

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 13 January 2015

**Public Authority:** Cabinet Office

**Address:** 70 Whitehall  
London  
SW1A 2AS

#### **Decision (including any steps ordered)**

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1. The complainant requested information in relation to the North Atlantic Treaty Organisation's (NATO) air strikes in Serbia and Kosovo in March 1999.
2. The Commissioner's decision is that:
  - The public authority was entitled to rely on the exemptions at sections 27(1)(a), (b), (c) and (d) and section 42(1) FOIA to withhold information within the scope of the request.
  - The public authority was entitled to rely on the exemptions at sections 23(5) and 24(2) to neither confirm nor deny whether it held information within the scope of the request which, if held, would be exempt by virtue of sections 23(1) and 24(1) FOIA.
  - The public authority was also entitled to rely on the exemption at section 35(3) to neither confirm nor deny whether it held information within the scope of the request which, if held, would be exempt by virtue of section 35(1)(b) FOIA.
  - The public authority contravened section 10(1) FOIA.
3. The Commissioner does not require the public authority to take any steps.

## Request and response

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4. On 14 August 2013 the complainant wrote to the public authority and requested information in the following terms:

*'We write to request copies of all records concerning the decision to commence a military air campaign against Serbia and Kosovo on 24 March 1999. Specifically, we request copies of:*

- 1. Minutes of Cabinet meetings, during which that decision was discussed.*
- 2. Memorandum between relevant Government Departments and specifically the Foreign Office and the Ministry of Defence.*
- 3. Any other records relating to the decision.*

*We further request clarification of the following. Pursuant to the United Nations Security Council Resolution 1160, of 31 March 1998, Statutory Instrument 1998, No. 1073, "The Federal Republic of Yugoslavia (United Nations Sanctions) (Isle of Man) Order 1998" was laid before Parliament on 23 April 1998 and came into force on 24 April 1998. It provided for an arms embargo throughout the Federal Republic of Yugoslavia.*

*On 11 February 1999, Statutory Instrument No. 280, The Federal Republic of Yugoslavia (United Nations Sanctions) (Amendment) Order 1999, was laid before Parliament and came into force on 12 February 1999. It provided, inter alia:*

*3. The following article shall be inserted in the Order immediately after article 5-"Training for terrorist activities"*

*5A. No person shall provide to any other person training or training facilities likely to assist the carrying out of acts of terrorism in the Federal Republic of Yugoslavia."*

*4. Article 6 of the Order shall be replaced by the following article-"Application of Articles 3 and 5A*

*6. - (1) The provisions of articles 3 and 5A of this Order shall apply to the conduct of any person within the United Kingdom and of any person elsewhere who:*

*(a) is a British citizen, a British Dependent Territories citizen, a British Overseas citizen, a British subject, a British protected person, or a British National (Overseas); or*

*(b) is a body incorporated or constituted under the law of any part of the United Kingdom.*

*(2) Subject to the provisions of paragraph (4) of this article, any person specified in paragraph (1) of this article who contravenes the provisions of article 3 of this Order shall be guilty of an offence under this Order.*

*(3) Subject to the provisions of paragraph (5) of this article, any person specified in paragraph (1) of this article who contravenes the provisions of article 5A of this Order shall be guilty of an offence under this Order.*

*On the same day, Statutory Instrument, No. 281 was placed before Parliament and came into force on 12 February 1999, to include 'dependant territories.'*

*The Orders originate from the Foreign and Commonwealth Office, which we trust was in close liaison with the Prime Minister's office, at all times, given the gravity of the decision to go to war. Please confirm:*

- 1. What was the evidence available to the Foreign and Prime Minister's Offices that rendered the enactment of the amendments to SI 1073, necessary?*
- 2. Please confirm whether any person was prosecuted for breach of the above Orders and if so, the number of persons prosecuted and details of the prosecution.*

*Finally, the Select Committee for Foreign Affairs records in its fourth report, prepared on 7 June 2000, at paragraph 7:*

*'Both the Defence Committee and ourselves encountered one problem in assembling the evidence on which to base our report. The Chairman of both Committees wrote jointly to the Prime Minister to ask for separate but sequential evidence sessions for the two Committees with a representation of the Joint Intelligence Committee (JIC) and the Chief of Defence Intelligence (CDI), who would appear together. The request to take evidence from the JIC was refused by the Prime Minister,[11] and the Defence Secretary was willing for CDI to appear only before the Defence Committee.[12] We regret this restriction on our work, which we shall take up with the Liaison Committee in their forthcoming inquiry into the accountability of the intelligence and security services.[13]*

*Please provide all available records that explain the reasons why the Prime Minister refused to allow the Select Committee to take evidence from a representative of the Joint Intelligence Committee. Further, please provide records relating to the matter being taken up by the Foreign Affairs Committee with the Liaison Committee following their inquiry into the accountability of the intelligence and security services.'*

5. The public authority provided its response to the request on 14 October 2013. It informed the complainant that it considered information within the scope of her request exempt from disclosure on the basis of the exemptions at sections 26(1)(a) and (b), 27(1)(a), (c) and (d) and (2) and 35(1)(a) and (b) FOIA.
6. With regards to the request for minutes of Cabinet meetings, the public authority neither confirmed nor denied whether it held any relevant information on the basis of section 35(3) FOIA by virtue of section 35(1)(b) FOIA.
7. Relying on the exemptions at sections 23(5) and 24(2) FOIA, the public authority also neither confirmed nor denied whether it held any information within the scope of the request subject to the exemptions at sections 23(1) and 24(1) FOIA.
8. On 16 October 2013 the complainant requested an internal review. On 13 January 2014 the public authority wrote to the complainant with details of the outcome of the internal review. The authority clarified that it did not hold information relevant to the requests in connection with the amendments to SI 1073 and on the refusal to allow the Select Committee on Foreign Affairs to take evidence from a representative of the JIC. It advised the complainant to consider submitting a request to the Foreign and Commonwealth Office for information relevant to those parts of her request. The authority however upheld its original decision on the application of exemptions.

### **Scope of the case**

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9. On 22 January 2014, the complainant contacted the Commissioner to complain about the way her request for information had been handled, primarily on the application of exemptions.
10. During the course of the Commissioner's investigation, the public authority disclosed the following publicly available documents to the complainant:
  - Deputy Prime Minister's statement on Kosovo to the House of Commons on 24 March 1999,
  - Transcript of the Press Conference by the Prime Minister, Berlin 24 March 1999, and
  - Prime Minister's statement on Kosovo to the House of Commons on 23 March 1999.

11. The public authority also introduced the exemptions at sections 27(1)(b) and 42(1) FOIA during the course of the investigation.
12. The scope of the Commissioner's investigation therefore was to:
  - Determine whether the public authority was entitled to rely on the neither confirm nor deny exemptions at sections 23(5) and 24(2),
  - Determine whether the public authority was entitled to rely on the neither confirm nor deny exemption at section 35(3) on the basis of the provisions in section 35(1)(b), and,
  - Determine whether the public authority was entitled to withhold information held by the authority within the scope of the request (the disputed information) on the basis of the exemptions at sections 26(1)(a) and (b), 27(1)(a), (b), (c) and (d) and (2), 35(1)(a) and (b) and 42(1).

## **Reasons for decision**

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### **Disputed information**

13. A schedule of the withheld documents was provided to the Commissioner in confidence by the public authority. All the documents were withheld on the basis of sections 27(1)(a), (b), (c), and (d). The remaining exemptions were applied to some, but not all of the documents.

### **Section 27(1)**

14. The Commissioner first considered whether the disputed information was correctly withheld on the basis of the exemptions at sections 27(1)(a), (b), (c) and (d).
15. Information is exempt from disclosure by virtue of section 27(1) if its disclosure would, or would be likely to, prejudice-
  - a) relations between the United Kingdom (UK) and any other State,
  - b) relations between the UK and any international organisation or international court,
  - c) the interests of the UK abroad, or
  - d) the promotion or protection by the UK of its interests abroad.

16. A small part of the public authority's submissions in support of engaging the exemptions above were provided by the authority to the Commissioner in confidence. He has therefore reproduced those specific submissions in the confidential annex which he has not made publicly available. For the avoidance of doubt, the Commissioner considered all of the submissions (including those in the confidential annex) before making his decision on whether the exemptions were correctly engaged.
17. The public authority considers that disclosing the disputed information would, or would be likely to, prejudice all of the interests in section 27(1) for the reasons explained below.
18. The public authority explained that the Government works in partnership with other nations and international organisations in ensuring international stability and in promoting social and economic development. These ensure the safety of individual UK citizens, both at home and abroad, and, by generating opportunities for trade and investment with other parts of the world, ensure the economic wellbeing of UK citizens as well as the citizens of other nations. In order to successfully pursue these objectives, the Government relies on the confidence of its international partners. The public authority submitted that disclosing information about discussions with or about the UK's international partners or other foreign States would damage the relationship of trust and goodwill between the UK and its international partners. Furthermore, the UK's diplomats would acquire a reputation in the diplomatic community for indiscretion and this would make it more difficult for the diplomatic service to pursue the UK's interests. The public authority consequently submitted that the associated risks of disclosing the disputed information were real and significant, and not merely speculative.
19. In order for a prejudice based exemption, such as section 27(1) to be engaged, the Commissioner considers that three criteria must be met:
  - 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;
  - 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; and
  - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would'

result in prejudice. As explained above, in relation to the lower threshold the Commissioner believes that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority.

20. The Commissioner is satisfied that damage to the relationship of trust and goodwill between the UK and its international partners or other foreign States and the consequential prejudice to the ability of the UK to promote its interest abroad all relate to the applicable interests within the exemption at section 27(1).
21. The Commissioner accepts that disclosing the disputed information, save one document, would pose a real and significant risk to the relationship between the UK and its international partners including other nations. Although the Commissioner is mindful that the disputed information is over 15 years old, he has taken into account the context in which the information was generated and the fact that there remains an ongoing NATO operation with a multinational contingent in Kosovo. The discussions and briefings took place in the midst of an ongoing debate among member states of the United Nations, particularly the permanent members of the Security Council regarding the legal and moral grounds for intervening in the conflict in Serbia and Kosovo. In the Commissioner's view, if the disputed information were disclosed, the countries and international organisations which shared information and discussed their views with the UK might be less willing to do the same under similar circumstances in future. This would be likely to have a detrimental effect on the ability of the UK to protect and promote its interests successfully.
22. The Commissioner does not consider section 27(1) engaged in respect of one document for reasons explained in the confidential annex.

### **Public interest test**

23. The exemptions at section 27(1) are qualified by the public interest test. Therefore, the Commissioner next considered whether in all the circumstances of the case, the public interest in maintaining the exemptions outweigh the public interest in disclosing the information withheld on the basis of section 27(1).
24. The public authority's submissions on the balance of the public interest are summarised below.
25. The public authority recognised the general public interest in openness in government and acknowledged that transparency may contribute to

greater understanding of and participation in public affairs. Specifically, it acknowledged that there is a public interest in understanding how the government reached its decision to launch a military air campaign against Serbia and Kosovo in March 1999. It further recognised that there is a general public interest in being able to evaluate the foreign policy of the government and, following from this, there is a public interest in understanding how officials brief Ministers, including the Prime Minister, on international relations, including those with its allies and the Balkan States.

26. Against these interests, the public authority argued that there is a weighty public interest in the UK being able to successfully pursue its national interests abroad. Officials must be able to compile briefings for Ministers without being concerned about how their commentary would be received by the UK's international partners if the briefings were to be made public.
27. The public authority argued that the disputed information is, in diplomatic terms, of recent provenance and this increases the weight of the public interest in maintaining the exemptions.
28. The burden of remedial measures required to offset the prejudice caused by disclosure would be significant. This significantly increases the weight to be given to the public interest in maintaining the exemptions. A period of probation would be inevitable during which the UK's international partners would make careful assessments of the degree of engagement they would wish to have with the UK. It is inevitable that there would be costs in terms of the UK's opportunities to advance work in the international sphere.
29. The scope of the prejudicial effects of disclosure increases the weight of the public interest in maintaining the exemptions. Damage to the UK's relations with international partners and other nations would make it more difficult for Her Majesty's government to promote stability and prosperity.

#### *Balance of the public interest*

30. In addition to the general public interest in openness and transparency, the Commissioner considers that disclosing the disputed information would increase public understanding of the reasons for the UK's decision to support its NATO allies in the military air campaign in Serbia and Kosovo in March 1999, and that would be in the public interest. Disclosure would also provide a first-hand account of the nature of the discussions that the UK was having with other countries in the lead up to the NATO air strikes. That would shed more light on the UK's decision to support the air strikes.



31. However, the Commissioner accepts that there is a significant public interest in protecting the UK from the likely prejudicial effects of disclosing the relevant documents. There is a strong public interest in not undermining the UK's ability to protect and promote its interests abroad. Undermining the UK's ability to do so would reduce its ability to influence the nature and level of intervention in future conflicts which might affect the UK's strategic interests. The Commissioner considers that this public interest is weightier than the public interest in disclosure.
32. The Commissioner therefore finds that in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.

### **Section 42(1)**

33. As mentioned, the Commissioner does not consider the exemption at section 27(1) engaged in respect of one document. He has instead considered whether the document was correctly withheld on the basis of the exemption at section 42(1) which had also been applied to it.
34. Information is exempt from disclosure by virtue of section 42(1) if it is information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.
35. The Commissioner is satisfied, for the reason explained in the confidential annex that this document engages the exemption at section 42(1). To be clear, the Commissioner is satisfied that the information in the document constitutes legal advice and for which a claim to legal professional privilege could be maintained in proceedings.
36. The Commissioner therefore finds that the exemption at section 42(1) was correctly engaged in respect of the document described in the confidential annex.

### **Public interest test**

37. The exemption at section 42(1) is qualified by the public interest test. Therefore, the Commissioner next considered whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the document correctly withheld under section 42(1).
38. The public authority's submissions on the balance of the public interest are summarised below.
39. It recognised the general public interest in openness and transparency may increase public trust in and engagement with the government. It

acknowledged the specific public interest in understanding the legal justification for decisions taken by government.

40. However, against disclosure, the public authority argued that there was a strong public interest in protecting the confidentiality of communications between lawyers and their clients. It explained that it was particularly important for the government to seek legal advice in relation to sensitive and difficult decisions such as decisions on whether to deploy the armed forces in conflicts overseas, and for the advice given to be fully informed and fully reasoned.
41. The public authority further argued that it was in the public interest to protect the confidentiality of communications between lawyers and their clients because without confidentiality, clients might fear that anything they say to their lawyers, however sensitive or potentially damaging, could be revealed later. They might be deterred from seeking legal advice at all or from disclosing all relevant material to their lawyers or the advice given may not be as full and frank as it ought to be.

*Balance of the public interest*

42. It is well established that the general public interest inherent in the exemption at section 42(1) will always be strong due to the importance of the principle of legal professional privilege: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice. Clear, compelling and specific justification that at least equals the public interest in protecting the legally privileged information would need to be adduced to override that inbuilt public interest.
43. The Commissioner accepts that there is a strong public interest in the government being able to freely seek, and receive full and frank legal advice in connection with decisions on whether to deploy the UK's armed forces in overseas conflict. He accepts that lawyers might not be as full and frank as they ought to if they felt that their advice could be disclosed. Although the advice relates to a conflict fifteen years ago, the Commissioner considers that in the context of recent similar conflicts where the UK has deployed its armed forces overseas, it is not far-fetched to suggest that disclosure of the relevant legal advice could result in lawyers not being as full and frank as they ought to be when giving advice to the government in relation to any future conflicts.
44. Furthermore, although the legality of the intervention by NATO in Serbia and Kosovo was questioned by some legal scholars and indeed some Member States of the UN, there was no widespread public dis-approval in the UK of the intervention in light of the rapidly deteriorating humanitarian situation in the region. In the Commissioner's view, this

also reduces the weight of the public interest in disclosure in the face of the strong public interest in maintaining legal professional privilege.

45. The Commissioner therefore finds that in all the circumstances of the case, the public interest in maintaining the exemption at section 42(1) outweighs the public interest in disclosure.

### **Section 35(3)**

46. In response to the specific request for the minutes of Cabinet meetings, the public authority refused to confirm or deny whether Cabinet discussed the decision to launch a military air campaign against Serbia and Kosovo on 24 March 1999. It relied on the section 35(3) exemption because if held, the relevant information would be exempt from disclosure on the basis of section 35(1)(b) (Ministerial communications). The public authority submitted that confirming or denying whether or not such information was held would defeat the purpose of section 35(1)(b) by disclosing the content of Cabinet discussions, including whether the issue was discussed.

### **Public interest test**

47. The exemption at section 35(3) is qualified by the public interest test. Therefore, the Commissioner next considered whether in all the circumstances of the case, the public interest in neither confirming nor denying whether the public authority holds information relating to Ministerial communications in relation to the decision to launch military air strikes against Serbia and Kosovo in March 1999 outweighs the public interest in confirming or denying whether such information is held.
48. The public authority's submissions on the balance of the public interest are summarised below.
49. It recognised the general public interest in openness and transparency in government. Specifically, the public authority acknowledged that decisions Ministers make may have a significant impact on the lives of citizens both here and overseas (in this instance in Serbia and Kosovo<sup>1</sup>) and there is a public interest in their deliberations being transparent. It also acknowledged that openness in government may increase public trust in and engagement with the government and has a beneficial effect

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<sup>1</sup> As mentioned, there remains an ongoing NATO operation with a multinational contingent in Kosovo.

on the overall quality of government. Specifically, there is a public interest in the public being well informed about the government's handling of the decision to launch military action against Serbia and Kosovo in March 1999.

50. Against these interests, the public authority submitted that disclosure of information about how government took decisions on the launching of military action abroad would invite judgements about whether these decisions were taken at an appropriate level. Ultimately, this would be corrosive of parliamentary democracy since it would hold Ministers and their advisers accountable for the level at which discussions occurred rather than for the decisions taken.
51. The public authority pointed out that there is a strong public interest in preserving the confidentiality of Cabinet discussions in order to protect the convention of collective Cabinet responsibility which underpins the accountability of governments to Parliament and is the foundation of Parliamentary sovereignty. It noted that Part 2, Section 2.1 of the Ministerial code sets out a Minister's duty to uphold the principle of collective responsibility while maintaining a united front when decisions are reached. The public authority therefore argued that confirming or denying whether it holds information relating to Ministerial communications in relation to the decision to launch military air strikes against Serbia and Kosovo in March 1999 would undermine collective Cabinet responsibility.
52. The public authority further submitted that it had found no evidence of urgent or widespread public concern with the circumstances of the launching of a military campaign against Serbia and Kosovo to justify overriding the convention of collective Cabinet responsibility in this case.

*Balance of the public interest*

53. The Commissioner recognises for the same reasons as the public authority that there is a public interest in neither confirming nor denying whether the authority holds information relating to Ministerial communications in relation to the decision to launch military air strikes against Serbia and Kosovo in March 1999. He considers that the public interest in not confirming or denying the actual position is slightly weakened by the fact that the air strikes took place over fifteen years ago.
54. However, the Commissioner accepts that there is a strong public interest in preserving the Convention of cabinet collective responsibility in this case. At the time the decision was taken by NATO in March 1999 to carry out the military strikes, there was widespread public concern regarding the humanitarian situation in Kosovo. The intervention by way

of military airstrikes was not met with widespread public disapproval in the UK. The Commissioner accepts that the strong public interest in preserving collective Cabinet responsibility has not weakened over time in this case.

55. He therefore finds that in all the circumstances of the case, the public interest in neither confirming nor denying whether the public authority holds information relating to Ministerial communications in relation to the decision to launch military air strikes in Serbia and Kosovo in March 1999 outweighs the public interest in doing so.

### **Sections 23(5) and 24(2)**

56. In reliance on sections 23(5) and 24(2), the public authority also refused to confirm or deny whether it held information exempt by section 23(1) and 24(1).
57. Information supplied by or relating to security bodies specified in section 23(3) is exempt information by virtue of section 23(1). Information which does not fall under section 23(1) is exempt from disclosure under section 24(1), if exemption is required for the purpose of safeguarding national security.
58. Sections 23(5) and 24(2) exclude the duty of a public authority to confirm or deny whether it holds information which, if held, would be exempt under section 23(1) or 24(1) respectively.
59. The public authority explained that both sections 23(5) and 24(2) were engaged. The Commissioner does not consider the exemptions at sections 23(5) and 24(2) to be mutually exclusive and he accepts that they can be relied on independently or jointly in order to conceal whether or not one or more of the security bodies has been involved in an issue which might impact on national security. However, each exemption must be applied independently on its own merits. In addition, the section 24 exemption is qualified and is therefore subject to the public interest test.
60. 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 section 23 exemption would be engaged.
61. 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 be applicable. 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.

62. There is clearly a close relationship between the public authority and the security bodies. In light of the public authority's relationship with the security bodies and the nature of parts of the request, the Commissioner finds that, on the balance of probabilities, some of the requested information, if held, could relate to or have been supplied by one or more bodies identified in section 23(3) FOIA.
63. 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 either a confirmation or denial of whether requested information if held would be likely to harm national security. 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 a specific, direct or imminent threat.
64. In relation to the application of section 24(2) the Commissioner notes that the First Tier Tribunal (Information Rights) 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.<sup>2</sup> Therefore, in considering 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 to the consequences of confirming whether the specific requested information in this case is held or not.
65. 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. On this occasion the Commissioner is satisfied that complying with the requirements of section 1(1)(a) would be likely to reveal whether or not the security bodies were interested in the subject matter of the relevant part of the request. The need for the public authority to adopt a position on a consistent basis is of vital importance in considering the application of an NCND exemption.

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<sup>2</sup> See for example, *The All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner and the Foreign and Commonwealth Office* – EA/2011/0049-0051

66. The Commissioner is satisfied that the public authority is entitled to rely on both sections 23(5) and 24(2) in the circumstances of this case. He accepts that revealing whether or not information is held within the scope of the request which relates to security bodies would reveal information relating to the role of the security bodies. It would also undermine national security and for that reason section 24(2) also applies because neither confirming nor denying if information is held is required for the purpose of safeguarding national security.

### **Public interest test**

67. Section 23 is an absolute exemption and no public interest test is required once it is found to be engaged. However, this is not the case for section 24(2).

68. Therefore, the Commissioner next considered whether the public interest in neither confirming nor denying whether the public authority holds information which would be exempt under section 24 outweighs the public interest in confirming or denying whether such information is held.

69. The public authority's submissions on the balance of the public interest are summarised below.

70. The public authority acknowledged the general public interest in openness and transparency in all aspects of government because it increases public trust in, and engagement with, the government. However, it argued that this has to be weighed against a very strong public interest in safeguarding national security. This includes information about whether those charged with protecting national security contributed to advice on the commencement of a military air campaign against Serbia and Kosovo. It submitted that this strong public interest in protecting national security could only be overridden in exceptional circumstances which did not exist in this case.

### *Balance of the public interest*

71. In addition to the general public interest in openness and transparency, the Commissioner considers that confirming or denying whether any information is held by the authority which is required for the purposes of safeguarding national security would increase public knowledge (albeit slightly) of the factors considered by the government before the decision was made by the UK and its NATO allies to carry out military air strikes in Serbia and Kosovo in March 1999.

72. However, the Commissioner accepts that the public interest in protecting information for the purposes of safeguarding national security is a very strong one. The humanitarian crisis leading up to the NATO air strikes is

well documented so the public is largely aware of the rationale for the intervention. Issuing a confirmation or denial in respect of whether any relevant information requiring exemption for the purpose of safeguarding national security is held by the authority would not, in the Commissioner's view, significantly increase the public's knowledge of the factors that led to the air strikes.

The Commissioner finds that in the circumstances of this case the public interest in protecting information for the purpose of safeguarding national security outweighs the public interest in favour of confirmation or denial.

### **Procedural Matters**

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73. A public authority is required by virtue of section 10(1) FOIA to respond to a request promptly and in any event no later than 20 working days.
74. The complainant's request was made on 20 August 2013. The public authority did not respond until 14 October 2013. The Commissioner therefore finds the public authority in breach of section 10(1) FOIA.

### **Other matters**

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75. Although there is no statutory time limit to complete internal reviews. As a matter of good practice, the Commissioner expects internal reviews should take no longer than 20 working days and in exceptional circumstances, 40 working days.
76. The complainant requested an internal review on 16 October 2013. It was not completed until 13 January 2014, over 40 working days. The Commissioner would therefore like to record his concern at the delay in completing the internal review in this case.



## Right of appeal

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77. 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: 0870 739 5836

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

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

78. 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.

79. 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**