

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 March 2020

Public Authority: Foreign and Commonwealth Office
Address: King Charles Street
London
SW1A 2AH

Decision (including any steps ordered)

1. The complainant submitted requests to the Foreign and Commonwealth Office (FCO) seeking two files concerning Guy Burgess. The FCO sought to withhold the requested files on the basis of section 23(1) (security bodies) or, in the alternative, section 24(1) (national security) of FOIA. The Commissioner has concluded that the files are exempt from disclosure on the basis of section 23(1) or section 24(1) of FOIA.
2. The Commissioner does not require any steps to be taken.

Request and response

3. The complainant submitted a request to the FCO on 14 April 2019 seeking a copy of file FCO 158/15 entitled 'Guy Burgess's private papers: C D W O'Neill'. He subsequently also sought a copy of the file FCO 158/16 entitled 'Guy Burgess: contacts with other government officials'.
4. The FCO responded on 15 May 2019. In relation to the request for the file FCO 158/15 the FCO confirmed that it held this information but it considered it to be exempt from disclosure on the basis of section 24 (national security) of FOIA. In relation to the file FCO 158/16 the FCO

confirmed that it held the information requested but it considered this to be exempt from disclosure on the basis of sections 23(1) (security bodies) or 24(1) of FOIA. The FCO explained that it was seeking to rely on these two exemptions 'in the alternative'.¹

5. Mr Lownie contacted the FCO on 16 May 2019 and asked for an internal review in relation to the decision to withhold both files.
6. The FCO informed him of the outcome of the internal review on 15 July 2019. The review concluded that requested information could not be disclosed as it '*remains withheld as it falls under either Section 23 or Section 23 and Section 24 in the alternative as described in our response*'.

Scope of the case

7. The complainant contacted the Commissioner on 5 August 2019 in order to complain about the FCO's decision to withhold the information he had requested. He argued that it was unbelievable that with so much information previously released about the Guy Burgess and Donald Maclean case almost 70 years since they fled to Russia that section 24 would apply. He also argued that there was a historical and public interest in this information. Consequently, the complainant argued that the FCO needed to make the case that the exemptions applied and in respect of section 24(1) that the public interest favoured maintaining the exemption.
8. During the course of the Commissioner's investigation the FCO clarified that with regard to the request for file FCO 158/15 it was seeking to rely on sections 23(1) and 24(1) in the alternative, ie the same position it had adopted for the file FCO 158/16 as set out in its correspondence with the complainant.

¹ Citing the sections 23(1) and 24(1) of FOIA 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

Reasons for decision

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

Section 24 – national security

9. 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).'

10. 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

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'.

12. 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;
- 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;

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 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. Furthermore, in this context the Commissioner interprets 'required for the purpose 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.
 14. 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.
 15. 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 or not 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.
 16. 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.
 17. Based on submissions provided to her by the FCO during the course of her investigation, the Commissioner is satisfied that the files FCO 158/15 and FCO 158/16 either fall within the scope of the exemption provided by section 23(1) of FOIA or fall 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.
 18. 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.

Other matters

19. As part of his submissions to the Commissioner the complainant noted that the file FCO 158/15 is retained by the FCO – as opposed to being transferred to The National Archives (TNA) – under a Lord Chancellor’s instrument, LCI 135, which was signed on 2 May 2019, ie after the date of his request. He suggested that this was strange because a TNA file from 1971 (ASSI 44/490) is retained under LCI 135 signed on 24 November 1998. The complainant explained that nor did he consider file FCO 158/15 to be covered by LCI 106.
20. Furthermore, the complainant noted that file FCO 158/16 was being retained under section 3(4) of the Public Records Act 1958 as opposed to under a LCI. He noted that if this file were at TNA then section 23(1) of FOIA would be qualified.³
21. In the Commissioner’s view the basis upon which the FCO has sought to withhold a record from transfer to TNA is not a matter which falls for her to consider under section 50 of FOIA. Furthermore, section 23(1) is indeed a qualified exemption when applied to historical records at TNA, but the records in question were still held by the FCO and therefore it remained an absolute exemption when applied by the FCO to these files.

³ Section 64(2) provides that section 23(1) is a qualified exemption when applied to any information contained in a historical record held at TNA.

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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