

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 November 2016

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant submitted a request to the public authority for information relating to the expulsion of two Cuban diplomats from the United Kingdom in 1988. The public authority disclosed some of the information within the scope of the request during the course of the Commissioner's investigation.
2. The Commissioner has concluded that the public authority was entitled to withhold the remaining information in scope on the basis of the exemption at section 23(1) FOIA (information relating to security bodies). She however finds the public authority in breach of the procedural requirements in sections 17(1)(a) and (b) FOIA.
3. No steps are required.

Request and response

4. The complainant submitted a request for information to the public authority on 29 February 2016 in the following terms:

"I am writing to make an open government request for all the information to which I am entitled under the freedom of information act. In order to assist you with this request, I am outlining my query as specifically as possible. If however this request is too wide or too unclear, I would be grateful if you could contact me as I understand that under the act, you are required to advise and assist requesters.

I am looking for documents relating to the expulsion of two Cuban diplomats in London during September, 1988. The period I am looking for cover the period September - December, 1988.”

5. The public authority wrote to the complainant under the terms of section 10(3) FOIA on 29 March 2016. The provision in section 10(3) permits a public authority to extend the 20 working day limit for complying with a request specifically in order to consider the balance of the public interest. The public authority advised the complainant that it was withholding the information requested under section 27 FOIA, and also that the outcome of its assessment of the balance of the public interest would be issued to him by 28 April 2016.
6. The public authority issued a substantive response to the request on 21 April 2016. It confirmed that it held the information requested. This of course should have been made absolutely clear in its original response. It also advised the complainant that it considered the information held exempt from disclosure on the basis of the exemptions at sections 23(1) (information relating to security bodies), 27(1)(a) (prejudice to international relations) and 40(2) (personal data) FOIA. The Commissioner has commented further on the public authority's response in the procedural matters section further below.
7. The complainant requested an internal review on 28 April 2016. He disagreed with the public authority's refusal to disclose the information held within the scope of his request.
8. The public authority wrote back to the complainant on 4 May 2016 with details of the outcome of the internal review. The review upheld the decision to withhold the information in scope.

Scope of the case

9. The complainant contacted the Commissioner on 9 May 2016 in order to complain about the public authority's decision to withhold the information held within the scope of his request.
10. During the course of the Commissioner's investigation however, the public authority disclosed the information originally withheld on the basis of the exemption at section 27(1)(a) save a very small amount of information which it redacted from the disclosed document on the basis of the exemption at section 40(2). The complainant did not dispute the decision to withhold some information from the disclosed document but maintained that the public authority was not entitled to rely on the exemption at section 23(1).

11. The Commissioner has therefore considered whether the public authority was entitled to rely on the exemption at section 23(1).

Reasons for decision

Section 23(1)

12. Section 23 (1) states:

“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).”

13. In order to successfully engage the exemption, a public authority must be able to demonstrate that the relevant information was directly or indirectly supplied by, or relates to, any of the bodies listed at section 23(3) FOIA.

Complainant's submission

14. The complainant advised the Commissioner that during the course of her investigation, the Foreign and Commonwealth Office (FCO) had provided him with documents containing information concerning the subject matter of his request – ie – the expulsion of two Cuban diplomats from the United Kingdom. He provided the Commissioner with a copy of one of the documents the FCO released to him. He questioned (speculatively) why the document had been withheld by the public authority under section 23(1); arguing that the document, a letter from the former Prime Minister Margaret Thatcher to a Member of Parliament, should come under the responsibility of the public authority.

Public authority's submission

15. The public authority explained that the withheld information relates to a security body under section 23(3). It provided the Commissioner with a letter from a very senior official (SO) in the Cabinet Office with the experience and authority to validate the provenance of the withheld information. The SO assured the Commissioner that the withheld information directly relates to one of the bodies listed in section 23(3).

Commissioner's conclusions

16. The Commissioner has considered all of the submissions from both parties in respect of the application of this exemption. She accepts that in the circumstances of this case, the assurance provided by the SO with

regards to the application of the exemption and the additional explanation provided by the public authority are sufficient.

17. She generally cannot comment on withheld information for the obvious reason that she could inadvertently reveal information a public authority considers exempt from disclosure. In any event, the exemption is engaged irrespective of whether disclosure of the information to which it has been applied would be likely to cause any harm. It applies to a class of information. This means there is no requirement to show that disclosing the information it has been applied to could prejudice a specified interest.
18. The Commissioner therefore finds that the withheld information is exempt from disclosure on the basis of section 23(1) because it relates to one of the bodies listed in section 23(3).
19. Section 23(1) is an absolute exemption which means that there is no requirement to carry out a public interest test to determine whether or not the information withheld on that basis should have been disclosed in any event in the public interest.

Procedural matters

20. A public authority is required, by virtue of section 10(1) FOIA, to comply with a request for information within 20 working days. If the public authority considers that the information requested is exempt from disclosure then it must, by virtue of sections 17(1)(a) and (b) FOIA, inform the applicant as well as specify the exemption(s) it has engaged within 20 working days.
21. A public authority is however permitted to extend the 20 working day limit to comply with a request up to a reasonable time if it requires more time to determine whether or not the balance of the public interest lies in maintaining the exemption(s). It only permits extensions for further consideration of the public interest. The additional time cannot be used to determine whether the information requested is held and/or whether exemptions are engaged.
22. The Commissioner does not consider that the public authority's initial response to the request on 29 March 2016 satisfies the requirements in sections 17(1)(a) and (b). It did not make it absolutely clear within 20 working days that it held the information requested. It also did not specify the exemption under section 27 it considered was engaged as well as notify the complainant of the exemptions it subsequently considered were engaged within 20 working days.

23. The Commissioner therefore finds the public authority in breach of sections 17(1)(a) and (b) for failing to issue an adequate refusal notice to the complainant within 20 working days.

Right of appeal

24. 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

25. 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.
26. 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
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