

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 January 2012

Public Authority: The Foreign and Commonwealth Office

Address: King Charles Street
London
SW1A 2AH

Decision (including any steps ordered)

1. The complainant submitted two requests to the Foreign and Commonwealth Office (FCO) both of which sought documents which had apparently been retained by the FCO when a file was passed to The National Archives. The FCO's initial position was that the information falling within the scope of both requests was exempt from disclosure on the basis of section 23(1) of FOIA which provides an exemption for information supplied by, or relating to, security bodies. However, during the course of the Commissioner's investigation the FCO informed him that it did not in fact hold the information falling within the scope of the second request.
2. The Commissioner's decision is that the information falling within the scope of the first request is exempt from disclosure on the basis of section 23(1). He is also satisfied that the FCO does not in fact hold the information falling within the scope of the second request. However, by incorrectly informing the complainant in its initial responses that it did in fact hold such information, the FCO breached section 1(1)(a) of FOIA. This section places a duty on public authorities to inform applicants whether or not they hold information of the nature that is requested.

Request and response

3. On 14 January 2011 the complainant wrote to the FCO and requested information in the following terms:

'I would like to request a number of documents that were retained by the FCO at the point at which accompanying material was passed to the Public

Record Office. This material is now contained within the National Archive file FO 371/70830.

With this file are a number of copies of a letter dated 12/7/48, from the FCO to the Chancery at the British Embassy in Brussels. One passage from each copy of the letter has been redacted, and the original copy retained under the terms of the Public Record Act 1958.

*I would like to request under the FoI an unredacted copy of that letter. [**The first request**]*

The FCO letter to the Chancery accompanied a copy of another letter, from a Belgian citizen, Madame E Fallen de Droog, concerning her husband, Ernest Fallen. The file makes clear that there [sic] a translation of this letter was provided to the Chancery. Both this letter and the translation have been retained in the department.

*I would like to request under the FoI a copy of both Madame de Droog's letter, and its translation'. [**The second request**]*

4. The FCO responded on 24 January 2011. It stated that the requested information was exempt from disclosure on the basis of section 23 of FOIA.
5. The complainant contacted the FCO on 27 January 2011 and asked it to conduct an internal review of this decision.
6. Following an internal review the FCO wrote to the complainant on 14 February 2011. The review concluded that section 23 had been applied correctly to withhold all of the requested information.

Scope of the case

7. On 17 February 2011 the complainant contacted the Commissioner to complain about the way his requests for information had been handled. At this stage the complainant asked the Commissioner to consider the following points:
 - In relation to the information sought by his first request, i.e. the redacted letter, the complainant argued that the FCO was incorrect to argue that this information fell within the scope of section 23(1). In support of this view the complainant explained that the facility which the letter referred to was operated by an organisation called the Combined Services Detailed Interrogation Centre, which was a division of the War Office. As such it was not run by – or on behalf of – any of the organisations listed in section 23(3) of FOIA. Although there was a widespread belief at the time that this facility was operated by the Security Service, this was not the case however.

Thus if the FCO believed that it was operated by the Security Service, then it was mistaken.

- In relation to the information sought by his second request, i.e. the Madame de Droog letter and its translation, the complainant argued that the document could not be said to be information from any of the section 23(3) bodies. Furthermore at least some of the contents of the letter, i.e. the allegations concerning Ernest Fallen's treatment do not relate to any of the section 23 bodies (precisely because such allegations were made by Madame de Droog). If the letter contained allegations regarding mistreatment carried out by section 23 bodies then such information could be redacted. Equally if the letter contained allegations that Ernest Fallen was associated with any of the section 23 bodies that could redacted accordingly.
 - Finally the complainant noted that although section 23 usually provides an absolute exemption, for records that are more than 30 years old and are held in the Public Record Office – now known as The National Archives (TNA) - such material, by virtue of section 64(2), is subject to a qualified exemption. The complainant therefore argued that the FCO should have applied a public interest test in respect of the information falling within the scope of his first request.
8. At the end of his investigation, the Commissioner informed the complainant that he was of the view that the FCO did not hold the information falling within the scope of his second request. The complainant explained that he remained dissatisfied with the manner in which the FCO had handled this request.
9. The Commissioner has therefore considered the FCO's handling of both requests in this notice.

Reasons for decision

The first request

10. Section 23(1) states that information is exempt from disclosure if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in section 23(3).¹

¹ A full list of the bodies listed in section 23(3) is available here: <http://www.legislation.gov.uk/ukpga/2000/36/section/23>

11. As part of his investigation of this complaint representatives of the Commissioner met with the FCO to discuss its handling of these requests. On the basis of these discussions the Commissioner is satisfied that the information redacted from the letter described by the first request is exempt from disclosure on the basis of section 23(1). In reaching this conclusion the Commissioner notes that his representatives have seen the files in question and have a clear understanding of the nature of the material that is held.
12. However, the Commissioner cannot provide any further details as to why he has reached this conclusion as to do so would involve describing the nature of the withheld information itself. This would of course undermine the FCO's position that the information is exempt from disclosure.
13. The Commissioner appreciates the fact that he cannot explain his reasoning in any greater detail will no doubt provide frustrating to the complainant, particularly in light of the specific arguments he had made in support of his position that section 23(1) was not engaged. However, the Commissioner wishes to reassure the complainant that he has fully taken into account the submissions he made when reaching his conclusion.
14. Furthermore, the Commissioner does not agree with the complainant that in the circumstances of this case the FCO should have treated section 23(1) as providing a qualified, rather than an absolute, exemption. Section 64(2) of FOIA states that two conditions have to be met in order for section 23 to be treated as a qualified exemption. Firstly, the information has to be contained in a historical record (i.e. 30 years have to pass since the record's creation) and secondly, the record has to be held in the Public Records Office, now TNA.
15. Although the information redacted from the letter sent by the FCO to the Chancery meets the first of these criteria the Commissioner does not accept that it meets the second. This is simply on the basis that the redacted parts of the letter – i.e. the parts which have been exempted under section 23(1) – have not in fact been transferred to TNA but retained by the FCO.

The second request

16. During the course of the Commissioner's investigation the FCO contacted the complainant and informed him that although the letter and its translation which his second request asked for were referred to in other correspondence contained within the file FO 371/70830, these two documents had never in fact been held by the FCO.

17. The FCO explained the reason why both its refusal notice and internal review suggested that these two documents were in fact held, albeit that they were exempt from disclosure, was due to the fact that individuals who reviewed the retained material did not recognise that he had in fact requested these specific documents. Rather the requests were simply interpreted as asking for the retained material (i.e. the information not transferred to TNA) and having examined the retained material, the FCO was satisfied that it was exempt from disclosure on the basis of section 23(1). However, during the course of considering this complaint the FCO asked TNA to provide it with the original file so that it could compare the material which the public were able to access at TNA with its own retained material. When the two files were juxtaposed it became apparent that the FCO had never in fact held the two documents sought by the complainant's second request.
18. The Commissioner accepts that given the procedures of creating and sending correspondence that would have existed in the 1940s, it is reasonable to conclude that letter from Madame de Droog would not have been retained by the FCO:
19. In terms of the letter falling within the scope of the first request, as this letter was created by the FCO, it would be reasonable to assume that when this letter was typed an original version, along with one or more carbon copies, would have been created. The original was presumably sent to the Chancery with a carbon copy version being retained by the FCO for its own files. It is presumably this carbon copy that is included in the file 371/70830.
20. However with regard to the letter from Madame de Droog, as this letter was not created by the FCO but simply received by it, it would appear unlikely the FCO would have made a copy of this letter before forwarding it to the Chancery. This is simply on the basis that at the time the technology for routinely copying documents was not widely available. Therefore although the FCO did receive a letter from Madame de Droog once it had received and forwarded this letter to the Chancery, it would have been unlikely that it would have retained a copy.
21. The Commissioner recognises that these assumptions do not necessarily address the question of the translated version of Madame de Droog's letter. Although the provenance of the translated version is not clear, it is possible that the translation was created by the FCO and thus a carbon copy of this translation was retained on file, as with the actual letter sent to the Chancery. However, as the FCO explained to the complainant, it had conducted searches of the retained extracts from the file 371/70830 and the co-located files and neither the translated version of the letter, nor the original, have been found.

22. In cases such as this where there is some doubt as to whether information is held by a public authority, the test the Commissioner applies is the civil standard on the balance of probabilities. In deciding where the balance lies the ICO will consider scope, quality, thoroughness and results of the searches carried out by the public authority as well as considering, where appropriate, any other reasons offered by the public authority to explain why the information is not held.
23. On the basis of the reasoning set out above the Commissioner is satisfied that on the balance of probabilities that the FCO does not hold the letter from Madame de Droog nor a translated version of this letter.
24. When a public authority receives a request a public authority is under a duty imposed by section 1 of FOIA to confirm to the applicant whether it holds that information – section 1(1)(a) - and if so, to disclose that information – section 1(1)(b). Both duties are subject to the application of exemptions.
25. In respect of the second request as the FCO incorrectly informed the complainant that it held the information he had requested, the Commissioner has concluded that it breached section 1(1)(a) of FOIA. This is on the basis that the FCO failed to provide an accurate response to the complainant with regards to whether it held the information.

Other matters

26. The Commissioner wishes to note his concern that the FCO initially provided the complainant with an inaccurate response to his second request. The Commissioner believes that the confusion that arose from this error highlights the need for public authorities to ensure that they carefully consider the text of an applicant's request so they are clear as to nature of information that is being requested. Furthermore it highlights the need for the public authorities to accurately establish whether or not they hold the requested information before responding to the request. The Commissioner expects the FCO to ensure that such errors are not repeated when it handles requests in the future.

Right of appeal

27. 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,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

28. 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.
29. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Graham Smith
Deputy Commissioner
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