

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 March 2016

Public Authority: Cabinet Office

Address: 70 Whitehall

London

SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested information in files relating to Anthony Blunt. The Cabinet Office withheld this citing the exemptions at section 22(1) (Information intended for future publication), section 23(1) (Security bodies' information), section 40(2) (Unfair disclosure of personal data); and section 41(1) (Information provided in confidence) as its basis for doing so. It upheld this position at internal review.
2. The Commissioner's decision is that the Cabinet Office is entitled to rely on section 22(1) as its basis for withholding some of the information and section 23(1) as its basis for withholding the remainder.
3. No steps are required.

Request and response

4. On 13 March 2015, the complainant requested information of the following description:

"Please release 16/2230 and any other retained files on Anthony Blunt".
5. On 20 May 2015, the Cabinet Office responded. It explained that there were three files in total. Files PREM 16/2230 and PREM 19/120 were being prepared for transfer to The National Archives (TNA) with redactions. They were withholding the files on the basis of the following exemptions:

- Section 22(1) (Information intended for future publication)
 - Section 23(1) (Security bodies' information)
 - Section 40(2) (Unfair disclosure of personal data)
 - Section 41(1) (Information provided in confidence).
6. It said it was withholding file PREM 15/1911 on the basis that all the information was exempt from disclosure under section 23.
 7. The complainant requested an internal review on 20 May 2015.
 8. The Cabinet Office sent him the outcome of its internal review on 31 July 2015. It upheld its original decision.

Scope of the case

9. The complainant had been in correspondence with the Commissioner about this and other requests. On 12 August 2015, he provided the Commissioner with the information needed to progress his complaint about how the Cabinet Office handled this request.
10. The Commissioner has already issued a decision notice on PREM 16/2230 and the Commissioner drew this to the complainant's attention.¹ Section 23 was not in dispute in that earlier case and PREM 15/1911 was excluded from it. Having exchanged further correspondence with the complainant to establish the scope of his complaint, the Commissioner investigated the following:
 - Is the Cabinet Office entitled to rely on section 23 in relation to information in PREM 16/2230 to which it has been applied and to all the information in PREM 15/1911?
 - Is the Cabinet Office entitled to rely on sections 22, 23, 40 and 41 in relation to PREM 19/120?

¹ https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1043232/fs_50543674.pdf

Reasons for decision

Section 23 – Security bodies' information

11. Section 23(1) provides an exemption which 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).'

12. The Cabinet Office applied this exemption to all the information contained in file 15/1911. It also applied it to all the information in both PREM 16/2230² and PREM 19/120 to which section 22 had not been applied.

13. To successfully engage the exemption at section 23(1), a public authority needs only to demonstrate that the relevant information was *directly or indirectly* supplied to it by, or *relates to* any of the bodies listed at section 23(3).³ This means that if the requested information falls within this class it is absolutely exempt from disclosure under the FOIA. There is no requirement on the public authority to demonstrate that disclosure of the requested information would result in some sort of harm. This exemption is not subject to a balance of public interests test.

14. When investigating complaints about the application of section 23(1), the Commissioner will need to be satisfied that the information was in fact supplied by a security body or relates to such a body, if he is to find in favour of the public authority. In certain circumstances the Commissioner is able to be so satisfied without examining the withheld information himself. Where it appears likely that the information would engage the exemption, the Commissioner may accept a written assurance from the public authority provided by someone who, because of their seniority and responsibilities, has regular access to information relating to the security bodies and who has first-hand knowledge of the relationship between the public authority and those bodies.

² As noted above, the complainant did not challenge any other exemptions applied to PREM 16/2230. These are set out in the Commissioner's published decision FS50543674 (see Note 1). For the avoidance of doubt, the Commissioner's decision in relation to those other exemptions cited in respect of PREM 16/2230 remains unchanged.

³ A full list of the bodies detailed in section 23(3) is available here: <http://www.legislation.gov.uk/ukpga/2000/36/section/23>

Furthermore, they must themselves have reviewed the disputed information in the particular case.

15. The Cabinet Office provided the Commissioner with a letter of assurance relating to this case from a relevant senior official within the department which confirmed that he had examined the information withheld under section 23(1) and was satisfied that all of it relates to, or was supplied by, one of the bodies specified in section 23(3) of FOIA. This official occupies a senior position at the Cabinet Office and meets the Commissioner's criteria outlined above.
16. The complainant asked the Commissioner to consider section 64(2), which provides that section 23 is qualified by the public interest where the information in relation to which it was cited is a historical record, the threshold for which is currently being reduced from 30 years to 20, *and* it has been passed by the originating body to TNA.
17. Whilst the information here is a historical record due to its age, it has been retained by the Cabinet Office and not been passed to TNA. This means that section 64(2) does not have effect, so section 23(1) remains an absolute exemption in relation to the information in question.
18. The complainant was strongly of the view that the Cabinet Office's decision not to transfer the records to TNA was erroneous and not in accordance with the law. He further argued that the Commissioner has a duty to ensure that this error is corrected.
19. The Commissioner disagrees on both points.⁴ The general functions of the Commissioner are set out in section 47 of the FOIA. It includes the Commissioner's duty to assess a public authority's good practice. The Commissioner must also promote observance with the FOIA section 46 Code of Practice. Section 47(3) specifies that the Commissioner is only able to consider whether a public authority is following good practice with the consent of that public authority.
20. Paragraph 17 of the Section 46 Code of Practice ("Retention or Transfer of Public Records") envisages that "Some categories of records are covered by a standard authorisation by the Lord Chancellor (known as 'blanket retentions') which are reviewed every 10 years".⁵ It is this

⁴ <http://www.legislation.gov.uk/ukpga/2000/36/section/47>

⁵ <https://ico.org.uk/media/for-organisations/research-and-reports/1432475/foi-section-46-code-of-practice-1.pdf>

notion of “blanket retentions” which the complainant believes should be challenged in this case.

21. The Commissioner is not responsible for determining whether information has been properly held back under the Public Records Act 1958 (“PRA”). The Commissioner notes that under Section 3(4) of the PRA, the Lord Chancellor has made an instrument (the most recent dated 19 December 2011; expiring 31 December 2021), which allows documents to be retained in the department concerned beyond 30 years (now 28 years) because the transfer of the records to TNA ‘will create a real risk of prejudice to national security’.⁶
22. The oversight of this decision making is by the Advisory Council on National Records and Archives (“ACNRA”) and not the Commissioner.⁷
23. In this case, the Commissioner is satisfied that the records have been retained by the Cabinet Office and that the Cabinet Office is not deviating from the Section 46 Code of Practice in doing so where it has applied a “blanket retention” to that information.

Section 23 - Conclusion

24. It is widely known that Anthony Blunt had a connection with the security services.⁸ Accordingly, the Commissioner accepts that, in the circumstances of this case, the assurance he has received from the senior official at the Cabinet Office regarding the nature of the information withheld under section 23(1), coupled with Anthony Blunt’s clear link to at least one of the bodies listed in section 23(3), is sufficient for him to conclude that this information is exempt from disclosure on the basis of section 23(1) of FOIA. He acknowledges the complainant’s concerns but disagrees with him on the applicability of section 64(2) for the reasons set out above.

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/219904/security-intelligence-instrument.pdf and
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/219905/not-es-security-intelligence-instrument.pdf

⁷ <http://www.nationalarchives.gov.uk/advisorycouncil%5Cdefault.htm>

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http://news.bbc.co.uk/onthisday/hi/dates/stories/november/16/newsid_3907000/3907233.stm

25. This conclusion applies to all the information in file PREM 15/1911 and that information in PREM 16/2230 to which section 23 has been applied (see Note 2).
26. This conclusion also applies to all the information in PREM 19/120 which the Cabinet Office is not proposing to transfer to The National Archives ("TNA"). In the light of the Commissioner's conclusion on section 23 in respect of some information in PREM 19/120, he has not gone on to consider sections 40 and 41 which were also applied to parts of the same information in PREM 19/120.
27. The Cabinet Office has applied section 22 to that information in PREM 19/120 to which it had not applied section 23. It is proposing to transfer this section 22 information to TNA. The complainant disputes whether section 22 has been correctly applied to this information.

Section 22 – Information intended for future publication

28. Section 22 provides an exemption from the duty to disclose in relation to information that is intended for future publication. This exemption includes the caveats that the requested information must have been held with a view to publication at the time that the request was made, and it must be reasonable in the circumstances to withhold the information from disclosure until the date of the intended publication.
29. Consideration of section 22 is a two-stage process. First, for the exemption to be engaged the public authority must be able to demonstrate a clear intention to publish the requested information and the caveats referred to above must be satisfied. Secondly, this exemption is qualified by the public interest, which means that if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information must be disclosed.
30. Covering first whether the exemption is engaged, the first issue to consider is whether there was a settled intention on the part of the Cabinet Office to publish the information.
31. The Cabinet Office asserted that there was a settled intention to publish at the time of the request. That is, it intended to transfer the information to TNA. The Commissioner is satisfied that this constitutes publication for the purposes of section 22.
32. The Cabinet Office said that its records show that there was an intention in 2009 to make the transfer. Unfortunately, it did not provide the Commissioner with evidence of this, despite the Commissioner specifically requesting that it do so. However, in the circumstances of this case, the Commissioner is prepared to accept the Cabinet Office's assertion on this point. The Commissioner has had a number of cases of

a similar nature and is familiar with the Cabinet Office's arguments. Nevertheless, he remains disappointed at the lack of primary evidence from the Cabinet Office in this case.

33. The Cabinet Office explained that it had originally intended to make the transfer in September 2015. It acknowledged that there had been some slippage in the timetable because of the complexity of the information and its sensitivity.
34. It also provided general information about the process by which information is transferred to TNA. It said that the process was quite lengthy and involved consideration by the Lord Chancellor's Advisory Council which only met quarterly to consider and, where appropriate, to recommend the retention of information contained in documents considered for transfer to TNA.⁹ Opportunities to submit documents to the Panel are therefore somewhat limited. The Cabinet Office explained that the process in relation to the relevant documents was well advanced by the time the request came in and it did not consider it reasonable to interrupt the process for the benefit of one person when the purpose of the process was to make information available to all at TNA. It explained to the Commissioner, in a letter of 17 December 2015, that it intended to make the transfer in two to three months' time. As at the date of this notice, the file has yet to be transferred.¹⁰
35. The Commissioner accepts the Cabinet Office's position that there was a clear intention to publish at the time of the request. He also considers it reasonable to wait until the intended date of publication (given that it is relatively soon) rather than disrupt an ongoing process which is aimed at facilitating public access to this information. This process is an accepted practice in line with legislation. Information must be prepared prior to transfer to TNA and then prepared for publication at TNA. The Commissioner acknowledges that there has been some slippage in the proposed transfer date but he is not aware of any evidence of deliberate delay on the Cabinet Office's part. While the case of Anthony Blunt is likely to remain of considerable historical interest, the Commissioner does not see a pressing need to over-ride or expedite the normal process in the circumstances of this case.

⁹ <http://www.nationalarchives.gov.uk/advisorycouncil/meetings.htm>

¹⁰ <http://discovery.nationalarchives.gov.uk/details/r/C11522087>

36. He has therefore concluded that the information within PREM 19/120 intended for transfer to TNA is exempt from disclosure under section 22(1).

Balance of public interest test

37. By virtue of section 2, section 22(1) is subject to the public interest test. This means that the Cabinet Office can only rely on section 22(1) if the public interest in doing so outweighs the public interest in disclosure ahead of schedule, that is, as at the time of the request.

The complainant's arguments

38. While the complainant's arguments focussed on the application of section 23, he has made repeated reference to the age of the information and the seriousness of his researches into this topic. He has already published a well-received book on the life of Anthony Blunt's associate, Guy Burgess.

The Cabinet Office's arguments

39. The Cabinet Office acknowledged a public interest in the disclosure of information about events of historical interest including the case of Anthony Blunt. It acknowledged the benefits of openness to increase "public trust in and engagement with the government".
40. However, it argued that there was a greater public interest in maintaining the confidence of journalists, scholars and the public by ensuring the regular transfer of records to TNA. It said that work had begun on the transfer in 2009 and that given the impending transfer of the majority of the requested file to TNA there was no justification to make a disclosure of that information ahead of time to one person. It stressed the complexity of the process involved in preparing a file for transfer to TNA particularly where it is considering redactions (as is the case here, in respect of the section 23 material) and there is little wider public benefit in disrupting this process for one person.
41. It said that the majority of the file would be opened shortly and that the public interest factors in disclosure that it had identified would be satisfied then.

The Commissioner's position

42. The Commissioner's approach when considering the public interest in relation to this exemption is that this is more likely to favour disclosure where the planned date of the publication is far in the future, or where there is no firm indication of a likely date of publication.

43. In this case, the Commissioner is satisfied that there is a settled intention from 2009 to disclose a large portion of the requested file. In the circumstances, the Commissioner does not regard the timescale for intended publication as too remote from the date of the request. The remaining question is whether it was in the public interest for the disclosure of this information to have been delayed for about a year from the date of the request, or whether the public interest would have been better served by publication at the time of the request.
44. The Commissioner agrees with the complainant that there is a public interest in disclosure of the information he has requested. The public revelation that Anthony Blunt who had been Surveyor of the Queen's Pictures, had also been a spy for the Soviet Union, had shocked the country.¹¹ It raised many questions as to how his activities were undetected and, once detected, how he was able to obtain immunity from prosecution. This is not a matter of purely historical interest. There remains a public interest in knowing more about the circumstances in which Anthony Blunt gained a position in the Royal Household. Examination of papers relating to the Blunt case would inform the public about these matters, which still provoke debate today.

Section 22(1) - Conclusion

45. In the Commissioner's view, there was and is no pressing public interest in disclosing the relevant information in advance of the normal timescale. There was no particular public interest requirement for it to have been published during the interim period between the making of the request and anticipated publication at TNA. Preparation for transfer was already under way at the time of the request and the public interest would not be well served by interrupting that process in the circumstances. The transfer process itself supports the principle of public access to information generally. Therefore, the Commissioner concludes that public interest in maintaining the exemption at section 22 outweighs the public interest in earlier disclosure in response to the complainant's request.

¹¹ <http://www.telegraph.co.uk/news/uknews/5889879/Anthony-Blunt-confessions-of-spy-who-passed-secrets-to-Russia-during-the-war.html>

Right of appeal

46. 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,
LEICESTER,
LE1 8DJ

Tel: 0300 123 4504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

47. 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.
48. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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