

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 July 2018

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

Decision (including any steps ordered)

1. The complainant has requested information in certain PREM files and a CAB file which has not been transferred to the National Archive. The Cabinet Office refused to provide this and cited sections 23 (security services), 37 (correspondence with the Sovereign), 40 (unfair disclosure of personal data) and 41 (information provided in confidence). It upheld this at internal review although during the Commissioner's investigation, it withdrew reliance on section 41.
2. The Commissioner's decision is that the Cabinet Office is entitled to rely on sections 23, 37(1)(a) and 40(2) as a basis for withholding the requested information.
3. No steps are required.

Request and response

4. On 13 July 2016, the complainant requested information of the following description:

"I am requesting release under FOIA of the following documents:

PREM 19/2470
PREM 19/2474
PREM 19/2504
PREM 19/2514
PREM 19/2516
CAB 164/1902."

5. On 11 August 2016, the Cabinet Office responded. It refused to provide the requested information. It cited the following exemptions as its basis for doing so:
 - Section 23 – Security services information.
 - Section 37 – Communications with her Majesty; honours.
 - Section 40 – Unfair disclosure of personal data.
 - Section 41 – Information provided in confidence.
6. The complainant requested an internal review on 11 August 2016. The Cabinet Office sent him the outcome of its internal review on 13 September 2016. It upheld its original position.

Scope of the case

7. The complainant first contacted the Commissioner on 14 September 2016 to complain about the way his request for information had been handled. However, he did not supply all the necessary documentation until 1 December 2016 (the Commissioner asked him to supply it earlier that day).
8. The Commissioner has therefore considered whether the Cabinet Office is entitled to rely on the exemptions it has cited as its basis for withholding the requested information.
9. On 15 March 2017, the Cabinet Office made a redacted disclosure to the complainant from file PREM 19/2470. The complainant confirmed on 27 April 2017 that he wished to pursue access to any information in this file which remained withheld.
10. On 15 February 2018, following a telephone conversation with it, the Commissioner wrote to the Cabinet Office to express disagreement with its use of section 41. The Commissioner considered it appropriate to do this in the circumstances of this case. It is not her normal practice to do so. The Cabinet Office had sought to use section 41 to protect the space in which confidential discussions were held even if the information in question had not been given to it. On 19 March 2018, the Cabinet Office provided additional arguments. Specifically, it withdrew reliance on section 41 (information provided in confidence).

Reasons for decision

11. The Cabinet Office explained that some of the withheld information was exempt from disclosure on the basis of section 23(1). This 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 the following information within the scope of the request:

PREM 19/2474

PREM 19/2504

PREM 19/2514

PREM 19/2516

CAB 164/1902.

13. According to the website of The National Archive ("TNA") these files are entitled as follows:

PREM 19/2474 - ROYAL FAMILY. Visits by the Queen to security services

PREM 19/2504 - SECURITY. Security of the Secret Service: Chapman Pincher's book 'Their Trade is Treachery'; Peter Wright case; part 5

PREM 19/2514 - SECURITY. Allegations against the Security Service

PREM 19/2516 - SECURITY. Lord and Lady Rothschild

CAB 164/1902 - 'Inside Intelligence', a book by Anthony Cavendish

14. 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).¹ This means that if the requested information falls within this class it is absolutely exempt from disclosure under FOIA. This exemption is not subject to a balance of public interests test.

¹ A list of the bodies included in section 23(3) of FOIA is available here: <http://www.legislation.gov.uk/ukpga/2000/36/section/23>

15. 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.
16. However, in the particular circumstances of this case the Commissioner considered it appropriate to inspect the information contained within the relevant files.
17. The Commissioner has seen the withheld information in question and is satisfied that it relates to one of the bodies listed in section 23(3). She therefore considers that the section 23(1) exemption is engaged. In addition, in light of the recent Upper Tribunal judgment in *Corderoy and Ahmed v (1) ICO (2) A-G (3) CO* [2017] UKUT 495 (AAC), the Commissioner also considered the issue of disaggregation and does not consider the information within the relevant files to which section 23 has been applied can be disaggregated on the principles in *Corderoy*.
18. In reaching this view, she has also considered the submissions made by the Cabinet Office with respect to the content of the withheld information.
19. The complainant has argued that the information in question should already have been transferred to TNA. Information which is considered exempt under section 23 is subject to a public interest test if it has been transferred to TNA.
20. The Commissioner would observe that information has not been transferred to TNA and therefore, while the complainant may wish it were not the case, the public interest test cannot apply. Public authorities are not obliged to transfer information to TNA simply because of the age it has reached where they have approval from a Secretary of State². Information it holds still remains subject to the requirements of FOIA.
21. Having concluded that the information in the files listed at paragraph 12 was exempt under section 23 for the reasons set out above, the Commissioner considered whether the Cabinet Office was entitled to withhold the information in the following file under one or more of the other exemptions it had cited:

² <https://ico.org.uk/media/for-organisations/documents/1624142/section-46-code-of-practice-records-management-foia-and-eir.pdf> (see paragraph 64)

PREM 19/2470 (the information in this file which remains withheld).

22. As noted above, the Cabinet Office disclosed some information from this file. It is the remainder which falls to be considered

Section 37(1)(a) – Communications with Her Majesty

23. Section 37(1)(a) of FOIA states that information is exempt if it relates to communications with the Sovereign.
24. The exemption is absolute (as a result of its amendment by the Constitutional Reform and Governance Act 2010). It does not require a consideration of the balance of the public interest once it is engaged.
25. The Commissioner has seen the information to which this exemption has been applied and is satisfied that it relates to communications with the Sovereign. As such, she is satisfied that it is exempt under section 37(1)(a).

Section 40 – Unfair disclosure of personal data

26. Personal data is information that is about a living identifiable individual and is biographically significant about them. If disclosure to the world (FOIA disclosure) would contravene any of the data protection principles of the Data Protection Act 1998 ("DPA98"), then that information is exempt from disclosure under section 40 of the FOIA. It is important to note that this request predates the implementation of the General Data Protection Regulation ("GDPR") and the Data Protection Act 2018 ("DPA18"). The applicable data protection legislation to be considered for this request is therefore DPA98.
27. Without revealing the withheld information to which this information has been applied, the Commissioner is satisfied that it is personal data. In reaching this view, she has had regard for her own guidance.³
28. In determining whether it would breach the first principle of the DPA (the most relevant) to disclose the personal data in question, the Commissioner has considered the legitimate interests of the individuals whose personal data it is. She has also considered whether, despite that legitimate interest, there is a more compelling legitimate interest in making that personal data public and whether disclosure is necessary to serve that more compelling interest.

³ <https://ico.org.uk/media/for-organisations/documents/1213/personal-information-section-40-and-regulation-13-foia-and-eir-guidance.pdf>

29. When considering this point, she has looked at the reasonable expectations of the individuals and whether the information relates to their public or private role. As above, she has also had regard to her own guidance on section 40.
30. In her view, it would be wholly outside the reasonable expectations of the individuals in question to disclose their personal data and that the compelling and legitimate interest in transparency has already been served by the disclosure of much of the other information in the file. Where any personal data relates to a person's public role, the Commissioner is satisfied that the individual is sufficiently junior to warrant a greater level of protection of their personal data.
31. In conclusion, the information to which the Cabinet Office has applied section 40 has, in the Commissioner's view, been properly exempted under that exemption.

Right of appeal

32. 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

33. 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.
34. 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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