

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 02 September 2013

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

Decision (including any steps ordered)

1. The complainant requested information relating to an agreement between the United Kingdom (UK) and France to return an individual to France to serve out the remainder of his sentence. The individual had previously been extradited to the UK from France. He was tried and convicted by a Crown Court in 2006.
2. The Commissioner's decision is that the public authority was entitled to withhold the information within the scope of the request on the basis of section 23(1) FOIA.
3. The Commissioner does not require the public authority to take any steps.

Request and response

On 3 May 2012, the complainant wrote to the public authority and requested information in the following terms:

'Could you please provide me with the following information:

1. *Any documents, including emails, possessed by the Home Office explaining the agreement reached with the French government regarding the extradition to the UK of Emmanuel Armand Hening on fraud charged for which he was convicted and jailed at Worcester Crown Court in December 2006. In particular I would like to see details of the part of the agreement that specified the point at which he should be returned to serve his sentence in France and the details about the agreement as to how this would affect his default sentence.*

2. *Any documents, including emails, possessed by the Home Office relating to Hening's repatriation to France in January 2011 and how this would affect the default sentence which he was serving for non-payment of the confiscation order imposed on him by the UK courts.'*
4. The public authority responded on 17 July 2012. It confirmed it held information within the scope of item 1 of the request (the disputed information) but considered the information exempt from disclosure on the basis of the exemptions at sections 23(1) and 27(1)(a) FOIA.
5. In terms of item 2 of the request, it explained that it did not hold the information requested and advised the complainant to re-direct his request to the National Offender Management Service.
6. On 3 August 2012 the complainant requested an internal review. He challenged the refusal to disclose the disputed information.
7. Following the internal review the public authority wrote to the complainant on 3 September 2012 with details of the outcome. It upheld its original position above that the disputed information was exempt on the basis of sections 23(1) and 27(1)(a) and that no information was held in relation to item 2.

Scope of the case

8. On 9 October 2012, the complainant contacted the Commissioner to complain about the way his request for information had been handled. He specifically appealed against the decision not to disclose the disputed information and argued that it should be disclosed for a number of reasons outlined below.
9. Emmanuel Armand Hening (Hening) was extradited to the United Kingdom (UK) from France under a European Arrest Warrant (EAW), convicted in 2006 of a major fraud, jailed for 15 years and was also given a £40 million confiscation order with a nine year default sentence attached if he failed to pay by November 2010.
10. However, the complainant alleges that under the terms agreed with the French government, Hening was returned to France in January 2011 to serve the remainder of his sentence but was subsequently released because, the complainant alleges, authorities in France do not recognise default sentences of the length imposed on Hening.
11. The complainant therefore argued that there was a strong public interest *'in understanding how it was that a criminal convicted of one of the largest frauds ever seen in this country, who still owes taxpayers more*

than £45 million in an unpaid confiscation order, came to be freed when he should have been serving a prison sentence. I regard this public interest in disclosure as far greater than the need to preserve confidentiality to avoid damaging diplomatic relations.'

12. He also argued that *'it is fundamental to democratic accountability to understand the nature of agreements reached on our behalf by our governments relating to such cases and that it is also fundamental to legitimate democratic scrutiny of our relations with international allies, and fellow EU members, such as France to know the details of such agreements.'*
13. He further argued that there is a strong public interest in knowing how the EAW system works in practice and whether there are any, hitherto unknown, caveats in the way that it is supposed to work. Given that the EAW is meant to improve the ability of the UK to bring serious offenders residing abroad to justice in this country, there is a strong public interest, to understand the circumstances of this case. This, he argued, was particularly relevant in view of the ongoing political debate about the value or otherwise of the EAW system.
14. In a letter dated 6 December 2012, the Commissioner outlined the scope of his investigation to the complainant (reflecting the complaint he made) and invited him to comment within 10 working days if he believed that there were any other matters which should be considered. The complainant did not respond.
15. The scope of the investigation therefore was to determine whether the public authority was entitled to withhold the disputed information on the basis of the exemptions at sections 23(1) and 27(1)(a) (i.e. the investigation was restricted to item 1 of the request).

Reasons for decision

Section 23(1)

16. The Commissioner first considered whether the public authority was entitled to rely on the exemption at section 23(1). Unlike the exemption at section 27(1)(a) which is qualified, section 23(1) is an absolute exemption. A public authority is not required to carry out a public interest test if an absolute exemption is engaged. The requirement to conduct a public interest test applies to qualified exemptions. Therefore, in considering the application of section 23(1), the Commissioner has only to satisfy himself that the requested information engages the exemption. If the exemption is engaged the public interest in disclosing

the requested information is irrelevant under FOIA, no matter how strong the arguments.

17. Sections 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. Section 23(3) contains a list of bodies dealing with national security matters. The Commissioner has to be particularly careful in cases potentially involving matters of national security that in providing reasons for his decision, he does not inadvertently reveal any information which itself is exempt, not least the withheld information. The Commissioner therefore appreciates that the brevity of his reasoning in cases such as this might prove frustrating to the complainant. It is however an unavoidable consequence of the required approach to section 23 cases.

19. To successfully engage the exemption at section 23(1), a public authority must be able to demonstrate that the relevant information was *directly or indirectly* supplied to it by, or *relates to* any of the bodies listed at section 23(3).

20. The public authority explained that, in the circumstances, it could not supply the disputed information to the Commissioner for the purposes of his investigation. It described the disputed information and made detailed submissions in support of the application of section 23(1). The public authority also invited the Deputy Commissioner to review the disputed information at its premises. The disputed information is contained in three separate documents.

21. The public authority explained that part of the information in document 1 was directly supplied by a named body listed at section 23(3). The remainder relates to the named body listed under section 23(3). Document 2 relates to a named body listed at section 23(3). Document 3 was supplied by a named body under section 23(3).

22. The Deputy Commissioner reviewed the disputed information at the public authority's premises on 14 May 2013 and discussed with their representative its content and provenance and the basis on which they held it.

23. The Commissioner accepts that the disputed information was supplied by, or relates to, bodies listed at section 23(3), namely SOCA (the Serious Organised Crime Agency) as successor to NCIS (the National Criminal Intelligence Service). Reproducing any more detail about the

disputed information or the public authority's submissions in this notice would reveal exempt information.

24. However, the Commissioner is fully satisfied that the disputed information is exempt from disclosure on the basis of section 23(1).
25. In view of his decision that the public authority correctly engaged section 23(1), the Commissioner did not consider the applicability of the exemption at section 27(1)(a).

Right of appeal

26. 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

27. 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.
28. 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
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