

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 July 2019

Public Authority: The Foreign and Commonwealth Office

Address: King Charles Street

London

SW1A 2AH

Decision (including any steps ordered)

1. The complainant submitted a request to the Foreign and Commonwealth Office (FCO) seeking access to the file 'FO 1030/270' which concerned post World War Two Germany. The FCO sought to withhold the information on the basis of section 23(1) (security bodies) or, in the alternative section 24(1) (national security). The Commissioner has concluded that the withheld information is exempt from disclosure on the basis of section 23(1) or section 24(1) of FOIA.

Request and response

2. The complainant submitted the following request to the FCO on 29 April 2018:

'Last year I conducted research at the National Archives at Kew regarding denazification in the British Zone of Occupied Germany following the end of the Second World War. I am returning to London next week and would like to consult the following file:

FO 1030/270

According to the catalogue description, "This record is closed and retained by Foreign and Commonwealth Office." I would like to receive permission to review this file, if possible. May I have permission to review this file?'

3. The FCO responded on 30 May 2018 and confirmed that it held information falling within the scope of the request but it considered this

to be exempt from disclosure on the basis of sections 24 (national security) and 27 (international relations) of FOIA and it needed additional time to consider the balance of the public interest test.

4. The FCO provided the complainant with a substantive response to his request on 27 June 2018. It explained that it was no longer seeking to rely on section 27 of FOIA to withhold the information. However, the FCO explained that it had concluded that the requested information was exempt from disclosure on the basis of either section 23(1) (security bodies) or section 24(1) of FOIA. With regard to the balance of the public interest under section 24, the FCO explained that *'We acknowledge the public interest in openness and transparency, but after reviewing the material we consider that there is a stronger public interest in protecting national security.'*¹
5. The complainant contacted the FCO on 2 July 2018 and asked it to conduct an internal review of this response. In particular, he asked that the FCO conduct a public interest test in respect of its reliance on section 24(1) of FOIA.
6. The FCO informed him of the outcome of the internal review on 26 September 2018. The FCO explained that it had concluded that some of the information falling within the scope of the request could be disclosed and that this would be provided to the complainant. However, the FCO explained that the remaining information was exempt from disclosure on the basis of either section 23(1) or section 24(1) of FOIA. The FCO also explained that the balance of the public interest was fully considered for the reasons set out in its letter of 27 June 2008.

Scope of the case

7. The complainant contacted the Commissioner on 10 November 2018 to complain about the way his request for information had been handled. More specifically he was dissatisfied with the FCO's decision to withhold the remaining information falling within the scope of his request. Furthermore, he argued that the FCO's refusal notice did not explain

¹ Citing these two exemptions in the alternative means that although only one exemption is engaged the other one is also cited so as to disguise which exemption is in fact being relied upon. This approach may be necessary in instances where citing one exemption would in itself be harmful. Further information on this issue is contained on page 9 of the following guidance issued by the Commissioner: https://ico.org.uk/media/fororganisations/documents/1196/how_sections_23_and_24_interact_foi.pdf

why the two exemptions were considered to potentially apply to the withheld information, nor in the case of section 24(1), did it explain why the public interest favoured maintaining that exemption.

Reasons for decision

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

Section 24 – national security

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).²

10. 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'.

11. FOIA does not define the term 'national security'. However in *Norman Baker v the Information Commissioner and the Cabinet Office* (EA/2006/0045 4 April 2007) the Information Tribunal was guided by a House of Lords case, *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, concerning whether the risk posed by a foreign national provided grounds for his deportation. The Information Tribunal summarised the Lords' observations as follows:

- 'national security' means the security of the United Kingdom and its people;

² 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>

- 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.
12. Furthermore, in this context 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.
 13. As is clear from the wording of section 24(1), the exemptions provided by sections 23(1) and 24(1) are mutually exclusive. This means they cannot be applied to the same request.
 14. However, the Commissioner recognises that the fact that section 24(1) can only be applied to information that is not protected by section 23(1) can 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, as referred to above at footnote 1, 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.
 15. As the Commissioner's guidance on this issue explains, a decision notice which upholds the public authority's position will not allude to which exemption has actually been engaged. It will simply say 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.
 16. Based on submissions provided to her by the FCO during the course of her investigation, the Commissioner is satisfied that the withheld information either falls within the scope of the exemption provided by section 23(1) of FOIA or falls within the scope of the exemption provided

by section 24(1) of FOIA, and that if the exemption engaged is section 24(1) then the public interest favours maintaining the exemption.

17. The Commissioner cannot elaborate on her rationale behind this finding without compromising the content of the withheld information itself or by revealing which of these two exemptions is actually engaged.

The FCO's refusal notice

18. Section 17(1) of FOIA requires a public authority to issue a requester with a refusal notice citing which exemption(s) it is seeking to rely and, unless it is not otherwise apparent, an explanation as to why that exemption(s) applies.
19. As explained above, the complainant was concerned with the lack of detail contained within the FCO's refusal notice, in particular the fact that it did not explain why the exemptions were considered to apply, and in the case of section 24(1), why the public interest favoured maintaining that exemption.
20. The Commissioner sought clarification from the FCO as to the lack of detail contained within the refusal notice and whether it was seeking to rely on the provisions of section 17(4) of FOIA. This subsection disapples the obligation on public authorities to provide such explanations where to do so would itself involve the disclosure of exempt information.
21. The FCO confirmed that it was indeed seeking to rely on the provisions of section 17(4) in the circumstances of this case and provided the Commissioner with an explanation as to why this was the case. Based on the FCO's submissions to her the Commissioner is satisfied that the FCO has a legitimate basis for doing so and that confirming which exemption applies, and indeed providing any further details as to why the FCO considered the public interest to favour maintaining section 24(1) – if indeed that is the exemption which is being relied on in this case - would reveal information that is itself exempt from disclosure.

Right of appeal

22. 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@justice.gov.uk

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

23. 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.
24. 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

Jonathan Slee
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