

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 31 March 2009

Public Authority: The Foreign & Commonwealth Office
Address: Information Management Group
Information and Technology Directorate
Old Admiralty Building
London
SW1A 2PA

Summary

The complainant requested information from the Foreign and Commonwealth Office (FCO) concerning the identification of the voice heard in the video that shows the beheading of the British hostage, Kenneth Bigley. The FCO replied refusing to confirm or deny that it held information relevant to the request, as the duty in section 1(1) (a) of the Freedom of Information Act (the "Act") did not apply in this case by virtue of sections 23(5) and 24(2) of the Act.

The Commissioner upheld the refusal of the request, having concluded that FCO was entitled to rely on both sections of the Act and that, as regards section 24(2), in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighed the public interest in disclosing whether FCO held the information.

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. The complainant emailed the FCO on 4 July 2007 and requested the following information under the Act:

“Information concerning the identification of the voice, apparently of the killer, which is heard in the video which shows the beheading of the British hostage Kenneth Bigley”

The complainant asked for any information that was not covered by an absolute exemption and, if FCO was of the view that there may be further information of the kind requested but it was held by another public authority, he asked to be told as soon as possible. He said that he believed that the release of the information was required, in the public interest to:

- Uphold public confidence that the FCO collects information about those responsible for killing British people abroad;
- Provide assurance that the Government provides accurate information to the public about those responsible for killing Britons abroad; and
- Ensure that the authorities spend money correctly protecting British people in dangerous locations overseas

3. The FCO responded on 30 July 2007 saying that, in reliance on the exemptions under sections 23(5) and 24(2) of the Act, it would neither confirm nor deny whether it held any of the requested information. Section 23 is an absolute exemption. However, in respect of section 24 (2), the FCO maintained that the public interest in maintaining the exclusion of the duty to confirm or deny outweighed the public interest in confirming whether the FCO held the information, and that to give a statement of the reasons for this would involve the disclosure of information that would of itself be exempt information. The FCO stated that the reply should not be taken as necessarily indicating that any further information that would meet the complainant's request did or did not exist. The FCO did inform the complainant of his right to request a review.
4. On 6 August, the complainant wrote to the FCO requesting an internal review.
5. The FCO replied on 21 December, maintaining its decision to neither confirm nor deny that it held the information sought and informing the complainant of his right to complain to the Commissioner.

The Investigation

Scope of the case

6. On 31 December 2007, the complainant contacted the Commissioner to complain about the way in which his request had been handled. The complainant stated that he was not aware of any on-going investigation and that he was interested in any information that did not come from the security bodies.

Chronology

7. The Commissioner wrote to the FCO on 3 June 2008 seeking further clarification regarding the FCO's position, including the public interest test. He also requested an explanation as to why it took the FCO over four months to undertake the internal review.
8. The FCO replied on 3 July providing further clarification and explained that the delay in replying to the complainant's request for an internal review was due to the nature of the information requested.

Analysis

Exemption

9. Under section 1(1) (a) of the Act, any person making a request for information to a public authority is entitled to be informed whether it holds information of the description specified in the request. That duty to confirm or deny is, however, subject to the proviso in section 2(1) (b) that section 1(1) (a) does not apply where any provision in Part II of the Act confers an absolute exemption or where, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information.
10. The full text of Section 1(1) (a) can be found in the Legal Annex at the end of this Notice.

Sections 23 & 24

11. The FCO's explanation for its refusal to confirm or deny is that it maintains that the information sought by the complainant is exempt due to sections 23(5) and 24(2) of the Act.
12. Under section 23(1), information held by a public authority is exempt from disclosure if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in section 23(3), such as the Security Service, the Secret Intelligence Service and the Government Communications Headquarters (for the complete list, see the Legal Annex). Under section 23(5) the duty to confirm or deny that a public authority holds the requested information 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 section 23(3). Section 23 affords an absolute exemption.
13. The full text of Section 23 can be found in the Legal Annex at the end of this Notice.

14. As to section 24(2), this 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. This section is not subject to the requirement that the information in question must have been provided by, or relate to, one of the bodies listed in section 23(3). The exemption in section 24 is a qualified one and it is therefore necessary to consider whether, 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 FCO holds the information. Information (if it were held) concerning the death of Mr Bigley could relate to one of the bodies specified in section 23(3) or it could have been supplied by other bodies or individuals not listed in section 23(3).
15. The full text of Section 24 can be found in the Legal Annex at the end of this Notice
16. The Commissioner notes the complainant's comments that he is not aware of any on-going investigation into the death of Mr Bigley, and that he believes the person said to have killed Mr Bigley is dead. However, that does not mean there is no investigation in progress and there has been no public statement that the investigation has been terminated. In any event, no investigation need be underway for section 24(2) and/or 23 (5) to apply. The matter before the Commissioner is whether the FCO is entitled to rely on the exemptions in section 23, and in section 24(2), to neither confirm nor deny that it holds the information currently being sought by the complainant.
17. In considering this, the Commissioner is guided by a ruling of the Information Tribunal (*Baker v the Information Commissioner and the Cabinet Office (EA/2006/0045)*), concerning the Cabinet Office's refusal to confirm or deny that it held information about the number of MPs subject to telephone tapping or other surveillance. The Cabinet Office argued (paragraph 34) (and the Tribunal concurred) that "*it is important that any response under the Freedom of Information Act does not allow any deduction as to whether or not there is any involvement by a section 23 body. It is equally important to protect the fact of whether or not a.....body which is not listed in section 23 is involved and it is for that purpose the exemption at section 24(2) is claimed*".
18. The Cabinet Office went on to explain 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*". The Tribunal agreed with that conclusion.
19. The Commissioner recognises that the Baker case concerned a request for details of a specific act of surveillance, and the information requested here is analogous. The FCO gave more detail relating to the information requested 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 and, having regard to the reasoning of the Tribunal when combined with the reasons given by FCO for its reliance on the exemptions in sections 23(5) and 24(2), the Commissioner considers that these exemptions are likewise engaged in the present case and FCO was entitled to neither confirm nor deny holding the information requested.

20. However, Section 24 is a qualified exemption and the Commissioner needs to assess whether, 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 FCO holds the information.

Public interest test

21. In comments made to the Commissioner, the FCO contended that there was a clear public interest that the Government neither confirms nor denies that it holds the requested information. The FCO said that if it did confirm or deny (whichever was appropriate), it would effectively confirm that the Government has (or has not) managed to identify those responsible for Mr Bigley's death, thereby confirming to those responsible that they may, or may not, be under suspicion. Similarly, the FCO maintains that were it to confirm that it does hold information (if indeed that were to be an option) on this subject, it would indicate to those responsible that the Government holds some information on their activities.
22. On the other hand, as the complainant has argued, this is a high profile matter. There is a strong public interest in the public knowing whether an investigation into the murder of Mr Bigley is still on-going, whether it has been possible to identify the voice, and whether the alleged murderer is now dead.
23. It is, however, the Commissioner's view that there is a greater public interest in ensuring that those who might have committed this murder remain ignorant of any investigation past or present or future. In the Baker case discussed above, the Tribunal approved the view expressed by the Cabinet Office 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 the cause of that consistency, the Commissioner considers that, in all the circumstances of this case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether FCO holds the information.

The Decision

24. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act and that the public authority applied sections 23 (5) and 24(2) correctly.

Steps Required

25. The Commissioner requires no steps to be taken.

Right of Appeal

26. 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 31st day of March 2009

Signed

**Gerrard Tracey
Assistant Commissioner**

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

Legal Annex

General Right of Access

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.”

Effect of Exemptions

Section 2(1) provides that –

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

- (a) the provision confers absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information section 1(1) (a) does not apply.”

Refusal of Request

Section 17(1) provides that -

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

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 17(3) provides that -

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

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(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.”