

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 January 2019

Public Authority: Northern Ireland Office
Address: 1 Horse Guards Road
London
SW1A 2HQ
United Kingdom

Decision (including any steps ordered)

1. The complainant requested a specific file from the Northern Ireland Office (the NIO). The NIO confirmed that it held the requested information but refused to disclose it in reliance on the exemptions at section 23(1) and section 24(1) of the FOIA.
2. The Commissioner's decision is that the NIO was entitled to rely on the exemptions at sections 23(1) and 24(1). She does not require any further steps to be taken.

Request and response

3. On 15 November 2017 the complainant requested file CJ4/6052, titled 'Provisional IRA intentions and activities in Great Britain', from the NIO.
4. On 15 December 2017 the NIO confirmed that it held the requested information. The NIO advised that the requested information "may be" subject to a qualified exemption, and that it required further time to consider the public interest test.
5. The NIO provided a substantive refusal notice on 18 January 2018, citing the exemptions at sections 23(1) and 24(1) of the FOIA. This refusal was upheld following an internal review.

Scope of the case

6. The complainant contacted the Commissioner on 11 April 2018 to complain about the way his request for information had been handled. The complainant asked the Commissioner to investigate whether the exemptions cited by the NIO had been properly applied.
7. The withheld information in this case is listed by The National Archive (TNA) as a public record. It is not held by TNA because it has been retained by the NIO under section 3.4 of the Public Records Act 1958.¹ This means that the information is not publicly available, and the NIO remains responsible for considering requests for it.

Reasons for decision

Sections 23(1) and 24(1)

8. Section 23(1) of the FOIA 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 engage the exemption, 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 security bodies listed at section 23(3) of the FOIA. The authority is not required to specify which body (or bodies) is relevant.
10. The test as to whether a disclosure would relate to a security body is decided on the civil standard of proof, that is, the balance of probabilities. In other words, if it is more likely than not that the disclosure would relate to a security body then exemption would be engaged.
11. Section 24(1) states 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'.

¹ <http://discovery.nationalarchives.gov.uk/details/r/C16527518>

12. FOIA does not define the term 'national security'. However the Commissioner is mindful of the Information Tribunal's comments in *Norman Baker v the Information Commissioner and the Cabinet Office*.² In *Baker* the Information Tribunal referred to a House of Lords case, *Secretary of State for the Home Department v Rehman*,³ concerning whether the risk posed by a foreign national provided grounds for his deportation. The Tribunal summarised the Lords' observations as follows:

- "national security" means the security of the United Kingdom and its people;
- the interests of national security are not limited to actions by an individual which are targeted at the UK, its system of government or its people;
- the protection of democracy and the legal and constitutional systems of the state are part of national security as well as military defence;
- action against a foreign state may be capable indirectly of affecting the security of the UK; and
- reciprocal co-operation between the UK and other states in combating international terrorism is capable of promoting the United Kingdom's national security.

13. The exemptions provided by sections 23(1) and 24(1) are mutually exclusive, which means they cannot be applied to the same information. However, the Commissioner recognises that this may present a problem if a public authority does not want to reveal whether a section 23 security body is involved in an issue. To overcome this problem the Commissioner will allow public authorities to cite both exemptions 'in the alternative' when necessary. This means that although only one of the two exemptions can actually be engaged, the public authority may refer to both exemptions in its refusal notice.

² Appeal no EA/2006/0045

³ [2001] UKHL 47

14. As the Commissioner's guidance on this issue explains,⁴ a decision notice which upholds the public authority's position in such a case will not allude to which exemption has actually been engaged. It will simply find that the Commissioner is satisfied that one of the two exemptions cited is engaged and that, if the exemption is section 24(1), the public interest favours withholding the information.
15. In this case the complainant argued to the Commissioner that the NIO had applied section 23(1) in a blanket manner, without due regard to the need to disaggregate information within the file which did not fall within its scope. With regard to section 24(1), the complainant disputed that national security concerns could prevent the disclosure of information dating from the 1970s.
16. The Commissioner has inspected the withheld information, ie the file titled 'Provisional IRA intentions and activities in Great Britain', which dates from 1975. The Commissioner considers that the subject matter of the request – the Provisional IRA, a terrorist organisation – is likely to be relevant to the work of the security bodies designated at section 23(3) of the FOIA. Consequently the Commissioner accepts that there is clearly potential for some or all of the withheld information to relate to the involvement of one or more of the security bodies.
17. The Commissioner acknowledges the complainant's concern regarding disaggregation. She is also mindful that she cannot comment in detail on the nature of the withheld information, and must avoid any indication as to whether or not section 23(1) is engaged in its own right. The Commissioner would stress that section 23(1) will only be engaged in respect of information that falls within the description set out in the exemption itself. To the extent that the information held does not fall within the scope of section 23(1) it has been considered separately under section 24(1). The Commissioner is therefore satisfied that the NIO has not applied section 23(1) in a blanket manner in this case.
18. Regarding section 24(1), the Commissioner also accepts that information relating to a terrorist organisation such as the Provisional IRA would clearly be relevant to safeguarding national security. Disclosure of the withheld information would inform the public, and by extension, terrorist organisations, as to the level of interest taken by the police and other bodies at the time. It may also expose the intelligence held, or lack of intelligence held, and how such

⁴ https://ico.org.uk/media/for-organisations/documents/1196/how_sections_23_and_24_interact_foi.pdf

intelligence was obtained. This would be likely to assist terrorist organisations in evading detection, even taking into account the age of the information.

19. Again the Commissioner acknowledges the complainant's argument that the withheld information dates from the 1970s. In the context of section 24(1) and national security the Commissioner interprets 'required for the purposes of' to mean 'reasonably necessary'. Although there has to be a real possibility that the disclosure of requested information would undermine national security, the impact does not need to be direct or immediate. The Commissioner acknowledges that information from the 1970s may still be relevant to current or live issues, and the age of the information does not prevent its disclosure from undermining national security.
20. For the reasons set out above the Commissioner is satisfied that the withheld information either falls within the scope of the exemption provided by section 23(1) of the FOIA or the exemption provided by section 24(1) of the FOIA. The Commissioner cannot provide further detail of her reasoning without compromising the content of the withheld information itself or by revealing which of the two exemptions is actually engaged.
21. Section 23(1) provides an absolute exemption, but section 24(1) is qualified. Therefore the Commissioner is required to consider whether, if section 24(1) is engaged, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest test

22. The NIO acknowledged the general public interest in openness in government because this increases public trust in and engagement with government. Although this is a general public interest argument, the Commissioner is of the opinion that openness and transparency are always relevant considerations. It is important to recognise this, even if a public authority considers that there is a stronger public interest in favour of maintaining the exemption.
23. The Commissioner also considers that disclosure of the withheld information would inform the public as to how the activities of a terrorist organisation were identified and analysed. There is a legitimate public interest in assuring the public that threats to national security are effectively considered by the relevant bodies.

24. In this case the NIO identified a significant public interest in safeguarding national security. The NIO argued that the content and nature of the withheld information was sufficiently sensitive that its disclosure into the public domain would damage national security.
25. The Commissioner's established position, supported by case law, is that section 24(1) contains an inherently strong public interest argument in favour of maintaining the exemption, given that it is only engaged if it is required to safeguard national security. The Commissioner acknowledges that the exemption is qualified, therefore Parliament considered it possible that the public interest may lie in disclosing information even though its disclosure may harm national security. However the Commissioner is of the opinion that such cases will be exceptional.
26. Having inspected the withheld information in this case the Commissioner is not satisfied that it demonstrates an exceptional case, and in any event the public interest in disclosure is limited. The Commissioner does not consider that the potential benefit in terms of informing the public, is sufficiently strong to counter the harm that would be caused by disclosure of the withheld information. Therefore the Commissioner finds that in the circumstances of this case the public interest in maintaining the exemption at section 24(1) outweighs the public interest in favour of disclosure.

Procedural requirements

Section 10(3): extension of the time for compliance

Section 17(3): extension of time to consider a qualified exemption

27. Section 10 of the FOIA states that, in most cases, a public authority is required to respond to a request for information within 20 working days (this is known as the time for compliance). Section 10(3) provides an extension of the time for compliance where the public authority is considering a qualified exemption. For this reason section 10(3) must be read in the context of section 17, which sets out how a public authority should refuse a request.
28. Section 17(1) provides that if a public authority wishes to rely on any exemption it must issue a refusal notice within the statutory time for compliance (ie 20 working days). That refusal notice must state which exemption (or exemptions) has been applied, and why it applies.

29. Section 17(3) further provides that, where a public authority has applied a qualified exemption, it may take additional time to consider the public interest test in respect of that qualified exemption. However, the authority must still issue a refusal notice within 20 working days that complies with section 17(1). The additional time may not be used to consider whether an exemption applies.
30. In this case the NIO responded to the complainant on 15 December 2017, 21 working days after the request was received. The NIO confirmed that it held the requested information, but advised that it may be subject to a qualified exemption. This response did not comply with section 17(1) since it did not cite any exemption, nor did it explain why any exemptions applied were engaged.
31. The NIO did issue a further refusal notice on 18 January 2018 which cited sections 23(1) and 24(1), and explained how they were engaged (or could be, since they were cited in the alternative). This met the requirement of section 17(1), but it ought to have been provided to the complainant within the 20 day time for compliance. The NIO would then have been entitled to take further time to consider the public interest in respect of section 24(1).
32. The Commissioner appreciates that the complainant suffered no detriment as a result of the NIO's failure to issue a valid refusal notice within 20 working days. However it is important that public authorities comply with the technical provisions of the FOIA, and the statutory timescales. Compliance with procedural requirements is arguably just as important as being able to apply an exemption or the public interest test, since it assures the applicant that the authority understands its obligations under the FOIA.

Right of appeal

26. 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

27. 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.
28. 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

Sarah O’Cathain
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SK9 5AF