

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 June 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 a list of records concerning the rendition of Abdul Hakim Belhaj. The FCO sought to withhold the information on the basis of 23(1) (security bodies) or, in the alternative section 24(1); section 40(2) (personal data); and, section 42(1) (legal professional privilege). 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 10 May 2018:

According to the [sic] BBC: -

<http://www.bbc.co.uk/news/uk-politics-44...>

"Abdul Hakim Belhaj said MI6 helped the US seize him in Thailand in 2004 to return him and his Moroccan wife, Fatima Boudchar, to Libya, where he says he was tortured.

The government has accepted the couple's account of what happened - and the settlement is the first time ministers have apologised for a specific act involving British security agencies".

FOIA REQUEST

1. I would like a list of all records held by FCO relating to Mr Belhaj and Ms. Boudchar.

Where possible, the list should contain:-

- a) the date of the record*
- b) the type of record - i.e. letter, email, phone record, image*
- c) a summary/gist of what the record is*

If the request exceeds costs threshold, please restrict request to year 2004.'

3. The FCO contacted the complainant on 11 June 2018 and explained that it considered section 24 (national security) of FOIA to apply to his request and it needed additional time to consider the balance of the public interest.
4. The FCO provided him with a substantive response to his request on 6 July 2018. The FCO 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 the following sections of FOIA: section 23(1) (security bodies) or, in the alternative section 24(1);¹ section 40(2) (personal data); and, section 42(1) (legal professional privilege).
5. The complainant contacted the FCO on the same day and asked it to conduct an internal review of this response.
6. The FCO informed him of the outcome of the internal review on 3 August 2018. The review upheld the application of the exemptions cited in the refusal notice.

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

Scope of the case

7. The complainant contacted the Commissioner on 3 August 2018 in order to complain about the FCO's handling of his request.
8. The Commissioner contacted the FCO on 12 September 2018 in relation to this complaint.
9. The FCO provided the Commissioner with a response to her enquires on 5 November 2018. The FCO provided the Commissioner with some details of the nature of the information it held falling within the scope of the request, including the total number of documents held. It explained that given the volume of such information across a broad data range, a decision was taken, in line with the complainant's suggestion, to limit the request simply to materials from 2004 only.
10. The Commissioner notes that the complainant's request not only sought the date and type of record falling within the scope of his request, but also a summary of each record. In the Commissioner's view it would be likely to take more than 1440 minutes (ie 24 hours) to fulfil the request in order to provide a summary of all of the information within the scope of the request and thus the request could have been refused on the basis of section 12 of FOIA. Therefore, she accepted the FCO's approach of simply focusing on material relating to 2004.
11. However, the Commissioner contacted the FCO in December 2018 and explained that she required further evidence from it before she could be in a position to conclude whether or not the information relating to 2004 was exempt from disclosure on the basis of any of the exemptions cited by the FCO. The Commissioner's considerations as to how best to seek such further evidence were influenced by the approach set out in her Memorandum of Understanding on National Security cases².
12. In May 2019 a representative of the Commissioner met with representatives of the FCO in order to discuss its handling of this request, in particular its basis for relying on section 23(1) and/or section 24(1) of FOIA.

² <https://ico.org.uk/media/about-the-ico/documents/1042533/mou-national-security-cases-foia-eir.pdf>

Reasons for decision

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

Section 24 – national security

13. 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).'

14. 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).³

15. 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'.

16. 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;

³ 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.
17. 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.
18. 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.
19. 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.
20. 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.
21. 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.
22. 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.

23. In light of this finding the Commissioner does not need to consider the other exemptions the FCO has cited in this decision notice.

Right of appeal

24. 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

25. 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.
26. 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
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