

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 24 January 2011

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

Summary

The complainant submitted several requests to the Foreign and Commonwealth Office (FCO). In respect of the first of these requests, the FCO confirmed that it held information but argued the information that it held was exempt from disclosure on the basis of section 23(1) of the Act. In respect of the remaining requests, the FCO refused to confirm or deny whether it held any information on the basis of sections 23(5) and 24(2) of the Act. Having investigated the circumstances of these requests, the Commissioner is satisfied that the FCO complied with the requirements of the Act in refusing these requests in the manner in which it did. The Commissioner does not require the FCO to take any steps in order to ensure compliance with the Act.

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 originally sent the FCO twenty-two numbered requests on 20 May 2008. In submitting these requests the complainant acknowledged that given the number of requests the cost

limit within the Act may be reached. The complainant therefore asked for as many of the requests to be dealt with as possible and noted that they were listed in order of priority. (The complainant also noted that FCO officials had previously confirmed to him that they would inform him if the cost limit was reached and put in place arrangements for dealing with the remaining requests.)

3. The FCO subsequently provided the complainant with a response to the requests numbered 1 to 5 in September 2008, noting that the remainder of the requests could not be answered within the cost limit. The complainant then re-submitted the requests numbered 6 to 13 in October 2008.¹
4. The complainant subsequently re-submitted the latter third of his requests, i.e. those numbered 14 to 22, in a letter dated 2 April 2009. It is these requests which are the subject of this Notice.
5. The text of these requests was as follows:

'14. All information relating to any visits by UK intelligence officers to British resident Binyam Mohamed al-Habashi while he was held in Karachi in 2002.

15. All information passed between UK authorities and Moroccan authorities, during the detention of Binyam Mohamed al-Habashi in Morocco between 2002 and 2004.

16. All information received as a direct result of the US interrogation of Khalid Sheikh Mohammed, between March 2003 and 6 September 2006.

17. All information received as a direct result of the US interrogation of Abu Zubayday, between November 2002 and 6 September 2006.

18. All information received as a direct result of the US interrogation of Abd al-Rahim al Nashiri, between November 2002 and 6 September 2006.

19. All information received from US authorities concerning the so-called 'Heathrow airport plot' in February 2003, including source of the information received, from March 2002 to February 2003.

¹ The FCO's handling of the requests numbered 6 to 13 is the subject of a separate complaint to the Commissioner, reference number FS50262409.

20. All information received from US authorities concerning the so-called 'Chemical bomb plot' in April 2004, including the source of the information received, from April 2003 to April 2004.

21. All information received from US authorities concerning the so-called '2004 UK Urban Targets Plot' in mid-2004, including the source of the information received, from April 2003 to November 2004.

22. All information received from the US authorities concerning the alleged foiled attack on Canary Wharf in November 2004, including the source of any information received, from November 2003 to November 2004'.

6. The FCO responded on 2 June 2009. In relation to request 14 the FCO noted that it had been publically acknowledged that the Security Service interviewed Mr Mohamed in Pakistan in May 2002 and details of this were published in the Intelligence and Security Committee 2007 Report on Rendition. The FCO provided the complainant with a website link to the report in question. The FCO also explained that all further information relating to that meeting (and thus falling within the scope of request 14) was exempt from disclosure on the basis of section 23(1) of the Act.
7. In respect of request 15 the FCO explained that the duty to confirm or deny whether it held information did not apply by virtue of sections 23(5) and 24(2) of the Act. The FCO noted that section 23 conferred an absolute exemption and in respect of the public interest test for section 24 it had concluded that this favoured maintaining the exclusion to confirm or deny whether it held information. The FCO went on to explain that the reasons these exemptions applying was the following: in considering issues of counter terrorism in any particular case the FCO may take into account information supplied by the security bodies covered by section 23 of the Act. To confirm or deny whether this was the case would harm national security. If the FCO were to confirm or deny that information existed in one case, inferences could be drawn, for example on the level of the government's knowledge of an individual in comparison to others, which in turn could be exploited by those individuals who may seek to damage national security. The FCO emphasised that it was important that consistency was maintained. It was for these reasons that the public interest favoured neither confirming nor denying whether the information was held.
8. In respect of requests 16 to 22 the FCO also explained that it was refusing to confirm or deny whether information was held on the basis

of the exemptions contained at sections 23(5) and 24(2) of the Act. The FCO's reasoning for relying on these exemptions mirrored that set out in the preceding paragraph in relation the refusal of request 15.

9. The complainant contacted the FCO on 20 July 2009 in order to ask for an internal review. In relation to requests 14 and 15 the complainant asked the FCO to consider whether it was appropriate for it to refuse to confirm or deny whether the requested information was held given the high public profile of Mr Mohamed's case, and in particular, the public debate generated by the action in the High Court in 2008 and 2009 over access to information held by the FCO relating to Mr Mohamed's case.² The complainant noted that whilst section 23 creates an exemption which is not subject to the public interest test, it does not impose an obligation on the authority in question to withhold all information supplied by the security bodies listed in section 23(3). The complainant highlighted the Commissioner's guidance which noted that the section 23 exemption 'does not mean that information supplied by or relating to one of the security bodies can never be released'. In relation to the application of section 24, the complainant suggested that this had been applied in a blanket fashion and it was not clear that any real and specific threat to national security would arise, particularly given the significant amount of information regarding Britain's involvement in the case of Mr Mohamed which had already come to light through the highly publicised court proceedings. The complainant also suggested that the relevant prejudice in this case could not be said to be more than a mere possibility, which in his view was insufficient to engage the exemption. The complainant also highlighted a number of reasons why he believed that the FCO had failed to take into account the strong public interest in disclosing (if held) the information that he had requested.
10. In respect of requests 16 to 22 the complainant asked the FCO to consider whether it was appropriate for it to rely on section 23 to neither confirm nor deny whether the requested information was held given the public debate generated by the various allegations of UK involvement in US interrogation practices. In light of this need for transparency the complainant also argued that the public interest in respect of section 24 favoured disclosure of this information.
11. The FCO informed the complainant of the outcome of the internal review on 5 November 2009. The review upheld the application of the exemptions as set out in the refusal notice.

² As set out above, the FCO did not in fact refuse to confirm or deny whether it held any information falling within the scope of request 14.

The Investigation

Scope of the case

12. On 9 February 2010 the complainant contacted the Commissioner in order to complain about the way his requests for information had been handled. The complainant set out in detail why he disputed the FCO's basis for refusing his requests. These submissions effectively mirrored the arguments the complainant set out in his request for an internal review. The complainant also noted the FCO's failure to provide a timely internal review response.

Chronology

13. The Commissioner wrote to the FCO on 28 July 2010 in relation to this complaint and acknowledged that cases such as this which involved the application of sections 23 and 24 had the potential to raise particular security concerns. The Commissioner noted that as a consequence of such concerns when investigating similar cases in the past, representatives of his office had met with the public authority in question in order to discuss the circumstances surrounding the case rather than, or in addition to, exchanging written correspondence. In his letter of 28 July 2010 the Commissioner therefore suggested that a meeting between his staff and representatives of the FCO might be the most appropriate way to begin his investigation of this complaint.
14. Representatives of the Commissioner's office (namely the Deputy Commissioner and case officer responsible for dealing with this complaint) attended a meeting with representatives of the FCO on 25 August 2010 in order to discuss the pertinent issues relevant to these requests.

Analysis

Exemptions

15. Section 1(1) of the Act provides a right of access to information held by public authorities. It states that:

'Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.'

Section 23(1)

16. In respect of request 14 the FCO has confirmed that it held information falling within the scope of the request, thus fulfilling the obligation at section 1(1)(a). However it refused to provide the information, and thus fulfil the obligation at section 1(1)(b), on the basis of exemption contained at section 23(1). This exemption states 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).'

17. The full list of the bodies included in section 23(3) is included in the legal annex attached to this notice.

18. The Commissioner is fully satisfied that based upon the discussions his representatives had with the FCO at the meeting of 25 August 2010, section 23(1) does provide an exemption to withhold any information held by the FCO which falls within the scope of request 14.

Sections 23(5) and 24(2)

19. In respect of requests 15 to 22 the FCO has argued that it is exempt from the duty contained at section 1(1)(a) of the Act by virtue of the application of sections 23(5) and 24(2).

20. Section 23(5) states 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).'

21. Sections 24(1) and (2) state that:

'(1) 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.

(2) 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.'

22. Section 23 and 24 are obviously closely linked provisions and, as the above quotes suggest, are mutually exclusive. That is to say if information is exempt from disclosure on the basis of the exemption contained at section 23, it cannot also be exempt under section 24. Indeed, in such circumstances the exemption cannot be required for the purposes of safeguarding national security because it is already exempt by virtue of the provisions of the previous section.
23. However, in respect of the application of sections 23(5) and 24(2), i.e. when a public authority believes it is exempt from the duty contained at section 1(1)(a), it is accepted practice to rely on both provisions without specifically stating which of the two actually applies. Such an approach is calculated to avoid disclosure of the fact that a section 23 body is or isn't involved in the scenario described in a particular request and was approved by the Information Tribunal in *Baker v Information Commissioner and the Cabinet Office* (EA/2006/0045). Obviously for such an approach to be effective, public authorities have to consistently cite both exemptions when responding to any similar requests.
24. At the meeting with the FCO on 25 August 2010 the representatives of the Commissioner's office were provided with a detailed explanation to support its decision to cite both sections 23(5) and 24(2) as a basis to refuse requests 15 to 22. On the basis of this explanation the Commissioner is fully satisfied that the Act has been correctly relied upon in respect of each request and thus in the circumstances of this case the FCO was not required to comply with the requirements of section 1(1)(a) when responding to requests 15 to 22.
25. In the Commissioner's opinion to include any further details in this Decision Notice explaining the basis upon which he has reached this conclusion risks revealing the exemption that has in fact been cited by the FCO and/or revealing whether the FCO actually holds information falling within the scope of any of the requests numbered 15 to 22. The Commissioner recognises that the brevity of his reasoning may prove to be frustrating to the complainant, particularly in light of the specific arguments he has advanced in support of his complaint. However, in cases of this nature the Commissioner believes that this is an inevitable consequence of the required approach.

26. Furthermore, in setting out his conclusion in this way, the Commissioner wishes to emphasise that it should not be inferred that one exemption is more likely to have been relied upon than another, nor should any inference be made as to whether the FCO actually holds any information falling within the scope of any of the requests numbered 15 to 22.

Procedural Requirements

27. Section 17(1) requires that when a public authority refuses a request by relying on any of the exemptions contained in Part II of the Act it must provide the applicant with a refusal notice which cites the particular exemptions upon which it is seeking to rely. Such a notice must be issued in line with the time for compliance with section 10(1) of the Act, i.e. not later than the twentieth working day following the date of receipt of the request.
28. In this case the complainant submitted his requests on 2 April 2009 but the FCO did not issue its refusal notice until 2 June 2009 and therefore breached section 17(1) of the Act.

The Decision

29. 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:
- (i) In responding to request 14 the FCO was entitled to refuse to provide the information that it held on the basis of section 23(1) of the Act.
 - (ii) In responding to requests 15 to 22 the FCO was correct to cite both sections 23(5) and 24(2) as basis to refuse to comply with the duty contained at section 1(1)(a) of the Act.
30. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- (i) By failing to issue a refusal notice within 20 working days following the date of the request the FCO breached section 17(1) of the Act.

Steps Required

31. The Commissioner requires no steps to be taken.

Other matters

32. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
33. The Commissioner has issued guidance on the time limits on carrying out internal reviews under the Act.³ This guidance explains that in the Commissioner's opinion 20 working days constitutes a reasonable amount of time to conduct an internal review. In exceptional circumstances it may be reasonable to take longer but in no circumstances should the total time taken exceed 40 working days. In this case, the FCO received correspondence from the complainant on 20 July 2009 asking it to conduct an internal review of its handling of his requests. The FCO did not inform the complainant of the outcome of this review until 5 November 2009, significantly outside of the 40 working day guideline.
34. In the future when then the FCO conducts internal reviews the Commissioner expects it to adhere to the timelines set out in his guidance paper.

³ [Freedom of Information Good Practice Guidance No. 5](#)

Right of Appeal

35. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

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 sent.

Dated the 24th day of January 2011

Signed

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

Legal Annex

Freedom of Information Act 2000

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."

Section 1(2) provides that -

"Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14."

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."

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.”

Section 10(3) provides that –

“If, and to the extent that –

- (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
- (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.”

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

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 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.”

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.”