

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 July 2024

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

Decision (including any steps ordered)

1. The complainant has requested a copy of a particular file the Cabinet Office holds on the deceased businessman, Ian Stuart Spiro. The Cabinet Office applied sections 23(1) (information supplied by, or relating to, bodies dealing with security matters) and 24(1)(national security) of FOIA, in the alternative, to refuse the request.
2. The Commissioner's decision is that the Cabinet Office was entitled to apply sections 23(1) and 24(1) in the alternative, to withhold the requested information.
3. The Commissioner requires no steps as a result of this decision.

Background

4. Ian Spiro was a British businessman who lived in the United States. In November 1992, his family were found murdered in their home. His body was later discovered at another location. The case was officially declared a murder-suicide, ostensibly sparked by pressure from the family's alleged financial problems. However, conspiracy theories have

circulated, suggesting that there may have been third party, state or terrorist involvement in the deaths¹.

Request and response

5. On 12 July 2023, the complainant wrote to the Cabinet Office and requested information in the following terms:

'Provide the file relating to the late businessman, Ian Stuart Spiro.

If you are going to rely upon s24 FOIA, please explain the reasons for doing so.

I would remind you that information which is exempt under s23 cannot be exempt under s24.

24 National Security'

(1) Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security'.

6. The Cabinet Office acknowledged receipt of the request on 12 July 2023 and subsequently wrote to the complainant on 25 July 2023 to inform him that they would require further clarification as to what he was requesting before they were able to proceed. The Cabinet Office asked the complainant if he could clarify:

'1. Whether there is a particular file you have in mind, if this is the case please provide the file reference or title.

2. Is the request for all information held by the Cabinet Office in relation to the late businessman Ian Stuart Spiro?'

7. The complainant replied to the Cabinet Office on the same date and provided the following clarification/information:

'<https://discovery.nationalarchives.gov.uk/details/r/C16561655>

Catalogue description

¹ <https://www.independent.co.uk/news/bizarre-case-of-the-cia-man-the-hostage-and-a-desert-suicide-1261208.html>

SECURITY. Ian Spiro, international businessman. This record is closed and retained by Cabinet Office.

Visit the department website.

Reference: PREM 19/3946

Description:

SECURITY. Ian Spiro, international businessman. Date: 1992 Nov 09. Held by: Creating government department or its successor, not available at The National Archives.

Legal status: Public Record(s). Closure status: Closed Or Retained Document, Open Description. Access conditions: Retained by Department under Section 3.4'.

8. The Cabinet Office wrote to the complainant on 14 August 2023 and advised him that they were extending the time limit for responding to his clarified request under section 10(3) of FOIA. They informed the complainant that the information he had requested was exempt under section 24 (national security) of FOIA and that they needed additional time to consider the balance of the public interest test. The Cabinet Office advised the complainant that they hoped to provide him with a substantive response to his request by 12 September 2023.
9. The Cabinet Office wrote to the complainant on 12 September 2023 and informed him that they were still considering the balance of the public interest test and that they hoped to be able to provide him with a substantive response by 10 October 2023.
10. On 10 October 2023 the Cabinet Office provided the complainant with a substantive response to his request. The Cabinet Office advised that the information requested was being withheld under sections 23(1) and 24(1) of FOIA and that the two exemptions were being cited in the alternative, 'as it is not appropriate, in the circumstances of the case, to say which of the two exemptions is actually engaged so as not to undermine national security or reveal the extent of any involvement, or not, of the bodies dealing with security matters'.
11. In other words, the Cabinet Office informed the complainant that they understood his point about the mutual exclusivity of sections 23 and 24 and that they were saying that either section 23 or section 24 was engaged, but, under FOIA, they did not have to state which one.
12. The Cabinet Office noted that section 23 is an absolute exemption and so they were not required to consider the public interest test. They stated that any information that was not exempt from disclosure under

section 23(1) could be exempt under section 24(1) and to the extent that section 24(1) was engaged, the Cabinet Office were not obliged to give any further explanation by virtue of section 17(4) because to do so would involve the disclosure of information which would itself be exempt.

13. In respect of the public interest test attached to section 24, the Cabinet Office stated that, 'there is a general public interest in the disclosure of information and we recognise that openness in government may increase public trust in and engagement with the government'. They informed the complainant that they had weighed these public interests against 'a very strong public interest in safeguarding national security'. The Cabinet Office contended that it was important that this sensitive information is protected, 'as disclosure of information in this case, if held, would damage national security'. Taking into account all the circumstances of the case, the Cabinet Office confirmed that they had determined that the balance of the public interest favoured withholding the information.
14. The complainant requested an internal review of the decision on 23 October 2023 and the Cabinet Office provided the same on 21 December 2023. The internal review upheld the decision. The Cabinet Office noted that the information requested by the complainant had previously been the subject of the Commissioner's investigation and the Commissioner had ruled that the Cabinet Office were entitled to apply sections 23(1) and 24(1) in the alternative. The Cabinet Office provided the complainant with a link to the Commissioner's previous decision notice².

Scope of the case

15. The complainant contacted the Commissioner on 4 January 2024 to complain about the way his request for information had been handled.
16. In submissions to the Commissioner the complainant contended that his request was not dealt with in accordance with the requirements of Part 1 of FOIA 'because the s24 PIBT (Public Interest Balancing Test) was wrongly decided'. The complainant contended that if the Commissioner believed the information was not exempt under section 24 because it

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4020401/ic-98881-g8r0.pdf>

was exempt under section 23 then the Commissioner, 'must explain how it conducted the PIBT to information which does not exist'.

17. The complainant cited the following Commissioner's guidance on citing the exemptions in the alternative:

'The second scenario is where the requested information engages section 23(1). In these cases the application of section 24(1) and the public interest test is only conjectural. It makes sense that in this scenario the hypothetical public interest test for section 24(1) will always favour maintaining the exemption'.

18. The complainant asked the Commissioner to explain, 'how the Commissioner conducts a PIBT which is 'only conjectural' to information which does not exist'. The complainant also asked the Commissioner to explain why he considers that the Commissioner, 'predetermining that the PIBT will always favour maintaining an exemption which does not apply is not unlawful as a matter of public law due to bias'.

19. The complainant noted that in their refusal notice, the Cabinet Office stated that, 'taking into account all the circumstances of this case we have determined that the balance of the public interest favours withholding this information'. He contended that the only circumstances in which the Cabinet Office could have determined the result of the section 24 PIBT was if they had conducted the test. Therefore, the complainant stated that the Cabinet Office decided the information was exempt under section 24 and not section 23.

20. The complainant referenced the Court of Appeal case of *The Department for Business and Trade and The Information Commissioner and Brendan Montague [2023] EWCA Civ 1378*³, in which Lord Justice Lewis stated, with reference to section 17 of FOIA:

'That section is concerned with a situation where a public authority refuses to comply with a request for information. Section 17(1) provides what a public authority must do if, amongst other things, it relies 'on a claim that information is exempt information'. The public authority must give the person making the request a notice which states that fact and 'specifies the exemption in question', and states why the exemption applies. In that context, section 17(1) is clearly concerned with ensuring that the individual concerned knows the specific provision

³ [Department for Business and Trade v Information Commissioner & Anor \[2023\] EWCA Civ 1378 \(22 November 2023\) \(bailii.org\)](https://www.bailii.org/uk/ew/cas/civ/2023/1378.html)

(or provisions) conferring exemption upon which the public authority is relying.

It is section 17(3)(b) which deals with how the public authority dealt with the request. If the public authority 'is to any extent relying on a claim that section 2(2)(b) applies', it must state the reasons for claiming that the public interest in maintaining the exemption outweighs the public interest in disclosure'. Those words mirror the wording in section 2(2)(b). The reference to the public interest in 'maintaining the exemption' means the public interest in maintaining the exemption of the information from disclosure. It reflects the same exercise as contemplated by section 2(2)(b). It is a different exercise from that envisaged in section 17(1) which is concerned with ensuring that the individual knows what provisions the public authority relies upon. Specifically, section 17(3)(b) does not refer to maintaining 'the exemption in question' as does section 17(1). That is a further indicator that section 17(3)(b), like section 2(2)(b), is not concerned with specific statutory provisions in isolation but rather the public interest underlying the exemption of the information'.

21. The complainant contended that in light of the Court of Appeal judgement above, the decision of the Upper Tribunal in *Foreign, Commonwealth and Development Office v Information Commissioner, Williams & Others* [2021] UKUT 248 (AAC) (FCDO case) was 'no longer good law'.
22. The complainant noted that section 17(1)(b) of FOIA states that where a public authority is relying on a claim that any provision of Part II that information is exempt information, it must, within the time for complying with section 1(1), give the applicant a notice which 'specifies the exemption in question'. The complainant contended that 'if the requested information engages section 23 then there is no ('that) information' by virtue of s24(1) FOIA'. He stated that the Commissioner, 'must now declare which (if either) of the two exemptions claimed is 'in question', and if it is s24 adjudicate as to whether or not the s24 PIBT was conducted correctly'.
23. The Commissioner considers that the scope of his investigation is to determine whether the Cabinet Office was entitled to rely on sections 23(1) and 24(1) of FOIA, in the alternative, to refuse the request.

Reasons for decision

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

Section 24 – national security

24. 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)’.

25. 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)⁴.

26. Section 24(1) states that:

‘Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security’.

27. FOIA does not define the term ‘national security’. However, in *Norman Baker v the Information Commissioner and the Cabinet Office* (EA/2006/0045 4 April 2007) the Information Tribunal was guided by a House of Lords case, *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, concerning whether the risk posed by a foreign national provided grounds for his deportation. The Information Tribunal summarised the Lords’ observations as follows:

- ‘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;

⁴ A list of the bodies included in section 23(3) of FOIA is available here: <http://www.legislation.gov.uk/ukpga/2000/36/section/23>

- 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 combatting international terrorism is capable of promoting the UK's national security.
28. Furthermore, in this context the Commissioner interprets 'required for the purpose of' to mean 'reasonably necessary'. Although there has to be a real possibility that the disclosure of requested information would undermine national security, the impact does not need to be direct or immediate.
29. As is clear from the wording of section 24(1), the exemptions provided by sections 23(1) and 24(1) are mutually exclusive. This means they cannot be applied to the same request.
30. However, the Commissioner recognises that the fact that section 24(1) can only be applied to information that is not protected by section 23(1) can present a problem if a public authority does not want to reveal whether or not a section 23 security body is involved in a matter. To overcome this problem, the Commissioner will allow public authorities to cite both exemptions 'in the alternative' when necessary⁵. This means that although only one of the two exemptions can actually be engaged, the public authority may refer to both exemptions in its refusal notice.
31. As the Commissioner's guidance on this issue explains, a decision notice which upholds the public authority's position will not allude to which exemption has actually been engaged. It will simply say that the Commissioner is satisfied that one of the two exemptions cited is engaged and that, if the exemption is section 24(1), the public interest favours maintaining the exemption.
32. This approach of citing these exemptions in the alternative has been accepted by the Upper Tribunal. As noted above, the complainant has contended that the Court of Appeal decision in Montague means that the Upper Tribunal decision in the FCDO case is 'no longer good law' on this point. However, the Commissioner does not agree with the complainant's contention that the Montague decision means that public authorities can no longer cite sections 23 and 24 in the alternative. This is because the issue being addressed in Montague was solely whether the public interest in maintaining multiple exemptions could be

⁵ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/how-sections-23-and-24-interact/>

aggregated when conducting the public interest test. The Court of Appeal made no attempt to consider the unique issue presented by sections 23 and 24. Therefore, the Upper Tribunal's decision in the FCDO case remains the binding decision on this point.

33. The information that is in the scope of the complainant's request has already been the subject of a previous decision notice issued by the Commissioner (IC-98881-G8R0 – 12 May 2022). In that case the Commissioner accepted that the withheld information (which the Commissioner had seen) either fell within the scope of the exemption provided by section 23(1) of FOIA or fell within the scope of the exemption provided by section 24(1), and that if the latter exemption was engaged then the public interest favoured maintaining the exemption.
34. In view of the above recent previous decision, the Commissioner is satisfied that the Cabinet Office were entitled to withhold the information requested by the complainant on the basis of section 23(1) or section 24(1) of FOIA. Furthermore, the Cabinet Office is not obliged to say which of these exemptions they are seeking to rely on to withhold the information. To the extent that section 24(1) may apply, the Commissioner is satisfied that the public interest still favours maintaining the exemption.

Other matters

35. Given that the information which was the subject of the complainant's request had been previously requested from the Cabinet Office (on 19 March 2019), the Commissioner considers that it should not have been necessary for the Cabinet Office to seek clarification from the complainant as to what particular information he was seeking. Similarly, due to the Cabinet Office having previously considered the public interest balance in respect of this information, the Commissioner does not consider that it was reasonable for the Cabinet Office to twice extend the time for consideration of the public interest test in this particular case. That is to say, it should have been more readily apparent to the Cabinet Office what the public interest balance was in relation to the information sought by the complainant.

Right of appeal

36. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

37. 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.
38. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Alexander Ganotis
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF