

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 17 July 2017

**Public Authority:** The National Archives  
**Address:** Kew  
Richmond  
Surrey TW9 4DU

#### Decision (including any steps ordered)

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1. The complainant has requested from The National Archives (TNA) a closed extract with TNA's reference *PREM/3/139/11B/1*, from the open parent file *PREM/3/139/11B – Prime Minister's Office: Operational Correspondence and Papers. Explosives. Tube Alloys*. TNA has withheld this information under section 24(1) (national security), section 26(1)(a) (defence of the British Islands or any colony) and section 27(1)(relations between the United Kingdom and any other state). TNA considers the balance of the public interest favours maintaining these exemptions.
2. The Commissioner's decision is that the requested information engages section 24(1) of the FOIA and that the balance of the public interest favours maintaining this exemption.
3. The Commissioner has decided that TNA breached sections 17(1) and 17(3) of the FOIA because it failed to provide the complainant with adequate refusal notices.
4. The Commissioner does not require TNA to take any further steps to ensure compliance with the legislation.

## Request and response

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5. On 24 March 2016, the complainant wrote to TNA and requested information in the following terms:

*"Web reference: TNA160175299... I wish to see this item which is presently closed for 75 years. I would be grateful if you could review this memorandum and make it available."*

6. TNA acknowledged the request on 25 April 2016. On 10 May 2016, TNA wrote to the complainant and informed him that all of the information he had requested is covered by a qualified exemption under the FOIA. This required it to carry out a public interest test (PIT) to determine whether the information could be released. TNA said it expected that the PIT decision would be reached by 8 June 2016 but did not advise which exemption it considered was engaged.
7. On 8 June 2016, TNA wrote to the complainant and again advised that the information is covered by a qualified exemption which required it to carry out a PIT to determine whether the information could be released. At this point TNA said it expected to have reached a decision by 6 July 2016.
8. Up to 24 November 2016, TNA continued to email the complainant regularly to advise that it was still considering the PIT and revising the date by which it expected this decision to have been reached. It did not go on to provide him with the outcome of the PIT. At this stage TNA indicated that the FOIA exemptions being considered were section 26, section 27(1) and section 31 (law enforcement).

## Scope of the case

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9. The complainant contacted the Commissioner on 25 November 2016 to complain about the way his request for information had been handled.
10. Following correspondence with TNA in March 2017 it became evident that the PIT consideration was still in process. Although TNA had not provided an internal review to the complainant at that stage, the Commissioner made the decision to accept the complaint for investigation.
11. During the course of the Commissioner's investigation, the PIT consideration was finalised and TNA advised the Commissioner on 4 April 2017 that it intended to provide a final response to the complainant which confirmed its reliance on sections 24, 26 and 27 of

the FOIA. It had withdrawn its earlier reliance on section 31. TNA sent its final response to the complainant on 5 April 2017.

12. On 5 June 2017, TNA provided the complainant with an internal review. The review focussed on TNA's handling of the request, including the time taken with regard to the PIT, rather than its application of the three exemptions.
13. The Commissioner has first investigated TNA's application of section 24(1) to the withheld information and whether the public interest favours maintaining this exemption. If necessary she has been prepared to consider TNA's application of sections 26 and 27.
14. The Commissioner has also considered its refusal of the request and whether TNA breached section 17 in this regard.

## Reasons for decision

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### Section 24 – safeguarding national security

15. Section 1(1) of the FOIA says that anyone who requests information from a public authority is entitled (a) to be informed whether the authority holds the information and (b) to have the information communicated to him or her if it is held.
16. Section 24(1) of the FOIA says 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 23(1) concerns information that is exempt information if it was supplied to the public authority by specific bodies, listed under section 23(3).
17. The Commissioner's guidance on this exemption advises that national security includes more than the security of the UK, its military defence and its systems of government. It also involves co-operation with other states in combating international terrorism and guarding against actions targeted at other states which may impact on the UK and its people.
18. The guidance says that "*required*" is taken to mean that the use of the exemption is reasonably necessary.
19. Although there has to be a real possibility that the disclosure would undermine national security, the impact does not need to be direct or immediate.

20. In broad terms section 24(1) allows a public authority not to disclose information if it considers releasing the information would make the UK or its citizens more vulnerable to a national security threat.
21. Section 24 is subject to the public interest test.
22. TNA initially provided the Commissioner with a copy of the withheld information. However, during her investigation TNA contacted the Commissioner to advise that following a consultation it had with Ministry of Defence (MOD) about the request, MOD informed TNA that the extract in question had a higher security level than TNA had previously indicated to her. TNA said that the Cabinet Office had taken back the extract and its parent file for review. At the behest of TNA, and on behalf of MOD, the Commissioner confirmed to TNA on 12 May 2017 that she had destroyed the copy of the withheld information that she held.
23. TNA's submission and the Commissioner's consideration of it are discussed in the Confidential Annex to this notice, which has been provided to TNA.
24. Having considered TNA's submission, the Commissioner is satisfied that the requested information is exempt information under section 24(1) of the FOIA, as the exemption is reasonably necessary for the purposes of national security.
25. Turning to the balance of the public interest, the Commissioner has considered whether the public interest in safeguarding national security is outweighed by the public interest in disclosing the information. Clearly, the public interest in safeguarding national security carries very great weight. In order for the public interest to favour disclosure, it will be necessary for there to be public interest factors in favour of this that are of at least equally significant weight.
26. The complainant has not put forward a case for disclosure having significant public interest. While he may have a personal interest in the material, in the Commissioner's view any wider public interest that there may be in disclosing the information – such as openness in government – does not match the weight of the public interest in safeguarding national security. This means that her conclusion is that the public interest in maintaining the exemption provided by section 24(1) outweighs the public interest in disclosing the information.

## **Section 17 – refusing a request**

27. Section 10(1) of the FOIA says that public authorities should comply with section 1(1) as soon as possible and within 20 working days.
28. In its internal review to the complainant, TNA discussed how it had handled the complainant's request and acknowledged that it had been unable to handle the request within a reasonable time, on this occasion. The review is comprehensive and helpful, and has been included in full in the Appendix.
29. TNA has said that it occupies a unique position within the FOI Act legislation because it is required to consult with other government departments before processing requests for access to closed information held within the archives.
30. Under section 10(4) of the FOIA, TNA has been granted additional time to process such requests in order to allow for this obligatory consultation period. Currently this additional processing period constitutes another 10 working days that may, on occasion, expire before a statutory response is provided to the requester.
31. Section 17(1) of the FOIA says that if a public authority is relying on an exemption it must give the applicant a notice which: (a) states that fact; (b) specifies the exemption in question and (c) states why the exemption applies. It must issue the notice within 20 working days. As above however, the timeframe of 30 working days applies to TNA.
32. In this case, the complainant submitted his request on 24 March 2016 and TNA provided a response that informed the complainant that the information he had requested was being withheld, on 10 May 2016. This correspondence met the 30 working day requirement and can be categorised as having been a refusal notice. However, although in this notice TNA informed the complainant that exemptions applied to the information he had requested, and when it expected to have completed its PIT considerations, it did not specify which exemptions these were.
33. The Commissioner therefore finds that TNA's initial refusal notice breached section 17(1).
34. Under section 17(3) of the FOIA an authority must provide the applicant with a final decision on its public interest test considerations either in the notice under 17(1) or in a separate notice given at such time as is reasonable in the circumstances.

35. The Act does not set a specific limit on the amount of additional time the public authority can take to consider the test, only stating that the notice communicating its final decision must be provided within 'such time as is reasonable in the circumstances'.
36. The Commissioner's position is that a public authority should take no more than an additional 20 working days to consider the public interest, which means that the total time spent dealing with the request should not exceed 40 working days, or 50 working days in the case of TNA.
37. TNA provided the complainant with a final response, which included its PIT decision, on 5 April 2017, more than 12 months after receiving the request. In its internal review of 5 June 2017, TNA explained why it had taken a long time to provide the complainant with its PIT decision on this occasion, and acknowledged that it had not been able to provide this within a reasonable time.
38. The Commissioner appreciates the complicated consultation process TNA needed to go through to reach a decision on the PIT, which it described in its review. She also notes that TNA did provide the complainant with regular updates. However, the Commissioner considers that the length of time TNA took to consider the PIT in this case was nonetheless unreasonable in the circumstances and a breach of section 17(3).

## **Right of appeal**

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39. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

40. 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.
41. 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**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**

## Appendix

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Internal Review: **F0049128**

5 June 2017

Dear [COMPLAINANT],

**Review of complaint about access decision under the Freedom of Information (FOI) Act 2000:  
Appeal by [Complainant] against The National Archives' decision (F0045332) that the  
requested information is exempt from disclosure under the FOI Act.**

The National Archives has now concluded this review and whilst I am satisfied that you were updated at every stage in regards to the processes used, this case did take an unreasonable amount of time and The National Archives apologises for this.

### **Handling**

The purpose of an internal review is to consider whether the requirements of the Act have been fulfilled. The scope of the review is defined by [Part VI of the Code of Practice under s45 of the Act](#).

In accordance with The National Archives' FOI appeals procedure your complaint, received 12 May 2017, was passed to me as FOI Manager to review. I reviewed the way your original request was handled to satisfy myself that all correct processes were applied.

### **Timeline**

24 March 2016

Your Freedom of Information request (**F0045332**) was forwarded to the FOI Centre and identified as a request for access to closed information:

**PREM 3/139/11B/1 – closed extract; 5 pages**

**From open parent file PREM 3/139/11B – Prime Minister's Office: Operational Correspondence and Papers. Explosives. Tube Alloys**

25 April 2016

The National Archives informed you that we would be making use of our extra 10 working days allowed under FOIA section 10, because of our duty to consult with other government departments: <http://www.legislation.gov.uk/uksi/2004/3364/contents/made>

10 May; 8 June; 5 July 2016

The National Archives informed you that we were required to conduct a public interest test (PIT) in relation to your request as the information within the closed extract was covered by a qualified exemption under the Freedom of Information Act 2000.

We thanked you for your continued patience and explained how you could get in touch with any queries on the case.

3 August 2016

The National Archives informed you that the PIT was still being considered and that unfortunately a decision had not yet been reached.

We confirmed that the exemptions being considered were:



**Section 26 – Defence of the British Islands or any colony**  
**Section 27(1) – Relations between the United Kingdom and any other state**  
**Section 31 – Prevention or detection of crime**

1 September; 29 September; 27 October; 24 November; 22 December 2016

The National Archives informed you that the PIT was still being considered and that unfortunately a decision had not yet been reached.

We apologised that a final decision had not yet been made and any inconvenience caused by the lengthy delay, and assured you that the case was being progressed.

20 January 2017

The National Archives informed you that the PIT was still being considered and that unfortunately a decision had not yet been reached.

We informed you that previously the exemption at section 31 was being considered, and that it had now been decided that this exemption does not apply to the material. We therefore confirmed that the exemptions being considered were:

**Section 26 – Defence of the British Islands or any colony**  
**Section 27(1) – Relations between the United Kingdom and any other state**

17 February 2017

The National Archives informed you that the PIT was still being considered and that unfortunately a decision had not yet been reached.

20 March 2017

The National Archives informed you that the PIT was still being considered and that unfortunately a decision had not yet been reached.

We provided you with a detailed explanation as to how the PIT process works in order to help illustrate the various processes being undertaken to facilitate your request and apologised that we were unable to provide you with a final response at this time.

5 April 2017

The National Archives sent a final response for your request. We explained that, following the outcome of the public interest test, **PREM 3/139/11B/1** would remain closed under the following exemptions:

**Section 24(1) – National Security**  
**Section 26 – Defence of the British Islands or any colony**  
**Section 27(1) – Relations between the United Kingdom and any other state**

Following consultation with Cabinet Office, the transferring department, we explained that the section 24(1) exemption applied to the extract alongside the two other exemptions previously identified.

Arguments for and against the release of the information considered in the Public Interest Test were outlined to you.

**Substance of the review**

To clarify at the outset, the scope of this review is limited to the handling of your Freedom of Information request (**F0045332**). The conclusion of this internal review will be sent to the ICO for consideration and inclusion within the decision notice for their investigation into The National Archives' decision to withhold the information within extract **PREM 3/139/11B/1**.

**Timeliness**

In assessing our initial review and handling, I have seen that we were unable to respond to your original requests within the allocated time of 20 days as outlined in the Freedom of Information Act. Within the Act, you have two rights of access:

Under section 1 of the Freedom of Information Act, 2000 you have two rights of access:

- To be informed if we hold the information you have requested
- And to have that information communicated to you

In meeting this obligation an authority must inform the requester of any decision (section 17 refusal notice) within the timeframes set out in section 10 (time limits) of the Act. The National Archives occupies a unique position within the FOI Act legislation, as we are required to consult with other government departments before processing requests for access to closed information held within the archives. In relation to the time we are given for compliance, section 10(4) of FOI Act specifies that The National Archives be granted additional time to process such requests in order to allow for this obligatory consultation period. Currently this additional processing period constitutes another 10 working days that may, on occasion, expire before a statutory response be provided to a requester. In the handling of your request (**F0045332**) we notified you of this allowance in our response 25 April 2016, which was delivered within the specified 20 working days.

Further to the above, where a qualified exemption is applied we have to carry out a public interest test to consider whether the balance of the public interest lies in favour of maintaining the exemption or in favour of releasing the information (section 15 of the FOI Act). The PIT process is a rigorous one for historical files at The National Archives as it requires independent evaluation. This occurs through consultation and approval of the Secretary of State's Advisory Council representatives, who consider the use of the qualified exemption via what we refer to as an FOI Panel.

Panels are comprised of three members of the Council who are sent 10-15 applications, asked to consider these cases and the balance of the public interest. The PIT considerations are provided to the Panel by the department who transferred the file, not by The National Archives. The Panel may then ask questions about the application of the exemption and/or query any aspect of the case with the transferring department and The National Archives. The Panel's advice about whether the exemption is justified is finally communicated to the FOI Assessor handling the case, who then informs the requester in writing.

For two of the applied exemptions (sections 26(1)(a) and 24(1)) it was necessary to complete a separate public interest test to be sent to the representative of the Secretary of State at Department for Culture Media & Sport for agreement.

In this case, your request was received by the FOI Centre in March 2016 and a final response was sent to you in April 2017. This meant that the case was exceptionally lengthy, and the delay was caused both by procedures at The National Archives and at the transferring department, Cabinet Office. In order to explain where the delays occurred in your specific case, it is necessary to outline the lifecycle of cases allocated to the FOI Centre including all of the processes to be completed before a final response is confirmed and sent out:

- a) Request received
- b) Request allocated to an FOI Assessor
- c) Files ordered and reviewed by the FOI Assessor
- d) Review completed by the FOI Assessor outlining a recommendation to either keep record closed, open with redactions or open in full
- e) Review sent to the relevant government departments (in this case the Cabinet Office and Ministry of Defence) and other relevant stakeholders
- f) Liaison with government departments over findings and final decision from them following The National Archives' recommendation
- g) PIT completed by the government department
- h) Completed PIT added to the waiting list of cases to be sent to a Panel
- i) A Panel reviews the case, asking questions when necessary, and agrees a decision
- j) The National Archives confirm the final decision to the requester

In this instance, there was a delay at each of the above stages which cumulated into a severe delay overall.

There were two particularly significant delays, which were at stage d) and stages f–g). I have outlined the reasons behind both of these two main delays below.

24 March – 10 October 2016: stage d)

The National Archives acknowledge that there was a significant delay between when request **F0045332** was received on 24 March 2016 and when the PIT form was sent to the Ministry of Defence on 10 October 2016. The main reason behind this was the mitigating circumstances of resource pressure and a high volume of cases, which meant that the FOI Assessor working on this case was juggling a substantially larger workload than is usually expected. The relevant departments and other invested parties were not contacted with a review of the file until 9 June 2016 as the Assessor was dealing with a significant backlog of cases. Following this, there was some complex consultation surrounding the material within extract **PREM 3/139/11B/1** with Cabinet Office, Ministry of Defence and other relevant stakeholders. Due to the nature of the content, a number of exemptions were considered during this time and different departments inputted on public interest test arguments for each exemption.

I have noted that you were not informed of the exemptions under consideration until 3 August 2016. It is our standard practice to inform requesters of the exemptions under consideration as soon as the request is extended for a public interest test at the point the exemption has been identified. Unfortunately in this case, this information was missed and The National Archives sincerely apologises for not following correct FOI procedures at this stage.

The public interest form was sent to the Ministry of Defence to complete the arguments for section 26(1)(a) on 10 October 2016. Unfortunately this delay – whilst a reflection of the mitigating circumstances the FOI team at the National Archives were experiencing during the summer of 2016 – added four months to an already long-running case.

17 November 2016 – 15 March 2017: stages f–g)

The completed PIT form for the exemption at section 26(1)(a) was returned on 3 November 2016. On 17 November 2016 the PIT form was sent to the transferring department for confirmation of the exemptions, the necessary details for the application of section 24(1) and completion of the public interest arguments for section 27(1).

The National Archives chased the completion of the PIT form on 17 January 2017 and escalated the case on 3 March 2017. It was chased by the Head of the FOI Centre on 15 March 2017 in order to ensure this case could make the next panel. The panel review cases based on when the original FOI request was received so that the longest-running and oldest cases go first. This meant that once the PIT for **PREM 3/139/11B/1** was completed, it was prioritised and sent to the next possible panel.

Following the finalised PIT on 15 March, The National Archives were able to send the separate public interest test for sections 26(1)(a) and 24(1) to the representative for the Secretary of State at Department for Culture Media & Sport and receive agreement to the application of these exemptions to the extract.

A final small delay occurred during the panel process, as further information was required by the panel in order to reach a decision. Following the necessary consultation with the transferring department, a response to the panel was sent on 27 March and panel agreement was provided on 4 April. This enabled us to send the final response on 5 April 2017.

Taken at face value – and by ICO guidance (<https://ico.org.uk/media/1165/time-for-compliance-foia-guidance.pdf>) – this case took an unreasonable amount of time and The National Archives apologises for this. I do, however, hope that the explanation of how delays cumulated throughout the lifecycle of the assessment process was helpful and can explain some of the causes of your complaint.

The National Archives was fully aware of the high case load and backlog of older cases throughout the summer of 2016. In order to reduce the length of time it was taking to clear the backlog of cases and comply with the timeframes set out in Section 10 of the Act, we put a number of emergency measures in place to alleviate the pressure to resources. For example, we worked with other, better-resourced business units within the organisation to relieve the FOI Centre of some administration duties. This allowed the FOI Centre to be able to focus on casework and improving efficiencies. We also worked with volunteers from other business areas to offer their time for up to one day a week, allowing vital assistance with casework and communication with requesters.

Unfortunately despite these attempts to handle the mitigating circumstances, we were unable to handle this case within a reasonable time and the additional delay from the departments added to an already very long-running case.

To conclude, whilst we did not provide clear information at every stage in regards to the exemptions that were being applied, I am satisfied that you were kept regularly up-to-date on the progress of the case. The case did take an unreasonable amount of time and The National Archives regrets that we weren't able to provide you with the appropriate level of service required to efficiently address your FOI request. We have worked hard to improve on our performance in summer 2016 and we have been successful – this is reflected in the Cabinet Office statistics for 2016:

<https://www.gov.uk/government/statistics/freedom-of-information-statistics-annual-2016>

### **Conclusion**

Due to particularly complicated consultation with multiple departments, this was unfortunately a very exceptional case and we did not meet our usual standards of providing clear information about the exemptions being applied. Despite delays, I am content that the final response provided you with accurate details of all the exemptions which apply to the extract and the public interest arguments for each.

The National Archives' internal review process has now been completed.

You have the right to ask the Information Commissioner, Wycliffe House, Water Lane, Wilmslow, Cheshire SK9 5AF, to investigate any aspect of your appeal.