

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 March 2016

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested information about breaking of diplomatic relations between Syria and the UK during 1986. The Cabinet Office refused to confirm or deny it held information within the scope of the request, citing section 23(5) (security bodies) or section 24(2) (national security) as its basis for doing so. It also cited section 27(4) (international relations). It upheld this at internal review.
2. The Commissioner's decision is that the Cabinet Office is entitled to rely on section 23(5) and section 24(2) as its basis for refusing to confirm or deny whether the requested information is held.
3. No steps are required.

Request and response

4. On 28 March 2015 the complainant requested information of the following description:

"I am writing to make an open government request for all the information to which I am entitled under the freedom of information act. In order to assist you with this request, I am outlining my query as specifically as possible. If however this request is too wide or too unclear, I would be grateful if you could contact me as I understand that under the act, you are required to advise and assist requesters.

I am looking for documents relating to the breaking of diplomatic relations between Syria and the UK during the period of 1986.

I understand that under the act, I should be entitled to a response within 20 working days. I would be grateful if you could confirm in writing that you have received this request. I look forward to hearing from you in the near future."

5. On 29 April 2015, the Cabinet Office wrote to tell the complainant that it needed further time to consider the balance of public interest although, contrary to its obligations under section 17, it did not tell him which exemption it was considering.
6. On 14 May 2015, the Cabinet Office provided its refusal notice. It refused to confirm or deny that it held the requested information. It sought to rely on section 23(5) (security bodies) or section 24(2) (safeguarding national security) as its basis for doing so. It also sought to rely on section 27(4) (international relations) as its basis for refusing to confirm or deny whether it held the requested information.
7. The complainant requested an internal review on 19 May 2015. The Cabinet Office sent him the outcome of its internal review on 14 July 2015. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 19 August 2015 to complain about the way his request for information had been handled. He had previously been in contact with the Commissioner regarding this and other requests but did not clarify his position until this date.
9. The Commissioner has considered whether the Cabinet Office is entitled to rely on the exemptions it has cited as a basis for refusing to confirm or deny whether it holds information within the scope of the requests.

Reasons for decision

10. The complainant drew a number of contemporaneous newspaper reports to the Commissioner's attention which cover the breaking of diplomatic relations between the UK and Syria at the time in question. He had obtained these newspaper articles following an FOIA request to the

Metropolitan Police. He also drew the Commissioner's attention to an item available in the online archive of Margaret Thatcher's papers which covers this period. Mrs Thatcher was Prime Minister at the time.¹

11. He asserts therefore that given the wealth of information in the public domain about the severing of diplomatic ties between the UK and Syria, a neither confirm nor deny ("NCND") position is untenable.

Sections 23(5) and 24(2)

12. Information supplied by or relating to security bodies specified in section 23(3) is exempt information by virtue of section 23(1). Information which does not fall under section 23(1) is exempt from disclosure under section 24(1) if the exemption is required for the purpose of safeguarding national security.
13. Sections 23(5) and 24(2) exclude the duty of a public authority to confirm or deny whether it holds information which, if held, would be exempt under section 23(1) or where a confirmation or denial as to whether requested information is held is required for the purpose of safeguarding national security.
14. The Cabinet Office explained that both sections 23(5) and 24(2) were engaged. The Commissioner does not consider the exemptions at sections 23(5) and 24(2) to be mutually exclusive and he accepts that they can be relied on independently or jointly in order to conceal whether or not one or more of the security bodies has been involved in an issue which might impact on national security. However, each exemption must be applied independently on its own merits. In addition, the section 24 exemption is qualified and is therefore subject to the public interest test.
15. The test as to whether a disclosure would relate to a security body is decided on the civil standard of proof, that is, the balance of probabilities. In other words, if it is more likely than not that the disclosure would relate to a security body then the section 23 exemption would be engaged.
16. From the above it can be seen that section 23(5) has a very wide application. If the information requested is within what could be described as the ambit of security bodies' operations, section 23(5) is

¹ <http://www.margaretthatcher.org/document/106407>

likely to be applicable. This is consistent with the scheme of FOIA because the security bodies themselves are not subject to its provisions.

17. Factors indicating whether a request is of this nature will include the functions of the public authority receiving the request, the subject area to which the request relates and the actual wording of the request.
18. In this case the Commissioner considers that it is clear that the subject matter of the request – the breaking of diplomatic relations between the UK and Syria in 1986 - is within the area of the work of bodies specified in section 23(3). This was apparently as a consequence of terrorist activities undertaken by a Syrian national. It is reasonable to assume that the security bodies could have been involved. Whether they were involved or not is something that the Cabinet Office believe it is entitled to neither confirm nor deny under the FOIA.
19. With regard to section 24(2), the Commissioner again considers that this exemption should be interpreted so that it is only necessary for a public authority to show either a confirmation or denial of whether requested information is held would be likely to harm national security. The Commissioner interprets the phrase '*required*' in the context of this exemption to mean '*reasonably necessary*'. In effect this means that there has to be a risk of harm to national security for the exemption to be relied upon, but there is no need for a public authority to prove that there is a specific, direct or imminent threat.
20. The Cabinet Office provided arguments to the Commissioner to explain its position in this regard. It said that if it did not rely on section 24(2), inference could be made that it did hold security bodies' information even though it has refused to confirm or deny that it has. It also drew attention to the complainant's strongly held view based on contemporaneous reports that national security information must be held to support its position. It was, it implied, necessary to address this strongly held view.
21. In relation to the application of section 24(2), the Commissioner notes that the First Tier Tribunal (Information Rights) has indicated that only a consistent use of a 'neither confirm nor deny' (NCND) response on matters of national security can secure its proper purpose. Therefore, in considering whether the exemption is engaged, and the balance of the public interest test, regard has to be given to the need to adopt a consistent NCND position and not simply to the consequences of confirming whether the specific requested information in this case is held or not.
22. As a general approach the Commissioner accepts that withholding information in order to ensure the protection of national security can

extend, in some circumstances, to ensuring that matters which are of interest to the security bodies are not revealed. On this occasion the Commissioner is satisfied that complying with the requirements of section 1(1)(a) would be likely to reveal whether the security bodies were involved in the subject matter of the request. The need for the public authority to adopt a position on a consistent basis is vitally important in considering the application of an NCND exemption.

23. The Commissioner is satisfied that the Cabinet Office is entitled to rely on both sections 23(5) and 24(2) in the circumstances of this case. He accepts that revealing whether or not information is held within the scope of the request which relates to security bodies would reveal information relating to the role of the security bodies. It would also undermine national security to do so and for that reason section 24(2) also applies because neither confirming nor denying if information is held is required for the purpose of safeguarding national security.

Public interest test

24. Section 23 is an absolute exemption and no public interest test is required once it is found to be engaged. However, section 24 is a qualified exemption and the Commissioner is required to consider whether the public interest in neither confirming nor denying whether the Cabinet Office holds information which would be exempt under section 24 outweighs the public interest in confirming or denying whether such information is held.
25. In submissions to the Commissioner the Cabinet Office recognised that there is a general public interest in openness in government because this increases public trust in and engagement with government. However, the Cabinet Office maintained that such public interest has to be weighed against a very strong public interest in safeguarding national security, which could only be overridden in exceptional circumstances.
26. The complainant has two key arguments. Firstly, that there is so much information in the public domain about the events in question that an NCND position is moot. Secondly, and connected to the first point, the passage of time means there is little risk to the safeguarding of national security by confirmation or denial that relevant information is held by the Cabinet Office.
27. The Commissioner considers that there is some valid public interest in confirmation or denial in response to the complainant's request. The current civil war in Syria and the effect this is having on the civilian population is of considerable international concern. Confirmation or denial would increase public knowledge of the historical context, in particular, how the UK's relationship with the Syrian government has

evolved. The passage of time would, in the complainant's view, diminish the impact on national security. So much more has happened in the region since the events covered in his request. The UK's relationship with Syria is but a small part of the larger picture of relations between the international community and that country, as they have evolved over the past 30 years.

28. However, the Commissioner accepts that the public interest in protecting information for the purposes of safeguarding national security is a very strong one.
29. The Commissioner finds that in the circumstances of this case the public interest in protecting information for the purpose of safeguarding national security outweighs the public interest in favour of confirmation or denial.
30. Given the Commissioner's view on sections 23(5) and section 24(2), he has not gone on to consider section 27(4) which was also cited as a basis for refusing to provide confirmation or denial in this case.

Right of appeal

31. 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 123 4504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

32. 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.
33. 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

Alexander Ganotis
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