

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 19 November 2007

Public Authority: Foreign and Commonwealth Office
Address: King Charles Street
London
SW1A 2AH

Summary

The complainant asked the Foreign and Commonwealth Office (FCO) whether it held information about supplies and/or stockpiles of anthrax held abroad. FCO refused to confirm or deny that it held such information, citing the exemptions in sections 23(5) and 24(2) of the Act. The Commissioner upheld the refusal of the request, having concluded that FCO was entitled to rely on both sections of the Act and that, as regards section 24(2), in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighed the public interest in disclosing whether FCO held the information.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision. Legislation relevant to this case is set out in full in the Legal Annex to the Notice.

The Request

2. On 22 August 2005 the complainant emailed the Foreign and Commonwealth Office (FCO) asking to be told whether it held 'Information concerning supplies, and/or stockpiles, of anthrax held abroad'. He said that, if FCO did hold such information, he wished to have: a copy of the information; an opportunity to inspect the information; and a summary of the information. He asked for any information that was not covered by an absolute exemption and, if FCO was of the view that there may be further information of the kind requested but it was held by another public authority, he asked to be told as soon as possible. He said that he believed that the release of the information was required, in the public interest: to uphold

public confidence that FCO monitored the possession of anthrax; to provide assurance that FCO thoroughly researched the current level of threat from anthrax; and to ensure that public funds were correctly being spent by FCO in assessing the international dangers of biological weapons.

3. FCO responded on 20 September 2005 saying that, in reliance on the exemptions under sections 23(5) and 24(2) of the Act (headed respectively 'Information supplied by, or relating to, bodies dealing with security matters' and 'National Security'), it would neither confirm nor deny whether it held any information of the type requested. FCO said that the public interest in relation to section 24 lay in favour of maintaining that qualified exemption (section 23 being an absolute exemption). FCO also said that it was relying on section 17(4) for relief from the obligation to give a statement of the reasons why an exemption applied and why the public interest remained in favour of non-disclosure, on the basis that such a statement would itself include exempt information.
4. On 30 September 2005 the complainant sought a review of FCO's decision, saying that the Government had in the recent past been happy to put information about anthrax supplies into the public domain. He cited the dossier 'Iraq's Weapons of Mass Destruction – the assessment of the British Government' (which was accessible on FCO's website) and the response to two Parliamentary written questions. He asked FCO to reconsider its application of the public interest test.
5. FCO replied on 16 December 2005, saying that the principle of neither confirming nor denying that information was held applied in circumstances where to confirm or deny the existence of information would itself communicate sensitive and potentially damaging information to the detriment of the public good. FCO maintained its decision to neither confirm nor deny that it held the information sought, and said that the exemptions in section 26(3) (Defence) and 27(4) (International Relations) were also relevant.

The Investigation

Scope of the case

6. On 12 January 2006 the complainant contacted the Commissioner to complain about the way in which his request had been handled. The complainant asked the Commissioner to review FCO's decision to decline his request for information concerning anthrax held abroad. However, since FCO's decision only related to the question of whether it should confirm or deny that it held the information requested, rather than any consideration of the substantive issues, that is the only matter before the Commissioner.

Chronology

7. The Commissioner contacted FCO on 4 April 2007 to ask for a further explanation as to why FCO believed that to confirm or deny that it held the information sought by the complainant would cause the damage outlined in its letter of 16 December 2005.

8. FCO responded on 3 May 2007 saying that, in the light of new practice and guidance from the Commissioner since the complainant made his information request, it believed that it should cease to rely on section 17(4) and agreed that it should now provide the complainant with an explanation of why, in relation to section 24, the public interest in maintaining the refusal to confirm or deny outweighed the public interest in disclosing whether FCO held the information. The Commissioner welcomed that development. FCO also said that it was no longer relying on the exemptions in sections 26(3) and 27(4).
9. On 22 May 2007 FCO wrote to the complainant to explain that, if FCO was to confirm or deny whether or not it held information about foreign stockpiles of a potential chemical weapons agent such as anthrax, this would harm national security. FCO said that:

“this is because it is reasonable to assume that such information would have come from or included information supplied by the security bodies covered by section 23 of the Act. If we were to confirm that such information was held one could infer the existence of intelligence available to the section 23 bodies. If we were to deny the existence of such information one could infer the absence of such intelligence in the extant case, and effectively confirm the existence of intelligence in any other cases where a neither confirm nor deny response was given. In each case, the effect would be to reveal valuable information concerning the state of knowledge of our intelligence services which could be used against us thus harming national security. It is important, therefore, that consistency is maintained to avoid inferences being drawn from our responses (whether correct or not), which would harm national security.”
10. On 23 May 2007 the complainant contacted the Commissioner expressing his dissatisfaction with FCO's response. He understood FCO to be saying that, if it confirmed that it held information, it would be assumed that the information originated from the intelligence services and so FCO would effectively be revealing what the intelligence services know. The complainant suggested that such information may have been supplied to FCO by other sources such as scientific bodies or diplomats or members of the public, and might be eligible for release. As he understood it, FCO also seemed to be saying that, if it denied holding information in this case, and in other cases it refused to confirm or deny holding information, it could be deduced that a refusal to confirm or deny was, in effect, the same as a confirmation that information was held; thus FCO would, by default, be providing a means of stonewalling replies to other, hypothetical, questions by the way it answered his. The complainant said that FCO's comment that it wanted “to avoid inferences from its responses (whether correct or not), which would harm our national security” seemed to him to be going too far into a world where information is not only, quite rightly, withheld for national security reasons, but where no information is provided about whether or not information exists in case an enemy makes an inference, whether right or wrong, and acts upon it. He contended that, “bearing in mind the amount of detailed intelligence from the intelligence services which was deliberately disclosed by the Government to the public in dossiers in the run-up to the Iraq war about the enemy's capabilities in ‘weapons of mass

destruction' including chemical, biological (including anthrax) and nuclear, this argument seems fanciful".

Analysis

Exemptions

11. Under section 1(1)(a) of the Act, any person making a request for information to a public authority is entitled to be informed whether it holds information of the description specified in the request. That duty to confirm or deny is, however, subject to the proviso in section 2(1)(b) that section 1(1)(a) does not apply where any provision in Part II of the Act confers an absolute exemption or where, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information.

Sections 23 and 24

12. In FCO's explanation for its refusal to confirm or deny that it holds the information sought by the complainant it relies on both sections 23 and 24 of the Act.
13. Under section 23(1), information held by a public authority is exempt from disclosure if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in section 23(3), such as the Security Service, the Secret Intelligence Service and the Government Communications Headquarters (for the complete list, see the Legal Annex). Under section 23(5) the duty to confirm or deny that a public authority holds the requested information 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 section 23(3). Section 23 affords an absolute exemption.
14. The Commissioner notes the complainant's comments that certain information gleaned from the intelligence services relating to anthrax stocks was put into the public domain by the Government in the dossier 'Iraq's Weapons of Mass Destruction – the assessment of the British Government'. However, in its comments to the Commissioner FCO has explained that the references to Iraq's anthrax stocks included in the dossier were sourced from the International Atomic Energy Authority in Vienna and not from the FCO or any other government department. FCO also said that, since then, the Government has accepted a recommendation of the Butler Review of Intelligence on Weapons of Mass Destruction that any future use of intelligence in public debate by the Government must be done with care as to its uses and limitations. It is not for the Commissioner to question that policy; rather the matter before him is the question of whether FCO is entitled to rely on the exemptions in section 23, and in section 24 (2), to neither confirm nor deny that it holds the information currently being sought by the complainant.
15. As to section 24(2), this provides that 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. This section is not subject to the requirement that the information in question must have been provided by, or relate to, one of the bodies listed in section 23(3). The exemption in section 24 is a qualified one and it is therefore necessary to consider whether, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether FCO holds the information.

16. Information (if it were held) concerning stocks of anthrax held abroad could relate to one of the bodies specified in section 23(3) or, as the complainant has pointed out, and as has been illustrated by the source of the information in the dossier (paragraph 15 above), it could have been supplied by other bodies or individuals not listed in section 23(3).
17. In *Baker v the Information Commissioner and the Cabinet Office (EA/2006/0045)*, concerning the Cabinet Office's refusal to confirm or deny that it held information about the number of MPs subject to telephone tapping or other surveillance, the Cabinet Office argued (paragraph 34) (and the Tribunal concurred) that "it is important that any response under the Freedom of Information Act does not allow any deduction as to whether or not there is any involvement by a section 23 body. It is equally important to protect the fact of whether or not a.....body which is not listed in section 23 is involved and it is for that purpose the exemption at section 24(2) is claimed".
18. The Cabinet Office went on to explain that "if the Cabinet Office were to rely solely on either section 23(5) or on section 24(2) in neither confirming or denying that information was held, in those cases where section 23(5) was relied upon alone that reliance could itself reveal that one of the bodies listed in section 23(3) was involved. That in itself would constitute the release of exempt information. Thus it is necessary to rely on both sections 23(5) and 24(2) consistently in order not to reveal exempt information in a particular case". The Tribunal agreed with that conclusion.
19. The Commissioner recognises that the *Baker* case concerned a request for details of a specific act of surveillance, whereas the present information request has been couched in far more general terms. However, having regard to the reasoning of the Tribunal when combined with the reasons given by FCO for its reliance on the exemptions in sections 23(5) and 24(2) (paragraph 9 above), the Commissioner considers that those exemptions are likewise engaged in the present case and FCO was entitled to neither confirm nor deny holding the information requested. That is not, however, the end of the matter. Section 24 is a qualified exemption and the Commissioner needs to assess whether, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether FCO holds the information.

Public interest test

20. In comments made to the Commissioner FCO contended that there was "a clear public interest that the Government neither confirms nor denies that it holds information on anthrax stocks". FCO said that if it did confirm or deny (whichever was appropriate) it would "expose the level of information that government holds (or

the lack of it) and would indicate to any potential enemies of the UK that, if information was not held, they can carry on planning their operations. Or, if it confirmed that information is held, they may alter plans, which will make it more difficult to monitor in the future. There is a clear public interest for the Government to be able to defend national security to the best of its ability; this would clearly be prejudiced if hostile organisations were able to adapt plans after rightly or wrongly drawing conclusions”.

21. On the other hand, as the complainant has argued, there is a strong public interest in being aware of the extent to which any external threat to the UK from those who hold anthrax or other biological weapons is monitored. It is, however, the Commissioner's view that there is a greater public interest in ensuring that those who might utilise such weapons remain ignorant of the level and nature of any such monitoring (or lack of monitoring as the case may be). In the *Baker* case discussed above the Tribunal approved the view expressed by the Cabinet Office that “the use of a neither confirm nor deny response on matters of national security can only secure its purpose if it is applied consistently”. In the cause of that consistency, the Commissioner considers that, in all the circumstances of this case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether FCO holds the information.

The Decision

22. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

23. There are no steps which the Commissioner requires the public authority to take.

Other matters

24. In reviewing its decision to neither confirm nor deny that it held the information sought by the complainant, FCO introduced two additional exemptions on which it was relying, namely those contained in sections 26(3) and 27(4) of the Act. In comments to the Commissioner FCO withdrew its reliance on those provisions, and on section 17(4). While the Commissioner welcomed FCO's reconsideration of its reliance on section 17(4), and its subsequent provision of full grounds for refusing to confirm or deny that it held the information sought, he would draw FCO's attention to the need to specify at the earliest possible stage the correct exemptions on which it is relying to withhold information.

Right of Appeal

25. Either party has the right to appeal against this Decision Notice to the Information 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

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

Dated the 19th day of November 2007

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

General Right of Access

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.”

Effect of Exemptions

Section 2(1) provides that –

“Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that either –

(a) the provision confers absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information

section 1(1)(a) does not apply.”

Refusal of Request

Section 17(1) provides that -

“A public authority which, in relation to any request for information, 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.”

Section 17(3) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

Section 17(4) provides that -

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

Information supplied by, or relating to, bodies dealing with security matters

Section 23(1) provides 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).”

Section 23(3) provides that –

“The bodies referred to in subsections (1) and (2) are-

- (a) the Security Service,
- (b) the Secret Intelligence Service,
- (c) the Government Communications Headquarters,
- (d) the special forces,
- (e) the Tribunal established under section 65 of the Regulation of Investigatory Powers Act 2000,
- (f) the Tribunal established under section 7 of the Interception of Communications Act 1985,
- (g) the Tribunal established under section 5 of the Security Service Act 1989,
- (h) the Tribunal established under section 9 of the Intelligence Services Act 1994,
- (i) the Security Vetting Appeals Panel,
- (j) the Security Commission,
- (k) the National Criminal Intelligence Service, and
- (l) the Service Authority for the National Criminal Intelligence Service.”

Section 23(4) provides that –

“In subsection (3)(c) “the Government Communications Headquarters” includes any unit or part of a unit of the armed forces of the Crown which is for the time being required by the Secretary of State to assist the Government Communications Headquarters in carrying out its functions.”

Section 23(5) provides 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 relates to, any of the bodies specified in subsection (3).”

National Security

Section 24(1) provides 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.”

Section 24(2) provides that –

“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.”