

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 8 December 2009

Cabinet Office: Cabinet Office
Address: Admiralty Arch
North Entrance
The Mall, London
SW1A 2WH

Summary

The complainant asked the Cabinet Office for the contents of a National Archives file referenced 'PREM 16/516'. The Cabinet Office withheld information under section 27(1)(a) and section 27(2) of the Act; and gave a 'neither confirm nor deny' response under sections 23(5) and 24(2) that any further information was held. During the course of the Commissioner's investigation the Cabinet Office dropped the 'neither confirm nor deny' response, and withheld some of the information by reference to sections 23(1) and 24(1). At internal review, and also during the Commissioner's investigation, the Cabinet Office released some of the withheld information. The Commissioner decided that some of the remaining withheld information was not exempt, and that the Cabinet Office had also breached the procedural requirements of sections 1(1)(a), 1(1)(b), 10(1), 17(1) and 17(3)(b). The Commissioner required the Cabinet Office to disclose the information which it had improperly withheld.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a Cabinet Office 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 4 September 2006 the complainant requested from the Cabinet Office the contents of a National Archives file referenced 'PREM 16/516'.
3. The Cabinet Office replied on 31 October 2006 that it held information that was exempt from disclosure under section 27(1)(a) and section 27(2) of the Act. It

added that, under sections 23(5) and 24(2) of the Act, it could neither confirm nor deny that it held any further information falling within the terms of the request. It stated that the public interest in maintaining the exclusion of the duty to confirm or deny outweighed the public interest in confirming or denying, but that *'to give a statement of the reasons for this would involve disclosure of information which would itself be exempt information'*. It advised the complainant that he could request an internal review, and complain to the Commissioner.

4. On 9 November 2006 the complainant requested an internal review. He objected that the Cabinet Office's response had failed to explain adequately the public interest test or the prejudice that would allegedly result from disclosure; that it was clear that information did exist because the National Archives file was a matter of public record; and that the Cabinet Office had failed to state whether any Minister had issued a certificate under sections 23(2) or 24(3). The complainant requested an acknowledgment within one day of receipt of his email and an estimated date for the decision to be communicated to him.
5. On 14 November 2006 the Cabinet Office referred the complainant to its website guidance for dealing with internal reviews.
6. The complainant sent a reminder to the Cabinet Office on 5 December 2006.
7. The Cabinet Office informed him on 8 December 2006 that the file was being reconsidered and that *'due to the nature of the material this can be quite a lengthy process'*, that it had *'every hope'* that it could provide a decision before Christmas, and that if it did not then it expected that a reply would be sent by mid-January.
8. The complainant sent a further reminder on 6 February 2007.
9. The Cabinet Office replied on 28 February 2007 that a submission regarding the internal review had been sent to the Permanent Secretary and his decision should be issued within two weeks.
10. The complainant sent a further reminder on 30 March 2007.
11. The Cabinet Office replied on 30 March 2007 that the Permanent Secretary wished to consult with *'another part of the government'* and the complainant should receive the decision during the following week.
12. The complainant sent a further reminder on 10 April 2007.
13. The Cabinet Office replied on 16 April 2007 that a reply had been posted that day. The letter was actually dated 12 April. It apologised for the delay in responding. It stated that, in relation to most of the information in the file, the exemptions had been properly applied. However, for some documents the exemptions had not been properly applied and/or the public interest test had not been correctly assessed. This information was therefore being enclosed with the letter. One document was now being withheld as exempt under sections 40 and

41 of the Act. The Cabinet Office reminded the complainant of his right to complain to the Commissioner.

The Investigation

Scope of the case

14. On 27 April 2007 (the letter was incorrectly dated 2006) the complainant made a complaint to the Commissioner that the arguments in his request for internal review had not been properly addressed by the Cabinet Office; that the Cabinet Office had failed to assess the public interest adequately; that it had failed to confirm in relation to section 27(2) that the other state involved had been consulted about the possibility of release; and that it had not addressed whether any Minister had issued a certificate under sections 23(2) and 24(2). He also complained about the *'inordinate'* delay, particularly given the relatively small amount of information which had eventually been provided.

Chronology

15. The Commissioner wrote to the complainant and the Cabinet Office for comments on 23 April 2008. He asked the Cabinet Office to send him the information which had been withheld.
16. He sent a reminder on 27 May 2008.
17. On 6 June 2008 the Cabinet Office wrote to the Commissioner regarding section 23.
18. The Cabinet Office sent a further response on 13 June 2008. It indicated that it now considered that some of the information could be disclosed, and advised that it was also dropping its 'neither confirm nor deny' response under sections 23(5) and 24(2). However, it was implicit in its response that it was now withholding some information by reference to the exemptions in sections 23(1) and 24(1). It forwarded some of the withheld information but informed the Commissioner of its view that the remainder should be viewed at its offices owing to its sensitivity.
19. The Commissioner wrote back on 20 June 2008 with some further queries. He informed the Cabinet Office that it should release to the complainant any information which it now considered was not exempt and inform him that it was no longer relying on the 'neither confirm nor deny' response.
20. The Cabinet Office confirmed on 30 June 2008 that it had done so on 27 June.
21. The Commissioner subsequently arranged to view the remaining withheld information at the Cabinet Office on 2 September 2008.

Findings of fact

22. The complainant requested the contents of a National Archives file referenced 'PREM 16/516'. This file has an 'open description' on the National Archives' website, which discloses that 'PREM 16' signifies records of correspondence and papers, of the period 1974-1979, from the Prime Minister's Office. It also discloses that the subject matter of the specific file 516 is: *'IRELAND. Situation in Northern Ireland: part 11; 1975 Jan 21 - 1975 Feb 05'*.

Analysis

23. Part of the complainant's complaint to the Commissioner was that the Cabinet Office had not addressed whether any Minister had issued a certificate under sections 23(2) and 24(2). The Cabinet Office has confirmed to the Commissioner that no certificate was issued.

Exemption – section 23

24. The Cabinet Office withheld some of the requested information by reference to 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).'

25. The Cabinet Office provided the Commissioner with a letter dated 6 June 2008 from its Director of Security and Intelligence which stated that the information to which section 23 had been applied was either received from or was directly related to one of the bodies listed in section 23.
26. The Commissioner is prepared, in limited circumstances, to accept the assurance of a senior official that information withheld under section 23(1) has indeed been supplied by or is related to security bodies specified in section 23(3). He will only do so where the official occupies a position in relation to the security bodies which allows them genuinely to validate the provenance of the information, and where the official is independent of the Cabinet Office's process for dealing with freedom of information requests. The Commissioner is satisfied that the Director of Security and Intelligence in the Cabinet Office occupied such a position in this case. Accordingly, he has concluded that the remaining information that was withheld by the Cabinet Office engaged the exemption under section 23(1). Since section 23(1) is an absolute exemption, there is no public interest test. For completeness, it should be noted that the Commissioner retains the power to serve an Information Notice under section 51 where he considers it appropriate and it remains open to the Cabinet Office to obtain, in appropriate cases, a conclusive ministerial certificate under section 23(2).

Exemption – section 24

27. Some of the information was withheld exclusively by reference to section 24(1). This section states:

'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.'

28. In response to the Commissioner's invitation to explain why section 24 was engaged, the Cabinet Office stated that the withheld information dealt with counter-subversion methods. It expressed the view that information *'concerning attempts to disrupt the unity of the United Kingdom by military means, and threats to the lives of its citizens, clearly relates to national security'*. It also claimed that disclosure of such counter-subversion methods now would endanger national security, since some of them *'may still be appropriate for employment today and any discussion of their effectiveness could enable forces hostile to the state to devise appropriate counter-measures'*.

29. The Commissioner takes the view that, for exemption to be *'required'*, the requested information must, firstly, relate to national security; and, secondly, there must be evidence that its disclosure would cause specific and real threats to national security, with a pressing need for the information to be withheld. In determining this second question, he has considered the case law on Article 8(2) of the European Convention on Human Rights, which states:

'There shall be no interference by a public authority with the exercise of this right except such as...is necessary in a democratic society in the interests of national security...'

The European Court of Human Rights has interpreted *'necessary'* as *'not synonymous with 'indispensable', neither has it the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable'*". Accordingly, in the view of the Commissioner necessity is less than absolutely essential but more than merely useful.

30. In considering whether the information relates to national security, the Commissioner notes the case of *Baker v the Information Commissioner and the Cabinet Office* (EA/2006/0045). In that case the Information Tribunal stated that it was unable to find an exhaustive definition of *'national security'* in either statute or judicial decisions, but it referred to a House of Lords decision (*Secretary of State for the Home Department v Rehman* [2001] UKHL 47; [2003] 1 AC 153) which made a number of observations on the issue:

- *'national security'* means the security of the United Kingdom and its people;
- the interests of national security are not limited to action by an individual which can be said to be *'targeted at'* the United Kingdom, its system of government or its people;

- not only military defence, but the protection of democracy and the legal and constitutional systems of the state, are part of national security;
- action against a foreign state may be indirectly capable of affecting the security of the United Kingdom;
- reciprocal cooperation between the United Kingdom and other states in combating international terrorism is capable of promoting the United Kingdom's national security.

Having considered the relevant part of the withheld information, the Commissioner is satisfied that it does relate to national security.

31. However, regarding the question of whether disclosure would cause specific and real threats to national security, resulting in a pressing need for the information to be withheld, the Commissioner is not satisfied that retention of the information is 'required to safeguard' national security. In reaching this conclusion, he has assessed the Cabinet Office's claim that disclosure of the counter-subversion methods utilised in Northern Ireland in 1975 '*could enable forces hostile to the state to devise appropriate counter-measures*'. He notes that the Cabinet Office's argument in this case is generic, and it has made no attempt to demonstrate how disclosure of counter-subversion methods utilised thirty years before the request in the context of Northern Ireland could be utilised in the future to produce specific and real threats to national security. The Commissioner has not simply dismissed the arguments because they generic, he has carefully assessed the information to see if these general arguments can apply to the information in question but it is not apparent to him from an inspection of the documents why disclosure would cause any specific and real threats, or why there would be a pressing need for the information to be withheld. The information relates to specific circumstances and issues at the time, which the Commissioner finds are genuinely historical and he cannot see how disclosure would impact on current security matters. The Commissioner accepts that the documents marked "top secret" would have been highly sensitive at the time but does not agree that the sensitivity continued to exist at the time of the request. In the circumstances, the Commissioner has reached the conclusion that section 24(1) is not engaged.

32. Accordingly, the Commissioner requires that the information withheld exclusively by reference to section 24 now be disclosed. This information is identified in a separate confidential Schedule which has been provided to the Cabinet Office.

Exemption – section 27(1)(a)

33. The Cabinet Office applied section 27(1)(a) of the Act to a number of documents; to some of those documents section 27(2) was also applied. Section 27(1)(a) 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...'

Section 27(2) states:

'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.'

The prejudice test

34. Section 27(1)(a) is only engaged when disclosure would produce the relevant prejudice. The Cabinet Office did not explain to the complainant what prejudice was likely to occur, although it provided some comments to the Commissioner during his investigation. However, its assessment of the public interest test in its refusal notice of 31 October 2006 has some bearing on the prejudice test:

'There is a definite public interest in understanding the United Kingdom's conduct of its foreign relations. The information requested might deepen public understanding and so lead to more informed public consideration of Britain's dealings with other countries. On the other hand, there is a clear public interest in the United Kingdom being able to advance our nation's interests internationally. We are more likely to be able to meet this objective if we avoid discord with other nations and observe standards of conduct that encourage our international partners to place their confidence in us. Taking into account all the circumstances of this case, I have concluded that the balance of the public interest favours withholding this information.'

The Cabinet Office therefore suggested that the prejudice involved was the general one that disclosure would create *'discord with other nations'* and undermine the confidence of *'international partners'*.

35. In determining the prejudice test, the Commissioner adopts the three step process laid out in the Information Tribunal case of *Hogan v the ICO and Oxford City Council* (EA/2005/0026, EA/2005/0030):

'The application of the 'prejudice' test should be considered as involving a numbers of steps. First, there is a need to identify the applicable interest(s) within the relevant exemption....Second, the nature of 'prejudice' being claimed must be considered ...A third step for the decision-maker concerns the likelihood of occurrence of prejudice' (paragraphs 28 to 34).

- *Step 1 – relevant applicable interests*

36. In the case of the exemption under section 27(1)(a), the relevant applicable interests are the United Kingdom's international relations with another State.

Having considered the relevant withheld information, the Commissioner is satisfied that it does bear on United Kingdom relations with a specific State or States. He is also satisfied that the prejudice applies to the interests of the United Kingdom as a whole, rather than only a part or sector or group within it (such as the Cabinet Office itself).

37. However, the Cabinet Office applied section 27(1)(a) to one document whose content does not appear to the Commissioner to have any bearing on international relations with another State. The Commissioner has concluded that this document does not embody any relevant interests applicable to section 27(1)(a), so that this exemption is not engaged. The Commissioner considered whether the document was instead exempt by virtue of section 24(1), but concluded that it was not, for the reasons given earlier in this Notice. He therefore requires that this document be disclosed.

- *Step 2 – nature of the prejudice*

38. Secondly, the Commissioner has considered the nature of the prejudice being claimed. The Tribunal in *Hogan* commented (paragraph 30) that:

'An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and that the prejudice is, as Lord Falconer of Thornton has stated, "real, actual or of substance" (Hansard HL, Vol. 162, April 20, 2000, col. 827). If the Cabinet Office is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be rejected. There is therefore effectively a de minimis threshold which must be met.'

The judgment of Lord Falconer of Thornton had emphasised:

'the strength of the prejudice test. Prejudice is a term used in other legislation relating to the disclosure of information. It is a term well understood by the courts and the public. It is not a weak test. The commissioner will have the power to overrule an authority if she feels that any prejudice caused by a disclosure would be trivial or insignificant. She will ensure that an authority must point to prejudice which is "real, actual or of substance"'.

39. The Tribunal commented on the prejudice test with specific reference to the section 27 exemption in the case of *Campaign Against the Arms Trade (CAAT) v the Information Commissioner and Ministry of Defence* (EA/2006/0040), where the appellant had requested certain Memoranda of Understanding between the United Kingdom Government and the Kingdom of Saudi Arabia. The Tribunal indicated that the nature of prejudice under section 27(1) is specific to international relations, and that disclosure of information could cause substantive prejudice *'if it makes relations more difficult or calls for a particular damage limitation response to contain or limit damage which would not have otherwise have been necessary'*. The Tribunal also stated that:

'Prejudice...imports something of detriment in the sense of impairing relations or interests or their promotion or protection and further we accept that the prejudice must be "real, actual or of substance", as described in [the case of] Hogan'.

The Tribunal did *'not consider that prejudice necessarily requires demonstration of actual harm to the relevant interests in terms of quantifiable loss or damage'*, rather than disclosure merely exposing United Kingdom interests to:

'the risk of an adverse reaction...or to make them vulnerable to such a reaction, notwithstanding that the precise reaction...would not be predictable either as a matter of probability or certainty'.

40. Taking into account these two Tribunal cases, the Commissioner considers that engagement of the section 27(1)(a) exemption requires that disclosure of the information must have a causal effect on the applicable interest, this effect must be detrimental or damaging in some way, and the detriment must be more than insignificant or trivial; an additional consideration is that the detriment might include an adverse reaction or vulnerability to one.
41. In this case, the Cabinet Office has provided comments to the Commissioner to the effect that disclosure of the information might damage the trust of, co-operation with and support of the relevant State(s), with a potentially prejudicial effect on the process of reconciliation in Northern Ireland. Having considered the specific nature of the information, the Commissioner is satisfied that this potential prejudice is more than insignificant, and that the nature of the prejudice is therefore sufficient to engage the exemption.

- *Step 3 – standard of proof*

42. Thirdly, the Commissioner has considered the likelihood of the prejudice occurring. He notes that the Cabinet Office did not itself specify the level of prejudice, that is, whether it 'would prejudice' or only 'would be likely' to do so. As the likelihood has not been specified by the Cabinet Office, the Commissioner has used the lower threshold, in accordance with the decision of the Information Tribunal in the case of *McIntyre v The Information Commissioner and the Ministry of Defence* (EA/2007/0068) (which involved the application of the section 36 exemption):

'Parliament still intended that the reasonableness of the opinion should be assessed by the Commissioner but in the absence of designation as to level of prejudice that the lower threshold of prejudice applies, unless there is other clear evidence that it should be at the higher level.'

43. Where disclosure is only likely to give rise to the relevant prejudice then, in accordance with the Tribunal's decision in the case of *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005), *'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk'*.

44. In deciding whether there was a 'real and significant risk' of prejudice from disclosure of the documents in this case, the Commissioner has again considered the comments provided by the Cabinet Office that disclosure might damage the trust of, co-operation with and support of the relevant State(s), with a potentially prejudicial effect on the process of reconciliation in Northern Ireland. He also notes that the Cabinet Office indicated to the complainant (albeit in its comments on the public interest test) that disclosure might create '*discord with other nations*' and undermine the confidence of '*international partners*'.
45. However, the Commissioner notes that in *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026, EA/2005/0030), the Tribunal stated that the '*evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice*'. Accordingly, unsupported speculation or opinion is not evidence of the likelihood of prejudice, although the Tribunal has also indicated that public authorities do not need to prove that something will happen if the information in question is disclosed. Therefore, while there will always be some extrapolation from the evidence available, the Cabinet Office must be able to provide some evidence (not just unsupported opinion) to extrapolate from.
46. The Commissioner considers that the fairly limited and essentially generalised arguments regarding the prejudice test which were advanced by the Cabinet Office in this case do not demonstrate a 'real and significant risk' of prejudice from disclosure for some of the information withheld under section 27(1)(a). He is mindful of the fact that the information was more than thirty years old at the time of the request. He does accept that close and constructive relations with the other State(s) were necessary for the success of the Northern Ireland peace process, and that there was a risk of alienating other State(s) if certain parts of the withheld information were to be disclosed. In its comments to the Commissioner (albeit regarding the public interest relating to section 27(2) rather than the prejudice test for section 27(1)(a)) the Cabinet Office also recorded its view that the age of the information was not as significant a factor as it might be, stating that:

'there has only been an end to the violence relatively recently. Northern Ireland remains a region where sectarian emotions can run high and political stability is still fragile. Individuals deeply involved in the events of 1975 are still active. The passage of time is starting to reduce sensitivities, but memories are recent and vivid.'

However, the Commissioner is not persuaded that this argument bears on the prejudice to international relations.

47. The Commissioner also notes that on 10 April 1998 the Belfast (or Good Friday) Agreement had been signed by the British and Irish governments and endorsed by most Northern Ireland political parties, which represented a major political development in the Northern Ireland peace process. The Agreement was subsequently endorsed by voters in referendums in Northern Ireland and the Republic of Ireland. He considers that this Agreement constituted a watershed in the political situation, and therefore the international relations arising from it, and

that this had the effect of diminishing some of the prejudice which might ensue from disclosure of information belonging to the previous era.

48. Having considered the withheld information the Commissioner has concluded that some elements of the information would be likely to prejudice United Kingdom relations with another State or States. Accordingly, the section 27(1)(a) exemption is not engaged for some of the information. In relation to the remaining information which did engage section 27(1)(a), the Commissioner has gone on to consider the public interest test.

Public interest test

49. Since section 27(1)(a) is a qualified exemption it is subject to a public interest test under section (2)(2)(b) of the Act, which favours disclosure unless, *'in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information'*. The Cabinet Office provided an assessment of the public interest test for section 27 generally in its refusal notice of 31 October 2006. In full, this assessment stated that:

'There is a definite public interest in understanding the United Kingdom's conduct of its foreign relations. The information requested might deepen public understanding and so lead to more informed public consideration of Britain's dealings with other countries. On the other hand, there is a clear public interest in the United Kingdom being able to advance our nation's interests internationally. We are more in general, and likely to be able to meet this objective if we avoid discord with other nations and observe standards of conduct that encourage our international partners to place their confidence in us. Taking into account all the circumstances of this case, I have concluded that the balance of the public interest favours withholding this information.'

50. During the course of his investigation, the Cabinet Office made some further comments to the Commissioner regarding its assessment of the public interest test, again in respect of section 27 generally. It stated that it was *'vital for the success of the Northern Ireland peace process that we continue to enjoy close and constructive relations'* with relevant foreign States, which could exert a beneficial influence; and that *'[t]o antagonise, or to lose the close co-operation'* with such States *'could seriously threaten the stability of Northern Ireland'*.
51. In relation to the age of the information, the Cabinet Office pointed out that *'there has only been an end to the violence relatively recently'*, *'political stability is still fragile'*, and *'[i]ndividuals deeply involved in the events of 1975 are still active'*. It accepted that *'[t]he passage of time is starting to reduce sensitivities, but memories are recent and vivid'*, so that, in this case, *'we do not consider that the passage of time is as significant a factor as it might be in other less contentious areas'*.
52. On the other hand, the complainant, in his internal review request, claimed that the Cabinet Office's public interest assessment failed to:

'give sufficient weight to the public interest in understanding the United Kingdom's conduct of its foreign relations or consider the possibility of non-disclosure may itself prejudice relations with other states'.

53. The Commissioner takes the view that there is a significant public interest in the public being able to understand the Northern Ireland situation and the government's actions in relation to it, including the international dimension, to inform public debate and promote understanding of international affairs. He also accepts that disclosure of the requested information would play a role in increasing public confidence, and promoting decision makers' accountability to the public.
54. On the other hand, he accepts the Cabinet Office's points regarding the impact of potential prejudice on the public interest. Generally, a failure to keep contacts with other States confidential may cause them to be more reluctant about sharing sensitive information in future, and less likely to respect the confidential nature of information supplied to and by the United Kingdom. In this specific circumstances of this case, disclosure of the information at issue could also damage relations with other States with a role in the Northern Ireland situation, and in particular could cause a loss of cooperation with potentially very detrimental effects on the process of reconciliation in Northern Ireland. The Commissioner considers that the impact of such potential prejudice on the public interest is highly significant.
55. While the Commissioner accepts that the signing of the Belfast (or Good Friday) Agreement represented a major political development in the Northern Ireland peace process which has diminished some of the potential prejudice from disclosure, he agrees with the Cabinet Office's assessment that the passage of time in this case is not as significant a factor as in less contentious areas.
56. Having considered all of the factors in favour and against disclosure, and the withheld information, the Commissioner has concluded that the balance of the public interest lies in withholding that part of the information which engages section 27(1)(a).

Exemption – section 27(2)

57. To some of the information to which section 27(1)(a) was applied the Cabinet Office also applied section 27(2). Section 27(2) states:

'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.'

58. The Cabinet Office claimed that the circumstances of the exchange of information made it clear that *'the information was being given in confidence and on the implied or explicit understanding that it was not to be more widely disseminated'*. It also pointed out that one of the documents *'explicitly stresses the delicacy of the information being passed on, and asks that it be treated with maximum secrecy'*.

59. Part of the complainant's complaint to the Commissioner was that the Cabinet Office had failed to confirm in relation to section 27(2) that the other State(s) involved had been consulted about the possibility of release. In the Commissioner's view, the Freedom of Information Act does not require a public authority to undertake actively such a consultation. In this case, he is satisfied that there was a very strong expectation of confidentiality at the time the information was provided to the United Kingdom, and there is no reason to believe that the expectations of the confider state have changed.
60. Section 27(2) is not subject to a test of prejudice but applies only if the requested information is in fact confidential. 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.'

There is therefore no requirement that any breach of confidence be actionable for this exemption to apply. Information may be confidential because of a formal confidentiality agreement, or because the context in which it was obtained implies an obligation of confidence.

61. In the case of *Campaign Against the Arms Trade (CAAT) v the Information Commissioner and Ministry of Defence (EA/2006/0040)*, where the appellant had requested certain Memoranda of Understanding between the United Kingdom Government and the Kingdom of Saudi Arabia, the Information Tribunal commented on confidentiality under section 27. It indicated that section 27(3) provided the definition of 'confidential information' for the purposes of section 27(2). The Tribunal confirmed that there was a distinction between the confidentiality test which characterised section 27 of the Act, and the common law of confidence applied in section 41, since the concept of confidentiality is subject to different interpretations in different countries and it would therefore be unrealistic to expect a common understanding.
62. The Tribunal took the view that the test of confidentiality under section 27 should be judged against *'what would have been reasonable for the [other State – Saudi Arabia in that case] to have expected'*, its attitude to the subject matter of the requested information, and its particular characteristics, including *'the secretive nature of its society'* and the fact that the *'concept of freedom of information and transparency is generally alien to their culture'*. The Tribunal also stated that there was no justification in *'imposing on the [other State] our particular customs and principles as to transparency or democratic accountability'*, particularly since the exemption remained subject to an assessment of the public interest. In light of the Tribunal's finding, the Commissioner's view is that confidentiality should be judged against what would have been reasonable in the mind of the confider, taking into consideration their culture, principles and possible lack of awareness about the United Kingdom's Freedom of Information Act.

63. In this case there is little evidence of an express condition from the other State(s) that the information should be treated in confidence. However, information may also be confidential if there is an expectation on the part of the other State that it will be held in confidence by the public authority. It may be that the expectation of confidentiality was so great that it was not felt necessary to make it explicit. It is also of some relevance that the information was provided by the other State(s) twenty-five years before the United Kingdom Freedom of Information Act 2000 was enacted, with its concomitant expectation of greater disclosure.
64. The Commissioner has considered the withheld information, and the submissions made by the Cabinet Office in this case. Having regard to the information, and the circumstances in which they were provided thirty years ago, he is satisfied that there was an expectation of confidence on the part of the other State(s), and that the section 27(2) exemption is engaged.

Public interest test

65. Since section 27 is a qualified exemption it is subject to a public interest test under section (2)(2)(b) of the Act. This favours disclosure unless, *'in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information'*.
66. In relation to section 27, the Cabinet Office provided an assessment of the public interest test in its refusal notice of 31 October 2006. This was quoted above in respect of section 27(1)(a).
67. During the course of his investigation, the Cabinet Office made some further comments to the Commissioner regarding its assessment of the public interest test. In relation to section 27(2), these amounted to the claim that close and constructive relations with the other State(s) were necessary for the success of the Northern Ireland peace process, and that there was a risk of alienating other State(s) were the information to be disclosed. The Cabinet Office also expressed its view that the passage of time was not as significant in this case as it might be in others, because memories of historical events were still *'recent and vivid'*.
68. In favour of disclosing the information, the Cabinet Office identified the public interest in understanding the United Kingdom's conduct of its foreign relations, and the continuing public interest in the historical and current political situation in Northern Ireland. The Commissioner considers that there were further factors which favoured disclosure: promoting accountability and transparency of the decision-making process in a very significant area; and bringing to light information having a very significant impact on public health and safety.
69. On the other hand, the Commissioner notes that in the *CAAT* case mentioned above the Tribunal expressed its acceptance that the provisions in section 27(2) and (3) of the Act assumed an *'inherent disservice to the public interest in flouting international confidence'*. In that particular case disclosure of the requested information *'would have been seen as reneging on or flouting the basis upon which that information was obtained'*. The Tribunal applied significant weight to this in the context of international comity and relationships.

70. Having considered the information withheld by reference to section 27(2), the Commissioner accepts that disclosure would increase public confidence, promote decision makers' accountability to the public, and facilitate public understanding and debate. However, he acknowledges that these factors have to be balanced against the desirability of maintaining trust and confidence between governments, and the fact that, given the nature of the information, there would have been an expectation among the parties that their discussions would be treated in confidence. Since section 27(2) covers confidential information as a class the Commissioner regards the expectation of confidence as being of particular significance, and considers that the grounds for any breach of this confidentiality must therefore be strong.

71. Having considered all of these factors, the Commissioner takes the view that the balance of the public interest under section 27(2) lies in withholding the information to which section 27(2) was applied.

Exemption – sections 40 and 41

72. In its letter to the complainant dated 12 April 2007 the Cabinet Office introduced sections 40 and 41 of the Act as applying to one document. Since the Commissioner has concluded that this document is exempt from disclosure by virtue of section 27(2), he has not gone on to consider the application of sections 40 or 41.

Procedural Requirements

73. Section 1(1) of the Act states:

'Any person making a request for information to a Cabinet Office is entitled–

- a) to be informed in writing by the Cabinet Office 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.'*

74. In providing a 'neither confirm nor deny' response under sections 23(5) and 24(2) to the complainant, which it subsequently dropped during the Commissioner's investigation, the Cabinet Office breached section 1(1)(a) by failing to confirm that it held the requested information.

75. Since it also failed to confirm within the statutory time limit that it held the information, it breached section 10(1) of the Act, which requires that:

'Subject to subsections (2) and (3), a Cabinet Office must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.'

76. In failing to disclose information that the Commissioner has now determined should not have been withheld, the Cabinet Office breached section 1(1)(b).
77. It breached section 10(1) again by failing to disclose that information within the statutory time limit.
78. In addition, the Commissioner notes that the request was made on 4 September 2006, but the Cabinet Office did not provide its response until 31 October 2006, 42 working days later. The Cabinet Office therefore failed to comply with its duty to issue the refusal notice within the statutory time limit, which constitutes a breach of section 17(1) of the Act.
79. Part of the complainant's complaint to the Commissioner was that that the Cabinet Office had failed to assess the public interest adequately. The Commissioner agrees that the explanation of the public interest in the refusal notice (quoted above) was inadequate, owing to its brevity. This constituted a breach of 17(3)(b) of the Act.

The Decision

80. The Commissioner's decision is that the Cabinet Office properly withheld some of the requested information, but that it did not deal with the following elements of the request in accordance with the Act:
- it breached section 1(1)(a) by failing to confirm that it held requested information;
 - it breached section 1(1)(b) by failing to disclose information which should not have been withheld;
 - it breached section 10(1) by failing to confirm that it held information, and by failing to disclose information, within the statutory time limit;
 - it breached section 17(1) by failing to issue its refusal notice within the statutory time limit;
 - it breached section 17(3)(b) by failing to assess the public interest adequately.

The Cabinet Office is required to disclose some of the withheld information.

Steps Required

81. The Commissioner requires the Cabinet Office to take the following steps to ensure compliance with the Act:

- the Cabinet Office should disclose the information identified in the separate confidential Schedule which has been provided to it.

82. The Cabinet Office must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

83. 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.

Other matters

Internal review delay

84. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern. Section VI of the Code of Practice (provided for by section 45 of the Act) makes it desirable practice that a Cabinet Office should have a procedure in place for dealing with complaints about its handling of requests for information. 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. While no explicit timescale is laid down by the Act, the Commissioner has decided that 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 Cabinet Office should explain to the requester why more time is needed. Furthermore, in such cases the Commissioner expects a Cabinet Office to be able to demonstrate that it has commenced the review procedure promptly following receipt of the request for review and has actively worked on the review throughout that period.

85. In this case, the complainant's internal review request was made on 9 November 2006, and the Cabinet Office issued its internal review decision around 16 April 2007. It therefore took over five months to complete the review. The Commissioner does not believe that any exceptional circumstances existed in this case that 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.

Inadequate internal review

86. Part of the complainant's complaint to the Commissioner was that the arguments in his request for internal review had not been properly addressed by the Cabinet

Office. The Commissioner agrees that the internal review was inadequate. Paragraph 39 of the section 45 Code of Practice encourages authorities to provide a fair and thorough review of matters, including a fresh look at the application of exemptions:

'The complaints procedure should provide a fair and thorough review of handling issues and of decisions taken pursuant to the Act, including decisions taken about where the public interest lies in respect of exempt information. It should enable a fresh decision to be taken on a reconsideration of all the factors relevant to the issue. Complaints procedures should be as clear and simple as possible. They should encourage a prompt determination of the complaint.'

87. Although it led to disclosure of some further information, the outcome of the review in this case, as communicated to the complainant, was very limited and did not demonstrate that a full reconsideration of the factors had taken place. The Commissioner is also not convinced that it genuinely engaged with the complainant's points. In particular, its justification for continuing to withhold information was limited to the statement: *'Having fully reconsidered this case I have concluded that for most of the information in the file the exemptions in the Act have been properly applied and where appropriate the public interest has been properly judged'*. The decision also failed to provide any explanation as to why sections 40 and 41 were being introduced as exemptions applying to part of the information. The Commissioner therefore advises that the Cabinet Office ensures that future internal reviews are carried out in accordance with the guidelines in the section 45 Code of Practice and communicated in full.

Right of Appeal

88. 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 8th day of December 2009

Signed

**Steve Wood
Assistant 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 Cabinet Office is entitled –

- (a) to be informed in writing by the Cabinet Office 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 10(1) provides that –

‘Subject to subsections (2) and (3), a Cabinet Office must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.’

Section 17(1) provides that -

‘A Cabinet Office 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(2) states –

‘Where–

- (a) in relation to any request for information, a Cabinet Office is, as respects any information, relying on a claim-
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the Cabinet Office (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.'

Section 17(3) provides that -

'A Cabinet Office which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, 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 authority holds the information, or
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.'

Section 17(4) provides that -

'A Cabinet Office 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 17(5) provides that –

'A Cabinet Office which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.'

Section 23(1) provides that –

'Information held by a Cabinet Office is exempt information if it was directly or indirectly supplied to the Cabinet Office 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 Cabinet Office 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.’

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.’

Section 27(4) provides that –

‘The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a)-

- (a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1), or
- (b) would involve the disclosure of any information (whether or not already recorded) which is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.’

Section 27(5) provides that –

‘In this section-

‘international court’ means any international court which is not an international organisation and which is established-

- (a) by a resolution of an international organisation of which the United Kingdom is a member, or
- (b) by an international agreement to which the United Kingdom is a party;

'international organisation' means any international organisation whose members include any two or more States, or any organ of such an organisation;

'State' includes the government of any State and any organ of its government, and references to a State other than the United Kingdom include references to any territory outside the United Kingdom.'