

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 May 2016

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

Decision (including any steps ordered)

1. The complainant submitted a request to the Cabinet Office for information which had been retained from a number of different files when the files had been transferred to The National Archives. The Cabinet Office refused to disclose the requested information relying on the exemptions contained at sections 23 (security bodies) and 24 (national security). The Commissioner has concluded that the withheld information is exempt from disclosure on the basis of either section 23(1) or section 24(1) of FOIA.

Request and response

2. The complainant submitted the following request to the Cabinet Office on 5 July 2015:

'hereby I make a Freedom of Information request (FOIA) for the following records retained under Section 3(4) of the Public Records Act 1958:

The entries about the Berlin crisis contained in the Red Books Weekly Survey of Intelligence (JIC)(WSI) for the period from November 1958 until January 1962 and preserved at CAB 179/13 et seq.'

3. The Cabinet Office responded on 31 July 2015 and confirmed that it held the information requested. However, it considered this to be exempt from disclosure on the basis of either section 23(1) or section 24(1) of FOIA.

4. The complainant contacted the Cabinet Office on 31 July 2015 in order to ask for an internal review of this decision.
5. The Cabinet Office informed him of the outcome of the internal review on 16 September 2015. The review upheld the application of the two exemptions cited in the refusal notice.

Scope of the case

6. The complainant contacted the Commissioner on 20 September 2015 in order to complain about the Cabinet Office's decision to withhold the information he had requested.
7. In his submissions to the Commissioner the complainant raised the following points:
 - The Cabinet Office had already granted the historian Michael S. Goodman access to many of these files;
 - The Cabinet Office had already released the so-called 'Grey Books' intelligence reports to The National Archives (TNA). Thus, he did not understand why the 'Red Books' cannot be released now too;
 - The requested documents are over 50 years old. Thus, he explained that he could not understand why these documents should still be classified. Moreover, the methods of gathering intelligence have changed much since then. There is also reason to believe that the persons concerned in the files are now deceased. The Federal German intelligence service Bundesnachrichtendienst (BND) has already released all its documents relating to the complainant's research into this area;
 - Finally, the complainant did not believe that the balance of the public interest has been fully considered by the Cabinet Office.

Reasons for decision

Section 23(1) – information supplied by or relating to bodies dealing with security matters

8. The Cabinet Office explained to the Commissioner that some of the information falling within the scope of the complainant's request was exempt from disclosure on the basis of the exemption contained at section 23(1) of FOIA.

9. Section 23(1) of FOIA provides an exemption which states 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).'

10. To successfully engage the exemption at section 23(1), a public authority needs only 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).¹ This means that if the requested information falls within this class it is absolutely exempt from disclosure under FOIA. There is no requirement on the public authority to demonstrate that disclosure of the requested information would result in some sort of harm. This exemption is not subject to a balance of public interests test.

11. When investigating complaints about the application of section 23(1), the Commissioner will need to be satisfied that the information was in fact supplied by a security body or relates to such a body, if he is to find in favour of the public authority. In certain circumstances the Commissioner is able to be so satisfied without himself examining the withheld information. Where it appears likely that the information would engage the exemption, the Commissioner may accept a written assurance from the public authority provided by someone who, because of their seniority and responsibilities, has regular access to information relating to the security bodies and who has first-hand knowledge of the relationship between the public authority and those bodies. Furthermore, they must themselves have reviewed the disputed information in the particular case.

12. In the circumstances of this case, the Cabinet Office provided the Commissioner with a letter of assurance from a relevant senior official within the department which confirmed that he had examined the withheld information and was satisfied that the parts of it withheld on the basis of section 23(1) relate to, or were supplied by, one of the bodies specified in section 23(3) of FOIA. This official occupies a senior position at the Cabinet Office and meets the Commissioner's criteria outlined in paragraph 11.

¹ A full list of the bodies detailed in section 23(3) is available here: <http://www.legislation.gov.uk/ukpga/2000/36/section/23>

13. The Cabinet Office also drew the Commissioner's attention to a website link which it suggested contained further information on the ongoing sensitivities of the CAB 179 series.²
14. Accordingly, the Commissioner accepts that in the circumstances of this case, the assurance he has received from the senior official at the Cabinet Office, allied with the description of the requested information set out in the aforementioned website link, is sufficient for him to conclude that section 23(1) of FOIA has been correctly applied.

Section 24 – national security

15. The Cabinet Office argued that the information falling within the scope of the request that was not exempt from disclosure on the basis of section 23(1) was exempt from disclosure on the basis of the exemption contained at section 24(1) of FOIA.
16. This exemption states that:

'Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) [ie the disclosure of requested information] is required for the purposes of safeguarding national security.'

17. There is no definition of national security within FOIA but an Information Tribunal decision noted the following:
 - 'national security' means the security of the United Kingdom and its people;
 - the interests of national security are not limited to actions by an individual which are targeted at the UK, its system of government or its people;
 - the protection of democracy and the legal and constitutional systems of the state are part of national security as well as military defence;
 - action against a foreign state may be capable indirectly of affecting the security of the UK; and
 - reciprocal co-operation between the UK and other states in combating international terrorism is capable of promoting the United Kingdom's national security.³

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/60940/note-s-on-cim-division.pdf

18. With regard to the wording of the exemption, the Commissioner interprets 'required' in the context of section 24 to mean reasonably necessary and therefore this sets a high threshold which has to be met in order for this exemption to be engaged. Consequently, it is not sufficient for the requested information simply to relate to issues of national security, rather there must be evidence of specific and real threats to national security which would occur if the requested information was disclosed, albeit that such threats do not have to be direct or immediate.
19. The Cabinet Office provided the Commissioner with an indication of the nature of the information which had been withheld on the basis of section 24(1) along with submissions to explain why it believed that disclosure of this information would threaten the UK's national security. The Commissioner cannot refer to these submissions in this notice as to do so would reveal information that the Cabinet Office considers to be sensitive. The senior official at the Cabinet Office referred to above also confirmed to the Commissioner that in his opinion the parts of the information which did not attract the exemption contained at section 23(1) were exempt from disclosure on the basis of section 24(1).
20. Furthermore, the Cabinet Office also addressed the complainant's first three specific points of complaint which are set out at paragraph 7 above. The Cabinet Office explained that:
 - Official historians are granted access to files on strict terms, which include that they cannot quote directly from the material without the Cabinet Office's clearance.⁴ Thus the Cabinet Office argued that providing access to official historians is not equivalent to disclosing the same files under FOIA or opening the files at TNA.
 - The Cabinet Office explained that a new system for the production and dissemination of current intelligence was introduced in 1956. Two weekly publications were introduced – the Weekly Review of Current Intelligence (the Grey Book) and the Weekly Survey of Intelligence (the Red Book). The Cabinet Office explained that the Grey Books were intended for fairly wide distribution and the Grey

³ Norman Baker v the Information Commissioner and the Cabinet Office (EA/2006/0045 4 April 2007) <http://www.informationtribunal.gov.uk/DBFiles/Decision/i24/Baker.pdf>

⁴ Professor Michael Goodman, the historian referenced by the complainant, is currently on secondment from King's College London to the Cabinet Office as the Official Historian of the Joint Intelligence Committee.

Books for the period in question were available to view at TNA at CAB179/1-12. However, the Cabinet Office explained that the Red Book expanded on selected items of current intelligence at higher levels of classification and had a limited distribution, hence the information remains sensitive even taking into account the age of the information.

- Finally, the Cabinet Office argued that the judgement of whether or not files can be released has to be made on the basis of the information it holds, not on the basis of the judgments made by other governments on other documents. It noted that there was no obligation under FOIA for the Cabinet Office to check what documents other countries have made publicly available which may be relevant to a request and moreover it did not have the resource to do so. In any event, the Cabinet Office argued that it is extremely unlikely that the BND holds the same information.
21. Having considered the submissions provided by the Cabinet Office, and taking into account the assurances provided by the senior official, the Commissioner accepts that withholding this information is required for the purposes of safeguarding national security. In reaching this conclusion the Commissioner wishes to emphasise that he also considers the Cabinet Office's rebuttal of the complainant's grounds of complaint to be logical and persuasive.

Balance of the public interest

22. Section 24(1) is a qualified exemption which means that it is subject to a public interest test. Therefore, the Commissioner also had to consider whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information withheld on that basis.
23. The Cabinet Office acknowledged that there is a general public interest in openness in government because this increases trust and engagement with the government. However, it was of the view that there was a very strong public interest in maintaining national security. (The Cabinet Office provided the Commissioner with more detailed submissions on this point which referenced the content of the withheld information which for obvious reasons the Commissioner has not replicated in this decision notice). Furthermore, the Cabinet Office explained that having considered all of the circumstances of this case, including taking into account the age of the withheld information, it was of the view that the public interest favoured maintaining the exemption.
24. The Commissioner agrees that disclosure of the withheld information could contribute to increasing trust in government and could provide an

informative insight into the subject matter which is the focus of the withheld information. However, the Commissioner also believes that there is a very strong public interest in safeguarding national security, one which in the circumstances of this case is ultimately compelling. He has therefore concluded that the public interest favours maintaining the exemption.

Other matters

25. In his submissions to the Commissioner the complainant raised the following points:

- He explained that the Cabinet Office had in the past also refused requests of his at the internal review stage. He argued that he therefore had reason to believe that the internal review team at the Cabinet Office does not operate independently enough from the Cabinet Office's freedom of information team.
- Furthermore, he explained that during his research at TNA he had often discovered that the Ministry of Defence and the Foreign and Commonwealth Office had released documents a long time ago. The Cabinet Office, on the other hand, had been withholding the same identical information, claiming that it is still sensitive even though it had been released to the public domain already by other government agencies. He therefore argued that he had reason to assume that the Cabinet Office is too restrictive in its handling of freedom of information requests and that it appears not to have been making appropriate investigations before making its decisions.

26. With regard to the first point the Commissioner does not accept that simply because a public authority, at the internal stage, upholds an earlier refusal of an FOI request this suggests a lack of independence in the internal review process. Moreover, simply because this happens on a number of occasions does not in itself suggest a lack of independence in a public authority's internal review procedures. Furthermore, from his experience of handling a number of complaints about the Cabinet Office the Commissioner does not have any concerns about the independence of its internal review procedures.

27. With regard to the second point, the Commissioner has not been provided with details of the specific requests referred to by the complainant. However, what the Commissioner can state is that he is satisfied, for the reasons outlined above, that the information falling within the scope of the request which is the focus of this complaint is exempt from disclosure on the basis of either section 23(1) or 24(1) and

moreover that the submissions provided to him by the Cabinet Office are thorough and ultimately compelling.

Right of appeal

28. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

29. 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.
30. 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

Jonathan Slee
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