

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 September 2015

Public Authority: Foreign and Commonwealth Office

Address: King Charles Street
London
SW1A 2AH

Decision (including any steps ordered)

1. The complainant submitted a request to the public authority for information in relation to an individual known as Alexander Joseph Patrick Wilson and for material retained from file FO 1093/263 available at the National Archives.
2. The Commissioner's decision is that;
 - The public authority does not hold information within the scope of the complainant's request in relation to Alexander Joseph Patrick Wilson (Part a of the request),
 - The public authority was entitled to withhold the material retained from file FO 1093/263 in reliance on the exemption at section 23(1) FOIA (Part b of the request),
 - The public authority breached section 10(1) FOIA.
3. No steps required.

Request and response

4. The complainant wrote to the public authority on 24 October 2014 in relation to a file which had been part released to the National Archives and became available for public inspection from May 2013. He claimed that the material retained from the file (FO 1093/263) relates to late *Alexander Joseph Patrick Wilson* who was the subject of a biography authored and published by the complainant in 2010. The complainant's request in relation to Alexander Joseph Patrick Wilson and file FO

1093/263 contained in his letter to the public authority was summarised by the authority as follows:

'(a) any information on Alexander Joseph Patrick Wilson (1893-1963) held by the Foreign and Commonwealth Office (FCO), including his time in India between 1925 and 1933;

(b) the Security Service report from file FO 1093/263.'

5. In its initial response to the request on 25 November 2014, the public authority advised the complainant that it considered the information requested exempt on the basis of section 27 FOIA (international relations) but it needed additional time to consider the balance of the public interest.¹
6. The public authority provided the complainant with its substantive response on 22 December 2014. The authority explained that its previous letter of 25 November was in respect of part (b) of his request only and that information relevant to this part of his request (ie the retained material from file FO 1093/263) had been withheld in reliance on section 23 FOIA.² The public authority also clarified that it did not hold any information relevant to part (a) of the request.
7. On 1 January 2015 the complainant requested an internal review of the public authority's decision. The public authority wrote to the complainant with details of the outcome of the review on 18 February 2015. It upheld the original decision above in full.

Scope of the case

8. On 4 April 2015, the complainant contacted the Commissioner to complain about the way his request for information had been handled. The grounds for his complaint are summarised below.
 9. The public authority was wrong to say that it did not hold any information in relation to part (a) of his request. He claims that there must be surviving personnel files, completed application forms, service records, vetting documentation and references because, in his view, file
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¹ The Commissioner has commented on this further below in the 'procedural matters' section.

² See the 'procedural matters' section for the Commissioner's comments.

FO 1093/263 identifies Alexander Joseph Patrick Wilson as employed by the Secret Intelligence Service between September 1939 and October 1942. The complainant explained that his expectation that there would be records relating to Alexander Joseph Patrick Wilson is based on his research into the subject's life and times, and the novels he wrote and published between 1928 and 1940.

10. In terms of part (b) of his request, the complainant argued that English common law and European Human Rights jurisprudence and case law³ under Article 10 of the Human Rights Act 1998 trump the withholding of historical information in statutory provision particularly when the historical reference is to documents and events more than 70 years ago.
11. The scope of the investigation therefore was to determine whether the public authority was correct to say that it did not hold any information relevant to part (a) of the request and whether the authority was entitled to withhold the material retained from file FO 1093/263 in reliance on section 23(1) FOIA (the withheld information).

Reasons for decision

Part (a) – information held/not held

12. When a public authority states that information is not held, the Commissioner will decide whether this is the case on the balance of probabilities. He will reach a decision based on the adequacy of the public authority's search for the information, and any other reasons explaining why the information is not held, such as there being no business need to record it.
13. The public authority explained that it does not hold personnel files for the Secret Intelligence Service (SIS). Nevertheless, it had carried out searches to determine whether it held any information relevant to part (a) of the request. A summary of the searches is described below.
14. The public authority carried out a search of the National Archives catalogue in order to find any relevant files originating from the Foreign and Commonwealth Office, Foreign Office, Colonial Office or Dominions Office or India Office. Generally, if any file is found, the public authority would check whether it is holding any retained material relating to the

³ Kennedy v The Charity Commission [2014] UKSC 20

relevant reference. The search terms used were: 'Alexander Joseph Patrick Wilson' as a phrase (all dates), 'Wilson' in combination with Alexander or Joseph or Patrick (1893-1963), 'Indian Political Intelligence' (all dates), 'Indian Intelligence bureau' (all dates), 'Islamia College' (all dates), 'Indian Intelligence', 'Indian AND Intelligence', 'Indian AND Intelligence Bureau' and 'Islamia'.

15. The public authority explained that none of the above search terms produced results containing information relevant to part (a) of the request. Possible relevant files relating to 'Indian Political Intelligence' were identified on the India office files. However, those files had been transferred to the British Library and the authority does not hold any retained material in relation to the files. The authority's internal inventory was also searched and it did not produce any relevant references.
16. The Commissioner is satisfied with the rigour and adequacy of the searches conducted by the public authority for information relevant to part (a) of the request. The fact that the public authority does not hold personnel files for the SIS also explains why the authority is unlikely to hold personnel files relating to Alexander Joseph Patrick Wilson if in fact any exist.
17. In view of the public authority's explanation and the adequacy of its searches, the Commissioner is left with no choice but to find that on the balance of probabilities, the public authority does not hold any information within the scope of part (a).

Part (b) - Section 23(1) FOIA

18. Sections 23 (1) states:

'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).'

19. To successfully engage the exemption at section 23(1), a public authority must be able to demonstrate that the relevant information was *directly or indirectly supplied by, or relates to* any of the bodies listed at section 23(3). Once that has been established, the exemption is

automatically engaged and the fact that it is an absolute exemption⁴ means that there is no requirement to carry out a public interest test.

20. It is however pertinent to also mention in the circumstances of this case that although it is an absolute exemption, section 23(1) is subject to a public interest test where it is applied to information in a historical record held by the National Archives or the Public Records Office of Northern Ireland.⁵ Originally, a historical record was one over 30 years old, or if forming part of a file, the last entry on that file must be over 30 years old. However, this has been amended to 20 years by the Constitutional Reform and Governance Act 2010. This reduction is being phased in gradually over 10 years. In effect, from the end of 2013 the time limit became 29 years, and has reduced by another year every year since until it reaches 20 years at the end of 2022.
21. In support of its position, the public authority provided the Commissioner with a letter from a very senior official in the Cabinet Office (SO) with the experience and authority to validate the provenance of the withheld information. The SO assured the Commissioner that the withheld information was received from one of the bodies listed in section 23(3).
22. In the circumstances of this case the Commissioner considers the SO's letter sufficient for the purposes of his investigation and he has accepted the SO's assurance that the withheld information was supplied by one of the bodies listed in section 23(3) FOIA.
23. The Commissioner therefore finds that the public authority was entitled to rely on the exemption at section 23(1).
24. The Commissioner is satisfied that the public authority was not required to carry out a public interest test in the circumstances of this case because the withheld information has not been transferred to the National Archives or the Public Records Office of Northern Ireland. Rather, it has been retained by the public authority, and under these circumstances, the Commissioner is not prepared to accept that the absolute exemption at section 23(1) could be interpreted in any other way to take into account the factors mentioned by the complainant.

⁴ An absolute exemption is not subject to the public interest test set out in section 2(2)(b) FOIA. Once an absolute exemption is engaged, a public authority is generally not required to conduct a public interest.

⁵ Section 64(2) FOIA

Procedural Matters

25. Section 10(1) FOIA requires a public authority to provide a response to a request within 20 working days. However, section 10(3) enables a public authority to extend the 20 working day limit to a reasonable time in any case where it requires more time to determine whether or not the balance of the public interest lies in maintaining an exemption, or it needs further time to consider whether it would be in the public interest to confirm or deny whether the information is held.
26. The extension at section 10(3) will therefore only apply to requests where the public authority has determined that a qualified exemption⁶ is engaged. The additional time cannot be used to determine whether the exemptions themselves are engaged. This means that the public authority should have identified the relevant exemptions, and satisfied itself that they are applicable, within the initial 20 working day time limit.
27. The public authority's substantive response to the request which was submitted on 24 October 2014 was issued on 22 December 2014 following an extension by the authority in reliance on section 10(3). However, the public authority withdrew its reliance on section 27, a qualified exemption, in its substantive response and instead relied on the absolute exemption at section 23(1).
28. In view of the above, the Commissioner finds that the public authority was not entitled to rely on section 10(3) and consequently breached section 10(1) for failing to provide its response to the request within 20 working days.

⁶ An exemption that is subject to the public interest test.

Right of appeal

29. 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 123 4504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

30. 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.
31. 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

Alexander Ganotis
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