

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 28 April 2022

**Public Authority:** Foreign, Commonwealth & Development Office

**Address:** King Charles Street

London

SW1A 2AH

#### **Decision (including any steps ordered)**

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1. The complainant submitted a request to the Foreign and Commonwealth Office (FCO, now the Foreign, Commonwealth & Development Office, FCDO) seeking the retained parts of a particular file, the remainder of which had been transferred to The National Archives. The FCO withheld the requested information 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 withheld information is exempt from disclosure on the basis of section 23(1) or section 24(1) of FOIA.
2. No steps are required.

## Request and response

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3. The complainant submitted the following request to the FCO<sup>1</sup> on 19 August 2020:

'I made a FOI request to the UKNA [The National Archives] for access to retained items making up part of FCO 168/654/1. As you can see from [name of TNA official's] response below part of my request has been acceded to. I have now also submitted a 'subject access request' to the UKNA for material to do with myself that forms part of the file.

[Name of TNA official] also informed me that the FCO was still retaining some documents that form part of the above-mentioned file under Section 3(4) of the Public Records Act 1958...I hereby request a review of this information in the hope that the FCO would consider releasing it to the UK National Archives or to me directly.'<sup>2</sup>

4. The FCO responded on 28 August 2020 and confirmed that it held the requested information but considered it to be exempt from disclosure on the basis of section 23(1) (security bodies) **or** section 24(1) (national security) of FOIA. The FCDO explained that it was seeking to rely on these exemptions 'in the alternative'.<sup>3</sup>
5. The complainant contacted the FCDO on 7 September 2020 and asked it to conduct an internal review of this refusal. They explained that they disagreed with the application of the exemptions; wanted the FCDO to provide them with an explanation of why the exemptions applied; and suggested that the FCDO should consider voluntarily disclosing the information to them outside of FOIA.
6. The FCDO informed the complainant of the outcome of the internal review on 27 November 2020. The review upheld the application of the

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<sup>1</sup> The FCO merged with the Department for International Development on 2 September 2020 to form the FCDO. This decision notice is therefore served on the FCDO but refers to the FCO where it was the body that took certain actions in relation to the request.

<sup>2</sup> As part of their request the complainant explained how they were related to individuals named in the file. The Commissioner has not included this wording from the request in the decision notice in order to ensure that the complainant is not identified.

<sup>3</sup> The Commissioner's guidance to these exemptions explains why he allows sections 23(1) and 24(1) of FOIA to be cited in the alternative. See paragraphs 25 to 27 of this document: [https://ico.org.uk/media/for-organisations/documents/1196/how\\_sections\\_23\\_and\\_24\\_interact\\_foi.pdf](https://ico.org.uk/media/for-organisations/documents/1196/how_sections_23_and_24_interact_foi.pdf)

exemptions cited and explained that due to section 17(4) of FOIA it was not obliged to explain why it considered the exemptions to apply<sup>4</sup>.

## Scope of the case

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7. The complainant contacted the Commissioner on 28 November 2020 in order to complain about the FCDO's refusal to provide them with the retained parts of file FCO 168/654/1. The complainant's grounds of appeal were as follows:

'I cannot conceive that 58 year old documents on such a relatively minor matter could conceivably affect national security in 2020 - particularly where I am certain that all parties except myself are deceased...However, if some small part of the document(s) needed to be redacted I might be willing to accept that as a compromise.'

## Reasons for decision

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### **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).<sup>5</sup>

10. Section 24(1) states that:

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<sup>4</sup> In the cases where it would undermine the purpose of claiming the exemption to explain why the request has been refused, section 17(4) of FOIA allows a public authority to leave this detail out of the refusal notice.

<sup>5</sup> 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>

'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;
  - 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 or not a section 23 security body is involved in an issue. To overcome this problem, as referred to above at footnote 3, 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 him by the FCDO during the course of his investigation including a copy of the retained material, 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 his rationale behind this finding without compromising the content of the withheld information itself or by revealing which of these two exemptions is actually engaged.

## Right of appeal

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

19. 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.
20. 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**