

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 24 May 2010

Public Authority: Cabinet Office
Address: 70 Whitehall
London
SW1A 2AS

Summary

The complainant asked the Cabinet Office (CO) for information from a named set of files for the period from 1976 to 1998 covering meetings between the British Prime Ministers of the day and the late King Hussein of Jordan. CO disclosed information for the period up to mid-1986 but withheld all relevant information dating between September 1986 and 1993. No information was held for the period from 1994 to 1998.

The complainant accepted (and the Commissioner agrees) that the relevant information was exempt under section 27(1)(a) but he disputed the balance of the public interest.

The Commissioner decided that CO had wrongly withheld some information but had acted correctly in withholding information for which the public interest in maintaining the exemption outweighed that in disclosure.

CO breached section 1(1) of the Act and were in technical breach of sections 10(1) and 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.

Background

2. The prefix "PREM" is used by the Cabinet Office (CO) for the Prime Minister's confidential files when they are transferred to The National Archives for permanent storage.
3. The late King Hussein bin Talal of Jordan (the King) reigned from 1953 until his death in 1999.

The Request

4. On 1 February 2006 the complainant asked the Cabinet Office (CO) to consider *an FOIA request for the PREM files for the 1976-98 covering meetings between the [British Prime Ministers of the day] and the King*. He said that he had already worked through the PREM materials available in The National Archive for the period up to 1975. The complainant's correspondence with CO continued and he subsequently received considerable assistance from CO and accessed relevant material at CO and in The National Archives for the period up to 1985. By mutual agreement, information was released in stages, with the request effectively being repeated and complied with at each stage, until early 2008 when CO began to withhold information.
5. On 12 March 2008 CO told the complainant, referring to his request of February 2006, that the final two files in the series, covering meetings for September 1986 onwards, would be withheld and cited section 40(2) and 27(1) of the Act with the balance of the public interest on the latter favouring maintaining the exemption. CO indicated that section 27(2) of the Act applied to some of the information. CO also relied on sections 23(5) and 24(2) of the Act and neither confirmed nor denied that it held any additional information falling within the scope of the request.
6. On 18 March 2008 the complainant sought an internal review of the refusal to provide information. He said that he had already received a large amount of information about meetings between the King and British Prime Ministers between 1974 and mid-1986. He said he believed it was arbitrary to suggest that the balance [of the public interest] under section 27 of the Act shifted decisively at that juncture from a position where a large amount of information about

those meetings could be released to one where no information at all could be released.

7. On 30 April 2008, following an internal review, CO told the complainant that it stood by its earlier refusal.

The Investigation

Scope of the case

8. The Commissioner noted some technical flaws in the procedure adopted by CO. The complaint did not encompass CO's reliance on the section 23(5) and section 24(2) exemptions and these exemptions are not addressed in this Notice.
9. In its response to the Commissioner, CO withdrew from an earlier reliance on the section 40(2) exemption which had been applied in error so the Commissioner has not addressed this exemption either.
10. CO mainly relied upon the section 27(1)(a) exemption which it said applied to all of the information being withheld. CO also relied upon the section 27(1)(c) and (d) exemptions and the section 27(2) exemption but failed to specify to which information it had applied them.
11. CO put forward extensive arguments in support of the prejudice test and said that it was very hard to make separate public interest arguments supporting its withholding information under the section 27(1)(a), (c) and (d) and section 27(2) exemptions of the Act. CO said it was especially difficult to make a hard and fast distinction between prejudice and the public interest, for the prejudice under sections 27(1)(c) and (d) may also be the public interest that insists that information is withheld under section 27(1)(a). The complainant accepted, as does the Commissioner, that the section 27(1)(a) exemption is engaged in respect of all of the withheld information, and that the section 27(1)(c) and (d) and section 27(2) exemptions may apply to some parts of the withheld information which CO did not identify. The Commissioner also accepted CO's view that, in this matter, the public interest arguments applying to each limb of the section 27 exemption are similar, so that the only significant matter of substance now at issue before the Commissioner is the application of the public interest balance.

12. The complainant confirmed to the Commissioner that he was not interested in information about administrative arrangements or modalities. Accordingly administrative and modality information has been identified and then disregarded by the Commissioner for the purposes of his decision. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

Chronology

13. On 19 June 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider that, having granted requests for information for the period from 1976 to mid-1986, the effect of CO's application of the section 27 exemptions of the Act was to draw an artificial boundary line for the release of information at 1 September 1986. The complainant said that it seemed arbitrary to suggest that the balance of the public interest shifted decisively at the end of the file covering the period 1984 to mid-1986 from a position where a large amount of information could be released to one where no information at all could be released.
14. On 16 March 2009 the Commissioner launched his investigation of the complaint and invited a response from CO. On 24 June 2009, CO told the Commissioner that it held eight files covering the period 1974 – 92. CO said that six of the files, those covering 1974 – mid-1986 were substantial; the last of these began in 1984 and extended to mid-1986. The remaining two files were less bulky and contained much information unrelated to the subject of meetings between the then British Prime Ministers and the King. CO said that the reducing activity in the series indicated that the file series dedicated to this subject came to an end in 1993
15. On 24 June 2009 CO told the Commissioner that, given the quantity of material and the sensitivity of some of the information, access had been given to the complainant two files at a time and even then some of the most sensitive information had been held back. CO confirmed that the (withheld) last two parts of the file series began in September 1986 and that the complainant had been shown papers up to mid-1986.
16. CO added that, following further analysis, it had concluded that all of the information now being withheld was exempt under the

section 27(1)(a) exemption. CO made lengthy detailed representations to the Commissioner, some of them in confidence, about the prejudice and public interest arguments and said that information withheld under the section 27(1)(a) exemption should continue to be withheld on public interest grounds. CO added that it was especially difficult to make a hard and fast distinction between prejudice and the public interest in section 27 matters. CO included representations to the Commissioner about the application of the section 27(2) and 27(1)(c) and (d) exemptions and the balance of the public interest.

17. On 27 November 2009 the complainant told the Commissioner that CO had released to him information relating to the period 1979 – 85. He said that his concern was with the CO decision that the balance of the public interest shifted soon after the end of 1985 from a position which permitted the relatively full release of these records to one which permitted no release at all. He regarded this as unjustified and arbitrary. He added that the Jordanian authorities had already provided him with what he believed to have been full access to their records of exchanges with British Prime Ministers throughout the 1980s and 1990s. He said that he saw as spurious the CO argument about potential damage that disclosing these files might do to relations with the Hashemite Kingdom of Jordan.
18. On 1 December 2009 the complainant told the Commissioner that the Jordanian authorities had already made available to him, from their national archives, a letter from the then British Prime Minister to the King dated 21 October 1988, extracts from which had been published in a book. He told the Commissioner that he had seen, and the published book had said, that the 21 October 1988 letter had pertained to British views on the implementation of the ceasefire in the Iran-Iraq war. The complainant added that, in addition to expressing her sympathy for the Iraqi position on that issue, the then Prime Minister had noted in a different vein that the British government had been obliged to request the withdrawal of a number of members of the Iraqi embassy staff in London for activities incompatible with their status. He said that he believed that this document should be available within the files being withheld from him by CO.
19. On 9 December 2009 a member of the Commissioner's staff met with CO staff and was shown 14 photocopied letters dating between 17 June 1986 and 15 September 1992. CO said that no PREM files were held containing papers for the period 1994

- 98. On 14 December 2009 CO told the Commissioner that it had just identified more information that fell within the scope of the request, which extended the time frame of the relevant withheld information, and would need time to consider whether any exemptions applied and, if so, to weigh the public interest. CO said that it hoped to provide a view by 25 January 2010. This target date was later revised by CO, first to 5 February and then to 12 February 2010.
20. On 18 February and again on 9 March 2010 the Commissioner's staff reviewed CO's original papers (not photocopies) and the additional information in scope that CO had identified in December 2009. On 10 March 2010 the Commissioner's staff provided CO with a preliminary view of his decision and invited CO to consider informal resolution of the matter. On 24 March 2010 CO rejected the Commissioner's preliminary view of this matter and said that it did not wish to consider informal resolution.

Findings of fact

21. The two relevant files, which have been withheld in full, start in September 1986 and the most recent document held in the second of them is dated 4 January 1993.
22. The Commissioner's staff confirmed with CO, both through assurance and from direct observation, that the withheld CO files do not contain a letter from the then British Prime Minister dated 21 October 1988.
23. The existence of a further prime ministerial letter to the King of 30 December 1989 is evidenced by another document on file dated 23 January 1990 but the letter itself was found not to be on the CO file.

Analysis

Exemptions

Section 27 – International relations

24. Section 27(1) of the Act says that information is exempt if its disclosure would, or would be likely to, prejudice (a) relations between Britain and any other State, (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) says that information is exempt if it is confidential information obtained from a State other than the United Kingdom.

25. As regards the application of section 27(1) in this matter the Commissioner is satisfied from the evidence he has seen from CO and from the content of the information itself that, for the information in respect of which he regarded the exemption as being engaged, real, substantial prejudice in some cases would, and in other cases would be likely, to be caused. Prejudice would in some cases, or would be likely in other cases, to be caused to the relations between the United Kingdom and (an) other State(s). The prejudice in this instance is making international relations more difficult.
26. It is common ground between the parties, and the Commissioner agrees, that the section 27(1)(a) exemption applies to all of the withheld information. Under section 27(1)(a) information is exempt if its disclosure would, or would be likely to, cause prejudice to the diplomatic relations between the government of the United Kingdom and that of any other State.
27. CO relied upon the section 27(1)(c) and (d) exemptions in respect of some of the withheld information. These relate to information the disclosure of which would, or would be likely to, prejudice the interests of the United Kingdom abroad or the promotion and protection by the United Kingdom of its interests abroad. CO also relied upon the 27(2) exemption which exempts information that is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court. CO did not specify to which information it had applied these additional exemptions but the Commissioner accepted CO's contention that these exemptions could also be said to apply to some parts of the information in addition to the section 27(1)(a) exemption.
28. As regards the application of section 27(2), the Commissioner has seen that the information that he accepts is properly regarded as exempt under this section has been obtained from another State at high government level in circumstances that strongly imply an intention of confidence. In reaching his decision, the Commissioner has considered what would have been in the minds of the confiders, taking into account their culture and traditions, and the lack of an internationally uniform concept of confidentiality.

29. CO said that there was a clear public interest in the United Kingdom being able to pursue our national interests successfully. This was more likely to happen if the United Kingdom conformed to the conventions of international behaviour, respecting the confidences of our international partners, and avoided giving offence to other nations. CO were concerned that the mere fact of disclosure of even relatively anodyne material might undermine trust between the United Kingdom and other states, making potential diplomatic partners less willing to trust the United Kingdom with confidential information in future.
30. In putting forward arguments in support of the prejudice test, CO said that it was difficult to make a hard and fast distinction between prejudice and public interest. The United Kingdom had many interests abroad including economic interests which could be put at risk by antagonising local people; there was a public interest in maintaining, promoting and protecting United Kingdom interests abroad. It followed that it was in the public interest to maintain good relations with those states with whom the interests of the United Kingdom are intertwined.
31. Some information withheld had been supplied in confidence and so was exempt under section 27(2). That information was also exempt under section 27(1)(a) since disclosure of confidential information would damage relations with the state that supplied it and more widely by virtue of having broken a confidence. The mere fact of disclosure of information, provided in confidence by the leader of any one nation to another, could undermine the trust and willingness of any existing and potential partner nations to provide information in future to the detriment of the United Kingdom's national interest.
32. In particular the Commissioner has seen it appropriate for CO to exempt: information about the King's personal affairs; and exchanges of information in confidence including - but not limited to - those between the King personally and the then British Prime Ministers and HM Ambassadors. The Commissioner also decided that it was appropriate for CO to withhold personal letters from the King to the then British Prime Ministers. The content of the letters, the person to person context of their delivery and the absence of any public pronouncements accompanying them all pointed to an intention and expectation of confidence, the breach of which

would make relations more difficult with relevant states. It would have been reasonable for the King at the time to expect that his letters would be held in confidence and for that confidence to endure. The Commissioner accepts the view of CO and followed the reasoning of the then Tribunal in *CAAT* that the courteous recognition of the laws and institutions of other nations and maintaining the confidentiality and ultimately relations with another state, outweighs the public interest in disclosing the information.

Public interest

33. CO said that it was very hard to separate the public interest arguments supporting its withholding information under the section 27(1)(a), (c) and (d) and section 27(2) exemptions of the Act, where they are engaged, adding that it was especially difficult to make a hard and fast distinction between prejudice and the public interest since the prejudice under section 27(1)(c) and (d) might also be the public interest that insists that information is withheld under section 27(1)(a). The complainant did not dispute that the section 27 exemptions could be said to apply but challenged CO's determination of the balance of the public interest. The Commissioner accepted CO's analysis of the difficulty of separating out the public interest factors as they applied to the different elements of the relevant section 27 exemptions. It is common ground that the issue for the Commissioner to determine is the balance of the public interest as it applies to the section 27(1)(a) exemption. The prejudice identified by the Commissioner in determining that the exemptions applied, and the level of that prejudice, has been carried over into his consideration of the public interest.
34. The Commissioner did not give separate consideration to the application of the section 27(1)(c), 27(1)(d) and 27(2) exemptions but he is satisfied that any consideration by him of the public interest in respect of those exemptions would, in this matter, not have differed significantly from that for the section 27(1)(a) exemption. In that the Commissioner has followed the view of the then Information Tribunal in *Gilby (Gilby v Information Commissioner & FCO EA/2007/0071, 0077, 0079)*. The Commissioner has seen that the circumstances of the present case are consonant with those in *Gilby*, relating as they do to the relationship between the United Kingdom government and the monarchy of Jordan, and that in practice the application of the public interest balance is the same in respect of both limbs of the section 27 exemption.

35. In addition to the matters set out in this notice, CO made further representations to the Commissioner in confidence on international matters which he has also taken into account in arriving at his decision.

Public interest timing

36. CO said that, in its view, the Commissioner should judge its application of the public interest on how matters stood at the time of the request. The Commissioner considers that his decisions about the exemptions and public interest should be based on the circumstances as they existed at the time of the request or at least by the time for compliance with sections 10 and 17 of the Act where the request is being refused. He has seen that, in response to the original request of 1 February 2006, CO and the complainant effectively entered into a dialogue which was productive for a time and resulted in the gradual disclosure of information from a large set of files over a period of time and that this was done partly for the convenience of CO. It was not until 12 March 2008 that CO formally refused to provide information, a refusal confirmed at internal review on 30 April 2008. At that point, CO withheld information relying on a set of exemptions, but principally relying on section 27(1)(a), and an analysis of the balance of the public interest. The Commissioner determined the public interest as it applied at the time of the formal refusal and application of the exemptions in 2008.

Public interest arguments in favour of disclosing the requested information

37. The complainant said that the disclosure of relevant information dated up to mid-1986, followed by the total withholding of information dating from September 1986 onwards, was arbitrary and unjustified. This is a line of reasoning which, if supported by the facts, would carry considerable weight.
38. The Commissioner has seen that there is a strong public interest in understanding how Britain conducts its foreign policies and in fostering the British public's trust in, and engagement with, the government. Disclosing the information requested would contribute to increased public knowledge and promote better informed discussion of the UK's relations with other nations. Making government information available to the public fosters public debate and understanding of political,

commercial and other developments; it also informs better understanding of British public policy at home and overseas making government more accountable. There is merit in fostering public understanding of commitments made and assurances given over time by British Prime Ministers and the responses they received.

39. The sensitivity of information generally reduces with the passage of time. The most recent of the information being withheld is over 17 years old. The relevant British Prime Ministers are, for the most part, no longer active in public life and it is now over 10 years since the King died. These factors point to a reducing public interest in maintaining the exemption over time arising from the reducing risk of harm to international relations from disclosure of the exempt information with the passage of time.
40. The Iraq military operation and the chains of events that contributed to it and which preceded it have been matters of substantial public interest and debate; this was the case when the request was made in early 2006 and the public interest in disclosure continued to remain high up to and beyond the time of the refusal notice and internal review by CO in March and April 2008.

Public interest arguments in favour of maintaining the exemption

41. The Commissioner sees that there is a very strong public interest in maintaining confidences between the United Kingdom and other states, especially those between heads of state and their representatives. If they or their successors were to fear that confidences, exchanged in private and intended to remain so, might some day become public, this could have a strongly detrimental effect. Mutual trust and the free and frank exchange of views could well be inhibited which would be damaging to United Kingdom interests.

Balance of the public interest arguments

42. The Commissioner has been guided by the decisions of the then Information Tribunal in the *CAAT (Campaign Against the Arms Trade (CAAT) v The Information Commissioner and Ministry of Defence, EA/2006/0040)* and *Gilby* cases which dealt with not dissimilar subject matter. He has seen that these precedent cases concerned the application of the section 27(1)(a), (c) and (d) and 27(2) exemptions and proceeded to

determine how considerations of prejudice informed analysis of the public interest - as does the present matter. The facts in the precedent cases also concerned the relationship of the United Kingdom government with an hereditary monarchy with a middle eastern cultural and religious heritage and considered the particular concerns and public interest factors that arose within that context. This is all common ground with the current matter.

43. The reasoning used in *CAAT* and *Gilby* by the then Tribunal was relevant to consideration of the application of the section 27(1)(a) exemption and the balance of the public interest as regards this matter. In this matter, the Commissioner accepted that the Jordanian government is discreet about details of its royal family. He has seen too that the dynasty of which the King was a part continues and that the present day King of Jordan is his son. The Commissioner has seen that the release of sensitive information by the United Kingdom government would be unwelcome and would cause serious offence. This would make the King's successor, and the Jordanian authorities generally, reluctant to share sensitive information with the United Kingdom government in the future, and also inhibit frankness and openness in diplomatic relationships more widely.
44. In *Gilby* and *CAAT*, the then Information Tribunal acknowledged the validity of very similar concerns raised by FCO in the context of the Saudi Arabian royal family. Similar cultural issues arose of a national royal family with high expectations of maintenance of privacy and the risk of adverse reactions in disclosures that would be perceived as breaches of confidence. In *CAAT*, the then Tribunal interpreted 'prejudice to international relations' broadly. The then Tribunal stated that they:
"do not consider that prejudice necessarily requires demonstration of actual harm to the relevant interests in terms of quantifiable loss or damage. For example, in our view there would or could be prejudice to the interests of the UK abroad or the promotion of those interests if the consequence of disclosure was to expose those interests to the risk of an adverse reaction from the KSA [Kingdom of Saudi Arabia] or to make them vulnerable to such a reaction, notwithstanding that the precise reaction of the KSA would not be predictable either as a matter of probability or certainty".
45. Similarly in relation to the application of section 27(1) in *Gilby*, the then Tribunal acknowledged the general importance

of transparency and accountability, the sensitive nature of the Saudi regime, and the importance of transparency in the fight against corruption. However, the Tribunal also said that these considerations did not:

"negate the public interest in maintaining our good relations with Saudi Arabia and avoiding prejudice to the UK interests in that country or the promotion of protection of those interests" (paragraph 51).

46. In determining the public interest arguments the Commissioner has taken full account of the content of the information. The Commissioner has also seen a particularly strong public interest, in 2006 when the request was made and in 2008 when the request was finally and formally refused, in the fullest appropriate disclosure of information regarding developments in Iraq pertaining to the allied military operation in Iraq which started in 2003.
47. The Commissioner has taken full account of further evidence provided to him in confidence by CO.
48. The Commissioner had regard for what would have been the reasonable expectations at the time of the King, the then British Prime Ministers and the officials advising them. He has seen that there were exchanges of confidence and he recognises the need to protect those. He has taken into account, as regards the King and his officials, the culture and traditions of the Middle East and has been mindful of the very strong public interest in not flouting international confidence, something which would make relations with other states more difficult.
49. The complainant said that he regarded the disclosure of relevant information dated up to mid-1986, followed by the total withholding of information from September 1986 onwards, as having been arbitrary and unjustified, something CO denies. However, having reviewed the information being withheld, the Commissioner did not see evidence to support a logical progression having been adopted by CO in suddenly reversing a policy of reasonably full disclosure to one of total non-disclosure in a cliff-edge style change. This coincided with the start of a new CO file beginning in September 1986; this appeared arbitrary and not justified by the content of that information in respect of which the risk that prejudice would be likely to occur would be low and would be outweighed by the public interest in disclosure. The Commissioner also saw a

heightened public interest in the disclosure of information relating to the Iraq military operation.

50. The Commissioner has provided CO with a decision schedule setting out in detail which: information is administrative in content and therefore outside the scope of the case; information should be withheld; and, information can reasonably be disclosed.

Procedural Breaches

51. The request was made on 1 February 2006 and the refusal notice was not issued until 12 March 2008. The Commissioner has seen that there was effectively a dialogue between the parties, which was generally productive in the intervening time. Accordingly he does not regard there to have been any significant breaches of the procedural requirements of the Act. However since the February 2006 request was not fully responded to until March 2008, very considerably more than 20 days later, it follows that CO was technically in breach of sections 10(1) and 17(1) of the Act.

The Decision

52. The Commissioner's decision is that CO did not deal with the request for information wholly in accordance with the Act in that CO withheld some disclosable information from the complainant as indicated in his decision schedule. This was in breach of section 1(1) of the Act and, in not giving a refusal notice within the specified time for compliance, CO breached sections 10(1) and 17(1) of the Act.

Steps Required

53. The Commissioner requires CO to provide to the complainant the information so indicated on his decision schedule to ensure compliance with the Act. The decision schedule contains information which is itself said by CO to be exempt; it has therefore been provided to CO under separate cover and does not form part of this notice.
54. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

55. 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.

Right of Appeal

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

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

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 sent.

Dated the 24th day of May 2010

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."

Time for Compliance

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."

Refusal of Request

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."

International Relations

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.”