

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 August 2016

Public Authority: The Cabinet Office
Address: 70 Whitehall
Room 405
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant submitted a request to the Cabinet Office for a copy of the legal advice referred to in the Prime Minister's announcement that a Royal Air Force remotely piloted aircraft had killed three people near Raqqa in Syria. The Cabinet Office sought to withhold the requested information on the basis of the exemptions contained at the following sections of FOIA: 23(1) (security bodies), 26(1) (defence), 27(1) (international relations), 35(1)(c) (Law Officers' advice), 40(2) (personal data) and 42(1) (legal professional privilege). The Commissioner has concluded the withheld information is exempt from disclosure on the basis of section 23(1) of FOIA.

Request and response

2. The complainant submitted the following request to the Cabinet Office on 8 September 2015:

'We write in reference to the Prime Minister's announcement in the House of Commons on 7 September 2015 that on 21 August 2015 a Royal Air Force remotely piloted aircraft killed three people near Raqqa in Syria, including British citizens Reyaad Khan and Ruhul Amin.

In that announcement, the Prime Minister stated that *'the action we took was entirely lawful. The Attorney General was consulted and was clear that there would be a clear legal basis for action in international law'* (Hansard, House of Commons, 7 September 2015, Col. 26)....

...We write to request that you publish the legal advice to which the Prime Minister referred in his announcement. While we appreciate that some of the specific facts to which the advice referred may be classified, we do not see that there is any reason why the advice, with appropriate redactions, cannot be published. Alternatively, we would ask that a summary of the advice and the legal reasoning contained within it ought be disclosed so that [we], and the public more generally, may consider the adequacy of the claimed lawful basis for this drone strike carried out by the United Kingdom, which killed three individuals.'

3. The Cabinet Office responded on 6 October 2015. It confirmed that it held the information requested however, it explained that it considered this information to be exempt from disclosure on the basis of the following exemptions within FOIA:
 - Section 23(1) – security bodies
 - Section 26(1) – defence
 - Section 27(1) – international relations
 - Section 35(1)(c) – Law Officers' advice
 - Section 40(2) – personal data
 - Section 42 – legal professional privilege
4. The complainant contacted the Cabinet Office on 25 January 2016 and asked it to conduct an internal review of this decision. In doing so she provided detailed submissions to support her request for a review.
5. The Cabinet Office informed her of the outcome of the review on 24 February 2016. The review upheld the application of the various exemptions set out in the refusal notice.

Scope of the case

6. The complainant contacted the Commissioner on 26 January 2016 to complain about the Cabinet Office's decision to withhold the information she had requested.¹

Reasons for decision

Section 23(1) – information supplied by or relating to bodies dealing with security matters

7. The Cabinet Office argued that all of the withheld information was exempt from disclosure on the basis of section 23(1) of FOIA.
8. Section 23(1) of FOIA 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).'
9. 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). This means that if the requested information falls within this class it is absolutely exempt from disclosure under the FOIA. This exemption is not subject to a balance of public interests test.
10. In her submissions to the Commissioner the complainant noted that it was unclear whether the Cabinet Office sought to rely on both limbs of the section 23 exemption, ie whether it was supplied to it by a section 23 body and/or whether it related to a section 23 body.
11. The complainant drew the Commissioner's attention to the relevant case law in relation to how this exemption should be interpreted. In particular she referred to the Upper Tribunal's interim decision on the Home Office v Information Commissioner in which the Tribunal confirmed that FOIA requires the decision maker to disaggregate the constituent elements of

¹ The complainant also submitted a request to the Attorney General's Office seeking the same information. This request is also the subject of a complaint to the Commissioner, see decision notice FS50607231.

the disputed information in order to determine whether some elements can be disclosed.² Therefore, even if part of the requested information is exempt by virtue of section 23, it still has to be determined whether the other parts of the withheld information are disclosable.

12. The complainant argued that to the extent that the parts of the requested legal advice in this case properly fall within the scope of section 23(1), she accepted that it was exempt from disclosure under FOIA. However, she argued that it was inherently unlikely that all of the information in the requested legal advice fell within the scope of this exemption. For example, she suggested that the Attorney General's summary of the relevant legal framework(s) or test(s) and/or the summary of his conclusions cannot all be said to be information which relates to or was indirectly or directly supplied by a security body.
13. 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 she is to find in favour of the public authority. In certain circumstances the Commissioner is able to be so satisfied without herself examining the withheld information. 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. Furthermore, they must themselves have reviewed the disputed information in the particular case.
14. In the circumstances of this case, the Cabinet Office provided the Commissioner with a letter of assurance from a relevant senior official at the Cabinet Office which confirmed that he had examined the withheld information and was satisfied that it contains either information received from one of the bodies listed in section 23(3) or is directly related to them. This official occupies a senior position at the Cabinet Office and meets the Commissioner's criteria outlined in paragraph 13.
15. Accordingly, the Commissioner accepts that, in the circumstances of this case, the assurance she has received from the senior official at the Cabinet Office regarding the nature of the withheld information is

² Home Office v (1) The Information Commissioner and (2) IC (Interim Decision) [2014] UKUT 0306 (AAC)

sufficient for her to conclude that the withheld information is exempt from disclosure on the basis of section 23(1) of FOIA.

16. In light of her findings in relation to section 23(1) the Commissioner has not considered the Cabinet Office's reliance on the other exemptions it cited in the refusal notice.

Right of appeal

17. 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 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

18. 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.
19. 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

Gerrard Tracey
Principal Adviser
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