

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 July 2019

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

Decision (including any steps ordered)

1. The complainant has requested certain PREM files (Prime Ministerial correspondence files) relating to the Lockerbie bombing. The Cabinet Office, after some delay, refused to provide this information citing the exemptions at section 23 (security bodies), section 24 (national security), section 27 (international relations) and section 31 (law enforcement) as its basis for doing so. It upheld this at internal review.
2. The Commissioner's decision is that the Cabinet Office is entitled to rely on section 31 as its basis for withholding the requested information. In failing to provide a timely response, the Cabinet Office contravened its obligation under section 1 and section 10 of the FOIA.
3. No steps are required.

Request and response

4. On 3 August 2018 (using the Cabinet Office's online request system) the complainant requested information of the following description:

"The following three files relating to the 21 December 1988 Lockerbie bombing. [The complainant also provided information about her personal connection to the bombing]:

PREM/19, Piece number 4064, dated 20/03/1992 – 25/05/1993 and entitled: 'DISASTERS. Lockerbie: Pan Am 747 air crash; part 3b

PREM19/3262

PREM19/3657"

5. On 3 August 2018, the Cabinet Office acknowledged receipt of this.
6. The complainant chased a response on 3 September and 5 September 2018. The Cabinet Office responded on 17 September 2018 and although it confirmed holding information within the scope of the request, it refused to provide it, citing the following exemptions as its basis for doing so:
 - section 23 (security bodies)
 - section 24 (safeguarding national security)
 - section 27 (prejudice to international relations); and
 - section 31 (prejudice to law enforcement).
7. The complainant requested an internal review on 20 September 2018. The Cabinet Office sent her the outcome of its internal review on 18 October 2018. It upheld its original position.
8. In sending the complainant the outcome of its internal review the Cabinet Office said that although it regretted the delay in its response it could have, in any event relied upon section 10(3) of the FOIA. This provision allows public authorities to take extra time to consider the balance of public interest in maintaining any exemption they seek to rely to rely on.
9. The Commissioner would observe at this point that a public authority cannot seek to rely on this provision retrospectively.

Scope of the case

10. The complainant submitted a complaint regarding the outcome of the Cabinet Office's internal review on 18 October 2018. She had previously been in contact with the Commissioner regarding the Cabinet Office's delays in responding firstly to her initial request and then to her request for internal review. The Commissioner had been in contact with the Cabinet Office regarding its delayed response to her initial request.
11. The Commissioner has considered whether the Cabinet Office is entitled to rely on the exemptions it has cited as its basis for withholding the information described in the request. As well as the exemptions cited in correspondence with the complainant, the Cabinet Office introduced reliance on section 35(1) and section 42(1) during the Commissioner's

investigation. The Commissioner has also considered whether the Cabinet Office has complied with its procedural obligations in respect of the FOIA.

Background

12. Pan Am Flight 103 was on its way from London to New York when it exploded above Lockerbie on 21 December 1988. 270 people were killed. Abdelbaset Ali Mohmed Al-Megrahi was convicted of the bombing in 2001. He is the only person who has been found guilty of involvement in this crime. Given that the crime was committed in Scotland, Scottish authorities have jurisdiction. Scotland has its own legal system.
13. Operation Sandwood was the Police Scotland investigation into allegations that there had been criminal wrongdoing in respect of the handling of the original investigation and subsequent prosecution. It reported in November 2018. However, there remains an ongoing investigation lead by the Crown Office and Procurator Fiscal Service which has yet to report at the time of this notice.¹ Also, in May 2018, the Scottish Criminal Case Review Commission (SCCRC) announced it would conduct a full review of the conviction of Abdelbaset Ali Mohmed Al-Megrahi for the bombing in order to decide whether it would be appropriate to refer the matter for a fresh appeal. At the time of this notice it has yet to report.²
14. PREM/19 documents are records from the Prime Minister's Office 1979 – 1997. These are public records at The National Archives ("TNA"). In a limited number of cases, some remain closed for a further period and some are returned to and/or retained by particular government departments.
15. While the description of PREM 19/4064 is in the request, the Commissioner would add for completeness that TNA description of the content of PREM 19/3262 is "DISASTERS. Lockerbie bombing, 21 December 1988: Pan Am 747 air crash; part 2a".³ The TNA description

¹ <https://www.copfs.gov.uk/media-site/media-releases/1818-renewed-pledge-on-lockerbie-investigation>

² <https://irp-cdn.multiscreensite.com/8f56052e/files/uploaded/3%20May%202018%20-%20SCCRC%20News%20Release%20-%20Application%20on%20behalf%20of%20Mr%20Abdelbaset%20Ali%20Mohmed%20Al%20Megrahi.pdf>

³ <https://discovery.nationalarchives.gov.uk/details/r/C16481507>

of PREM19/3657 is "DISASTERS. Lockerbie bombing: Pan Am 747 air crash, 21 December 1988; part 3a".⁴

Reasons for decision

16. Due to the sensitive nature of much of the withheld information, the progress of the Commissioner's investigation was disappointingly slow. Access to the information was not readily provided and the Commissioner had to serve an Information Notice under section 51 of the Act on 28 March 2019 in order to obtain access. Further information about this is in the Other Matters section of this Notice.
17. A representative of the Commissioner with a suitable level of security clearance was eventually allowed to view the information and they discussed the application of FOIA to it with the Cabinet Office in some detail.
18. In considering this request, the Commissioner will first address the application of section 31 (prejudice to law enforcement which has been applied to all the withheld information.
19. Section 31(1)(a) FOIA states that:

"Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-
(a) the prevention or detection of crime,
(b) the apprehension or prosecution of offenders,"
20. In order for a prejudice based exemption, such as section 31(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

⁴ <https://discovery.nationalarchives.gov.uk/details/r/C16561828>

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. In relation to the lower threshold, the Commissioner considers 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. The anticipated prejudice must be more likely than not.

21. The complainant did not submit arguments regarding section 31 nor did the Commissioner require her to.

22. The Cabinet Office explained that :

"The Police Scotland investigation 'Operation Sandwood' started in 2014 and was ongoing at the time of the request. This is an inquiry into allegations of potential criminality in relation to the handling of the investigation and prosecution of the Lockerbie bombing case. Certain government files were retained or were requested as part of the inquiry. The inquiry completed in December 2018 ...".

23. It went on to explain that "If the requested information were released this would be likely to prejudice law enforcement and the apprehension or prosecution of offenders as the work of the investigation would be impeded." It also added comment about the risk of prejudice to the ability of the organisation concerned to carry out the investigation.

24. It added reference to the Commissioner's own guidance on section 31 which said that a public authority that was not itself carrying out the investigation could nevertheless rely on section 31(1)(a) and (b) in order to protect the work of one that does – it referred to section 31(1)(g).⁵

25. With regard to the first criterion, the Commissioner is satisfied that the harm envisaged relates to the interest that section 31 seeks to protect against, namely prejudice to law enforcement.

26. The Commissioner next went on to consider whether the prejudice being claimed is "real, actual or of substance", not trivial, and whether there is a causal link between disclosure and the prejudice claimed. She is satisfied that the prejudice being claimed is not trivial or insignificant

⁵ <https://ico.org.uk/media/for-organisations/documents/1207/law-enforcement-foi-section-31.pdf> (see paragraph 12).

and she accepts that it plausible to argue that there is a causal link between disclosure of the information and prejudice occurring. The prejudice in this case would be to a major investigation on a subject of international importance – whether there was criminal wrongdoing in the conduct of the original investigation into the Lockerbie bombing and the subsequent prosecution. There is a clear causal link between the disclosure of information being considered in a live criminal investigation and the risk of undermining that investigation.

27. The Commissioner notes that the Cabinet Office is arguing that the disclosure of the withheld information *would be likely* to prejudice the prevention of crime. In the case of *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)* the Tribunal confirmed that, when determining whether prejudice would be likely, the test to apply is that “the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk.” (para 15). In other words, the risk of prejudice need not be more likely than not, but must be substantially more than remote. The Commissioner accepts that disclosure of the withheld information would be likely to prejudice the prevention of crime. Operation Sandwood was still ongoing at the time of the request and, indeed, at the time of the internal review. Even if the Cabinet Office had handled the request in full accordance with the timeliness obligations set in the FOIA – these are addressed later in this notice – it would have been doing so while Operation Sandwood was still a live investigation. The Commissioner accepts that disclosure of information which forms part of that which is being considered by a law enforcement body during its investigation of alleged criminality would be likely to prejudice that investigation. Consequently, it would be likely to prejudice the prevention or detection of crime and the apprehension or prosecution of offenders.
28. The Commissioner finds that the prejudice test has been satisfied in the circumstances of this case and consequently the exemption at section 31(1)(a) is engaged.
29. Just because an exemption is engaged does not mean that the public interest favours maintaining that exemption. Section 31 is qualified by a balance of interest test. By virtue of section 2(2)(b) of the FOIA, the Cabinet Office can only be rely upon section 31 as a basis for withholding the information in question if the public interest in doing so outweighs the public interest in disclosure.
30. The complainant did not submit arguments as to the balance of public interest in relation to section 31 nor did the Commissioner require her to do so. The Commissioner notes the complainant’s personal connection to Lockerbie bombing and acknowledges that there is an extremely

compelling public interest in ensuring that individuals who lost loved ones as a result of that terrorist attack receive as much information as possible about those events. Such a compelling public interest would be served by disclosure in this case.

31. The Cabinet Office implied acknowledgement of this point in its submissions to Commissioner. It appeared to accept that the balance of public interest in respect of section 31 is likely to be different in respect of this information when any investigation is ended, subject to the application of other exemptions.
32. In the Commissioner's view the fact that there was a live investigation at the time for compliance with the request – Operation Sandwood – means that the public interest in maintaining the exemption was stronger than the public interest in disclosure at that time. Law enforcement bodies should be free to look at whatever material they need as part of that investigation and to consider it without external parties commenting on the progress of that investigation or the relative relevance of material considered. The result of any investigation could be readily undermined by arguments as to external prejudice or influence. That, of itself, is contrary to the public interest. The Commissioner notes that although Operation Sandwood has now concluded, there is another investigation and a criminal case review (as referred to at Notes 1 and 2), still ongoing at the time of writing this notice.

Section 31 - Conclusion

33. In light of the above, the Commissioner has concluded that the Cabinet Office is entitled to rely on section 31 as its basis for withholding all the information described in the request and that the public interest in maintaining that exemption outweighs the public interest in disclosure. In reaching this view, the Commissioner has given particular weight to the fact that there was a live investigation ongoing at the time for compliance with the request.

Other exemptions cited

34. In the light of the Commissioner's conclusion on section 31, she has not gone on to consider the application of other exemptions.

Section 10

35. In failing to respond to the complainant's request within 20 working days (as required by section 10 of the FOIA), the Cabinet Office contravened section 1(1)(a) and section 10(1). The complainant submitted the request on 3 August 2018 but she did not receive a response until 17 September 2018.

Other matters

36. The Commissioner is extremely disappointed that she had to serve an Information Notice in this case on 28 March 2019 in order to obtain access to both the withheld information and the Cabinet Office's submissions in support of its position. She is also extremely disappointed that there was a further delay in compliance with that Notice. Failure to comply with a notice may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act, and the matter may be dealt with as a contempt of court. Unfortunately, the Cabinet Office's further protracted delay after service of the Information Notice meant that the Commissioner considered this course of action in this case. Ultimately, it was not necessary for her to do so in this case in order to obtain the Cabinet Office's compliance with the Information Notice.

Right of appeal

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

38. 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.

39. 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

**Gerrard Tracey
Principal Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**