

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 September 2018

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

Decision (including any steps ordered)

1. The complainant requested information relating to an aircraft incident that occurred on 17 August 1988, and which caused the death of the then president of Pakistan, and then ambassador to Pakistan for the United States of America. The Home Office refused to confirm or deny whether information was held and cited the exemptions provided by sections 23(5), 27(4), and 31(3) of the FOIA.
2. The Commissioner's decision is that the Home Office was entitled to rely upon the exemption provided by section 23(5) 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 23(1).
3. The Commissioner does not require the Home Office to take any steps.

Request and response

4. On 29 October 2017, the complainant wrote to the Home Office and requested information in the following terms:

I am making a FOI request asking for documents that touch upon a plane crash that took place on 17th August 1988 in Pakistan that took the life of Pakistan leader, Zia Ul Haq and US Ambassador Arnold Raphel.

For instance I understand that a few weeks after the crash the Pakistan government asked the Home Office assistance in locating several individuals based in the UK who were deemed to be persons of interests when it came to involvement in the crash. I would be interested in correspondence and other documents relating to the crash. I understand there were also other areas where the Pakistan government requested the Home Office for assistance.

5. The Home Office responded on 27 November 2017. It refused to confirm or deny whether information was held under the exemptions provided by sections 23(5), 27(4), and 31(3).
6. Following an internal review the Home Office wrote to the complainant on 22 December 2017. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 7 January 2018 to complain about the way his request for information had been handled. The complainant stated that he did not agree with the reasons given by the Home Office for the refusal of his request.
8. Upon investigation, the Commissioner noted that the Home Office had treated the request as only seeking information about "assistance" sought by Pakistan from the UK. The Home Office explained in its response to the complainant that any such assistance between states is known as 'Mutual Legal Assistance' ("MLA").
9. However, the Commissioner also noted that the request clearly sought any information held by the Home Office relating to the incident (such as "correspondence and other documents"), and was not simply limited to MLA.

10. The Commissioner therefore asked the Home Office to advise whether the full parameters of the request had been recognised and acted upon.
11. The Home Office subsequently advised that it did not originally consider the full parameters of the request, and undertook searches for any information that would not fall within the scope of MLA. On identifying no relevant information, the Home Office provided a revised position to the complainant to advise him of this.
12. The complainant subsequently informed the Commissioner that he wished the case to proceed in respect of that part of his request which sought information that would fall within the scope of MLA.
13. The Commissioner therefore considers the scope of the case to be the determination of whether the Home Office is entitled to neither confirm nor deny holding information (that would fall within the scope of MLA) by virtue of any of the exemptions cited.

Reasons for decision

Section 23(5) - Information supplied by, or relating to, bodies dealing with security matters

14. Section 23(1) of the FOIA 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 sub-section (3).

15. Section 23(5) of the FOIA states that:

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 related to, any of the bodies specified in subsection (3).

16. The full list of bodies specified in section 23(3) can be viewed online¹.

¹ <http://www.legislation.gov.uk/ukpga/2000/36/section/23>

17. Section 23(5) is engaged if the wording of the request suggests that any information falling within its scope would be within the class described in this section. There is no requirement to go on to consider what the results of disclosure of the confirmation or denial may be, nor whether confirmation or denial would be in the public interest as section 23(5) is an absolute exemption and not subject to the public interest test set out in section 2 of the FOIA.
18. Furthermore, the Commissioner considers 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 decisions².

The position of the Home Office

19. The Home Office argues that the information, if it existed, would either have originated from, or been referred to, one of the security bodies listed in section 23(2). The confirmation or denial whether such information is held would therefore reveal whether a security body was, or was not, involved in any request that may or may not have been made to the UK for MLA in relation to the incident.
20. The Home Office further argues that whilst the complainant contests that he has found little evidence to justify the involvement of any British Security Service in the matter, it is necessary to apply section 23(5) to avoid any such confirmation or denial.

The Commissioner's analysis

21. The Commissioner's published guidance³ on this exemption states that a request must be "*in the territory of national security*" in order for 23(5) to be relevant. This means there has to be a realistic possibility that a security body would be involved in the issue that the request relates to. There also has to be a realistic possibility that if a security body was involved, the public authority that the request is addressed to would hold information relating to its involvement.

² See for example *Dowling v Information Commissioner and The Police Service for Northern Ireland*, EA/2011/0118, paras 17 to 22.

³ https://ico.org.uk/media/for-organisations/documents/1182/security_bodies_section_23_foi.pdf

22. In considering this case, the Commissioner is aware that the request relates to a significant incident, and that it seeks information about any request for MLA that a foreign government may have made to the UK in relation to that incident. The Commissioner is also aware that the request has been made to the Home Office. In such a scenario, it is reasonable for the Commissioner to accept that there is a realistic possibility that a section 23(3) security body would be involved in any such request for MLA. It is also reasonable for the Commissioner to accept that any related information may be held by the Home Office as part of its functions as a public authority.
23. The Commissioner is satisfied that complying with the requirements of section 1(1)(a) would be likely to reveal whether or not security bodies were involved in any request for MLA from the government of Pakistan. Her conclusion is, therefore, that the exemption provided by section 23(5) of the FOIA is engaged. In light of her findings in respect of 23(5), the Commissioner has not gone on to consider the Home Office's reliance on sections 27(4) and 31(3) of the FOIA.

Right of appeal

24. 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

25. 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.
26. 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

Deborah Clark
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