

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 27 May 2008

Public Authority: Cabinet Office
Address: Admiralty Arch
North Entrance
The Mall, London
SW1A 2WH

Summary

The complainant asked the public authority for the contents of a file 'PREM 8/928' listed in the National Archives catalogue, which he believed dealt with United States Air Force facilities in the United Kingdom in 1948. In fact the file contained information about an entirely different issue, but the complainant indicated that he wanted to pursue the matter. The public authority concluded that all of the information was exempt under one or both of sections 23 and 27(1)(a) of the Freedom of Information Act 2000 ('the Act'). The Commissioner accepted the assurance of an independent senior official that most of the withheld information fell within section 23, but required the public authority to disclose some information to which it had applied section 27 alone.

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 8 June 2006 the complainant requested from the Cabinet Office the contents of a file 'PREM 8/928' listed in the National Archives catalogue. He indicated that it dealt with United States Air Force facilities in the United Kingdom in 1948.
3. The Cabinet Office informed him on 16 June 2006 that it held the file, but the catalogue was incorrect as to the subject matter. It asked him to confirm whether he still wished to pursue the request.

4. The complainant confirmed on the same day that he wanted the matter to be progressed as a freedom of information request.
5. The Cabinet Office informed the complainant on 7 July 2006 that all of the information in the file was exempt under one or both of sections 23 and 27(1)(a) of the Act. In relation to section 27(1)(a) it gave a brief assessment of the public interest test. It notified the complainant of its internal review procedure and of his right to approach the Information Commissioner.
6. The complainant asked the Cabinet Office on 13 July 2006 to conduct an internal review of its decision.
7. The Cabinet Office replied on 19 September 2006. It stated that it was satisfied that the exemptions applied and that it had properly assessed the public interest test.

The Investigation

Scope of the case

8. On 22 September 2006 the complainant contacted the Commissioner to complain about the way in which his request for information had been handled. He expressed his view that the public interest did not justify withholding the information.

Chronology

9. The Commissioner wrote to the complainant and the Cabinet Office on 9 October 2007. He asked the Cabinet Office to comment on various issues, and to provide the requested information.
10. The Cabinet Office replied on 6 November 2007. It stated that it was giving an assurance to the Commissioner that section 23 applied to all of the information, and so did not consider that it was necessary to provide him with a copy.
11. The complainant sent the Commissioner some copy correspondence on 24 October 2007.
12. The Commissioner wrote back to the Cabinet Office on 26 November 2007. He pointed out that it was necessary for him to have sight of the withheld information and asked the Cabinet Office to provide it within ten working days.
13. The Cabinet Office did not respond until 17 December 2007, when it indicated that a letter would be provided from an independent senior official that the withheld information was caught by section 23. This letter dated 19 December was sent to the Commissioner on 20 December. The Cabinet Office informed the Commissioner that it was no longer relying on the section 27 exemption in respect of all information which also engaged section 23. It identified a small

amount of information which it had originally considered to engage both sections 23 and 27, which it had now concluded only engaged section 27. The Commissioner has had sight of this information.

Analysis

Exemption – section 23(1)

14. Section 23(1) states:

'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).'

15. The Commissioner is prepared, in limited circumstances, to accept the assurance of a senior official that information withheld under section 23(1) has indeed been supplied by or is related to security bodies specified in section 23(3). He will only do so where the official occupies a position in relation to the security bodies which allows them genuinely to validate the provenance of the information, and where the official is independent of the public authority's process for dealing with freedom of information requests. For completeness, it should be noted that the Commissioner retains the power to serve an Information Notice under section 51 where he considers it appropriate and it remains open to the public authority to obtain, in appropriate cases, a conclusive ministerial certificate under section 23(2). In this case, the Director of Security and Intelligence in the Cabinet Office gave an assurance in his letter of 19 December 2007 that *'all the information now being withheld under s23 was either received from one of the bodies listed in section 23(3) or is directly related to them'*. The Commissioner is satisfied that the Director was an appropriate person to give this assurance, and he has concluded accordingly that the information which was withheld by the Cabinet Office engaged the exemption under section 23(1). Since section 23(1) is an absolute exemption, there is no public interest test to be applied.

Exemption – section 27(1)(a)

16. Section 27(1) of the Act provides that:

'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...'

Prejudice test

17. To engage the section 27(1)(a) exemption it is therefore necessary for the public authority to demonstrate that disclosure of the information would or would be likely to cause some relevant prejudice. The Commissioner's interpretation of 'likely to prejudice' is that there should be evidence of a significant risk of

prejudice to the subject of the exemption. The degree of risk must be such that there 'may very well' be prejudice to those interests. Whether prejudice exists is to be decided on a case by case basis. The prejudice test is a dynamic concept and different levels of prejudice will occur at different times according to the varying circumstances affecting the international relations or interests of the United Kingdom abroad.

18. In this case the requested information is contained within the file 'PREM 8', which the National Archives lists as containing 'Prime Minister's Office: Correspondence and Papers, 1945-1951'. The Cabinet Office reported that it was the opinion of the Foreign and Commonwealth Office that, even though the events pertaining to the information had taken place over fifty years previously, disclosure of the information '*would not be well received*' by a particular foreign state with which the United Kingdom wished to maintain cordial relations and would be likely to prejudice relations with that state. It therefore claimed that '*the effective conduct of the United Kingdom's international relations, and its ability to protect and promote its interest abroad, would be compromised if we released the information*'.
19. The Commissioner notes that the information at issue has a security classification of 'Confidential', which reflects an expectation on the part of those creating the information that it would be treated in confidence. However, while that is not an insignificant classification, the Commissioner takes account of the fact that the information was designated as such over fifty years ago. Furthermore, the classification is a general one – circulation of the information was not restricted to specific personnel.
20. Having given careful consideration to the withheld information and the submissions made by the Cabinet Office (including the reported view of the Foreign and Commonwealth Office), the Commissioner takes the view that the information pertains to international issues which are no longer live or affecting United Kingdom relations with other states. He considers it highly unlikely that disclosure would provoke any reaction from the foreign state involved.
21. Accordingly, the Commissioner has decided that disclosure of this information would not prejudice United Kingdom relations with another state, and the exemption under section 27(1)(a) is not engaged. The part of the information to which section 27(1)(a) alone was applied should therefore now be disclosed.

The Decision

22. The Commissioner's decision is that the Cabinet Office dealt with most of the request in accordance with the requirements of the Act, since it correctly withheld information as being exempt by virtue of section 23(1). However, the Commissioner has also decided that the Cabinet Office inappropriately withheld some of the requested information on the basis that it was exempt under section 27(1)(a), which constitutes a breach of section 1(1)(b) of the Act.

Steps Required

23. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- The Cabinet Office should provide the complainant with the information which it claimed was exempt under section 27(1)(a) of the Act alone.

24. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

25. Failure to comply with the steps described above 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 may be dealt with as a contempt of court.

Other matters

26. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern. There is no timescale laid down in the Act for a public authority to complete an internal review, but the Commissioner takes the view that, in the absence of exceptional circumstances, a reasonable time for completing an internal review is 20 working days from the date of the request for review. In this case the complainant's internal review request was made on 13 July 2006 and the Cabinet Office issued its decision on 19 September 2006. The Cabinet Office therefore took 47 working days to complete the review. The Commissioner does not believe that any exceptional circumstances existed in this case to justify that delay, and he therefore wishes to register his view that the Cabinet Office fell short of the standards of good practice in failing to complete its internal review within a reasonable timescale.

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.

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 27th day of May 2008

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

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.’

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).’

Section 27(1) provides that –

‘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,
- (c) the interests of the United Kingdom abroad, or
- (d) the promotion or protection by the United Kingdom of its interests abroad.’

Section 27(2) provides that –

‘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.’

Section 27(3) provides that –

‘For the purposes of this section, any information obtained from a State, organisation or court is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.’

Section 27(4) provides that –

‘The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a)-

- (a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1), or
- (b) would involve the disclosure of any information (whether or not already recorded) which is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.’

Section 27(5) provides that –
'In this section-

'international court' means any international court which is not an international organisation and which is established-

- (a) by a resolution of an international organisation of which the United Kingdom is a member, or
- (b) by an international agreement to which the United Kingdom is a party;

'international organisation' means any international organisation whose members include any two or more States, or any organ of such an organisation;

'State' includes the government of any State and any organ of its government, and references to a State other than the United Kingdom include references to any territory outside the United Kingdom.'