

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 February 2024

Public Authority: Home Office
Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant requested information relating to a file held by the Home Office.
2. The Home Office refused to provide the information, citing sections 23(1) (information supplied by, or relating to, bodies dealing with security matters) or in the alternative section 24(1) (national security), 27(1)(a) (international relations) and 40(2) (personal information) of FOIA.
3. The Commissioner's decision is that the information is exempt from disclosure on the basis of section 23(1) or in the alternative section 24(1) of FOIA.
4. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

5. On 23 April 2023, the complainant wrote to the Home Office and requested information in the following terms:

"I note from records in The National Archive that the Home Office file HO287/3120: 'The Lie Detector: consultation document; correspondence with government departments' has been retained by your Department. Under the Freedom of Information Act could you please:

- 1) confirm that you have the file
- 2) provide a list of its contents
- 3) release the contents to The National Archive.

Please note that if you decide that the information is exempt under s23 FOIA , then it cannot be s24 information, therefore, there would be no s24 information upon which to conduct the s24 PIBT [public interest balance test].

[..]

It is legally impossible to conduct the s24 PIBT to s23 information.”

6. The Home Office wrote to the complainant on 24 May 2023 to extend the 20-working-day limit for further consideration of the public interest, citing section 27 (international relations).
7. The Home Office provided its substantive response on 16 June 2023. It confirmed that the Home Office holds the requested information but refused to provide the file or a list of its contents. It explained that the information is exempt from disclosure under section 23(1) (information supplied by, or relating to, bodies dealing with security matters) or 24(1) (national security). It advised that sections 23(1) and 24(1) have been applied in the alternative¹.
8. The Home Office told the complainant that some of the information is also exempt under sections 27(1)(a) (international relations) and 40(2) (personal information) of FOIA.
9. In relation to the part of the request asking for the contents to be released to The National Archives, the Home Office confirmed that file HO 287/3120 is currently retained by the Home Office under section 3(4) of the Public Records Act 1958 under the Security and Intelligence instrument.

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 in the following guidance issued by the Commissioner: <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/how-sections-23-and-24-interact/>

10. Following an internal review, the Home Office wrote to the complainant on 10 August 2023 maintaining its view.

Scope of the case

11. The complainant is dissatisfied with the way their request for information has been handled, specifically the application of sections 23 and 24 and the public interest balancing test.
12. The Commissioner acknowledges that the complainant told the Home Office:

“You cannot consider s23 information under the s24 PIBT [public interest balance test]”.
13. The Commissioner accepts that, in the course of his investigation, the complainant put forward a number of arguments in support of their position. Where those arguments were supported with references to legal decisions, not all of the decisions related to FOIA legislation. One of the legal decisions, referred to by the complainant, had not been handed down at the time of the request.
14. The analysis below considers whether the Home Office is entitled to rely on sections 23(1) and 24(1) in the alternative to withhold the requested information.

Reasons for decision

Section 23 – information supplied by, or relating to, bodies dealing with security matters

Section 24 – national security

15. 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)”.
16. Section 23(3) lists the security bodies, which include the Security Service, the Secret Intelligence Service and other similar bodies.
17. 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).

18. 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”.

19. 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.

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

The Home Office position

21. In its substantive response, the Home Office told the complainant that sections 23(1) and 24(1) have been applied in the alternative.

22. It further explained:

“In choosing to cite these exemptions ‘in the alternative’ the Home Office is therefore confirming that one of these exemptions is substantively engaged but declining to specify which one.

In the circumstances of this case, it is not appropriate to provide any information that would undermine national security or reveal

the extent of any involvement of the security bodies listed at section 23(3) of the FOI Act. We are therefore applying sections 23(1) and section 24(1) in the alternative. This means that only one of the two exemptions is engaged, but it is not appropriate to say which one”.

23. The Home Office also explained how the balance of the public interest regarding section 24(1) could apply if section 24(1) were engaged.
24. In its internal review response, the Home Office told the complainant that this approach of applying these exemptions in the alternative is well established and supported by Information Commissioner’s Office guidance².

The Commissioner’s position

25. 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.
26. 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 or not 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.
27. The approach of applying these exemptions in the alternative is supported by both the ICO’s guidance and a recent Upper Tribunal (UT) decision³.
28. While the Commissioner recognises that the complainant disputes the Tribunal’s finding, a decision by the Upper Tribunal provides a binding decision which the Commissioner must follow, and in any event, the

² <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/how-sections-23-and-24-interact/>

³ [Foreign, Commonwealth and Development Office v Information Commissioner, Williams and Others \(Sections 23 and 24\): \[2021\] UKUT 248 \(AAC\) - GOV.UK \(www.gov.uk\)](#)

Upper Tribunal's decision endorses the approach to these exemptions previously set out in the Commissioner's guidance.

29. As the Commissioner's guidance on this issue also 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.
30. The Commissioner has viewed the withheld information in this case. However, due to the nature of the information, he is unable to go into detail about what the information comprises.
31. Nor can he elaborate further on the rationale behind his finding without compromising the content of the withheld information itself or by revealing which of the two exemptions is actually engaged.
32. However, having viewed the information, and on the basis of the submissions provided by the Home Office, 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.
33. In the circumstances this case, therefore, the Commissioner is satisfied that the Home Office was entitled to withhold the information sought by the complainant's request on the basis of section 23(1) or section 24(1) of FOIA. Furthermore, the Home Office is not obliged to say which of these exemptions it is seeking to rely on to withhold the information.

Other exemptions

34. In light of his decision, the Commissioner has not found it necessary to consider the other exemptions also cited by the Home Office.

Right of appeal

35. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

36. 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.

37. 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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