

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 1st September 2008

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

Summary

The complainant asked the public authority for information about an incident in which Nyman Levin, the Head of the Atomic Weapons Research Establishment, allegedly '*dropped dead in the Cabinet Office in 1965*', and specifically for (a) any report about the death, and details of the meeting he was attending, and (b) details of warnings which had been issued to Nyman Levin, and relevant security investigations into him and others. The public authority stated that it did not hold any information relating to the first part of the request; in relation to the second part it refused to confirm or deny whether it held the information, citing section 23(5) and 24(2) of the Freedom of Information Act 2000 ('the Act'). The Commissioner decided that the public authority had addressed the first part of the request properly; however, in respect of the second part of the request it had breached section 1(1)(a) by failing to notify the complainant in writing whether it held information of the description specified in the request, and the Commissioner requires it now to provide the complainant with that confirmation or denial.

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.

The Request

2. On 9 July 2006 the complainant requested from Cabinet Office information relating to an incident in which Nyman Levin, the Head of the Atomic Weapons Research Establishment, was alleged to have *'dropped dead in the Cabinet Office in 1965'*. The complainant's request had two parts:

'any report which was made about his death and details – minutes etc – of any meeting he was attending';

and any papers relating to the following issues:

'Was Nyman Levin interviewed as part of (or subject to) any security investigation into unauthorized contacts with foreign contacts or leaks of British or allied atomic secrets? Was he warned about contact with Israeli scientists? Were two other British nuclear scientists also investigated and cleared? Was there any investigation into leaks of British secrets to Israel?'

3. The Cabinet Office replied on 7 August 2006. It confirmed that the information in the first part of the request was not held; in relation to the second part, it neither confirmed nor denied that it held the information, citing the exemptions in sections 23(5) and section 24(2) of the Act. It advised the complainant of his right to request an internal review and to complain to the Commissioner.
4. The complainant requested an internal review on 8 August 2006. He pointed out that the subject of his request had been dead for more than forty years, and claimed that there was a strong public interest in disclosure of the requested information.
5. The Cabinet Office issued its internal review decision (dated 19 September 2006) on 20 September 2006, confirming its original response.

The Investigation

Scope of the case

6. On 13 February 2007 the complainant wrote to the Commissioner. He pointed out that the implication of the Cabinet Office's claim that it could never release information about security investigations into individuals was that information could not, for example, have been released about Anthony Blunt (an agent of Soviet intelligence from the 1930s to 1950s).

Chronology

7. The Commissioner wrote to the complainant and the Cabinet Office on 10 January 2008. He asked the Cabinet Office to comment on a number of issues.

8. The Cabinet Office provided its response on 7 February 2008.

Analysis

First part of the request

9. The complainant's first request was for:

'any report which was made about his death and details – minutes etc – of any meeting he was attending'.

The Cabinet Office informed the complainant that it did not hold any information in respect of this part of the request.

10. The Commissioner has been guided by the decision of the Information Tribunal in *Linda Bromley v Information Commissioner and The Environment Agency* (EA/2006/072). In its decision the Tribunal agreed that the test to be applied in such cases *'was not certainty but the balance of probabilities'*. The Tribunal also set out the factors which should be considered:

'the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted.'

11. During the course of his investigation the Commissioner asked the Cabinet Office whether there was any evidence that it had ever held the information, and whether there had been any legal requirement to hold it. In its reply the Cabinet Office stated that it held no information at all about the death of Nyman Levin, there was no evidence that it had ever held any such information, and that a search on the internet had not located any information about the date or nature of his death. It accepted that a death on Cabinet Office premises in 1965 was likely to have been recorded, but pointed out that after forty years it was also likely that any such record would have been disposed of either by destruction or transfer to the National Archives. The Cabinet Office also stated that it was unable to suggest any public authorities which might have the information beyond the Ministry of Defence and the United Kingdom Atomic Energy Authority, which the complainant had already indicated his intention to approach.
12. In reaching a decision the Commissioner has considered whether the Cabinet Office could have been expected to hold the requested information, whether there was any legal requirement to hold it, and whether there is any evidence that the information was once held. The Cabinet Office has not been able to provide a definitive response to these points, but has accepted that if the event occurred it was likely to have been recorded. The Commissioner can identify no legal requirement for a record to have been made, although he agrees that it is likely that some sort of record would have been made at the time.

13. The Commissioner has also reflected on whether the Cabinet Office had any specific reason or motive to conceal the information, noting that the possibility of foul play in the premises of the Cabinet Office is implicit in the terms of the request.
14. However, the Commissioner has had particular regard to the fact that the (alleged) events took place over forty years ago, and to the Cabinet Office's point that any records would be likely to have been either destroyed or transferred to the National Archives.
15. In the circumstances the Commissioner has concluded, in light of the Cabinet Office's response, and on the balance of probabilities, that it did not hold any relevant information. Accordingly, he does not consider that there is any evidence of a breach of section 1 of the Act in relation to the first part of the request.

Second part of the request

16. The second request was for any papers relating to a number of issues:

'Was Nyman Levin interviewed as part of (or subject to) any security investigation into unauthorized contacts with foreign contacts or leaks of British or allied atomic secrets?'

'Was he warned about contact with Israeli scientists?'

'Were two other British nuclear scientists also investigated and cleared?'

'Was there any investigation into leaks of British secrets to Israel?'

17. Section 1(1) of the Act gives two rights of access to information: the duty to confirm or deny to the applicant whether the information is held by the authority and, if so, the duty to communicate that information to the applicant. Where the public interest test is appropriate it should be applied to both duties separately, and the outcome of each may differ.

18. The Cabinet Office applied sections 23(5) and 24(2) to this part of the request. 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).'

Section 24(2) states:

'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.'

19. In the case of *Baker v the Information Commissioner and the Cabinet Office* (EA/2005/0002), the Tribunal accepted the public authority's justification for claiming sections 23(5) and 24(2) simultaneously. The public authority pointed out that the requested information – which concerned the telephone tapping of MPs – could, if it were held, relate to the bodies specified in 23(3) or to other bodies (such as the police or Defence Intelligence Staff). The Tribunal agreed with the public authority that a response to a request should not allow any deduction to be made as to the involvement of a section 23 body or any other body, and that:

'if the Cabinet Office were to rely solely on either section 23(5) or on section 24(2) in neither confirming or denying that information was held, in those cases where section 23(5) was relied upon alone that reliance could itself reveal that one of the bodies listed in section 23(3) was involved. That in itself would constitute the release of exempt information. Thus it is necessary to rely on both sections 23(5) and 24(2) consistently in order not to reveal exempt information in a particular case.'

Accordingly, where the holding of information is neither confirmed nor denied for the purpose of safeguarding national security, section 23(5) and section 24(2) can be applied in conjunction.

20. The general principles governing the Commissioner's approach to neither confirm nor deny cases is set out in his *Freedom of Information Act Awareness Guidance No 21*:

- where information is or is not held, but falls or would fall within an absolute exemption such as section 23, the public authority should consider in the particular case whether the effect of the exemption in fact relieves it of the duty to confirm or deny;
- where information is or is not held, but falls or would fall within a class-based qualified exemption such as section 24, the public authority should consider in the particular case whether confirming or denying that the information was held would fall within the relevant class, and also apply the public interest test;
- where information is not held, but would be disclosable if it were held, the public authority must inform the applicant that it does not hold it;
- where the existence of the information is already in the public domain a refusal to confirm or deny is not appropriate.

21. The Cabinet Office's explanation in its refusal notice as to why the information was exempt was that to confirm or deny *'whether individuals were or had been subject to security investigations could harm national security'*; further, if it confirmed or denied that an:

'investigation had taken place in one case, inferences, whether correct or not, might be drawn in those instances where we were unable to do so,

which would have similar harmful effects. It is important that consistency is maintained'.

It concluded that, for these reasons, the public interest favoured neither confirming nor denying whether the requested information was held, and stated that *'This is in line with usual practice in commenting on security investigations...'*

22. In its comments to the Commissioner the Cabinet Office made a number of points. It claimed that *'Any relevant information, if held, would almost certainly be exempt from disclosure under section 23 or 24 of the Act by virtue of the subject matter'*. Considering the terms of the second part of the request, the Commissioner does not believe that all of the requested information, were it to be held, would necessarily fall within the class of information covered by section 23, or be required for the purpose of safeguarding national security as required by section 24.

23. In relation to section 23, the Cabinet Office added that *'it would be difficult to conceive of a security investigation of the kind specified by [the complainant] taking place without it at least relating to one of the bodies specified in subsection (3) of section 23'*. Section 23(1) 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).'

The Commissioner considers that it is possible that a 'security investigation' could be conducted by bodies other than those cited in section 23(3), such as the police or staff of the Atomic Weapons Research Establishment (of which Nyman Levin was Head, according to the complainant). Accordingly, he rejects the implicit suggestion that all requests for information relating to 'security investigations' will always fall within section 23, and even more so the suggestion that in response to requests for information about 'security investigations' a public authority could therefore always invoke the neither confirm nor deny provisions laid down in section 23(5).

24. The Cabinet Office also claimed that, in cases where information was not held, confirmation of that fact might lead it to *'be concluded, rightly or wrongly, that no such investigation had taken place'*. The Commissioner does not agree that the possibility that individuals might draw incorrect conclusions from released information – ie conclusions not logically supported by the evidence – should be an argument against releasing information. The complainant's request here is a case in point: should the Cabinet Office hold no information falling within the request, the explanation could as well be the length of time since the relevant events, so that information about an investigation has been destroyed, as that no security investigation occurred in the first place.

25. The Cabinet Office made a more plausible argument in pointing out the need for consistency in order to maintain the credibility of the neither confirm nor deny response. It stated that confirmation that information was not held in relevant cases would undermine the value of the neither confirm nor deny response in

those cases where it was held, since *'a requestor familiar with our policy in cases where we did not hold information could conclude, quite correctly, that we probably did hold relevant information'*.

26. The Commissioner accepts that there is some merit in the point. Indeed, the general argument has been accepted by the Information Tribunal. In the *Baker* case cited above, the Tribunal stated that *'The use of a neither confirm nor deny response on matters of national security can only secure its purpose if it is applied consistently'*. In other words, in all requests where confirmation or denial of the information's existence would by itself reveal exempt information, public authorities should always refuse to deny or confirm. In the *Baker* case the relevant part of the request was for information about the number of MPs subject to telephone tapping or other surveillance since the Wilson Doctrine was set out. The public authority had refused to confirm or deny whether it held such information by virtue of section 24(2). The Tribunal accepted that this was in the public interest because, if any particular category of people were engaged in activities damaging to national security and the public authority effectively announced that no interceptions had taken place in relation to that category, any person in that category could continue their activities in the knowledge that they were not subject to interception; whereas if a particular category of people were engaged in activities which were damaging to national security and the Cabinet Office announced that a certain number of telephones had been tapped, such an announcement would effectively alert them to avoid certain forms of communication. The Information Tribunal ruled that the Commissioner had been right to decide that the Cabinet Office's refusal to confirm or deny was in accordance with the Act.
27. In this case, the Commissioner takes the view that confirmation of whether information is held would not undermine the credibility of a neither confirm or deny response in other potential 'security investigation' requests. The reason is that the (second part of the) complainant's request is composed of a number of elements: the security investigation interview, the warning about contact, investigation of two other scientists, and the general leaks investigation.
28. If the Cabinet Office does in fact hold information which falls within one or more of these elements and confirms that fact, it is not possible for the complainant or anyone else to deduce from that response what information is held, including whether a 'security investigation' had taken place. Provided that the Cabinet Office responds to the request as a totality, an effective level of doubt about the nature of any information which might be held would be preserved. If necessary section 17(4) of the Act could be relied upon to limit the amount of detail revealed by any refusal notice.
29. On the other hand, if the Cabinet Office does not hold any information falling within the second part of the request, with the result that it confirms that it holds no information, neither the complainant nor anyone else could logically draw the conclusion that there had not been any 'security investigation'. The Commissioner's reason for reaching this conclusion is the length of time which has elapsed since the events which would have given rise to the relevant information. That is to say, if the Cabinet Office does not hold any information

falling within the request that may be because there was no security investigation, or it may be because there was an investigation but the information was subsequently destroyed or sent to the National Archives. The Commissioner notes that in its response to the first part of the complainant's request the Cabinet Office itself made precisely this point that information might have existed but been destroyed or transferred over the intervening years. Since confirmation that it did not hold any information falling within the request could not reasonably lead to the conclusion that it had never held any such information, the necessary indeterminacy would be preserved in this event too.

30. Accordingly, the Commissioner takes the view that, whether the Cabinet Office holds information falling within the second part of the complainant's request or not, it should confirm the situation to the complainant as to do so would not involve the disclosure of information which is itself exempt.

The Decision

31. The Commissioner's decision is that the Cabinet Office dealt with the first part of the complainant's request in accordance with the requirements of the Act. However, the Commissioner has decided that it failed to notify the complainant in writing whether it held information of the description specified in the second part of the request, in breach of section 1(1)(a).

Steps Required

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

- The Cabinet Office should confirm or deny whether it holds any information that falls within the second part of the complainant's request. (If it confirms that it holds information, the Cabinet Office should proceed to fulfil its obligations under section 1 of the Act.)
- The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

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

Other matters

34. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern. There is no timescale laid down in the Act for a public authority to complete an internal review. However, as he has made clear in his *'Good Practice Guidance No 5'*, the Commissioner considers that these internal reviews should be completed as promptly as possible. In the absence of exceptional circumstances, a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer, but the total time taken should not exceed 40 working days, and as a matter of good practice the public authority should explain to the requester why more time is needed. In this case the complainant's internal review request was made on 8 August 2006 and the Cabinet Office issued its internal review decision (dated 19 September 2006) on 20 September 2006. The Cabinet Office therefore took 30 working days to complete the review. The Commissioner recognises that the Cabinet Office's internal review in this case was conducted prior to the issuing of the *'Good Practice Guidance No 5'* in February 2007. However, he is not aware of any exceptional circumstances existing in this case to justify that delay, and he therefore wishes to register his view that the Cabinet Office fell short of the standards of good practice in failing to complete its internal review within a reasonable timescale.

Right of Appeal

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@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

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 1st day of September 2008

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 1(3) provides that -

'Where a public authority -

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.'

Section 1(4) provides that -

'The information -

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.'

Section 1(5) provides that -

'A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).'

Section 1(6) provides that -

'In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as 'the duty to confirm or deny'.'

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).’

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.'