

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 26 October 2009

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

Summary

The complainant asked to be provided with two category 'A' documents identified in the Report of the Inquiry into the export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions (the Scott Report), published in 1996. The Foreign and Commonwealth Office (FCO) refused the complainant's request, citing sections 41 and 38 of the Act as its reasons for withholding the two documents. The Commissioner finds that the requested information engages the exemption provided by section 41 and that the FCO was correct in its refusal of the request on that basis.

The Commissioner also finds that the FCO failed to comply with the procedural requirements of section 10(1) in failing to comply with the requirements of section 1(1)(a) within the time for compliance. The FCO also breached section 17(1) of the Act by its failure to issue a refusal notice within 20 working days. The public authority is not required to take any steps.

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.

Background

2. Matrix Churchill was a leading British machine tools manufacturer whose products were exported world-wide. Following the conclusion of the Gulf War of 1991 there was considerable interest in the extent to which British companies had been supplying materials to Saddam Hussein's regime in Iraq. In 1992 four Matrix

Churchill directors were put on trial for supplying equipment and knowledge to Iraq. The trial collapsed however when it was revealed that the government had advised the company about its sales. This led to Sir Richard Scott's inquiry and to the publication of his report in 1996. Much of the information considered by the Inquiry was not published in the Scott Report, including the identity of a 'whistleblower' who had alerted the Government to the company's order to supply lathes which could be used for munitions production.

The Request

3. The complainant wrote to the Foreign and Commonwealth Office ("FCO") on 3 January 2008 making a request for information which he had previously made to the Ministry of Justice and to the Cabinet Office. The complainant referred to volume III page 1325, G13.25 of the 'Report of the Inquiry into the export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions' and asked to be sent the following information:

"Paragraph 3 described the three categories into which the documents fell A, B, C. Category A consists of two documents that were deemed confidential and not revealed to the public. As a member of the public I would now like to see these two documents".

4. The FCO acknowledged the request on 9 January 2008 and the complainant was advised that the FCO aimed to respond to his request within 20 working days.
5. The FCO wrote to the complainant again on 5 February 2008 to inform him that it was unable to respond to his request within its previously stated timescale.
6. On 4 March 2008 the FCO formally responded to the complainant's request by confirming that it held two documents in Category A and that it was withholding these in reliance of section 41(1) (Information provided in confidence).
7. On 5 March 2008 the complainant asked the FCO to review its decision to withhold the information he had requested.
8. The FCO concluded its internal review and communicated its findings to the complainant on 8 April 2008. The review determined that section 41 of the Act had been correctly applied to the withheld information and also that section 38 (Health and safety) should be applied.

The Investigation

Scope of the case

9. On 15 May 2008 the complainant sent the Commissioner a letter entitled, 'This is a letter of claim'. The letter outlined the complainant's original grievance from

which his information requests flowed. The complainant was not specific about the basis for his complaint to the Commissioner.

10. The Commissioner wrote to the complainant on 12 June 2008 informing him that he would investigate whether the FCO had dealt with his request in accordance with the provisions of the Freedom of Information Act 2000.

Chronology

11. The Commissioner wrote to the FCO on 8 June 2009. He asked the FCO to send him the two 'category 'A' documents' withheld in relation to the complainant's initial request and to respond to a number of questions concerning its application of sections 38 and 41 to those documents.
12. The FCO sent the withheld information to the Commissioner on 7 July 2009 and its response to his enquiries on 30 July 2009.

Analysis

Exemptions

Section 41 – Information provided in confidence

13. The Commissioner has reviewed the withheld information provided by the FCO. He has established that the FCO holds two documents which were identified within Sir Richard Scott's Report as Category A documents and which therefore fall within the scope of the complainant's request.
14. Section 41(1) provides that information provided to the public authority in confidence is exempt. For this exemption to be engaged there are two conditions that must be satisfied. These conditions are:
 - 1) The information must have been provided to the public authority by a third party.
 - 2) The disclosure of this information must constitute an actionable breach of confidence.
15. The Commissioner accepts that both the documents satisfy the first condition. One document consists of information provided to the public authority directly from an un-related third party. The other document consists of internal governmental correspondence which repeats the information provided by the third party to the public authority.
16. In determining whether the second condition is satisfied the Commissioner's approach is to follow the test provided by the High Court in the case of *Coco v A N Clark (Engineers) Limited [1968] FSR 415*. Here Mr Justice Megarry said:

“In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself [...] must ‘have the necessary quality of confidence about it’. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it...”

17. The Commissioner recognises that *Coco v Clark* does not represent the only test of confidentiality, particularly in the light of the Information Tribunal’s comment in *Smart v The Information Commissioner*, and in the High Court’s judgment in *Home Office v BUAV & the Information Commissioner*, nevertheless he considers it an appropriate test in the context of this case. Therefore the Commissioner considers that an actionable breach of confidence would arise if:
- the information has the necessary quality of confidence;
 - the information was imparted in circumstances importing an obligation of confidence; and
 - the unauthorised use of the information given in confidence would result in a detriment to the confider (the element of detriment is not always necessary).
 - There is no defence to disclosure in the public interest.

Quality of confidence

18. The information sought by the complainant is characterised by Sir Richard Scott’s report as follows:

“ Category A consists of two documents; a document from a confidential informant who is a member of the public and whose personal security and livelihood may be jeopardised if his or her identity is disclosed and a second document which is also in Category B described below which discussed the first document and identified the informant.”

The information contained within the two documents, in addition to the substantive issues concerning Matrix Churchill, relates to the identity of the confidential informant and contains certain biographical details.

19. For this information to have the necessary quality of confidence it must not be otherwise accessible and be correctly characterised as being more than trivial. This follows the generally accepted principle that the law should not concern itself with trivialities. Information which is trivial will not have the necessary quality of confidence unless the person who provided that information had attached a great deal of emotional significance to it or would suffer distress if it was to be disclosed.
20. The Commissioner is satisfied that the requested information is not otherwise accessible. He accepts the FCO’s assurance that the documents or the information they contain has not been shared with other Whitehall Departments or made public to any degree.

21. The Commissioner also considers that the contents of the two documents, including the informant's identity and other biographical details, are not of a trivial nature. He therefore concludes that the first element of the test is satisfied.

Obligation of confidence

22. An obligation of confidence most obviously exists where there has been an explicit agreement between the confider and confidant at the time when the information was imparted. In this case there was no such agreement.
23. Notwithstanding the absence of an explicit obligation, an implicit obligation of confidence can also exist, particularly in circumstances where the nature of the imparted information makes it sufficiently clear that the confider would expect it to be treated in confidence.
24. Having reviewed the requested information, the Commissioner accepts that the requested information was imparted on the implied basis that it would be treated in confidence and is therefore satisfied that an obligation of confidence exists.

Detriment to the confider

25. Although detriment is not always necessary for section 41(1) to be engaged, in this case the Commissioner is satisfied that, as at the date of the request, there would have been a significant detriment to the informant if this information had been disclosed. In this regard he agrees with the substance of Sir Richard Scott's statement at paragraph 13 where he describes the detriment likely to be caused by any disclosure of the requested information. The Commissioner considers that the detriment as described in the 1996 report is equally relevant as at the date of this request.
26. The Commissioner is satisfied that disclosure of the requested information by the FCO would constitute an actionable breach of confidence unless there was a public interest defence to that disclosure.

Public interest defence

27. Section 41 is an absolute exemption and as such is not subject to the public interest test in the same way as the Act's qualified exemptions. Nevertheless the Commissioner must determine whether disclosure of the requested information would result in an actionable breach of confidence where there is a public interest defence to that breach.
28. Consideration of the public interest in relation to section 41(1) is not the same as consideration of the public interest test in relation to qualified exemptions. Where qualified exemptions are concerned the test is whether the public interest in maintaining the exemption outweighs the public interest in disclosure. In this case the Commissioner is required to determine whether the public interest in disclosing the information outweighs the public interest in maintaining the confidence.

29. The Commissioner has concluded that there was, and is, an obligation of confidence owed to the informant. He takes the view that this obligation should not be overridden lightly on public interest grounds and that there must be clear factors favouring disclosure which outweigh the public interest in the maintenance of confidence.
30. In this case it is the informant's identity and certain other biographical details which are being protected by the duty of confidence.
31. The Commissioner recognises that disclosure of the requested documents would serve the public interest by demonstrating openness on the part of the FCO, placing more, albeit limited, background information of the events in this matter into the public arena.
32. Nevertheless the Commissioner finds that there is a stronger public interest argument favouring withholding the information. He considers that it is in the public interest to encourage and protect informants when they come forward with information relating to matters of importance to the wider public interest. He believes that if the identity of informants was to be made public through the operation of this Act, it is likely that fewer informants would come forward for fear of jeopardising their careers and their personal security. In reaching this view the Commissioner notes and agrees with the statement on page 1326 of Sir Richard Scott's report, which he considers were still relevant as at the date of this request:

"5. With regard to the Documents in category A it is undoubtedly in the public interest that the identity of a person carrying out his duty to inform the authorities of suspected wrong doing and thereby jeopardising himself and his livelihood should as far as possible be kept confidential."
33. Additionally the Commissioner believes that the withheld information itself contains nothing which would support the public interest defence for making a disclosure. Such a disclosure would not expose corruption or wrong-doing. Rather, it would deter people in coming forward to expose these very things and thereby potentially allow their perpetrators to go unpunished.
34. In view of the reasons set out above the Commissioner believes that a valid defence to a breach of confidence could not be made in this case and therefore such a breach would be an actionable.
35. The Commissioner therefore concludes that the exemption provided by section 41(1) is maintained in relation to the two requested documents.

Section 38 – Health and safety

36. As the Commissioner finds that the requested information engages section 41(1) of the Act, it has not been necessary to consider the FCO's application of section 38.

Procedural Requirements

37. The Commissioner finds the FCO in breach of section 10(1) of the Act in failing to comply with the provisions of section 1(1)(a), the duty to confirm or deny whether information is held, promptly and in any event not later than the twentieth working day following the receipt of the request.

The Decision

38. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- The FCO correctly applied section 41 of the Act to the two documents requested by the complainant.
39. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- By failing to comply with the provisions of section 1(1)(a) within the time for compliance required by the Act, the Foreign and Commonwealth Office breached section 10(1).
 - Additionally, in failing to issue a refusal notice to issue a refusal notice within 20 working days, the FCO breached section 17(1) of the Act.

Steps Required

40. The Commissioner requires no steps to be taken.

Right of Appeal

41. 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 26th day of October 2009

Signed

**Lisa Adshead
Senior FOI Policy Manager**

**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.”

Time for Compliance

Section 10(1) provides that –

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

Health and safety.

Section 38(1) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to-

- (a) endanger the physical or mental health of any individual, or
- (b) endanger the safety of any individual.”

Section 38(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, have either of the effects mentioned in subsection (1).”

Information provided in confidence.

Section 41(1) provides that –

“Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

Section 41(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.”