

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 21 August 2008

Public Authority: Foreign and Commonwealth Office ('FCO')
Address: Old Admiralty Building
Whitehall
London
SW1A 2PA

Summary

The complainant made a request to the Foreign and Commonwealth Office (FCO) for the release of certain material from archived files entitled 'Englandspiel'. The FCO refused to release the material, citing the exemption contained at section 23 of the Act. Following his investigation the Commissioner is satisfied that the public authority was correct in its application of the exemption. However, the Commissioner has concluded that the FCO breached the following procedural sections of the Act when dealing with this request: section 1(1)(a), section 10(1) and section 17(1).

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.

The Request

2. On 29 November 2005 the complainant made a request to the FCO for files dating from 1949 covering the British government's actions and attitude toward the official Dutch Commission of Enquiry in that year into 'Englandspiel'¹. The National Archives had released FCO files on the same topic in the previous year (2004) and the complainant sought release of the following retained files:
 1. FO 371/ 79556 Jacket Z 2083/G – two minutes. 1 page dated 3/3/1949 and 2/3/1949

¹ See paragraphs 12 to 15 for further background on the intelligence operation known as 'Englandspiel'.

2. FO 371/ 79557 Jacket Z 6036/G - Telegram of 19/9/1949
 3. FO 371/ 79557 Jacket Z 6036/G - Minute of 26/9/1949
 4. FO 371/ 79558 Jacket Z 7178 - Minutes
 5. FO 371/ 79559 Jacket Z 7339/G – 7 pages PRO document put in place 18 November 2005
3. The FCO sent the complainant an interim reply by email on 29 December 2005 informing him that the extracts were currently under review and that it would send a substantive response, or a further update, by 26 January 2006.
 4. The FCO wrote to the complainant again on 26 January 2006 to inform the complainant that the re-review of the retained documents had taken place and that the items referenced as 1, 2 and 3 above were not releasable as they contained information provided by, or relating to, the security and intelligence agencies. These documents were therefore withheld under section 23 of the Act. The FCO informed the complainant that item 4 was suitable for release with redactions and would be sent to the National Archives for reuniting with the parent file within a fortnight. Finally, the FCO explained that item 5 had been released on 18 November 2005 as part of its regular programme of releases from the Retained Archive.
 5. On 1 February 2006 the complainant made a request for an internal review of the decision to withhold items 1, 2, and 3.
 6. The outcome of the internal review upholding the original decision was communicated to the complainant on 31 March 2006.

The Investigation

Scope of the case

7. On 29 April 2006 the complainant contacted the Commissioner appealing for a decision to release the items labelled above as 1, 2 and 3. The complainant argued that 'Englandspiel' was an historical subject worthy of enquiry into its causes, and that no information relating to it could possibly harm current British national interests more than 50 years after the event.

Chronology

8. On 6 September 2007 the Commissioner contacted the FCO to seek an explanation of the application of section 23 to the withheld material.
9. The FCO replied on 20 September 2007 explaining that the material in question was classified and that it could not be released to the Commissioner for viewing. However, the FCO explained that it was prepared to meet with the Commissioner or one of his representatives to discuss the matter further.

10. A meeting subsequently took place on 12 October 2007 between the Deputy Commissioner and representatives of the FCO at which the nature of the withheld information was discussed.
11. Further to this meeting, on 23 November 2007 the Commissioner was provided with a draft version of a letter from Director General of Defence & Intelligence at the FCO confirming that she had viewed the information that had been withheld on the basis of section 23 and confirmed that she was fully satisfied that the exemption had been correctly applied. The Commissioner was subsequently provided with a signed version of this letter from Director General.

Findings of fact

12. The Special Operations Executive (SOE) was a British covert operations service formed in July 1940 by the amalgamation of three bodies which had been created shortly before the outbreak of the Second World War: Section D of the Secret Intelligence Service (SIS); EH (named after its headquarters, Electra House, on the Embankment), and Military Intelligence, Research (MIR).
13. SOE was a secret, independent auxiliary service whose task was to coordinate action against the enemy by means of subversion and sabotage, including propaganda on behalf of the Allied war effort. It had first to identify, train, supply and coordinate the efforts of Resistance groups in Occupied Europe. It had then a twofold purpose: ultimately, to raise secret armies to rise in concert with the eventual Allied invasion; in the meantime, to carry out a programme of sabotage detrimental to the enemy's fighting potential. SOE was active in every theatre of war until it was disbanded in 1946. Surviving SOE records were transferred to the SIS.
14. The SIS reviews SOE records prior to their transfer to The National Archive and cooperates with other departments to review and security-edit records which refer to SIS before they are placed in The National Archive.
15. The name 'Englandspiel' relates to a controversial incident during the Second World War which resulted in a number of SOE agents in Holland losing their lives.

Analysis

Procedural matters

16. The Commissioner has concluded that the FCO breached a number of procedural requirements of the Act when dealing with this request (the full text of particular sections are included in the legal annex which is attached to this notice):
17. The complainant submitted his request on 29 November 2005 and although the FCO informed the complainant on 29 December 2005 that it was processing his request, it was not until 26 January 2006 that the FCO provided the complainant with a substantive response to this request.

18. Clearly this response of 26 January 2006 fell outside of the 20 working day period within which the Act requires public authorities to reply to a request in, and therefore the FCO breached section 10(1) of the Act. Furthermore by failing to confirm or deny within 20 working days whether the requested information was held and by also failing to issue a refusal notice within 20 working days, the Commissioner has concluded that the FCO breached both section 1(1)(a) and section 17(1) of the Act..

Exemption

19. The FCO's position is that the information not disclosed to the complainant, i.e. items 1-3 above, are exempt from disclosure on the basis of section 23.
20. The parts of section 23 which are relevant to this request are reproduced in the legal annex attached to this notice.
21. On the basis of the letter provided by the Director General of Defence & Intelligence at the FCO referred to at paragraph 11, the Commissioner is satisfied that section 23(1) has been correctly applied to all pieces of information because the information withheld was provided to the FCO either directly or indirectly by the Security Intelligence Service, the body named at section 23(3)(b) of the Act, or contains information which is related to that body.
22. This exemption is an absolute exemption and is therefore not subject to a public interest test.

The Decision

23. The Commissioner's decision is that the FCO dealt with the following element of the request in accordance with the requirements of the Act:
- The FCO was correct to refuse to disclose the information listed above as 1, 2 and 3 on the basis of section 23(1) of the Act.
24. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- The FCO breached sections 1(1)(a), 10(1) and 17(1) by failing to confirm within 20 working days following the request that the information was held but the FCO considered it be exempt.

Steps Required

25. The Commissioner requires no steps to be taken.

Other matters

26. The Commissioner notes that in the particular circumstances of this case he relied upon a re-assurance from the individual identified at paragraph 11 that the information withheld is exempt from disclosure on the basis of section 23. However, the Commissioner wishes to emphasis to all public authorities that in dealing with complaints he has received under section 50 of the Act the Commissioner will usually require sight of the information withheld by public authority as well as an explanation as to why a public authority considers that information to be exempt from disclosure.

Right of Appeal

27. 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@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

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 21st day of August 2008

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

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.”

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

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 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(2) provides that –

“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.”

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.”