

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 November 2023

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

Decision (including any steps ordered)

1. The complainant has requested two Joint Intelligence Committee reports. The Cabinet Office withheld these reports relying on section 23(1)(security bodies) or, in the alternative, section 24(1)(national security) and section 27, international relations, of FOIA.
2. The Commissioner's decision is that the Cabinet Office is entitled to rely on section 23(1) or 24(1) in the alternative to withhold the entirety of the requested information.
3. The Commissioner does not require any steps.

Request and response

4. On 21 February 2023, the complainant wrote to the Cabinet Office and requested information in the following terms:

"Please could you provide me with a copy of the following Joint Committee reports which I believe you hold in this file

<https://discovery.nationalarchives.gov.uk/details/r/C11959664>

- "French support for Biafra", JIC(68)65 dated 23 October 1968.

- "Soviet arms and activities in Nigeria", JIC(68)70 dated 9 December 1968."
5. On 22 February 2023, the Cabinet Office wrote to the complainant to request clarification of what information was sought. The Cabinet Office stated:
- "Could you please clarify your request? It is not clear whether the request is for:
1. The file
<https://discovery.nationalarchives.gov.uk/details/r/C11959664>
 2. "French support for Biafra", JIC(68)65 dated 23 October 1968 and "Soviet arms and activities in Nigeria", JIC(68)70 dated 9 December 1968
 3. Both of the above".
6. The complainant responded on the same day confirming that he was seeking the two named reports and had provided the link to assist the Cabinet Office in finding the documents.
7. The Cabinet Office provided its response on 22 March 2023 and confirmed that it held the requested information. The Cabinet Office confirmed that it was withholding the information on the basis that it is exempt under sections 23(1), 24(1) and 27(1)(a), (c) and (d) of FOIA.
8. The Cabinet Office explained that sections 23 and 24 were being cited in the alternative as it was not appropriate, in the circumstances of the request, to say which of the two exemptions is actually engaged so as not to undermine national security or reveal the extent of any involvement, or not, of the bodies dealing with security matters.
9. The Cabinet Office explained that section 23 is an absolute exemption and it is not required to consider whether the public interest favours disclosure of this information. The Cabinet Office set out that any information that is not exempt from disclosure under section 23(1) could be exempt under section 24(1) of FOIA which exempts information from disclosure if its exemption is required for the purpose of safeguarding national security. The Cabinet Office confirmed that, for the reasons it had already stated, it could not say which of the two exemptions is actually engaged. The Cabinet Office explained that it is not obliged to

give any further explanation by virtue of section 17(4)¹ because to do so would involve the disclosure of information which would itself be exempt.

10. The Cabinet Office explained that section 24 is a qualified exemption and provided its public interest considerations. The Cabinet Office acknowledged the general public interest in disclosure of information and recognised that openness in government may increase public trust in and engagement with the Government. The Cabinet Office confirmed that it had weighed these public interests in disclosure against a very strong public interest in safeguarding national security. The Cabinet Office set out that it is important that this sensitive information is protected as disclosure of information in this case would damage national security. The Cabinet Office considered that in the circumstances of the request, the balance of the public interest favours withholding the information.
11. The Cabinet Office explained why sections 27(1)(a), (c) and (d) were engaged and confirmed that it considered that the public interest lay in maintaining the exemption.
12. The complainant requested an internal review of the handling of their request on 4 April 2023. They provided detailed arguments regarding why they considered that the information should be disclosed.
13. The Cabinet Office provided the outcome of its internal review on 18 May 2023. It upheld its original position. The Cabinet Office confirmed that the exemptions were properly explained insofar as would be appropriate without disclosing exempt information. The Cabinet Office confirmed that it had considered the points made in the application for review, in particular the age of the information and the fact that much information on this subject has previously been released. The Cabinet Office considered that the previous release of information on this subject demonstrates that it does release as much as it can. It went on to explain that, however, it must and does withhold some information where it is deemed necessary to do so and it does so based on its objective assessment of its continued sensitivity and the application of exemptions of FOIA.

¹ Section 17(4): "A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information"

Scope of the case

14. The complainant contacted the Commissioner on 29 May 2023 to complain about the way their request for information had been handled. The complainant disputed that all of the requested information would engage sections 23 and 24. They also disputed that the public interest associated with sections 24 and 27 would favour maintaining the exemptions as they did not agree that there was “continuing sensitivity” around the nature of the information requested.
15. The complainant was also dissatisfied at the quality of the Cabinet Office’s explanations. They considered that they failed to demonstrate whether the specific nature of the information had been considered. In particular, they believed that the internal review failed to respond substantively to any of the arguments made. They considered that the reviewer could have addressed these without disclosing exempt information or damaging the public interest.
16. During the course of the investigation, the Cabinet Office confirmed that it was no longer relying on sections 27(1)(a), (c) and (d) to withhold the information. It confirmed that it was relying on sections 23(1) and 24(1), in the alternative, to withhold the entirety of the requested information.
17. The Commissioner considers that the scope of this investigation is to determine whether the Cabinet Office is entitled to rely on sections 23(1) and 24(1) in the alternative to withhold the requested information.

Reasons for decision

Section 23: Information supplied by or relating to bodies dealing with security matters

Section 24: National security

18. Section 23(1) of FOIA provides an exemption which provides 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 supplied in subsection (3).”
19. 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.

20. 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”.

21. 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’ observation 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 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 combatting the international terrorism is capable of promoting the United Kingdom’s national security.

22. 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.

² <https://www.legislation.gov.uk/ukpga/2000/36/section/23>

23. 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 information.
24. 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, the Commissioner will allow public authorities to cite both exemptions 'in the alternative' where 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.
25. As the Commissioner's guidance on this issue³ 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 exemptions cited is engaged and that, if the exemption is section 24(1), the public interest favours withholding the information.
26. This approach of applying these exemptions in the alternative has been accepted by the Upper Tribunal⁴.
27. The Cabinet Office provided the following background information:

"The Joint Intelligence Committee (JIC) is an inter-agency body, the role of which is:

'... to assess events and situations relating to external affairs, defence, terrorism, major international criminal activity, scientific, technical and international economic matters and other transnational issues, drawing on secret intelligence, diplomatic reporting and opensource material...'⁵

Its role was described thus in 1944:

"The [JIC] in addition to its responsibility for co-ordinating the product of the various collectors of intelligence into the form of

³ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/how-sections-23-and-24-interact/#text6>

⁴

https://assets.publishing.service.gov.uk/media/6166ebf5e90e07197f18fc7b/GIA_388_389_390_2021-00.pdf

⁵ <https://www.gov.uk/government/groups/joint-intelligence-committee>

agreed advice on enemy intentions, has the additional responsibility of watching, directing and to some extent controlling the British intelligence organisation throughout the world so as to ensure that intelligence is received at the most economical cost in time, effort and manpower, so as to prevent overlapping.⁶

The Nigerian Civil War (often referred to as the Biafran War) was fought between 1967 and 1970.

The JIC compiled reports on the subject of French support for Biafra (in October 1968) and the aims and activities of the Soviet Union in Nigeria (in December 1968). These reports constitute the information within the scope of the request.⁷

28. On the basis of the further submissions provided to him by the Cabinet Office during his 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.
29. The Commissioner cannot elaborate further on his rationale behind this finding without compromising the content of the withheld information itself or by revealing which of the two exemptions is actually engaged. However, he would note that given the remit of the JIC, the potential relevance of section 23(1) or 24(1) is clear. The Commissioner also wishes to note that despite the age of the information, and the passage of time since it was created, he is satisfied that this does not undermine the Cabinet Office's position that section 23(1) or section 24(1) applies.
30. The Commissioner's decision is therefore that the Cabinet Office was entitled to rely on sections 23(1) and 24(1) in the alternative, to refuse the request.

⁶ Goodman, *The Official History of the Joint Intelligence Committee, Volume I: from the approach of the Second World War to the Suez Crisis* (Routledge, 2015), Introduction]

⁷ JIC, *French support for Biafra, (21 October 1968), JIC(68)65; Soviet aims and activities in Nigeria, (9 December 1968), JIC(68)70]*

Other matters

31. The Commissioner understands the complainant's concerns and frustrations at not being provided with detailed, information specific explanations regarding why the information was being withheld. However, as explained by the Cabinet Office in its refusal notice and internal review, this is sometimes necessary to prevent negating the use of the exemption itself.
32. The Commissioner considers that the Cabinet Office's approach was appropriate in all the circumstances of this request.

Right of appeal

33. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

34. 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.
35. 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

Victoria Parkinson
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