

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date 28 February 2008

**Public Authority:** Cabinet Office  
**Address:** 70 Whitehall  
London

### Summary

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The complainant requested all the documents held by the Cabinet Office in relation to the bombing of the Rainbow Warrior. The Cabinet Office refused to confirm or deny if information is held under section 23(5) and 24(2) of the Act. The Commissioner has investigated and has upheld the application of section 23(5) and 24(2) to neither confirm nor deny if information is held. The Commissioner also found that the Cabinet Office's refusal notice breached section 17 of the Act.

### The Commissioner's Role

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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.

### The Request

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2. The complainant has advised that on 29 March 2005 he made the following request for information to the Cabinet Office:

*"My request relates to the bombing of the Greenpeace ship, the Rainbow Warrior, on July 10 1985 by French secret service officers. This bombing of the British-registered ship took place in Auckland harbour, New Zealand. One photographer died in the bombing. Two of the French officers were caught and convicted of manslaughter.*

*Under the Act, I would like complete copies of any and all documents held by Downing Street / Cabinet Office dated between January 1 1985 and December 12 1985 on the subject of the bombing of the Rainbow Warrior.*

*I would also like to ask the Cabinet Office / Downing Street, on answering the above request, to comply with a further request under the Freedom of Information Act. This request is to provide a schedule of documents which re relevant to the above request. I believe there should be a brief description of each relevant document including the nature of the document, the date of the document and whether the document is being released or not.*

3. The Cabinet Office responded on 1 August 2005. It refused to confirm or deny that it holds any information requested under section 23 (5) 'Information supplied by, or relating to, bodies dealing with security matters' and 24 (2) 'National security'. The Cabinet Office explained that under section 17 (4) it was under no duty to state why either exemption applied. In relation to section 24(2) it was also not required to give reasons why the public interest in maintaining the exemption outweighed the public interest in disclosing whether or not it holds the information, because to do so would involve the disclosure of information which would itself be exempt.
4. On 12 August 2005 the complainant requested a review of this decision highlighting to the Cabinet Office the length of time elapsed since the incident. The complainant also queried whether all the information requested would be covered by the exemptions.
5. The Cabinet Office responded on 21 December 2005 upholding the original decision to neither confirm nor deny holding any information relevant to the request by virtue of section 23(5) and 24(2).

## **The Investigation**

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### **Scope of the case**

6. On 13 January 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the disclosure by the Foreign Office and the Department for Transport of a large number of pages on the subject.
7. The Commissioner's investigation has therefore focused on the refusal to confirm or deny that information is held under sections 23(5) and 24(2) of the Act.

### **Chronology**

8. The Commissioner began his investigation by contacting the Cabinet Office on 28 June 2007. The Commissioner asked the Cabinet Office to supply to him further information regarding its application of the exemptions to neither confirm nor deny if the requested information is held.

9. The Cabinet Office responded on 7 September 2007 providing further explanation regarding its application of sections 23(5) and 24(2) to neither confirm nor deny if the information requested is held.
10. The Commissioner responded on 7 September 2007 asking for some more information regarding the effect confirming or denying would have in relation to the exemptions applied and for information regarding the consideration of the public interest test in relation to the reliance on section 24.
11. The Cabinet Office responded on 10 October 2007 providing more detailed arguments and explanations to support its application of sections 23 and 24 to neither confirm nor deny that information is held.
12. The Commissioner responded on 07 October 2007 requesting further details on the public interest arguments considered for and against maintaining the section 24 exemption.

## Analysis

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### Procedural matters

13. The Cabinet Office has sought to rely on section 23(5) and 24(2) to neither confirm nor deny that the information requested is held. Although the Act does not allow section 24(1) to be applied to information which is exempt by virtue of section 23(1), there is nothing in the Act which prevents a public authority from refusing to confirm or deny it holds information under both 23(5) and 24(2) simultaneously.
14. This approach to the application of sections 23(5) and 24 (2) is supported in the Tribunal Decision *EA/2006/0045 Norman Baker vs. Information Commissioner and the Cabinet Office*. In this case the Cabinet Office also sought to rely on 23(5) and 24(2) explaining that relying on section 23(5) alone to neither confirm or deny could itself reveal the fact that one of the security bodies listed in section 23(3) was or could have been involved, therefore it was necessary to rely on both sections 23(5) and 24(2) in order not to reveal any exempt information in a particular case. The Commissioner acknowledges that in this case the request is of a much more general nature, however confirming or denying would still disclose information related to the bodies specified and relying on both is justified.
15. The Cabinet Office have also sought to rely on section 17(4) of the Act to support their assertion that they are not required to explain why the exemptions apply or outline the public interest arguments considered. Section 17(4) states that a public authority is not obliged to make a statement explaining the above if to do so would involve the disclosure of information which would itself be exempt.
16. Section 17(1) states that a public authority which is relying on a claim that the information is exempt, must, within the time for complying, issue a refusal notice which:

- (a) states the fact that information is exempt,
- (b) specifies the exemption in question, and
- (c) states why the exemption applies.

17. Section 17(3) states that if a public authority is relying on a qualified exemption it must state the reasons for claiming that, in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. Section 17(4) states that a public authority is not obliged to make a statement under section 17(1)(c) or (3) if the statement would involve the disclosure of information which would itself be exempt.
18. Section 10 of the Act provides that a public authority must comply with section 1 of the Act no later than the twentieth working day following receipt of the request. Section 1 states that a person making a request for information is entitled to be informed in writing whether the information is held, but, by virtue of section 2, this entitlement is subject to the exemptions in Part II of the Act.
19. The complainant made his initial request on the 29 March 2005 and the Cabinet Office the refusal notice on 1 August 2005 outside of the 20 working days as required by section 10 of the Act. This is in breach of section 17(1). In the refusal notice the Cabinet Office explained to the complainant that sections 23 and 24 were being applied in order to neither confirm nor deny that information is held. The Cabinet Office also informed the complainant that he should not regard the response as indicative of the existence or non-existence of any information and that in respect of section 24(2) a public interest test had been carried out. The Cabinet Office continued to explain that under section 17(4) it was under no obligation to tell the requester why the exemptions applied or the reasons for claiming that the public interest in maintaining the exemption outweighed the public interest in disclosing whether or not the information requested is held.
20. During the course of the investigation the Cabinet Office provided to the Commissioner more detail regarding its application of the exemptions and outlined the public interest considerations. They were provided so the Commissioner could determine whether the application of section 17(4) was appropriate in this case. The Commissioner considers that, with care, more information could have been provided to the complainant without revealing whether the requested information is held or not. Indeed in the arguments submitted to the Commissioner (some of which are detailed below) further explanation was given which does not reveal any exempt information.
21. The Commissioner therefore finds that in incorrectly relying on section 17(4) the refusal notice issued by the Cabinet Office was not in accordance with section 17(1)(c) as it did not explain why the exemption applied, nor with section 17(3) as it failed to outline the reasons for its conclusion on applying the public interest test.

**Exemptions: Sections 23 'Information supplied by, or relating to, bodies dealing with security matters' and Section 24 'National Security'.**

22. Where a public authority has relied on an exemption which entails a refusal to confirm or deny whether information is held, the Commissioner needs to ensure that his Decision Notice does not give any indication as to whether or not information is held by the public authority, or in this case under which exemption any information held would be exempt. As a consequence, it is not always possible for him to comment in great detail on the reliance by a public authority on the exemption concerned.
23. The Commissioner would also emphasise that his decision relates solely to the issue of whether the public authority should have confirmed or denied it held the information requested under section 23(5) and under section 24(2). His decision does not relate to the question whether any such information, if held, should have been disclosed to the complainant.
24. The Commissioner considers it appropriate to discuss the application of both exemptions together as they have been applied jointly by the Cabinet Office. This has been done so as not to reveal precisely which of the exemptions would apply to any statement confirming or denying that the information requested is held. The reason for this approach is explained in paragraph 14 above.
25. Section 23(1) states that information is exempt if it was directly or indirectly supplied to the public authority by, or relates to, any of the security bodies specified in subsection (3). 23(5) states that the duty to confirm or deny does not arise if to do so would involve the disclosure of any information supplied to the public authority by or relates to any of the bodies specified in subsection (3).
26. Section 24(1) states that information is exemption if exemption is required for the purposes of safeguarding national security. Section 24(2) states that the duty to confirm or deny does not arise if exemption from doing so is required for the purposes of safeguarding national security.
27. The Cabinet Office explained that in general the security and intelligence agencies seek to protect not only the actual information (intelligence) they hold but also the information as to whether they hold such intelligence. The aim of the UK intelligence collection effort is to obtain information which others do not want the UK to see. To admit that intelligence on a certain subject is or is not held would alert those from or about whom the intelligence may have been gathered as to whether information they were seeking to protect is in the hands of others. Such a revelation could endanger the source of that information, damage future collection efforts and damage the effectiveness of the intelligence collection and assessment process. The Cabinet Office also explained if it were to routinely confirm or deny whether information is held under section 23 requestors could build up a picture of matters about which intelligence is held and matters about which intelligence is not held. Such information would paint a picture of the requirements, priorities, strengths and weaknesses of the UK intelligence collection effort.

28. The Cabinet Office explained that when responding to requests for information on matters relating to national security it may use section 23 and 24 together because to use section 23 alone would allow an inference to be drawn as to the involvement (or not) of the security and intelligence agencies in a particular matter. By relying additionally on section 24(2) that inference cannot be drawn.
29. The arguments considered above are general arguments surrounding the use by the Cabinet Office of the section 23(5) and 24(2) exemptions to neither confirm nor deny that information is held. Whilst these arguments are presented by the Cabinet Office to support their use in this case they should not be considered as indicating whether information is or is not held, nor under which exemption it might be exempt if held.
30. The Cabinet Office gave more detail relating to the specific request for information in this case and provided further arguments to the Commissioner to support the exclusion of the duty to confirm or deny. The Commissioner has taken these into consideration when reaching his decision but details have not been included in the decision notice for the reasons stated in paragraph 22 above.
31. The Commissioner has reviewed all the arguments put forward and finds that the Cabinet Office was justified in its application of section 23(5) and 24(2) to neither confirm nor deny that the requested information is held.

### **Public Interest Test**

32. Section 24 is a qualified exemption and the Commissioner must therefore consider if the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the information is held.
33. In the refusal notice the Cabinet Office indicated that it could not disclose the details of the public interest test considerations as to do so would reveal exempt information. However in responding to the Commissioner the Cabinet Office was able to provide more information regarding their application of the public interest test without revealing whether information is held or not.
34. The Cabinet Office recognised that there is a public interest in being informed whether or not it holds the requested information. However the Cabinet Office found that the public interest lay in safeguarding national security and that in all circumstances of this case the public interest in maintaining the exclusion of the duty to confirm or deny outweighed the public interest in disclosing whether information is held.
35. In expanding on this conclusion the Cabinet Office explained that although some time has passed since the events themselves the two countries most directly involved remain close allies of the UK and that their cooperation is vital for the purposes of safeguarding national security. Confirming or denying whether the requested information is held could adversely affect this level of cooperation and is therefore not in the public interest. The Commissioner considers that the relevant public interest factor here extends to the maintenance of cooperation

with the UK of other allies who might be concerned about the public confirmation or denial by the UK Government that information of a similar nature to that requested in this case is held.

36. The Cabinet Office provided further arguments to support its assertion that the public interest favoured maintaining the exclusion of the duty to confirm or deny. These have not been included in this notice for the reasons explained in paragraph 22 above.
37. The Commissioner has considered these arguments and weighed them against the competing public interest factors in favour of confirming or denying if information is held. The Commissioner recognises that there is a general public interest in the Cabinet Office disclosing whether or not it holds information on a particular topic, and that there is a general public interest in the topic itself. The Commissioner has also considered the passage of time that has elapsed since the incident in question. He also considered the issue raised by the complainant of the information disclosed by the Foreign Office but rejects this as a valid argument when considering disclosure in this case. The Commissioner considers that the public interest in safeguarding national security is strong one, and for this reason, and for the reasons provided by the Cabinet Office, the Commissioner finds that the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the requested information is held.

## The Decision

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38. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

The application of sections 23(5) and 24(2) to neither confirm nor deny if information is held.

However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

The refusal notice was in breach of section 17(1), 17(1) (c) and 17(3) as it was not issued within 20 working days, did not state why the exemptions apply and did not sufficiently outline the public interest test considerations taken into account.

## Steps Required

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39. The Commissioner requires no steps to be taken.

## Right of Appeal

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40. 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](mailto: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 28<sup>th</sup> day of February 2008**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

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



## Legal Annex

### **Information supplied by, or relating to, bodies dealing with security matters**

**Section 23(1)** provides 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).”

**Section 23(2)** provides that –

“A certificate signed by a Minister of the Crown certifying that the information to which it applies was directly or indirectly supplied by, or relates to, any of the bodies specified in subsection (3) shall, subject to section 60, be conclusive evidence of that fact.”

**Section 23(3)** provides that –

“The bodies referred to in subsections (1) and (2) are-

- (a) the Security Service,
- (b) the Secret Intelligence Service,
- (c) the Government Communications Headquarters,
- (d) the special forces,
- (e) the Tribunal established under section 65 of the Regulation of Investigatory Powers Act 2000,
- (f) the Tribunal established under section 7 of the Interception of Communications Act 1985,
- (g) the Tribunal established under section 5 of the Security Service Act 1989,
- (h) the Tribunal established under section 9 of the Intelligence Services Act 1994,
- (i) the Security Vetting Appeals Panel,
- (j) the Security Commission,
- (k) the National Criminal Intelligence Service, and
- (l) the Service Authority for the National Criminal Intelligence Service.”

**Section 23(4)** provides that –

“In subsection (3)(c) “the Government Communications Headquarters” includes any unit or part of a unit of the armed forces of the Crown which is for the time being required by the Secretary of State to assist the Government Communications Headquarters in carrying out its functions.”

**Section 23(5)** provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).”

### **National Security**

**Section 24(1)** provides 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.”

**Section 24(2)** provides that –

“The duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security.”

**Section 24(3)** provides that –

“A certificate signed by a Minister of the Crown certifying that exemption from section 1(1)(b), or from section 1(1)(a) and (b), is, or at any time was, required for the purpose of safeguarding national security shall, subject to section 60, be conclusive evidence of that fact.”

**Section 24(4)** provides that –

“A certificate under subsection (3) may identify the information to which it applies by means of a general description and may be expressed to have prospective effect.”