

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 22 April 2010

Public Authority: The National Archives
Address: Kew
Richmond
Surrey
TW9 4DU

Summary

The complainant asked for the information contained in a closed part of a file held by The National Archives ('TNA'). The file in question was entitled 'Situation in Katanga: correspondence between Sir R Welensky and the Prime Minister'. TNA argued that the information was exempt from disclosure on the basis of section 27(1)(a) because disclosure would be likely to prejudice the UK's relations with the Democratic Republic of Congo and 27(1)(b) because disclosure would be likely to prejudice the UK's relations with the UN. The Commissioner has concluded that section 27(1)(b) is not engaged. In respect of section 27(1)(a) he has concluded that it is only engaged in respect of a small portion of the withheld information. However, where section 27(1)(a) is engaged, the public interest favours maintaining the exemption.

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 information the complainant sought in this case relates to the 'Congo Crisis' of the early 1960s. This crisis refers to a series of political disturbances, in what is now the Democratic Republic of Congo ('DR Congo'), following the decision by Belgium to grant the country independence in 1960.
3. Following this decision, although a single state was created, fighting between the various tribes broke out and the province of Katanga proclaimed itself to be an independent republic.
4. The actual information which the complaint asked for is from a file entitled 'Situation in Katanga: correspondence between Sir R Welensky and the Prime Minister'. When the file had been transferred from the Cabinet Office to The National Archives ('TNA') an extract from it had been 'closed' and it is this extract which the complainant requested.
5. Under the Public Records Act 1958 when files are transferred to TNA they can be subject to extended closure if this is approved by the Advisory Council on National Records and Archives. The part of file requested by the complainant was subject to an extended closure of 50 years until 2012. In the final year before the expiry of the 50 years the Cabinet Office will look again at the closed extract and assess whether any of the information merits further extended closure. If it does then a fresh application will be made to close the information for a longer period, typically 5 to 10 years.
6. Sir Roy Welensky was the Prime Minister of the Federation of Rhodesia and Nyasaland between 1956 and 1963. The 'Prime Minister' referred to in the title of the file was the British Prime Minister, Harold Macmillan, who held this post between 1957 and 1963.
7. The Federation of Rhodesia and Nyasaland was defined as part of the federal realm of the British Crown.
8. Northern Rhodesia, part of the Federation of Rhodesia and Nyasaland, shared a border with Katanga.

The Request

9. The complainant submitted a request to TNA on 11 October 2008 asking for 'two papers extracted and closed in PREM 11/3187 under former section 5(1) on 9.4.1991'.
10. TNA acknowledged receipt of the request on 21 October 2008.
11. TNA contacted the complainant again on 18 November 2008 and explained that it had to consult with a number of departments in relation to the request and in such cases it was entitled under the Act to extend the time for compliance by an extra ten working days. TNA therefore explained that it would respond by 3 December 2008.
12. On 3 December 2008 TNA contacted the complainant and explained that it believed that all of the requested information was exempt from disclosure on the basis of section 27(1). (Although the response listed all four sub-sections of 27(1) it was not specific about which of these sub-sections it was relying on in this case). However, TNA explained that it had yet to reach a determination as to where the balance of the public lay and therefore it needed to extend the time it needed to reach such a decision.
13. TNA contacted the complainant again on 5 January 2009 and explained that it needed to extend the time it needed to consider the public interest test again given the complex considerations relevant to this request.
14. On 3 February 2009 TNA informed the complainant that it had concluded that the public interest lay in maintaining the exemption.
15. The complainant subsequently asked for an internal review to be conducted on 10 February 2009.
16. TNA informed the complainant of the outcome of the review on 8 April 2009. This review had concluded that all of the information was exempt from disclosure on the basis of the exemptions provided by sections 27(1)(a) and 27(1)(b) and in all the circumstances of the case the public interest favoured maintaining the exemptions.

The Investigation

Scope of the case

17. The complainant contacted the Commissioner on 3 June 2009 and argued that TNA was incorrect to withhold the information she requested. In support of this position, the complainant explained why she believed that disclosure would not result in prejudice to the UK's relations with other countries or international organisations and moreover it was in the public interest to disclose the information she requested. The Commissioner has set out the complainant's submissions in more detail in the Analysis section below.

Chronology

18. The Commissioner contacted TNA on 29 July 2009 and asked to be provided with a copy of the withheld information and submissions to support TNA's reliance on sections 27(1)(a) and 27(1)(b) to withhold this information.
19. TNA provided the Commissioner with a copy of the information and its submissions to support the application of the exemptions on 25 August 2009.

Analysis

Exemptions

Section 27 – international relations

20. TNA has argued that all of the withheld information is exempt from disclosure on the basis of sections 27(1)(a) and 27(1)(b). These exemptions provide that information is exempt from disclosure if its disclosure 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.
21. In order for a prejudice based exemption, such as section 27(1), to be engaged the Commissioner believes that three criteria must be met:

- Firstly, the actual harm which the public authority alleges would or would be likely to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e. disclosure would be likely to result in prejudice or disclosure would result in prejudice. If the likelihood of prejudice occurring is one that is only hypothetical or remote the exemption will not be engaged.
22. Furthermore, the Commissioner has been guided by the comments of the Information Tribunal which suggested that in the context of section 27(1), prejudice can be real and of substance ‘if it makes relations more difficult or calls for a particular damage limitation response to contain or limit damage which would not have otherwise have been necessary’.¹

TNA's position

23. In its submissions to the Commissioner, TNA did not specifically state whether it believed that disclosure of requested information ‘would’ prejudice the interests identified above or whether disclosure would simply be ‘likely to prejudice’ these interests. Rather these submissions explained that TNA believed that disclosure ‘could’ prejudice the UK’s international relations. The Commissioner is conscious of the Tribunal’s comments that where a public authority has not clearly indicated which limb of the prejudice test it is seeking to rely on, it is appropriate to assume that it is the lower threshold of prejudice that applies.² The Commissioner has therefore considered whether disclosure of the information would be likely to result in the prejudice to the interests described at sections 27(1)(a) and 27(1)(b).
24. In providing submissions to support the application of these exemptions, TNA explained that these were given in confidence and it did not wish them to be replicated in any decision notice. Therefore the

¹ *Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence* (EA/2006/0040), paragraph 81.

² *McIntyre v The Information Commissioner and Ministry of Defence* (EA/2007/0068), paragraph 45.

level of detail which the Commissioner can include in this notice in relation to his assessment of the exemptions is limited. Instead the Commissioner has produced a confidential annex which sets out his findings in relation to TNA's submissions in more detail. This annex will be provided to TNA but for obvious reasons not to the complainant.

25. Nevertheless, the Commissioner believes that he is able to include the following summary of TNA's position, largely because this is drawn from the reasoning set out in the refusal notice and internal review issued by TNA.
26. TNA has identified three reasons why disclosure would be likely to result in prejudice to the UK's international relations, namely:
 - Disclosure could impact on the UK's relations with DR Congo;
 - Disclosure could impact on the UK's relations with the UN; and
 - Disclosure of this information could jeopardise relations between DR Congo and the UN.
27. In support of this position, TNA highlighted the fact that at the time of the request both the UK government and UN were working with other States to improve the political situation in Congo and release of this information, in the opinion of both the FCO and Cabinet Office, could damage these current international efforts.

Complainant's position

28. In support of her view that disclosure of the requested information would not prejudice the UK's international relations the complainant made the following points:
29. Given that changes that have occurred in DR Congo since 1961 it was impossible that any of the requested information would prejudice relations between the UK and DR Congo. This was because the links between Adoula's government at that time and the government in DR Congo are non-existent.³ The position was the same in relation to the UK government's relations with Zambia and Zimbabwe.
30. The same argument applied to the UN: the passage of time made it impossible to see how the release of factual information would damage international efforts now. Moreover, the UN would welcome release of information about the Congo mission in the 1960s, as evidenced by the fact they opened their files to scholars.

³ Cyrille Adoula was Prime Minister of Congo between 1961 and 1964.

Commissioner's position

31. The Commissioner accepts that TNA's argument that disclosure would be likely to harm the UK's relations with DR Congo is clearly an applicable interest falling within the scope of section 27(1)(a). Similarly, he is satisfied that the argument that disclosure of the information would be likely to prejudice the UK's relations with the UN is an argument which relates to the applicable interests which section 27(1)(b) is designed to protect. These two arguments therefore meet the first criterion set out above at paragraph 21.
32. In relation to TNA's third argument, in theory, the Commissioner accepts that it could potentially be argued that disclosure of information by the UK which resulted in prejudice to the relationship between two third parties could be used as basis to engage either one of the exemptions. This would be if the disclosure and resulting harm to the relations between the third parties subsequently harmed the UK's relations with either of the third parties. Presumably this would be because one of the third parties would be dissatisfied with the UK's disclosure of information which in the first instance led to tension between the two third parties.
33. However, in this case the Commissioner's understanding is that TNA's position is simply that as disclosure of the information would be likely to harm relations between DR Congo and the UN, the exemptions are engaged. TNA has not made a clear connection between disclosure of the information, tension between the two third parties and then any resulting prejudice to the relations between UK and DR Congo or the UN.
34. Therefore the Commissioner does not believe that TNA can rely on the third argument to engage either exemption because both sections are designed to protect the UK's relations with another State, international organisation or international court. TNA's third argument simply concerns prejudice that may occur to the relations between two third parties.
35. With regard to the second criterion, the Commissioner accepts that is logical to argue that disclosure of information which contains comments by the British Prime Minister of the day about the situation in the Congo in the early 1960s, and the role of various individuals and organisations in the region, has the potential to prejudice both the UK's relations with DR Congo and the UN. The Commissioner is therefore satisfied there is a causal relationship between the potential disclosure of the requested information being withheld and prejudice to both the UK's relations with DR Congo and the UN.

36. Furthermore, the Commissioner is satisfied that the resultant prejudice which TNA believes would be likely to occur is one which can be correctly categorised, in light of the Tribunal's comments above, as real and of substance. In other words, subject to meeting the likelihood test at the third criterion, disclosure could result in making relations more difficult and/or demand a particular diplomatic response.
37. With regard to the third criterion, the Commissioner notes that TNA has emphasised that disclosure of the requested information at the time of the request in October 2008, i.e. because of the UK's and UN's ongoing work to improve the political situation in the Congo, would be likely to prejudice the UK's international relations. The Commissioner agrees that the timing of any request is vital to any consideration of whether a prejudice based exemption is engaged.
38. However, equally vital, if not more so, is the content of the requested information itself. Any assessment of likelihood has to therefore assess the cumulative effect of disclosing particular information, at a particular point in time.
39. In its submissions to the Commissioner, TNA highlighted a number of reasons why it considered the content of the requested information to be particularly sensitive. However, for the reasons noted above the Commissioner cannot set out in detail what these are in the main body of the Notice. Instead he has simply summarised his conclusions with regard to whether the exemptions are engaged below.
40. With regard to section 27(1)(a), TNA has highlighted a particular and specific reason why, given the content of the requested information, disclosure would be likely to result in prejudice to the UK's relations with DR Congo. Having considered this reason and the content of the documents that have been withheld very carefully the Commissioner has concluded that the sensitivity identified by TNA is only relevant to certain parts of certain documents. In relation to these sections the Commissioner accepts that their disclosure by the UK at the time of the request would have been likely to result in prejudice to the UK's relations with DR Congo. However, in relation to the remainder of the documents where, in the Commissioner's opinion the sensitivity identified by the TNA is not relevant, section 27(1)(a) is not engaged.
41. Having considered the content of the requested information very carefully the Commissioner does not accept that TNA has demonstrated that disclosure of this information in October 2008 would have been likely to prejudice the UK's relations with the UN. This is because although TNA has highlighted a number of reasons why the content of

the information is particularly sensitive, the Commissioner is not sufficiently persuaded that these sensitivities, even when combined with the timing of the request and the UK's ongoing work in the region, make the likelihood of prejudice one that is real and significant. The exemption contained at section 27(1)(b) is therefore not engaged.

Public interest test

42. Section 27(1) is a qualified exemption and therefore as the Commissioner has concluded that a small portion of the requested information is exempt from disclosure on the basis of section 27(1)(a) of the Act, he must consider the public interest test at section 2(2) of the Act in respect of that information. This requires a consideration of whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the requested information

43. TNA identified the following reasons why disclosure would be in the public interest:
44. Disclosure would be in the interests of open government and public accountability.
45. The general presumption of openness in the Act.
46. There is a general historical interest in Katanga and the UN involvement in that province in the early 1960s; disclosure would improve the historical record in this area.
47. The information was nearly 50 years old.
48. In her submissions to the Commissioner the complainant argued that:
49. The public has a right to know, both in terms of historical understanding and learning from the past, and also in terms of increasing the body of knowledge about the UK's role in DR Congo and the Federation of Rhodesia and Nyasaland at that time. It is likely that disclosure of the information would throw more light on the role of the UK and of decolonisation in central Africa at the time.
50. If the file revealed any questionable behaviour by the UK or Rhodesian government, then the public have a right to know this; this includes the public in the UK, in DR Congo, in Zambia and Zimbabwe.

Public interest arguments in favour of maintaining the exemption

51. In submissions to the Commissioner, TNA identified the following reasons why the public interest favoured maintaining the exemptions it cited:
52. The extract contains information that, if released, could put at risk the effective conduct of the UK's international relations.
53. The UK's ability to protect and promote its interests abroad would also be compromised.
54. It is strongly against the public interest to damage our international relations in this way. At present the UK government is working very hard, in partnership with other States, to improve the political situation in DR Congo. The release of the information could arguably damage these efforts, increasing the current suffering experienced by the people of the area.

Balance of the public interest arguments

55. With regard to attributing weight to the public interest arguments in favour of disclosing the information the Commissioner notes that they focus on issues often cited in any consideration of the public interest test, namely accountability and transparency. However, as such concepts are inherent to the Act this should not diminish their relevance to this case. Nevertheless the weight that should be applied to them will depend upon the content of the information that the Commissioner has decided is exempt on the basis of section 27(1)(a). Having considered carefully the information which the Commissioner has decided is exempt, he considers that the extent to which its disclosure would actually inform the public and advance the historical record, in both the UK and abroad, about this issue is relatively limited, not least because the amount of information which the Commissioner has decided is exempt under section 27(1)(a) is relatively small.
56. In relation to the public interest arguments cited by TNA in favour of maintaining the exemption, the Commissioner does not believe that the argument identified at paragraph 53 is relevant. The prejudice that may occur to the UK's ability to protect and promote its interests abroad is in fact protected by a separate prejudice based exemption contained at section 27(1)(c). It is not an argument which can be used to support the public interest test under section 27(1)(a).

57. However, the Commissioner accepts that it would be very strongly against the public interest if the UK's relations with DR Congo were harmed, especially in the context of the UK government currently working with DR Congo to improve the political situation in the region.
58. Consequently, when set against the limited extent to which the public interest would be met by the information being disclosed, the Commissioner has concluded that in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Procedural Requirements

59. Part I of the Act includes a number of procedural requirements with which public authorities must comply.
60. These include section 1(1) which states 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.’
61. Section 10(1) requires a public authority to respond to a request within 20 working days following the date of receipt.
62. Section 17(1) of the Act requires a public authority to provide an applicant with a refusal notice, within the time for compliance set out at section 10(1), stating the basis upon which it has refused a request for information.
63. Under section 4 of The Freedom of Information (Time for Compliance with Request) Regulations 2004, the twenty working days for TNA can be extended by 10 working days if the request relates to information contained in a transferred record which has yet to be open information for the purposes of section 66 of the Act. The provision is applicable to this case.
64. The Commissioner understands that the complainant submitted her request electronically on 11 October 2008. On 21 October 2008 she received a response from TNA confirming that her request had been received and would be forwarded to its FOI department for their attention. On 3 December 2008 TNA issued the complainant with a

refusal notice. As this notice was issued outside of the 30 working days since the date the TNA received the request on 11 October 2008 this constitutes a breach of section 17(1) of the Act.

65. As the Commissioner has decided that the majority of the information falling within the scope of the request is not exempt from disclosure on the basis of sections 27(1)(a) or 27(1)(b) this information should have been disclosed to the complainant. Failure to provide this information when initially dealing with the request constitutes a breach of sections 1(1)(b) and 10(1) of the Act.

The Decision

66. 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:
- A small portion of the requested information is exempt from disclosure on the basis of section 27(1)(a) of the Act and in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
67. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- With the exception of the information referenced in the preceding paragraph, section 27(1)(a) does not provide a basis upon which to withhold the requested information.
 - Section 27(1)(b) does not provide a basis to withhold any of the requested information.
 - TNA breached section 17(1) of the Act as the refusal notice was not issued within 20 working days of the request.
 - By failing to provide the information which the Commissioner has decided is not exempt from disclosure, TNA breached sections 1(1)(b) and 10(1) of the Act.

Steps Required

68. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- To provide the complainant with the information she requested with the parts of the information the Commissioner has decided is exempt from disclosure on the basis of section 27(1)(a) redacted. The Commissioner has indicated which information should be redacted in the confidential annex which will be provided to TNA.
69. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

70. 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

71. 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 served.

Dated the 22nd day of April 2010

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

Freedom of Information Act 2000

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.”

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.”

Effect of Exemptions

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”

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, 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.”

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.”

The Freedom of Information (Time for Compliance with Request) Regulations 2004

Archives

4. - (1) This regulation applies where-

- (a) a request for information is received by an appropriate records authority or by a person at a place of deposit appointed under section 4(1) of the Public Records Act 1958[4]; and
- (b) the request relates wholly or partly to information:
 - (i) that may be contained in a transferred public record, and

(ii) that has not been designated as open information for the purposes of section 66 of the Act.

(2) Where this regulation applies, subsections (1) and (2) of section 10 of the Act have effect as if any reference to the twentieth working day following the date of receipt were a reference to the thirtieth working day following the date of receipt.