

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 9 March 2009

Public Authority: Cabinet Office
Address: Propriety and Ethics Team
Room 118
70 Whitehall
London
SW1A 2AS

Summary

The complainant requested information held by the Cabinet Office concerning the identification of the July 7 2005 suicide bombers. The Cabinet Office refused to disclose this information citing the exemption contained at section 31 of the Act (law enforcement). In correspondence with the Commissioner the Cabinet Office also argued that some of the information falling within the scope of the request was exempt on the basis of section 23 of the Act. The Commissioner is satisfied that some of information is exempt on the basis of section 23(1) and that the remaining information is exempt on the basis of sections 31(1)(a) and that the public interest favours maintaining the exemption. However, the Commissioner has also concluded that the Cabinet Office breached section 17 of Act by failing to provide the complainant with a refusal notice within 20 working days of his request and by failing to inform the complainant that it considered some of the information exempt under section 23 of the Act.

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 July 18 2005 the complainant submitted the following request to the Cabinet Office:

'Please would you let me know in writing if you hold information of the following description:

Information concerning the identification of Mohammad Sidique Khan, Shezad Tanweer, Hasib Hussain and Jermaine Lindsay as among the dead of the London bombings of July 7 2005, including any documents from the Identification Commission.

If you do hold such information I wish to have:

*A copy of the information
An opportunity to inspect the record
A summary of the information'.*

3. On 26 August 2005 the Cabinet Office responded to the complainant and informed him that it held information related to the subject of his request. However, it did not hold any information or documents from the Identification Commission. The Cabinet Office explained that it was refusing to disclose the information because it considered it exempt by virtue of section 31(1)(c) of the Act (the administration of justice). The Cabinet Office explained that disclosure of the requested information would harm not only the ongoing Coroner's Inquest, but also any possible future legal proceedings in relation to criminal acts. The Cabinet Office explained that it had considered the public interest in this case and concluded that the balance lay in withholding the information.
4. The complainant contacted the Cabinet Office on 26 August 2005 and asked for an internal review to be conducted into the decision to refuse his request. The complainant noted that the purpose of the opening of a Coroner's Inquest is take evidence of the identification of the deceased and to deal with any consequent applications for the release of the body. The complainant noted that as the respective inquests into the four men had already been opened, the legal process had therefore already determined the identification of these four men and thus the process was complete and did not need any further protection. Furthermore, the complainant suggested that the purpose of the Coroner's Court is not to determine criminal participation. Therefore, the complainant argued that release of the information would not damage the integrity of the Coroner's Inquest since the only information requested is that concerning identification, which had already been determined.
5. The Cabinet Office contacted the complainant again on 2 December 2005 and informed him that having conducted an internal review it had concluded that the information should not be disclosed. The Cabinet Office acknowledged that it was not in fact the role of the Coroner's Office to establish criminal participation of any of the dead. However, the Cabinet Office explained that it believed that disclosure of the information would damage the efforts of law enforcement bodies and could compromise criminal investigations. Further, it could undermine the confidence of the police in releasing information related to investigations for confidential use by Government Departments.

The Investigation

Scope of the case

6. On 2 December 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled.

Chronology

7. Regrettably, due to the volume of complaints made to his office, the Commissioner's investigation did not get underway until July 2007. The Commissioner wrote to the Cabinet Office on 7 July 2007 and asked to be provided with a copy of the requested information. The Commissioner also asked the Cabinet Office to explain why it had concluded that the requested information was exempt from disclosure on the basis of section 31 of the Act and why it had concluded that the public interest favoured withholding the information.
8. The Cabinet Office responded to this letter on 22 August 2007. This response was sent directly to the Deputy Commissioner due to the sensitive nature of issues surrounding this case. In this letter the Cabinet Office explained why it believed that the information covered by the scope of this request was exempt on the basis of section 31(1) and that it had concluded that the public interest favoured withholding the information. The Cabinet Office also explained that some of the information falling within the scope of the complainant's request was exempt because it fell within the scope of section 23(1).

Analysis

Procedural matters

Section 17

9. Section 17(1) of the Act states that when a public authority is relying on a claim that requested information is exempt from disclosure on the basis of the exemptions contained in Part II of the Act, it must provide the applicant with a refusal notice stating which exemption(s) it is relying on and why, if not clear, it believes that exemption(s) apply.
10. Section 17(1) also states that that such a refusal notice must be provided within the time limit proscribed by the Act for complying with section 1(1). This time limit is specified at section 10 of the Act as 20 working days following the date of receipt of the request by the public authority.
11. In this case the complainant submitted his request on 18 July 2005 and the Cabinet Office provided him with a refusal notice dated 26 August 2005. As the Cabinet Office failed to issue this refusal notice within 20 working days the

Commissioner has concluded that the Cabinet Office breach section 17(1) of the Act.

Exemptions

Section 23

12. Section 23(1) 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).'

13. The Commissioner is prepared, in limited circumstances, to accept, on the basis of the description of the information withheld and confidential discussions and correspondence with senior representatives of the public authority and other relevant bodies, that information withheld under section 23(1) has in fact been supplied by, or is related to, the security bodies specified in section 23(3). In this case on the basis of discussions and correspondence culminating in the letter dated 22 August 2007 addressed to the Deputy Commissioner, he is satisfied that some of the information covered by the scope of complainant's request falls within the exemption contained at section 23(1).

14. As section 23(1) is an absolute exemption, there is no need for the Commissioner to consider the public interest.

Section 31

15. On the basis of the Cabinet Office's letter dated 22 August 2007, the Commissioner understands that the Cabinet Office's position is that the remainder of the information covered by the scope of the request is exempt from disclosure on the basis of section 31(1)(a). (Such a position mirrors that suggested by the Cabinet Office's internal review described in paragraph 5, but differs from the Cabinet Office's initial reliance on section 31(1)(c) as cited in its refusal notice of 26 August 2005). Section 31(1)(a) states that:

'31(1) information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice –

(a) the prevention or detection of crime.'

16. As section 31 is a prejudiced based exemption, the Cabinet Office has to be able to demonstrate that disclosure of the requested information would, or would be likely to prejudice the activities described above. Given the nature of the information being requested in this case, the Commissioner cannot comment in great detail in this Decision Notice on the Cabinet Office's reliance on section 31 because to do so might reveal details of the withheld information.

17. However, the Commissioner can provide the following reasoning to explain why he believes that disclosure of the requested information would, or would likely to, prejudice the prevention or detection of crime and the apprehension of offenders:
18. Disclosure of the requested information would reveal the exact nature of the evidence collected about the bombers along with when, and how, this evidence was collected. If this information were disclosed, this could highlight the strengths and weaknesses of police and the security services investigatory efforts into combating terrorist activities. This information could be used by perpetrators, facilitators and supporters of terrorist acts in the future leading to the authorities' ability to both prevent and detect crime, and apprehend potential terrorists, being harmed.
19. The Commissioner has been guided on the interpretation of the phrase 'would, or would be likely to' be a number of Information Tribunal decisions. With regard to likely to prejudice, the Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (Tribunal at paragraph 15). With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The information Commissioner* (EA/2005/0026 & 0030) commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (Tribunal at paragraph 36).
20. With regard to the specifics of this case, the Commissioner notes that since the terrorist attacks of 7 July 2005, the authorities in the UK have disrupted a number of other alleged terrorist plots including in August 2006 a plan to detonate liquid explosives on board several airlines travelling from the UK to the United States and in July 2007 two car bombs were discovered in central London and disabled before they could be detonated. Furthermore, in June 2007 terrorists were successful in launching a car bomb attack on Glasgow Airport.
21. The Commissioner believes that evidence such as this demonstrates that the threat the UK faces from terrorist attacks similar to that of July 7 2005 is clearly a very real one. Moreover, the Commissioner is satisfied that the requested information could be directly employed by potential terrorists to the detriment of the activities listed in section 31(1)(a). Therefore, the Commissioner accepts that in terms of the likelihood of harm, the danger can be more accurately described as one that would occur, rather than one that would simply be likely to occur. The public authority did not specify whether it was arguing that the alleged prejudice would occur or would simply be likely to occur. In those circumstances, the lower threshold ("would be likely to prejudice") applies. The Commissioner is satisfied that the relevant test is satisfied and the exemption is therefore engaged.
22. Section 31 is a qualified exemption and therefore subject to the public interest test under section 2(2)(b) of the Act. Section 2(2) states that exempt information is not required to be communicated in accordance with section 1(1)(b) where the public interest, in all of the circumstances of the case, in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest test

23. The Commissioner believes that disclosure of the requested information could reassure the public that the correct identification of all of the victims of the attacks, including the bombers, took place. Correct identification is essential not only for the families of victims, but can also assist in criminal investigations and may improve public confidence in official investigations. Moreover, there is a public interest in ensuring that public funds are provided in sufficient amounts to identify suicide bombers to the satisfaction of their families and the wider national and international communities.
24. The Commissioner also believes that there is an inherent public interest in accountability for and transparency of decisions taken by public authorities. Although there have been a number of official reports into the events of July 7 2005, the Commissioner is aware that there has been much speculation in the media as to whether the intelligence and security agencies knew of the attackers and the plans for the attacks prior to July 2005.
25. Therefore, the Commissioner believes that disclosure of the requested information could provide the public with further insight into the potential for terrorist threats to the UK and information which may be held about such matters. Furthermore, disclosure of the requested information may re-assure the public that the security services did all they could to prevent the July 7 attacks and thus increase public confidence in these organisations. Arguably, given the indiscriminate way in which people are killed or injured by such attacks, it could be argued that there is a genuine and particular public interest in the public being re-assured that all necessary steps are being taken to protect the UK population from such attacks.
26. However, the Commissioner believes that there is a very strong public interest in the police and security services being able to prevent and detect crime and apprehend the perpetrators of these crimes. This public interest is particularly strong when the crimes involved are terrorist attacks designed to kill large numbers of civilians indiscriminately. Clearly, disclosure of any information that would assist potential terrorists in planning or committing such attacks or evading detection is not in the public interest. Moreover, as the Commissioner has indicated at paragraph 21 above, the likelihood, in his view, of this harm occurring if the information was disclosed is one that is more than hypothetical; it represents a significant and weighty risk.
27. The Commissioner also believes that the public interest in relation to securing the correct identification of the four bombers had been met by the due process of the Identification Commission and the Coroner's Court.
28. Having considered the public interest arguments for both disclosing the relevant information and maintaining the section 31 exemption, the Commissioner has concluded that in this case the public interest is weighted more heavily in favour of maintaining the exemption. In reaching this conclusion the Commissioner has been particularly persuaded by the very strong public interest in both the police and security services being able to prevent and detect potential terrorist attacks in

the UK. Although the Commissioner acknowledges, that the requested information relates to an unprecedented event in the UK, i.e. the country's first suicide attack by terrorists, and there is obviously a legitimate public interest in the public being informed about the authorities' handling of such an event, disclosure of the information would ultimately undermine the authorities' ability to deal with potential attacks in the future, something which is clearly not in the public interest.

29. The Commissioner is therefore satisfied that the requested information which is not exempt by virtue of section 23(1) is exempt from disclosure on the basis of section 31(1)(a) and that in the circumstances of this case the public interest is heavily weighted in favour of maintaining the exemption..

The Decision

30. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- The Cabinet Office were correct to withhold some of the information falling within the scope of the complainant's request on the basis that it is exempt by virtue of the exemption contained at section 23(1) of the Act.
 - The Cabinet Office were correct to withhold the remaining information falling within the scope of the request on the basis that it was exempt from disclosure by virtue of the exemption contained at sections 31(1)(a) of the Act and that the public interest in maintaining the exemption outweighs that in disclosing the information.
31. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- By failing to issue a refusal notice within 20 working days of the request the Cabinet Office breached section 17(1) of the Act.

Steps Required

32. The Commissioner requires no steps to be taken.

Right of Appeal

33. 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 9th day of March 2009

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 1(2) provides that -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

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.”

Section 2(2) provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

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

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(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 31(1) provides that –

“Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,
- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls,
- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),

- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
- (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment."