



## **Freedom of Information Act 2000 (Section 50)**

### **Decision Notice**

**Dated 26 July 2006**

**Public Authority: The Foreign and Commonwealth Office**

**Address: King Charles Street  
London  
SW1A 2AH**

#### **Summary Decision and Action Required**

**The complainant requested a copy a UK/US agreement regarding signals intelligence. The Foreign Office (the "FCO") refused both to release the information and to confirm or deny that the information was held. The Commissioner's decision in this matter is that the public authority should have provided a fuller explanation of the grounds of refusal. However, in other respects, the Commissioner finds that it has dealt with the complainant's request in accordance with Part I of the Act. In the light of this, the Commissioner requires no steps to be taken to achieve compliance with the requirements of the Act.**

#### **1. Freedom of Information Act 2000 (the 'Act') – Application for a Decision and the Duty of the Commissioner**

**1.1 The Information Commissioner (the 'Commissioner') has received an application for a decision whether, in any specified respect, the complainant's request for information made to the public authority has been dealt with in accordance with the requirements of Part I of the Freedom of Information Act 2000 (the 'Act').**

**1.2 Where a complainant has made an application for a decision, unless:**

- a complainant has failed to exhaust a local complaints procedure, or
- the application is frivolous or vexatious, or
- the application has been subject to undue delay, or
- the application has been withdrawn or abandoned,

**the Commissioner is under a duty to make a decision.**



1.3 The Commissioner shall either notify the complainant that he has not made a decision (and his grounds for not doing so) or shall serve a notice of his decision on both the complainant and the public authority.

## **2. The Complaint**

2.1 The complainant has advised that on 2 February 2005, the following request was submitted to public authority in accordance with section 1 of the Act:

2.2 "Exercising my rights under the Freedom of Information Act, I would like to read the UK-USA Agreement of June 1948. I believe that this is largely concerned with signals intelligence."

2.3 This request was refused on 10 March 2005. The FCO declined to confirm or deny that the requested information was held, citing sections 27 (International Relations) and Section 24 (National Security).

2.4 The complainant requested an internal review of this refusal. This was completed and the result reported to the complainant on 12 April 2005. The original refusal was confirmed. The FCO explained, moreover, that in accordance with section 17(4) of the Act, it was unable to provide any further explanation of why it could not confirm or deny that the requested information was held.

2.5 The complainant had meanwhile made a complaint to the Information Commissioner on 19 March 2005.

## **3. Relevant Statutory Obligations under the Act**

3.1 **Section 1(1)** provides that –

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

3.2 **Section 17(1)** provides that –

"A public authority which... is to any extent relying:

- on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request, or
- on a claim that information is exempt information



must, within the time for complying with section 1(1), give the applicant a notice which –

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

3.3 **Section 17(3)** provides that, when refusing a request, a public authority

“... must state the reasons for claiming ... that, in all the circumstances of the case, the public interest in maintaining the exclusion if the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information ...”

3.4 **Section 17(4)** provides that –

“A public authority is not obliged to make a statement under sub-section (1)(c) or (3) if, or to the extent that the statement would involve the disclosure of information which would itself be exempt information.”

3.5 **Section 23** provides that –

“(1) 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)

(2) A certificate signed by a Minister of the Crown certifying that the information to which it applies was directly or indirectly supplied by, or relates to, any of the bodies specified in subsection (3) shall, subject to section 60, be conclusive evidence of that fact.

(3)The bodies referred to in subsections (1) and (2) are:

- (a) the Security Service,
- (b) the Secret Intelligence Service,
- (c) the Government Communications Headquarters...”

(5) 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 relates to, any of the bodies specified in subsection (3).”

3.6 **Section 24** provides –



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

(2) The duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security.”

**3.7 Section 27** provides that –

“(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

(a) relations between the United Kingdom and any other State,

(b) relations between the United Kingdom and any international organisation or international court...

(2) Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.”

**4. Review of the case**

4.1 Unfortunately, due to an administrative error in the Information Commissioner's Office, the complaint was not actively considered until 27 March 2006. A written apology for this error was provided to the complainant once the mistake came to light.

4.2 Contact was made with the FCO which was asked to confirm to the Commissioner whether the requested information was held and, on the assumption that it was, why a fuller explanation of the refusal could not be given to the complainant who evidently had some knowledge of the type of information which may have been held. The FCO was also asked whether a Ministerial Certificate, warranting that information was exempt by virtue of section 24, had been obtained.

4.3 A response was received from the FCO, dated 17 May 2006. This advised that no agreement of 1948 existed, although a “British-US Communication Intelligence Agreement,” signed in March 1946, did exist. It was explained that previously the existence of this agreement had never been admitted, whether in response to Parliamentary Questions or other enquiries. However, it had recently come to the attention of the FCO that the US Government had publicly confirmed the existence of the agreement. The FCO was therefore content to do the same. It was explained that the FCO did not have a copy of this agreement. It was stated that a Ministerial Certificate had not been obtained.

4.4 The Commissioner made further enquiries of the FCO on 8 June 2006, asking in particular if it could clarify whether an agreement was held by another government



department to which the complainant could make an application. The FCO responded by stating that so far as it was aware no other government department held a copy of the document.

- 4.5 The Commissioner conveyed this information to the complainant. Although no firm information had been provided by the FCO as to which body or bodies might in fact hold the requested information, the Commissioner suggested to the complainant that if the document was held by a UK-based body, it was highly likely that the information would be held by a body listed in section 23(3) of the Act or would relate to such a body. As such the information would be subject to an absolute exemption. The complainant was asked whether he wished to withdraw his complaint in the light of the investigation that had been conducted thus far. The complainant indicated that he did not wish to do so.
- 4.6 The FCO subsequently confirmed that the requested information was indeed held by a body listed in s.23 of the Act.

## **5. The Commissioner's Decision**

5.1 The Commissioner's decision in this matter is that the public authority has dealt with the complainant's request in accordance with the requirements of Part I of the Act although it should have provided a fuller explanation of why it had refused to confirm or deny that it held the requested information. In reaching this conclusion, he has considered first whether the requested information is held by the FCO and secondly whether exemptions cited by the FCO applied to the requested information. Insofar as those exemptions are qualified exemptions, he has considered whether the public interest required the disclosure of the information. Finally he has considered the terms in which the complainant's request was refused.

### **5.2 Is the requested information held?**

- 5.2.1 The Commissioner has been given a clear assurance by the FCO that the requested information is not held by it. The FCO has indicated moreover that it does not believe that the information is held by another government department but, on the contrary, it understands it to be held by body listed in s.23(3).
- 5.2.2 Where a dispute arises as to whether requested information is held, the Commissioner generally makes enquiries of a public authority as to whether the information was ever held, whether it was destroyed in accordance with a records management policy and so forth. In this particular case, where the information is an international agreement, the Commissioner judges that the FCO will know with a high degree of certainty whether the information is or is not held.
- 5.2.3 The Commissioner has no grounds to disbelieve the account given by the FCO. If the agreement is, as its title would suggest, an agreement concerning signals



intelligence, it seems reasonable to suppose that the information must relate (albeit) indirectly to a security body.

### 5.3 Section 27 (International relations)

- 5.3.1 Since, for the reasons stated above, the Commissioner accepts that the requested information is not held by the FCO, he has focused not upon the question of whether or not the information should have been communicated to the applicant, but rather upon the question of whether or not the FCO should have confirmed or denied that it held it.
- 5.3.2 The FCO states, in response to the Commissioner's enquiry, that it has "recently become aware" of the fact that the US Government had confirmed the existence of the 1946 Agreement. The Commissioner's inference is that this information was not in its possession at the time of the complainant's request.
- 5.3.3 It seems clear to the Commissioner that the nature of a genuinely secret agreement is that all parties will assume that the information is of a confidential nature. There is scope for debate as to whether the information contained in the agreement was "obtained" from another state, and therefore whether the information it contains is exempt by virtue of s.27(2). In any event, the Commissioner is satisfied that disclosure of the existence of a secret agreement without the consent of the other party to that agreement would have had an adverse impact upon diplomatic relations and would have resulted in a reduction in the level of trust between the two governments.
- 5.3.4 Confirmation that a copy of a secret agreement was not held would imply that, whenever a non-committal response was given, the information was in fact held. The Commissioner is satisfied, in other words, that in this particular case, the exemption provided a reasonable basis for the non-committal response given by the FCO.
- 5.3.5 Section 27 is subject to the public interest test. Even though information is exempt, a public authority must still confirm that it is or is not held if the public interest in doing so is equal to or greater than the public interest in maintaining the exemption.
- 5.3.6 In making his complaint to the Commissioner, the complainant has made an argument as to why the public interest required the FCO to provide the requested information. In brief, this is that the agreement concerns not only the monitoring and interception of telephone and other signals but that is intimately connected with joint US/UK military operations. He argues that these are matters of strong public interest and, in particular, that since military operations involve life or death matters, the information request should have been considered in the context of the right to life recognised by the European convention on Human Rights and the Human Rights Act 1998.



5.3.7 Since the Commissioner has no evidence that the requested information is held, even though the existence of the agreement has now been confirmed, he is only required to consider retrospectively the possible result of having confirmed or denied that the information was held. In the Commissioner's view, the impact upon international relations would have been significant. Although public knowledge of the existence of the agreement may have contributed to public debate and understanding of military and diplomatic issues, the Commissioner does not consider that the public benefits would have been equal to or have outweighed the public interest in maintaining the exemption.

#### 5.4 Section 24 (National Security)

5.4.1 In its original refusal of the complainant's request, the FCO cited section 24 (National Security). The FCO has now explained that it considers the information to be exempt by virtue of section 23. Section 24 is only applicable in those cases not covered by section 23. The Commissioner understands why the FCO sought initially to rely upon section 24. However, given that section 23 has now been cited, it is not necessary to consider the later section.

#### 5.5 Section 23

5.5.1 The FCO has given an assurance to the Commissioner that the requested information is in fact held by a body listed in section 23(3) or the Act. Even in the absence of such an assurance, the Commissioner would think it highly likely from the title of the document that the information would be held by or relate to one of these bodies.

5.5.2 The Commissioner accepts that the requested information was exempt. Since section 23 provides an absolute exemption, the Commissioner has not considered any public interest matters that may arise.

#### 5.6 The manner of the refusal of the request

5.6.1 Section 17(4) of the Act provides that public authorities need not explain why a particular exemption justifies the refusal to neither confirm nor deny that requested information is held to the extent that the provision of such an explanation would involve the disclosure of exempt information.

5.6.2 Although the Commissioner accepts that at a time when the other party to the agreement regarding signals intelligence had not publicly acknowledged its existence, it would have been difficult for the FCO to provide a very detailed explanation of its response, he does think that some additional explanation could have been given. It would have been possible, for instance, without disclosing exempt information to explain that the nature of agreements in this area, in particular the need for security, was that non-committal responses were often



given. It might also have been possible to explain, albeit in general terms, how the provisions of the Act apply to security matters.

## **6. Action Required**

- 6.1 Although the Commissioner could have required the public authority to provide additional information as to the manner of its response, the Commissioner considers with the public confirmation of the existence of the 1946 Agreement the explanation that might have been given has now been superseded by events. He does not, therefore, require further information to be provided.
- 6.2 In the light of that and other considerations set out above, the Commissioner does not require any further steps to be taken to achieve compliance with the requirements of the Act.

## **7. Right of Appeal**

- 7.1 Either party has the right to appeal against this Decision Notice to the Information Tribunal (the "Tribunal"). Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@dca.gsi.gov.uk](mailto:informationtribunal@dca.gsi.gov.uk)





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7.2 Any Notice of Appeal should be served on the Tribunal within 28 days of the date on which this Decision Notice is served.

**Dated the 26 day of July 2006**

**Signed .....**

**Graham Smith**  
**Deputy Commissioner**

**Information Commissioner**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**