

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 26 March 2007

Public Authority: Foreign and Commonwealth Office
Address: King Charles Street
London
SW1A 2PA

Summary

The complainant asked the Foreign and Commonwealth Office ('FCO') for any information that it held relating to the Rhodesian Army's raid on Joshua Nkomo's headquarters in Lusaka in April 1979. FCO provided the complainant with five documents relevant to his request but withheld others, citing section 27 of the Freedom of Information Act 2000 ('the Act'). FCO considered that the balance of the public interest favoured withholding the information. The complainant sought an internal review of the decision, and asked FCO for the exact number of documents that had been withheld. FCO maintained the decision to withhold the information sought, saying that it was unable to provide detailed reasons without revealing the contents of documents (in effect a section 17(4) argument). FCO also declined to disclose the number of relevant documents, but agreed to do so following the Commissioner's intervention. Having viewed the information, the Commissioner accepted that some of the information had been correctly withheld under section 27, but considered that some of it could be released. He criticised FCO for its failure specifically to cite section 17(4).

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision. Legislation relevant to the consideration of this complaint is set out in the Legal Annex to this decision notice.

The Request

2. On 21 April 2005 the complainant asked FCO, under the Act, for any information that it held on the Rhodesian (now Zimbabwe) Army's raid on Joshua Nkomo's headquarters in Lusaka on 14 April 1979 (although it appears from the

information provided by FCO that the raid actually occurred on 13 April 1979). Specifically, he sought any correspondence, intelligence assessments, reports on raids, submissions and press releases generated by the military operation. On 20 May 2005 FCO provided an interim reply, saying that the complainant's request raised complex public interest considerations which needed to be analysed before it could come to a decision on releasing the information. FCO said that it was considering the complainant's request under section 27 of the Act relating to international relations, and that it was looking at whether disclosure would prejudice relations between the United Kingdom ('the UK') and Zimbabwe or any other State. FCO said that it needed to extend the response time until 10 June to consider the public interest aspects.

3. FCO replied substantively on 10 June 2005, enclosing five documents that were relevant to the complainant's request. FCO said that other documents on file were exempt from disclosure under section 27. FCO said that, in applying this exemption, it had had to balance the public interest in withholding the information against the public interest in disclosing it, and had concluded that it would not be in the public interest to reveal the information.
4. On 17 June 2005 the complainant applied for an internal review of FCO's decision, saying that the documents it had provided were largely in the form of press releases with very little in the way of internal FCO advice. He asked FCO for the exact number of documents that it had held back under the exemption in section 27. He also said that FCO had failed to explain or justify how releasing the information would not be in the public interest and asked FCO to make its public interest considerations clear. FCO acknowledged the review request on 24 June 2005, saying that it hoped that it would be completed within a reasonable amount of time.
5. Following further correspondence, FCO provided a substantive reply on 6 October 2005, apologising for the delay, which it said had occurred because it took longer than expected to confirm that all the relevant files had been correctly searched. FCO said that it was not a requirement of the Act to disclose how many papers were withheld, nor was it FCO's policy. FCO concluded that the public interest test had been properly considered and applied including, in this case, by the Secretary of State. FCO said that it was not possible to explain to the complainant the application of those considerations without revealing the contents of the documents.

The Investigation

Scope of the case

6. On 20 October 2005 the complainant again contacted the Commissioner to reiterate his complaint about the way his request for information had been handled, and to complain about the outcome. The complainant specifically asked the Commissioner to consider the following points:

at no stage had FCO provided him with its public interest test considerations in not releasing the information ; he surmised that FCO was relying on section 17(4) of the Act, but the FCO had not confirmed this;

that FCO took approximately five months to complete its internal review; at no time did FCO voluntarily inform him of any progress and, when he chased FCO, it would not commit to a target date for response; this, he said, was contrary to guidelines issued by the Department for Constitutional Affairs;

it was not clear how the exemption in section 27 of the Act was relevant to his request as FCO had not explained how releasing the information in question on Rhodesia could damage international relations with Zimbabwe.

7. The Commissioner wrote to FCO on 31 October 2006 to confirm that he would be investigating the complaint. He sought clarification from FCO as to why it had declined to provide the complainant with the number of documents that were being withheld. He also asked FCO to provide any comments that it might wish to make, and to make available the information sought by the complainant. Further correspondence ensued, in the course of which FCO has agreed to tell the complainant how many documents had been withheld from him under section 27. The Commissioner welcomes that development.

Analysis

Procedural matters

Section 17 – Refusal of a request

8. In his complaint to the Commissioner the complainant expressed dissatisfaction with the amount of time taken by FCO to complete its internal review. While there is no statutory time limit for review action, as the complainant has said, the Department of Constitutional Affairs' guidance provides that simple review requests should be completed within two to three weeks, with complex reviews being completed within six weeks. The complainant made his review request on 17 June 2005 but FCO did not respond substantively until 6 October 2005, which was well outside the suggested time limits. In correspondence with the Commissioner, FCO has acknowledged that the review should have been dealt with more quickly and, via that correspondence, apologised to the complainant for the delay. FCO said that its working practices had now been reviewed and that it tried to complete internal reviews within six weeks. FCO also acknowledged that it should have kept the complainant informed as to progress. The Commissioner considers that the review took considerably longer than it should have done, and this warrants his criticism. He nevertheless welcomes FCO's acceptance of its shortcomings and its apology to the complainant both for the delay and for the failure to update him.

9. The complainant also expressed concern that FCO had not provided him with a detailed explanation as to why section 27 applied to the information currently withheld, nor as to why it considered the balance of the public interest lay with withholding the information. There is no requirement under the Act for a public authority to provide an explanation or reasons for its decision if to do so would cause it to reveal information which would itself be exempt information (section 17(4) of the Act). In saying that it was not possible to explain to the complainant the reasons for applying section 27 without revealing the contents of the documents, FCO was relying on section 17(4). Having considered the withheld information, the Commissioner accepts that section 17(4) applies here, but FCO's failure to explicitly cite it in correspondence with the complainant warrants his criticism.

Exemption

Section 27 – International relations

10. The only information held by FCO which falls within the terms of the complainant's information request is contained in a number of telegrams sent between the British Embassy in Lusaka and FCO in April and July 1979. FCO initially relied on section 27(1)(a) as its basis for withholding the information: this provides that information is exempt if its disclosure would, or would be likely to, prejudice relations between the UK and any other State. In its comments to the Commissioner, FCO said that section 27(2), which exempts information obtained on a confidential basis from a State other than the UK, should more properly have been applied to some of the information that had been withheld.
11. For reasons that it is not possible to set out in full without revealing information which would itself be exempt (section 17(4) of the Act refers) FCO has argued that, if released, some of the withheld information could be used by certain countries to undermine the UK's credibility, and could inhibit the UK's ability to influence the southern African States on current problems and other issues. FCO has also argued, in relation to other parts of the withheld information, that disclosure is exempt under section 27(2) because the information was provided in confidence by the embassy of a foreign State.
12. Although the Commissioner gives considerable weight to the expertise of FCO in judging when prejudice to international relations is likely to occur, having examined in detail the withheld information the Commissioner is not persuaded that relations between the UK and any other State would be prejudiced if certain factual information contained in the telegrams were to be released. The information in question comprises a factual account of a raid which took place in 1979. The Commissioner recognises that the release of that information nearer to the time of the event might have had a prejudicial effect on relations between the UK and other States. However, he considers that FCO has not made a case for its conclusion that that information still remains sensitive and likely to cause the kind of prejudice envisaged by section 27(1)(a). The Commissioner finds that FCO is not entitled to rely on section 27(1)(a) of the Act as regards this information, and it should now be released to the complainant.

13. However, and notwithstanding the age of the information, the Commissioner accepts on balance that, for reasons which it is not possible to set out here without revealing information to which section 17(4) of the Act applies, relations between the UK and other States might be prejudiced if certain other information contained in the telegrams were to be released. He therefore accepts that section 27(1) (a) is engaged in relation to that information. Also, it is clear from the papers provided by FCO that other information in the telegrams was provided in confidence by a foreign state: the Commissioner therefore accepts that section 27(2) is likewise engaged.

Public interest test

14. Section 27 does, of course, attract the public interest test. As stated above, in its refusal of the request under section 27(1)(a), FCO has argued that the release of some of the information sought could be used by certain countries to undermine the UK's credibility and its ability to influence southern Africa. For reasons given by FCO, but which cannot be set out here under section 17(4) of the Act, FCO has contended that it would not be in the public interest for such information to be released. Having studied those reasons in the context of the information under consideration, the Commissioner has concluded that the likely harm to the UK's relationships with other countries if the information were to be released outweighs the public interest in its release.
15. As to the information which FCO has withheld under section 27(2), FCO contends that, if that information were to be disclosed, it could damage relations with the providing State. FCO said that it could also deter that country, and perhaps others, from providing the UK with strategic information in the future. FCO said that it believed that the public interest favoured withholding the information. Having considered the information in question, it appears to the Commissioner that it retains considerable sensitivity even after the passage of time. Moreover, given the age of the material, it could no longer be said that there is sufficient general public interest in its release to outweigh the potential harm to future mutual exchanges of information between the UK and other States if it were to be put into the public domain. The Commissioner therefore concludes that the balance of the public interest test favours maintaining the exemption, and that the relevant information should be withheld.

The Decision

16. The Commissioner's decision is that FCO has correctly withheld some of the information in the telegrams relating to the raid on Joshua Nkomo's headquarters under section 27 of the Act, but has misapplied section 27 in failing to provide the remaining information.

Steps Required

17. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

to provide the complainant with the factual account of the raid on Joshua Nkomo's headquarters as outlined in paragraph 12 above by means of a redacted version of the relevant documentation as more fully indicated in the Commissioner's letter to the public authority enclosing this DN.

18. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

19. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

20. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 26th day of March 2007

Signed

**Graham Smith
Deputy Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 1(1) provides that -

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

Section 1(2) provides that -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

Section 2(1) provides that –

“Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that either –

(a) the provision confers absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information

section 1(1)(a) does not apply.”

Section 17(1) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 17(4) provides that –

“A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.”

Section 27(1) provides that –

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

Section 27(2) provides that –

“Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.”

Section 27(3) provides that –

“For the purposes of this section, any information obtained from a State, organisation or court is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.”