

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 March 2019

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

Decision (including any steps ordered)

1. The complainant submitted a request to the Cabinet Office seeking access to the file CAB 163/205 which dates from 1973 and concerns a 'Review of the UK/Australia intelligence liaison following leaks to the Australian press of information on defence matters and intelligence gathering activities'. The Cabinet Office sought to withhold the file on the basis of the following sections of FOIA: 23(1) (security bodies), or in the alternative, 24(1) (national security), 26(1) (defence), 27(1) and 27(2) (international relations) 38(1)(b) (health and safety), 40(2) (personal data) and 41(1) (information provided in confidence). The Commissioner has concluded that the withheld information is exempt from disclosure on the basis of section 23(1) or section 24(1) of FOIA.

Request and response

2. On 7 July 2017 the complainant submitted the following request to the Cabinet Office:

'I would like to ask that you release as much as possible of the following record to me under the FOI Act. It is relevant to research I am conducting as part of my PhD.'

The details are as follows:

*Reference:
CAB 163/205*

Description:

Review of the UK/Australia intelligence liaison following leaks to the Australian press of information on defence matters and intelligence gathering activities

Date:

1973 Feb 28 - 1973 Jun 29

Held by:

Creating government department or its successor, not available at The National Archives

Former reference in its original department:

903 VOL II

Legal status:

Public Record(s)

Closure status:

Closed Or Retained Document, Open Description

Access conditions:

Retained by Department under Section 3.4'

3. The Cabinet Office responded on 2 August 2017 and confirmed that it held the requested file. However, it explained that it considered the information to be exempt from disclosure on the basis of one or more exemptions contained with FOIA. More specifically the Cabinet Office cited the exemptions contained at sections 27(1)(a), (c) and (d) and 27 (2) of FOIA (international relations). It also explained that it was seeking to rely on sections 23(1) and 24(1) of FOIA, 'in the alternative'.¹ The Cabinet Office also noted that to the extent to which section 24(1) was engaged it was not obliged to explain in detail why this was the case by virtue of section 17(4) of FOIA because to do so would involve the disclosure of information which would itself be exempt.
4. The complainant contacted the Cabinet Office on 4 August 2017 and asked it to conduct an internal review of this response. She questioned

¹ Citing these two exemptions in the alternative means that although only one exemption is engaged the other one is also cited so as to disguise which exemption is in fact being relied upon. This approach may be necessary in instances where citing one exemption would in itself be harmful. Further information on this issue is contained on page 9 of the following guidance issued by the Commissioner: https://ico.org.uk/media/for-organisations/documents/1196/how_sections_23_and_24_interact_foi.pdf

whether a redacted version of the file could be disclosed and also whether the information was still sensitive given that it was nearly 50 years old.

5. The Cabinet Office informed her of the outcome of the internal review on 8 September 2017. The review upheld the position adopted in the refusal notice and explained that given the nature of the material held in the file, and the application of the exemptions, it would not be possible to release a redacted version of it.

Scope of the case

6. The complainant contacted the Commissioner on 5 October 2017 in order to complain about the Cabinet Office's refusal to provide her the file she had requested.
7. During the course of the Commissioner's investigation, in addition to relying on the exemptions cited in correspondence with the complainant, the Cabinet Office also explained that it considered a number of additional exemptions within FOIA to apply to parts of the material, namely sections 26(1) (defence), 38(1)(b) (health and safety), 40(2) (personal data) and 41(1) (information provided in confidence).

Reasons for decision

Section 23(1) – information supplied by or relating to bodies dealing with security matters

Section 24 – national security

8. Section 23(1) of FOIA provides an exemption which states that:

'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).'

9. 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).²

² A list of the bodies included in section 23(3) of FOIA is available here:

10. Section 24(1) states that:

'Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security'.

11. FOIA does not define the term 'national security'. However in *Norman Baker v the Information Commissioner and the Cabinet Office* (EA/2006/0045 4 April 2007) the Information Tribunal was guided by a House of Lords case, *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, concerning whether the risk posed by a foreign national provided grounds for his deportation. The Information Tribunal summarised the Lords' observations as follows:

- 'national security' means the security of the United Kingdom and its people;
- the interests of national security are not limited to actions by an individual which are targeted at the UK, its system of government or its people;
- the protection of democracy and the legal and constitutional systems of the state are part of national security as well as military defence;
- action against a foreign state may be capable indirectly of affecting the security of the UK; and
- reciprocal co-operation between the UK and other states in combating international terrorism is capable of promoting the United Kingdom's national security.

12. Furthermore, in this context the Commissioner interprets 'required for the purposes of' to mean 'reasonably necessary'. Although there has to be a real possibility that the disclosure of requested information would undermine national security, the impact does not need to be direct or immediate.

13. As is clear from the wording of section 24(1), the exemptions provided by sections 23(1) and 24(1) are mutually exclusive. This means they cannot be applied to the same request.

14. However, the Commissioner recognises that the fact that section 24(1) can only be applied to information that is not protected by section 23(1)

can present a problem if a public authority does not want to reveal whether a section 23 security body is involved in an issue. To overcome this problem, as referred to above at footnote 1, the Commissioner will allow public authorities to cite both exemptions 'in the alternative' when necessary. This means that although only one of the two exemptions can actually be engaged, the public authority may refer to both exemptions in its refusal notice.

15. As the Commissioner's guidance on this issue explains, a decision notice which upholds the public authority's position will not allude to which exemption has actually been engaged. It will simply say that the Commissioner is satisfied that one of the two exemptions cited is engaged and that, if the exemption is section 24(1), the public interest favours withholding the information.
16. Based on submissions provided to her by the Cabinet Office during the course of her investigation, the Commissioner is satisfied that the withheld information either falls within the scope of the exemption provided by section 23(1) of FOIA or falls within the scope of the exemption provided by section 24(1) of FOIA, and that if the exemption engaged is section 24(1) then the public interest favours maintaining the exemption.
17. The Commissioner cannot elaborate on her rationale behind this finding without compromising the content of the withheld information itself or by revealing which of these two exemptions is actually engaged. However, she would note that given the subject matter of the file, namely a review of UK-Australia intelligence liaison following leaks to the Australian press of information on defence matters and intelligence gathering activities, the potential relevance of section 23(1) or section 24(1) is clear. The Commissioner also wishes to note that despite the age of the information, and the passage of time since it was created, she is satisfied that this does not undermine the Cabinet Office's position that section 23(1) or section 24(1) applies.
18. In light of this finding the Commissioner does not need to consider the other exemptions the Cabinet Office has cited in this decision notice. However, the Commissioner would note that in her view release of the requested file would have a very high likelihood of prejudicing the UK's continuing relationship with Australia in particular, but also potentially with other allies, and thus the exemptions contained at sections 27(1)(a), (c) and (d) would also be likely to provide a basis to withhold the contents of the file. Furthermore, despite the public interest in disclosure of the information, the Commissioner considers that there is also a clear public interest in the UK being able to maintain effective relations with its international partners and it is more likely to be able to do this if it conforms to the conventions of international behaviour, avoid giving offence to other nations and retain the trust of international

partners, especially where close working relationships between intelligence communities are concerned. Consequently, had the Commissioner reached a formal finding in respect of section 27(1) of FOIA she would accept that the public interest would favour maintaining this exemption.

Right of appeal

19. 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

20. 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.
21. 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

Jonathan Slee
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