as in relation to the International Relations exemption.

6. It eventually provided its response on 21 February 2012. It refused to provide the requested information. It cited the following exemptions as its basis for doing so:

- section 35(1)(b) – Ministerial Communications;
- section 27(1)(a) – Relations between the UK and any other state; and
- section 27(2) - Confidential information obtained from another state, an international organisation or an international court.

7. It also refused to confirm or deny whether it held any other information within the scope of the request. It explained it was entitled to do this under the provisions of the following exemptions:

- section 23(5) – Information supplied by, or which relates to, listed security bodies; and
 - section 24(2) – National security
8. Following an internal review, the FCO wrote to the complainant on 29 May 2012. It revised its position. It disclosed information contained in four documents but argued that it was entitled to withhold the remainder that it held within the scope of the request on the basis of exemptions at section 27(1)(a) and section 27(2).

Scope of the case

9. The complainant contacted the Commissioner on 23 July 2012 to complain about the way his request for information had been handled. Specifically, he raised concerns about the FCO's use of exemptions.
10. At the start of his investigation, the FCO acknowledged to the Commissioner that it had failed to explain fully its position to the complainant in its letter of 29 May 2012 after internal review. This was as follows:
11. As well as relying on section 27(1)(a) and section 27(2), it also sought to rely on section 27(1)(c) as a basis for withholding requested information. It also sought to rely on section 35(1)(b) as a basis for withholding requested information (although it withdrew reliance on this during the Commissioner's investigation). Additionally, it continued to rely on provisions of section 23 and section 24 as a basis for refusing to confirm or deny whether it held other information within the scope of the request.
12. The Commissioner has therefore considered whether the FCO is entitled to withhold information within the scope of the request on the basis of
- section 27(1)(a)
 - section 27(1)(c); and
 - section 27(2).
13. The Commissioner has also considered whether FCO is entitled to rely on section 23(5) and section 24(2) as a basis for refusing to confirm or deny whether it holds other information within the scope of the request.

Reasons for decision

14. The right of access under section 1(1) of the FOIA is in two parts. Under section 1(1)(a), public authorities must confirm or deny whether they

hold information that is described in FOIA requests made to them. Under section 1(1)(b), public authorities must provide that information. By virtue of section 2, exemptions can apply to both parts.

15. In this case, the FCO has confirmed it holds information within the scope of the request. It has disclosed some information it holds within the scope of the request but has argued that it is not required to disclose other information within the scope of the request because it can rely on the international relations exemption at section 27. Further, it has refused to confirm or deny whether the information which is, in its view, exempt under the international relations exemption constitutes everything that it holds within the scope of the request. It says that it is not obliged to provide this confirmation or denial by virtue of the exclusion for information about security bodies at section 23 and the national security exclusion at section 24.
16. This Notice will first deal with the information that FCO confirms it holds but which FCO believes is exempt from disclosure under FOIA. Having reached a conclusion on that point, the Notice will then consider whether the FCO is entitled to refuse to confirm or deny whether it holds any other information within the scope of the request.

FCO confirms it holds some information but refuses to disclose it

17. Section 27(1) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

(a) relations between the United Kingdom and any other State,

...

(c) the interests of the United Kingdom abroad,”

18. The Commissioner considered the two exemptions within section 27(1) in tandem.
19. In order for a prejudice-based exemption, such as those set out in section 27(1), to be engaged the Commissioner believes that three criteria must be met.
20. Firstly, the actual harm which the public authority alleges would (or would be likely to) occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption.
21. Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the

information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance.

22. Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e. disclosure would be likely to result in prejudice or disclosure would result in prejudice. If the likelihood of prejudice occurring is one that is only hypothetical or remote the exemption will not be engaged.
23. Furthermore, the Commissioner has been guided by the comments of the Information Tribunal which suggested that, in the context of section 27(1), prejudice can be real and of substance 'if it makes relations more difficult or calls for a particular damage limitation response to contain or limit damage which would not have otherwise have been necessary' (Campaign Against the Arms Trade (CAAT) v the Information Commissioner and Ministry of Defence (EA/2007/0040)).¹

Section 27(1)(a) and (c) – Engaging the exemptions

24. With the above in mind, the Commissioner has considered both the withheld information and the FCO's detailed submissions in support of its reliance on section 27(1)(a) and (c). He has also considered the complainant's submissions.

Does the alleged harm relate to the exemptions cited?

25. The alleged harm claimed by the FCO clearly relates to the exemptions within section 27(1)(a) and (c). That is, the FCO has asserted that there will be a likely detrimental impact upon bilateral relations between the UK and Russia as well as any other States mentioned in the information. It has asserted that this would also impact negatively on the UK's efforts to promote its interests abroad. The first criterion for engaging these exemptions is therefore met. The harm envisaged relates to the prejudicial outcomes described in the exemptions cited.

Is there a causal relationship between disclosure and the harm described in the exemption?

26. The FCO provided relevant background detail. It noted the passage of a considerable amount of time since the events in question but identified

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<http://www.informationtribunal.gov.uk/DBFiles/Decision/i205/Campaign%20Against%20the%20Arms%20Trade;%20EA.2007.0040%20.pdf> (EA/2007/0040)
Paragraph 81.

how disclosure would nevertheless, in its view, be likely to give rise to harm. It stressed that the events taking place around the time the withheld information was created (the attempted coup of August 1991, the break-up of the Soviet Union) are still sensitive matters across the region. For this reason, disclosure could have a negative effect on international relations as well as damage the UK's interests abroad.

27. It also provided further detailed arguments which make specific reference to the withheld information. Unfortunately, the Commissioner is unable to set them out on the face of this Notice without disclosing the withheld information itself. In the Commissioner's view, the FCO has satisfactorily established a causal link between disclosure of the withheld information and the prejudicial outcome described in both exemptions in section 27(1). He also agrees that the alleged likely prejudice is real and of substance. The Commissioner, therefore, agrees that the second criterion for engaging both section 27(1)(a) and section 27(1)(c) is met.

Likelihood of prejudice

28. Considering the third criterion, that is, likelihood of prejudice, the Commissioner notes that the FCO has not clarified which threshold of prejudice it is relying on. However, based on its assertions as to likely prejudice, the Commissioner has concluded that it is relying on the lower threshold, namely that prejudice would be likely to arise following disclosure rather than asserting that prejudice would arise.
29. The complainant focussed his arguments on the age of the material and asserted that the FCO had failed to take proper account of this. He also stressed that, given that the 30 year rule on disclosure was soon to be reduced by 10 years, the government had acknowledged that information of this age was suitable for disclosure.
30. He also queried whether disclosure would give rise to harm to the UK's relationship with other states and said that, on the contrary, the information "*could show how the UK tried to help the Soviet Union, Russia, Estonia, Latvia and Lithuania in 1991 politically and economically*". He also queried how disclosure could harm the UK's relationship with the United States as asserted by the FCO.
31. The Commissioner has considered the detail of the withheld information and agrees that, although the information dates from over 20 years ago, disclosure would be likely to have a negative impact on the UK's relations with other states. Disclosure would also be likely to damage the UK's interests abroad. The withheld information includes subject matter which remains sensitive to this day.

32. While the attempted coup in Moscow in August 1991 may be of purely historical interest outside the former Soviet Union, the Commissioner accepts that the events remain a sensitive topic in Russia and elsewhere.² Given that the information relates to a visit by the UK's Prime Minister of the day at a crucial time for the region, the matters covered in the information to which section 27 has been applied relate to bilateral discussions at the highest level. By their very nature, such discussions would include matters which were sensitive and which, the Commissioner agrees, remain sensitive today.
33. With the above in mind, the Commissioner agrees that the prejudicial outcomes described in both section 27(1)(a) and section 27(1)(c) would be likely to arise if the FCO were to disclose the withheld information to which those exemptions have been applied.

Section 27(1)(a) and (c) – Public interest test

34. Section 27 is a qualified exemption. This means that, even where its provisions are engaged, the information can only be withheld when the public interest in maintaining the exemption(s) in question, outweighs the public interest in disclosure.

The complainant's arguments

35. As noted above, the complainant focussed his arguments on the age of the material. He stressed that, in his view, the FCO had failed to take proper account of this.
36. As also noted above, he argued that disclosure could have a positive impact on the UK's relationship with other states which would benefit the public interest.

The FCO's arguments

37. As noted above, in making its arguments, the FCO made considerable specific reference to the withheld information. This greatly assisted the Commissioner in understanding the FCO's position. However, it means that the Commissioner is somewhat limited in the detail that he can reproduce on the face of this Notice without revealing the withheld information itself. However, the Commissioner thinks that some of the FCO's arguments can be summarised on the face of this Notice as follows:

² <http://www.bbc.co.uk/news/world-europe-17839672>

- There is a strong public interest in avoiding disclosure of information on topics that remain live.
- There is a strong public interest in maintaining a safe space for discussions at the highest level between governments, particularly where the issues discussed remain sensitive.

The Commissioner's position

38. The complainant gave particular emphasis to his view that the matters covered were not live. The Commissioner agrees that the matters in question are not technically live. Even if the matters were live, the Commissioner considers, contrary to the FCO's view, that there can be a public interest in disclosing information covering live issues even where that might give rise to prejudice to international relations. He must consider each case on its own merits.
39. Although the matters covered are not technically live, the Commissioner thinks that they remain sensitive for reasons outlined below.
40. Estonia, Latvia and Lithuania regained their independence in the period following the failed coup in the Soviet Union in 1991, over 20 years ago.^{3 4 5} All three countries are now members of the European Union and the North Atlantic Treaty Organisation ("NATO") as is the UK. Relations between the UK and the three Baltic States have therefore evolved in the past 20 years to one of active partnership.
41. This contrasts sharply with the situation in the late summer of 1991 – the period covered by the withheld information. The FCO has argued that the events of August 1991 still have resonance today such that the public interest favours maintaining the exemptions cited in section 27(1). It has referred to specific parts of the withheld information which, in the Commissioner's view, add weight to this point but which, in order to avoid inadvertent disclosure, the Commissioner cannot set out in the face of this Notice. However, the Commissioner thinks that there is relevant background information that can be set out on the face of the Notice which goes some way to explaining the FCO's position.
42. At the relevant time, all three Baltic States were nominally still member states of the Soviet Union but in the process of reasserting their independence. As member states of the Soviet Union (having been

³ <http://www.bbc.co.uk/news/world-europe-17220814>

⁴ <http://www.bbc.co.uk/news/world-europe-17529542>

⁵ <http://www.bbc.co.uk/news/world-europe-17540745>

annexed by the Soviet Union in 1940), they were also part of the Warsaw Pact, a military alliance set up shortly after (and in response to) the creation of NATO. The period of history between the end of the Second World War and the collapse of the Soviet Union is commonly referred to as the "Cold War". Relations between NATO (lead by the USA) and the Warsaw Pact nations (lead by the Soviet Union) were often strained close to breaking point, either because of events within Europe, such as disputes over the administration of the city of Berlin or in areas beyond their respective borders where both sought to have influence, such as in Cuba.

43. The attempted coup of 1991 represented efforts by conservative elements in the Soviet Union to reverse the liberal political and economic reforms instigated by Mikhail Gorbachev (who was president of the Soviet Union at the time). These Soviet reforms also included a reversal of the so-called Brezhnev Doctrine (named after a previous Soviet leader). This doctrine asserted the Soviet Union's intention to suppress attempts at liberal reform in countries of the Warsaw Pact. It could be argued that the Warsaw Pact acted as a bulwark between the Soviet border and NATO which the Soviet Union was keen to preserve; the Brezhnev doctrine reflected this. The reversal of the Brezhnev doctrine contributed to the ultimate destruction of the Berlin Wall (symbol of the divide between Eastern and Western Europe) in 1989, as members of the Warsaw Pact introduced their own political and economic reforms without interference from the Soviet Union.
44. Had the August 1991 coup been successful, it is reasonable to assume that this would this may have resulted in a clampdown on a reassertion of independence by the Baltic States. Such a clampdown would have formed part of efforts to stem the flow of liberal reform across Eastern Europe at what was then the border of the Soviet Union, even if it would have been difficult for the coup plotters to re-ignite the Brezhnev Doctrine elsewhere in Eastern Europe. There had already been attempts to suppress concerted moves towards reform and independence in Lithuania (see Note 2) in 1990 and early 1991.
45. UK Prime Minister John Major's visit to Moscow therefore came at a key moment in the history of Soviet Union, when its member states, including the three Baltic States, were taking the opportunity presented by the failure of the coup, to add momentum to their respective efforts towards gaining full independence. Russia (the largest member state of

the Soviet Union), led at the time by Boris Yeltsin, was also asserting its independence from the Soviet Union.⁶

46. While these events are now part of history, they remain, nevertheless, the subject of considerable controversy, particularly in Russia itself (see note 2). In the Commissioner's view, the FCO's assertion that the events of August 1991, remain sensitive in the region carries particular weight. There is a strong public interest in avoiding aggravation of these complex sensitivities. This is because the UK strives to maintain positive working and trading relations with countries across this region, not only with its NATO and EU partners but also with other countries that were members of the former Soviet Union.
47. Finally, the FCO has acknowledged that considerable time has passed since the events in question and it has disclosed information described in the request at internal review. The Commissioner accepts, therefore, that the FCO has not adopted a blanket approach to withholding the requested information. It took the opportunity at internal review to take this factor into account.

Section 27(1)(a) and (c) - Conclusion

48. In the Commissioner's view, the FCO has made a strong case for showing how disclosure would give rise to prejudicial outcomes that are not in the public interest. He has therefore concluded that the public interest in maintaining the exemptions at section 27(1) outweigh the public interest in disclosure. He has given particular regard to the FCO's argument that the information in question covers matters which remain sensitive in the region.

Section 27(2) – Engaging the exemption

49. Section 27(2) provides that –

“Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.”

50. This exemption applies to information which matches the description set out in the previous paragraph. It is therefore a class-based exemption with no test of prejudice or harm; the information in question either matches this description or it does not.

⁶ <http://www.bbc.co.uk/news/world-europe-17858981>

51. The Commissioner has reviewed the information to which this exemption has been applied. He is satisfied that it is confidential information within the meaning of section 27(2). Unfortunately, he is unable to elaborate on this point without disclosing the detail of the withheld information, which would defeat the object of the exemption. However, in conclusion, he is satisfied that section 27(2) is engaged in relation to this information. The Commissioner would note that the FCO applied this exemption to a discrete set of information to which other exemptions had not been applied.

Section 27(2) – Public interest test

52. As above, the complainant made no specific arguments as to any of the exemptions within section 27 other than to assert that the FCO had considered the balance of public interest incorrectly. He gave particular emphasis to the passage of time since the information was created and the significant political changes that have taken place in the countries concerned.
53. The FCO explained its reliance on section 27(2) and its view on the balance of public interest in its submissions to the Commissioner. The Commissioner is unable to reproduce the detail of these arguments on the face of this notice but would note that it addressed the complainant's assertion that sufficient time had passed to warrant disclosure.

Section 27(2) – Balance of public interest

54. Section 27(2) was considered in the aforementioned Tribunal case, *Campaign Against the Arms Trade (CAAT) v the Information Commissioner and Ministry of Defence (EA/2007/0040)*. At paragraph 95, the Tribunal accepted that Parliament recognised that the Act, by virtue of the provisions in s27, assumes an "*inherent disservice to the public interest in flouting international confidence*". It ascribed particular weight to the importance maintaining confidences in the context of what it referred to as "*international comity*". The Shorter Oxford Dictionary definition of comity is: the mutual recognition by nations of the laws and customs of others.
55. The Commissioner considers that the public interest arguments favouring disclosure which have been set out above in relation to section 27(1)(a) and section 27(1)(c) also apply here, that is, the passage of time diminishes the detrimental effect of disclosure. However, he considers that the public interest in protecting international confidences is more weighty in the circumstances of this case. He has also thinks that the background detail set out above reflects the sensitivity that is still attached to the withheld information. He has also taken the FCO's

further detailed arguments with specific reference to the withheld information into consideration.

Section 27(2) - Conclusion

56. The Commissioner agrees that the FCO is entitled to rely on this exemption where it has applied it. He has concluded that the public interest in maintaining this exemption outweighs the public interest in disclosure. He has given particular weight to the public interest in maintaining confidences in this context.

Refusal to confirm or deny

Section 23 – security bodies

Section 24 - national security

The Commissioner's interpretation of the relevant legislation

57. The parts of the exemption contained at section 23 of FOIA relevant to this case state that:

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

(5) 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).⁷

58. The Commissioner has recently clarified his guidance on how these two exemptions interact. This can be found on his website.⁸
59. Section 23 provides a class based exemption which means that a public authority does not need to demonstrate a likelihood that prejudice would occur if it complied with a request, simply whether the requested information (if held) would fall within the description set out in section

⁷ The list of section 23(3) bodies can be viewed here:
<http://www.legislation.gov.uk/ukpga/2000/36/section/23>

⁸

http://www.ico.gov.uk/for_organisations/guidance_index/~/media/documents/library/Freedom_of_Information/Detailed_specialist_guides/how_sections_23_and_24_interact_foi.ashx

23(1). Furthermore, the exemption is absolute and thus not subject to the public interest test.

60. The parts of section 24 of FOIA relevant to this case state 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.'
61. The section 24 exemption is qualified and is therefore subject to the public interest test. Sections 23 and 24 are closely linked provisions. Sections 23(1) and 24(1) are mutually exclusive. However, sections 23(5) and sections 24(2) are not mutually exclusive and therefore a public authority can apply just one exemption or both in order to refuse to confirm or deny whether or not it holds requested information. However, in the Commissioner's opinion each exemption must be applied independently on its own merits.
62. In the Commissioner's opinion, the exemption contained at section 23(5) should be interpreted so that it is only necessary for a public authority to show that **either** confirmation **or** denial as to whether the requested information is held would involve the disclosure of information relating to a security body. It is not necessary for a public authority to demonstrate that both responses would disclose such information. Whether or not a security body is interested or involved in a particular issue is in itself information relating to a security body.
63. Furthermore, the Commissioner believes that the phrase 'relates to' should be interpreted broadly. Such an interpretation has been accepted by the First-Tier Tribunal (Information Rights) in a number of different decisions.⁹ Therefore, in the Commissioner's opinion section 23(5) could be used by a public authority to avoid issuing a response to a request which revealed either that a security body was involved in an issue or that it was not involved in an issue.

⁹ See for example *Dowling v Information Commissioner and The Police Service for Northern Ireland*, EA/2011/0118, paras 17 to 22.
<http://www.informationtribunal.gov.uk/DBFiles/Decision/i678/20120222%20Open%20Decision%20EA20110118.pdf>

64. The test as to whether a disclosure would relate to a security body is decided on the normal civil standard of proof, that is, the balance of probabilities. In other words, if it is more likely than not that the disclosure would relate to a security body then the exemption would be engaged.
65. From the above, it can be seen that section 23(5) has a very wide application. If the information requested is within what could be described as the ambit of security bodies' operations, section 23(5) is likely to apply. This is consistent with the scheme of FOIA because the security bodies themselves are not subject to its provisions. Factors indicating whether a request is of this nature will include the functions of the public authority receiving the request, the subject area to which the request relates and the actual wording of the request.
66. With regard to section 24(2), the Commissioner again considers that this exemption should be interpreted so that it is only necessary for a public authority to show that **either** a confirmation **or** denial of whether requested information is held would be likely to harm national security. It is not necessary for a public authority to demonstrate that both responses would have such an effect. The Commissioner interprets the phrase 'required' in the context of this exemption to mean 'reasonably necessary'. In effect, this means that there has to be a risk of harm to national security for the exemption to be relied upon but there is no need for a public authority to prove that there is specific, direct or imminent threat.
67. In relation to the application of section 24(2) the Commissioner notes that the Tribunal has indicated that only a consistent use of a neither confirm nor deny ("NCND") response on matters of national security can secure its proper purpose. Therefore, in considering both whether the exemption is engaged and the balance of the public interest test, regard has to be given to the need to adopt a consistent NCND position and not simply the consequences of confirming whether the specific requested information in this case is held or not.

The FCO's position

68. The FCO has explained that during the course of discussions between a Prime Minister or other senior official and a foreign Head of State or senior official, information related to the section 23 security bodies could well be discussed and could therefore form part of the requested information in this case. If it provided confirmation or denial in this case, such confirmation or denial would, of itself, reveal sensitive detail related to one or more section 23 security bodies. It tells the requester that a matter which the security bodies cover was or was not discussed.

69. The FCO also sought to argue that it was citing section 24 "in conjunction with" section 23 citing *Baker vs IC and Others* (EA/2006/0045) in support of its position.¹⁰ For the reasons outlined above, the Commissioner does not agree that this is an appropriate approach, although he accepts that both NCND provisions may be cited without specifying which actually applies (see note 8).

The complainant's position

70. Although the complainant accepted that section 23 applied as a reason for withholding information where the information related to security bodies, he disputed reliance on section 24, particularly given the passage of time. The FCO did not give a clear explanation of the NCND provisions of section 23 and section 24 to the complainant and therefore the complainant's submissions to the Commissioner focus on arguments for disclosure and not for confirmation or denial.

The Commissioner's position – Section 23(5)

71. The Commissioner has initially considered the FCO's reliance on section 23(5) before going on to consider the FCO's reliance on section 24(2).

72. Dealing first, with section 23(5), the Commissioner is satisfied that, on the balance of probabilities, if the FCO confirmed whether or not it held information of the nature sought by the complainant then this would reveal something about the security bodies.

73. The Commissioner is satisfied that if the FCO confirmed that it held information relating to security bodies that was within the scope of the request then it would, in effect, be confirming that an issue falling within the remit of one or more of the listed bodies was covered in discussions held during John Major's visit. Conversely, if the FCO denied that it held information relating to security bodies within the scope the request, then, in effect, it would be confirming that an issue falling within the remit of one or more of the listed bodies was not discussed.

Section 23(5) - Conclusion

74. The Commissioner is therefore satisfied that the FCO can rely on section 23(5). It is entitled to refuse to confirm or deny whether it holds any information within the scope of the request which was directly or indirectly supplied to it by, or which relates to, any of the bodies

¹⁰ <http://www.informationtribunal.gov.uk/DBFiles/Decision/i24/Baker.pdf>

specified in subsection (3). This is an absolute exemption and not subject to either a test of prejudice or a balance of public interests test.

The Commissioner's position – Section 24(2)

75. With regard to the application of section 24(2), the Commissioner has carefully considered the complainant's submissions that complying with this request would be very unlikely to result in any of the prejudicial consequences envisaged by the FCO given the passage of time. However, in the context of section 24 the Commissioner notes that the threshold to engage the exemption is relatively low. Furthermore, as a general approach, the Commissioner accepts that withholding information in order to ensure the protection of national security can extend, in some circumstances, to ensuring that matters which are of interest to the security bodies are not revealed. Moreover, it is not simply the consequences of revealing whether information is held in respect of a particular request that is relevant to the assessment as to whether the application of the exemption is required for the purposes of safeguarding national security, but the consequences of maintaining a consistent approach to the application of section 24(2).
76. Given the role of the security bodies in protecting the UK's national security, the Commissioner accepts that it could be prejudicial to national security if the subject matters which the security bodies were interested in (and were not interested in) were disclosed so that those with criminal intentions could build up a picture of issues which would attract the interest of the security bodies. For the reasons set out above, the Commissioner therefore is satisfied that complying with the requirements of section 1(1)(a) in respect of the request would be likely to reveal whether or not the security bodies were interested in the subject matter which is focus of the request.
77. The Commissioner accepts that the passage of time is a relevant factor in this case when considering whether section 24(2) is engaged. However, as noted above, of vital importance in considering the application of a NCND exemption is the need for a public authority to adopt a position on a consistent basis. He accepts that there may be a point at which the age of the issues described in a request means that a NCND approach is not required for the purpose of safeguarding national security. However, he does not consider that this is such a case. The Commissioner is therefore satisfied that, in the circumstances of this case, it is sustainable for the FCO to argue that a NCND approach to the request is required for the purpose of safeguarding national security.

Section 24(2) – the public interest test

78. Although the Commissioner has concluded that section 24(2) is engaged, section 24 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exclusion at section 24(2) outweighs the public interest in providing confirmation or denial.
79. The Commissioner recognises the validity of the public interest arguments identified by the complainant and he agrees that such arguments deserve notable weight. However, the Commissioner also thinks that there is a very strong public interest in ensuring that the UK's national security is not compromised by responses given by public authorities to requests submitted under FOIA. In the circumstances of this case, the Commissioner believes that the public interest tips in favour of maintaining the exclusion at section 24(2) given the need to adopt a consistent NCND position to ensure that information about the operational interests of the security bodies is not revealed.
80. However, it is important to remember that even if the Commissioner had concluded that section 24(2) was not engaged, or that the public interest favoured confirming or denying whether information was held, then the FCO would still have been absolved from the duty contained at section 1(1)(a) of FOIA given the Commissioner's decision in respect of section 23(5).

Right of appeal

81. 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,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

82. 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.

83. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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