

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 November 2018

Public Authority: Cabinet Office

Address: 70 Whitehall

London

SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested information on the file PREM 19/2368 NIGERIA regarding the attempted abduction of former Minister Umani Dikko.
2. The Commissioner's decision is that the Cabinet Office has appropriately withheld some of the requested information in reliance of section 23(1) and 27(1)(a)(c) & (d) FOIA.
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

Request and response

4. On 16 October 2016 the complainant wrote to the Cabinet Office and requested information in the following terms:

"I would like to access the file PREM 19/2368 NIGERIA – Attempted abduction of former Minister Umani Dikko. National Archives records show the file has been temporarily retained by the Cabinet Office."
5. The Cabinet Office responded on 16 November 2016. It stated that the information held was withheld in reliance of the exemption at section 22(1), with some of the content withheld in reliance of sections 23, 27 and 40 of the FOIA.

6. Following an internal review the Cabinet Office wrote to the complainant on 23 March 2017. It stated that the application of section 22(1) was upheld. It explained:

"The file is currently undergoing the review process and will be transferred before the summer Parliamentary recess. The intention is to open the file with some redactions."

7. The complainant contacted the Commissioner on 16 October 2017 to complain about the way his request for information had been handled. He explained that the Parliamentary summer recess had started on 20 July 2017, however, the National Archive ('TNA') online records still showed the file as retained by the Cabinet Office. This remained the situation as at the date of his complaint.
8. Following her contact with the Cabinet Office on 5 January 2018 the Cabinet Office informed the Commissioner on 13 February 2018 that it was attempting to release "the majority of the material".
9. On 16 April 2018 the Cabinet Office wrote to the complainant providing some information along with a list of items already released to TNA. The Cabinet Office explained that some information continued to be withheld in reliance of sections 23(1), 27 and 40(2).
10. On 10 May 2018 the complainant contacted the Commissioner with regard to the information disclosed by the Cabinet Office. He noted that TNA still showed the file retained by the Cabinet Office and he had therefore not viewed the list of documents which the Cabinet Office had advised as being released. However, he had reviewed the information specifically provided on 16 April 2018. He asked the Commissioner to examine the withheld information and not to rely on assurances from another body in the application of the exemptions cited and to "establish whether the grounds for withholding are valid". The complainant also asked the Commissioner to determine the volume of withheld information and made reference to specific documents.

Scope of the case

11. Following the on-going correspondence between the complainant, the Cabinet Office and the Commissioner, the Commissioner determined the scope of her investigation to be the application of the exemptions at section 27, 23 and 40(2) FOIA to the remaining withheld information.

Reasons for decision

12. Section 27 of FOIA states:

“(1) 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,
- (d) the promotion or protection by the United Kingdom of its interests abroad.”

13. The information withheld in reliance of section 27(1)(a)(c) & (d) comprises correspondence between former Prime Minister Margaret Thatcher, her Private Secretary, former Foreign Secretary Sir Geoffrey Howe, former Minister of State for Europe Sir Malcolm Rifkind, senior policy advisor Charles Powell and former Home Secretary Leon Brittan. The correspondence comprises 12 documents over a several month period in 1984.

14. In order for a prejudice based exemption, such as section 27(1), to be engaged the Commissioner considers 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 on by the public authority is met – ie, disclosure ‘would be likely’ to result in prejudice or disclosure ‘would’ result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner’s view this places a stronger evidential burden on the public authority to discharge. The anticipated prejudice must be more probable than not.

15. The Commissioner is satisfied that the information identified falls to be considered within the section 27 exemption. Although the information is limited, in comparison with the information already disclosed, the Commissioner accepts that it has the potential to prejudice relations

between the United Kingdom ('UK') and Nigeria including the UK's interests abroad.

16. The Cabinet Office provided the Commissioner with its view on the importance of international relations and foreign policy. It explained the many aspects of foreign policy including safeguarding the UK's national security; working to reduce conflict; promoting UK interests and business around the world; helping to build strong, functioning and peaceful States; sustainable development; good government and human rights. It reiterated that success in influencing development overseas depends on practical co-operation with other countries based on strong relationships.
17. The Commissioner accepts that the successful conduct of international relations is founded on the ability to influence, persuade, negotiate and build alliances based on mutual trust and confidence. These matters are implicit in the section 27(1) exemption and are applicable in this case.
18. The Commissioner notes that this exemption does not necessarily focus on the importance, subject or content of the requested information, but on whether UK interests abroad, or the international relations of the UK would be prejudiced through the disclosure of the information. Thus section 27(1) focusses on the effects of the disclosure.
19. In assessing the prejudice that would, or would be likely to be caused to the UK's relations with another state, the Commissioner is required to consider the wider context and long-term consequences in which the disclosure of the requested information would result.
20. The Commissioner understands that the age of the withheld information may suggest that the information is no longer relevant in today's international relations. However, with regard to the specific circumstances of this case she can confirm that she is satisfied that the information may be considered to continue to have the potential to create prejudice to international relations.
21. The Cabinet Office confirmed its reliance on the lower threshold of likelihood, that being disclosure would be likely to prejudice international relations.
22. With regard to the first criterion of the three limb test described in paragraph 14 above, the Commissioner accepts that the potential prejudice described by the Cabinet Office clearly relates to the interests which the exemption contained at section 27(1)(a),(c) & (d) is designed to protect. With regard to the second criterion, having examined the withheld information, and taken into account the Cabinet Office's submissions to her, the Commissioner is satisfied that there is a causal link between disclosure of this information and prejudice occurring to the UK's international relations. Furthermore, she is satisfied that the

resultant prejudice would be real and of substance with more than a hypothetical risk of prejudice occurring which therefore meets the third criteria.

23. The Commissioner accepts that the withheld information engages the section 27(1)(a)(c) & (d) exemptions. She will continue to consider the public interest test for this exemption.

The public interest

24. In accordance with section 2(1)(b) the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.
25. The Cabinet Office explained to the Commissioner that it recognises the general public interest in being able to evaluate the foreign policy of the Government of the time. It advised that it recognises the general public interest in openness in public affairs in order to ensure that the public is able to scrutinise the manner in which public authorities reach important decisions. This makes for greater accountability, increases public confidence in government decision-making and helps to encourage greater public engagement with political life.
26. In favour of withholding the information the Cabinet Office explained the significant weight it accords to maintaining good relations with other countries, and in this case with Nigeria. It advised the Commissioner of the strong public interest in maintaining the robust diplomatic relations between the UK and Nigeria. These relationships are more effectively maintained if the UK conforms to the accepted conventions of international behaviour, avoids giving offence to other nations and retains the trust of the UK's international partners. The Cabinet Office considers the public interest in maintaining strong diplomatic relations between the UK and Nigeria to be particularly important in the context of forthcoming national elections in Nigeria. Disclosure of the withheld information may prejudice the UK's recognised political impartiality and reduce the UK Government's ability to protect and promote UK interests through its relations with other countries. The Cabinet Office concluded that this would not be in the public interest.

The Commissioner's view

27. There is a public interest inherent in prejudice-based exemptions, in avoiding the harm specified in that exemption. The fact that a prejudice-based exemption is engaged means that there is automatically some public interest in maintaining it, and this should be taken into account in the public interest test.

28. The Commissioner's guidance explains that there is a general public interest in promoting transparency, accountability, public understanding and involvement in the democratic process. FOIA is a means of helping to meet that public interest, similarly this must also be taken into account.
29. The Commissioner notes that the Cabinet Office has endeavoured to provide the complainant with the majority of the information falling within the scope of the request. It has withheld a limited amount of information and has provided the Commissioner with detailed submissions on the specific reasons for withholding the 12 documents concerned. The Commissioner is unable to go into the detail of these submissions having made her decision that the section 27(1)(a)(c) & (d) exemptions are engaged and she encounters the same restriction with respect to the public interest.
30. Notwithstanding this, the Commissioner is clear that there must be a strong public interest in international co-operation and the UK supporting peaceful elections in Nigeria in 2019 and promoting UK interests more widely with political impartiality. She has therefore concluded that the public interest favours maintaining the section 27 exemption.

Section 23

31. Section 23(1) of the FOIA states:

"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)."

32. To successfully engage the exemption at section 23(1), a public authority needs only to demonstrate that the relevant information was directly or indirectly supplied to it by, or relates to, any of the bodies listed at section 23(3).¹ This means that if the requested information falls within this class it is absolutely exempt from disclosure under FOIA. This exemption is not subject to a balance of public interest test.
33. When investigating complaints about the application of section 23(1), the Commissioner will need to be satisfied that the information was in fact supplied by a security body or relates to such a body, if she is to

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

find that the exemption is engaged. Therefore the Commissioner considered it appropriate to inspect the information.

34. Consequently the Commissioner has seen the limited withheld information in question and is satisfied that it was supplied by or relates to one of the bodies listed in section 23(3). She therefore considers that the section 23(1) exemption is engaged.
35. During the course of the Commissioner's investigation the Cabinet Office withdrew its application of section 40(2). The Commissioner has therefore not considered this exemption.

Right of appeal

36. 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: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

37. 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.
38. 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

**Gerrard Tracey
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