

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 30 August 2016

**Public Authority:** Cabinet Office

**Address:** 70 Whitehall  
London  
SW1A 2AS

### Decision (including any steps ordered)

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1. The complainant has requested a number of files from the Cabinet Office which were subsequently transferred in part to The National Archives ("TNA"). In a much delayed response, the Cabinet Office cited section 22 (intended for future publication), section 27 (international relations) section 23 (security bodies) and section 24 in the alternative (safeguarding national security), and section 40 (unfair disclosure of personal data). It upheld this at internal review although dropped reliance on section 40.
2. The Commissioner's decision is that the Cabinet Office was not entitled to rely on section 22 in respect of some of the information to which it was applied. It was entitled to rely on section 22 in respect of some of the requested information. Also the Cabinet Office is entitled to rely on the other exemptions it cited at internal review as its basis for refusing to provide the other information within the scope of the request. However, it has also contravened the requirements of section 10 of the FOIA in failing to respond to the request in a timely manner.
3. No steps can be required because the information to which section 22 had been incorrectly applied has already been transferred to TNA.

### Request and response

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4. On 30 December 2014, the complainant requested information of the following description:

"Under the FOIA 2000, I request copies of the following four files:  
J281 Part 1, which the National Archives refers to as CAB 163/452

India: political,

Date: 1979 May 04 – 1985 Aug 08

PREM 19/1535 INDIA. Visits to UK by L K Jha, member of the Brandt Commission and adviser to Indira Gandhi: meetings with Prime Minister, Date: 1983 Jul 04 – 1985 Mar 21

PREM 19/1536 INDIA. UK/Indian relations: situation in Punjab; activities of Sikh extremists; proposed visit to UK by Rajiv Gandhi in June 1985; part 4.

Date 1984 Mar 05 – 1985 May 22

PREM 19/1663 DEATHS. Assassination of Indira Gandhi, October 1984: Prime Minister's visit to India to attend funeral

Date 1984 Oct 31 – 1984 Dec 12

Please respond ***promptly***, and in any event no later than 20 working days from today (30/12/2014)".

5. On 3 March 2015, the Cabinet Office responded. It refused to provide the requested information. It cited the following exemptions as its basis for doing so:
  - section 22 – information intended for future publication;
  - section 27 – international relations;
  - section 40 – unfair disclosure of personal data;
  - section 23 and section 24 in the alternative – security bodies/national security.
6. The complainant had an exchange of correspondence with the Cabinet Office. On 15 February 2015, he asked the Cabinet Office for an internal review of its delayed response.<sup>1</sup> Throughout this exchange, the two parties appeared to be at cross purposes about the extent of the complainant's internal review request, that is, whether it would also include a review of any refusal the Cabinet Office issued.
7. The complainant queried the status of his internal review on 30 June 2015. On 7 July 2015, the complainant wrote to the Cabinet Office to confirm that he wanted to have an internal review of its refusal of 3 March 2015. The Cabinet Office explained in response that he would need to make a fresh request for an internal review of its refusal. The

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<sup>1</sup> The Commissioner would not recommend complainants do this. She would encourage complainants to first seek informal resolution of the delay with the public authority (as the complainant did here). If this is unsuccessful, they should then report any protracted delays in response directly to her.

complainant confirmed on 15 July 2015 that he still wished the Cabinet Office to conduct an internal review.

8. The Cabinet Office sent the outcome of its internal review of its refusal to the complainant on 19 August 2015. It upheld its original position with respect to CAB 163/452. It explained that PREM 19/1535, PREM 19/1536 and PREM 19/1663 had now been transferred in part or as a whole to TNA. It later told the Commissioner that it had made the transfer on 16 July 2015.

## **Scope of the case**

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9. After initial contact with the Commissioner on 20 June 2015, the complainant contacted the Commissioner on 26 August 2015 to complain about the way his request for information had been handled.
10. The Commissioner has considered whether the Cabinet Office was entitled at the time of the request to rely on section 22 as its basis for withholding some of the information (since transferred to TNA), whether it was entitled to rely on section 27 and section 23 (section 24 in the alternative) for the other information which had not been transferred.
11. The Commissioner is disappointed that she had to serve an Information Notice on 8 February 2016 requiring the Cabinet Office to respond to her enquiries. It had failed to respond to the Commissioner's initial letter of enquiry and her follow-up efforts to obtain a response without recourse to formal action. The Commissioner recognises that delays can arise in responding, particularly where the subject matter is sensitive. However, she would urge all public authorities to keep her informed as to any delays. Indeed, she specifically asks the Cabinet Office to do so at the opening of every case in anticipation of likely sensitivities. The Cabinet Office eventually ensured that it kept the Commissioner updated as to the progress of preparing its response but it would have been preferable for it to do so from the outset.

## **Reasons for decision**

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### **Background**

12. There were four documents named in the original request. The Cabinet Office's current position can be summarised as follows:

CAB 163/452	- Retained and withheld in full by the Cabinet Office
PREM 19/1535	- Most of the information in the two files

PREM 19/1536<sup>2</sup> has been transferred to TNA although some is still closed at the TNA. Some information in the files has not been transferred to TNA and is still retained by and withheld by the Cabinet Office.

PREM 19/1663<sup>3</sup> - The information in this file has been transferred to TNA although some is still closed at the TNA. It is no longer held by the Cabinet Office.

13. It is important to make the distinction between "closed" at TNA and "retained by and withheld by the Cabinet Office". Information which is "closed" at TNA is no longer held by the Cabinet Office. The Commissioner would observe that the Cabinet Office was not clear about the distinction between these two terms in correspondence with the complainant. It suggested that the complainant now make a fresh request for the "closed" information to TNA.
14. The Cabinet Office explained to the Commissioner that it made the transfer of most of the information in the files prefixed PREM to TNA on 16 July 2015. It had retained some of this information and this is detailed above.
15. This transfer was one day after the complainant made his request for internal review although, as noted above, there was an exchange of correspondence at the beginning of July 2015 where the complainant clearly signalled his request for internal review on the Cabinet Office's use of exemptions.
16. The Cabinet Office told the Commissioner that where it receives a request for internal review in such circumstances it treats each request on a case by case basis but would generally halt any proposed transfer to TNA and consider the matter in-house. It said that the complainant was not clear that he wanted an internal review of the substantive refusal. The Commissioner disagrees with this interpretation of the complainant's correspondence (see Other Matters).

## **Section 22 – Information intended for future publication**

17. Section 22(1) provides that –
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<sup>2</sup> <http://discovery.nationalarchives.gov.uk/browse/r/h/C14568414>

<sup>3</sup> <http://discovery.nationalarchives.gov.uk/browse/r/h/C14568378>

"Information is exempt information if-

- (a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),
- (b) the information was already held with a view to such publication at the time when the request for information was made, and
- (c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a)."

18. Section 22(1) is qualified by a public interest test.

19. The Commissioner has considered whether the Cabinet Office was entitled to rely on this exemption at the time the request was made or, at least, at the time the Cabinet Office was required to comply with this request. This approach follows the Tribunal's comment in the case of *the Department for Business, Enterprise and Regulatory Reform (DBERR) and the Information Commissioner and Friends of the Earth* (EA/2007/0072), in which it was said that "*the timing of the application of the test [the public interest test] is at the date of the request or at least by the time of the compliance with ss. 10 and 17 FOIA*" (para 110)<sup>4</sup>.

20. Leaving to one side, for the moment, the Cabinet Office's delay in responding to this request in a timely manner (see below), the Commissioner has therefore considered whether the Cabinet Office's position as regards section 22 at the time of the request. At that time, it still held the requested files.

21. When looking at section 22, there are four questions to consider following the wording of the exemption:

- Is there an intention to publish the requested information at some future date?
- Is the information already held with a view to publication at the time the request was made?
- Is it reasonable to withhold the information from disclosure until the intended date for publication?

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[http://www.informationtribunal.gov.uk/DBFiles/Decision/i181/DBERRvIC\\_FOEFinaldecision\\_w eb0408.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i181/DBERRvIC_FOEFinaldecision_w eb0408.pdf)

Where the answer to the above three questions is "yes", the exemption is engaged but a fourth question must be addressed:

- Does the public interest favour maintaining the exemption or disclosing the information?

*Is there an intention to publish the requested information at some future date?*

22. The main point at issue here is the fact that, at the time of the request, the Cabinet Office was about to transfer information to TNA that would be both "open" and "closed" there.
23. The Commissioner's own guidance is clear on the issue of "open" files at TNA:  
  
"Where a public authority has identified records for transfer to The National Archives (TNA) as 'open' records, we would accept that there is an intention to publish. This is because, once transferred to TNA, the information is made available to the public by an established and accessible system of inspection."<sup>5</sup>
24. The question remains whether the transfer to TNA of information which the Cabinet Office knew would remain "closed" there constitutes an intention to publish at some future date.
25. The detail available at Notes 2 and 3, shows that there is an intention by TNA to publish this information on specific dates but these were considerably in the future.<sup>6</sup>
26. In other words, the information was held by the Cabinet Office at the time of the request with a view to its publication, by the authority or **any other person** [the Commissioner's emphasis], at some future date (whether determined or not). It is far from clear that the Cabinet Office knew the precise dates of publication at the time of the request but it did appear to know that some of the information in transferred PREM

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<sup>5</sup> <https://ico.org.uk/media/for-organisations/documents/1172/information-intended-for-future-publication-and-research-information-sections-22-and-22a-foi.pdf> (para 19)

<sup>6</sup> 1 January 2025, 1 January 2026, 1 January 2046 and 1 January 2051  
<http://discovery.nationalarchives.gov.uk/browse/r/h/C14568414> and  
<http://discovery.nationalarchives.gov.uk/browse/r/h/C14568378> (click on Details in Closed Documents)

files would remain "closed". The Commissioner must therefore conclude with respect to the information which was to remain "closed" at TNA for some considerable time, that the Cabinet Office still intended that another person, that is, TNA, would publish the "closed" information in the PREM files at a future date.

27. Had there not been a specified date for disclosure of the closed information in the PREM files, the Commissioner would have taken a different view on this point. It remains open to the complainant or any other person to challenge TNA regarding the closure of these files in advance of the specified dates. The Commissioner would again take the opportunity to note that this is extremely unsatisfactory for the complainant.

*Is the information already held with a view to publication at the time the request was made?*

28. Given that the information in question was being prepared for transfer to TNA at the time of the request, the Commissioner has concluded that the information was held by the Cabinet Office with a view to publication at some point at the time the request was made.

*Is it reasonable to withhold the information from disclosure until the intended date for publication?*

29. The Commissioner accepts that at the time of the request, preparations were at an advanced stage for the transfer of information from the requested files to TNA and that some information would be open at TNA. As far as this information is concerned, the Commissioner is satisfied that it was reasonable to withhold the open information from disclosure until the intended date for publication. All three elements of section 22(1) are met in respect of this open information.
30. However, the Commissioner takes a different view with regard to the information that would be transferred as closed to TNA. This information will remain closed at TNA for a considerable period (see Note 6). In the Commissioner's view, this is not a reasonable use of section 22. Put another way, the Cabinet Office can meet the requirements of 22(1)(a) and (b) but not 22(1)(c) in order to engage section 22 in respect of the closed information. It is not reasonable to rely on section 22 as a basis for withholding the information from disclosure given the length of time before the information is going to be opened for public access at TNA.
31. There may well be other exemptions that are applicable to the closed information and the Cabinet Office should have explained this to the complainant by the time it was obliged to comply with the request and while it still held the information. The Commissioner notes that the

exemptions at section 27 and section 40 have subsequently been applied to most of the closed information, according to the TNA website. Also, the "FOI decision" about most of the closed information is recorded on the TNA website as having been made in 2014 (the year before the transfer). The Cabinet Office, therefore knew, at the time of the request and at least in general terms, that the information was not going to be published at TNA upon transfer and the reasons why this was so. It also knew, at least in general terms, the length of time that the information would be closed for. It is likely that the closure period is not a decision reached unilaterally by TNA and there has been consultation with, if not direction from, the Cabinet Office on this point.

32. As well as the obvious unfairness to the complainant regarding the closed information, the Commissioner considers that it is unfair to now put TNA in a position where it may now have to consider a request for the very same information. Had the Cabinet Office treated the closed information separately and, at least, explained the exemptions applicable to the closed information, the complainant would have had a much clearer picture of how this matter stood upon receipt of the refusal notice.
33. The Commissioner has concluded, therefore, that the open information was exempt under section 22 at the time of the request but that the closed information was not exempt under section 22. In reaching this view, she has had regard for length of time that the closed information will remain closed at TNA after transfer. She has also had regard for her own published guidance which states "The closer to the date of publication, the more reasonable it is likely to be for the public authority to withhold the information until publication has taken place." The date of publication for the closed information is considerably in the future.
34. Given that the information in question has now been transferred anyway to TNA, there are no meaningful steps the Commissioner could require the Cabinet Office to take with respect to the closed information described in the request. However, the Commissioner remains of the view that it was not exempt from disclosure under section 22 at the time for compliance with the request for the reasons outlined above.

### **Balance of public interest test**

35. As noted above, the Commissioner has concluded that the Cabinet Office were entitled to cite section 22 in respect of the information that was transferred as "open" to TNA. She has therefore gone on to consider where the public interest lies in respect to reliance on this exemption for the open information.

36. As noted above, the Commissioner has looked at the time for compliance when considering the balance of public interest here. She accepts that, at the time for compliance, it was reasonable to press ahead with the transfer to TNA and that, strictly speaking, the Cabinet Office was entitled to rely on section 22 in respect of the open information because the balance of public interest favoured it doing so. Where requests are complied with in a timely and standard manner and the transfer of open information to TNA is imminent, it is usually in the public interest that the transfer should go ahead. Disclosure under FOIA is disclosure to the public and access to information at TNA is also disclosure to the public. Unless earlier access under FOIA is warranted in the public interest, it is normally in the public interest for the operation of imminent transfer to TNA to go ahead unimpeded.
37. Strictly speaking, therefore, the Commissioner has concluded that the public interest favoured maintaining the exemption at section 22 in respect of the open information at the time for compliance with the request.
38. The Commissioner has addressed in further detail later in this notice the consequences for the complainant of the protracted delays that arose in this case. The Commissioner has also made observations about a more practical approach that the Cabinet Office could have taken in respect of all the information to which section 22 had been applied given the protracted delays. However, given the clear interpretation (in the *DBERR* case referred to above) regarding the time at which the public interest should be considered, she has reached the conclusion detailed in the previous paragraph.
39. The Commissioner will now consider the information which has been retained by the Cabinet Office. The Cabinet Office cited section 27 as its basis for refusing to provide some of this information. In addition, it cited section 23 (and section 24 in the alternative) for some of this information.

## **Section 27 – international relations**

40. The Cabinet Office has sought to rely on section 27(1)(a), (c) and (d) and 27(2) as its basis for withholding some of the requested information.

Section 27(1) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) relations between the United Kingdom and any other State,  
...
- (c) the interests of the United Kingdom abroad, or
- (d) the promotion or protection by the United Kingdom of its interests abroad."

Section 27(2) provides that –

"Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court."

41. The Cabinet Office argued that the information in question was exempt under the provisions of section 27(1) that it had cited and that some of it was also exempt under section 27(2). The Commissioner has focussed on the provisions of section 27(1).
42. The Cabinet Office's arguments were limited and those which it provided contain specific reference to the withheld information. Regrettably, the Commissioner is therefore unable to set them out in detail on the face of this Notice. Its submissions included reference to the confidential nature of the information.
43. In order for a prejudice based exemption, such as those in section 27(1), to be engaged the Commissioner believes that three criteria must be met:
  - Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
  - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
  - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be

a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.

44. Furthermore, the Commissioner has been guided by the comments of the Information Tribunal which suggested that, in the context of section 27(1), prejudice can be real and of substance *'if it makes relations more difficult or calls for a particular damage limitation response to contain or limit damage which would not have otherwise have been necessary'*.<sup>7</sup>
45. With regard to the first criterion of the three-limb test described above, the Commissioner accepts that potential prejudice to international relations as described by the Cabinet Office relates to the interests which each of the exemptions cited in section 27(1) are designed to protect.
46. With regard to the second criterion, the Commissioner is satisfied that disclosure of the information redacted on the basis of this exemption has the potential to harm international relations in the manner described by the Cabinet Office. Its arguments on this point were thin but, in the Commissioner's view, sufficiently convincing. The Commissioner is therefore satisfied that there is a causal link between the potential disclosure of the withheld information and the interests which section 27(1) are designed to protect. Moreover, the Commissioner is satisfied that the resultant prejudice which the Cabinet Office believes would be likely to occur can be correctly categorised, in light of the Tribunal's comments above, as real and of substance. In other words, subject to meeting the likelihood test at the third criterion, disclosure could result in making relations more difficult and/or demand a particular damage limitation exercise.
47. With regard to the third criterion, the Commissioner is satisfied that the disclosure of the redacted information would be likely to have the prejudicial effects envisaged by the Cabinet Office. Again, the Commissioner is unable to set out the Cabinet Office's arguments in this regard (limited as they are) without disclosing sensitive detail.
48. Section 27 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether in all the

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<sup>7</sup> [Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence \(EA/2006/0040\)](#), paragraph 81.

circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

### **Public interest in disclosure of the information**

49. The complainant provided the Commissioner with arguments as to why there is a compelling public interest in the disclosure of the redacted information. He said:

"[there is] considerable public interest in the disclosure of this file, given that it contains information on India from 1979-1985, a period which included major human rights violations (namely the massacre at Sri Harmandir Sahib in June 1984 and the genocide of Sikhs later that year), during which time the UK government provided military advice and weaponry to the Indian authorities".

50. The Cabinet Office acknowledged a general public interest in openness and the disclosure of government information. It also recognised a public interest in the disclosure of information about relations with India between 1979 and 1985.

### **Public interest arguments in favour of maintaining the exemption**

51. The Cabinet Office argued that there was, in this case, a more compelling public interest in maintaining the exemptions. It set out the importance of maintaining confidentiality in diplomatic exchanges and in the importance of building and maintaining goodwill in international relations. It said that strong international partnerships had a positive effect on, for example, trade and investment. It also made limited specific reference to the withheld information in support of its position.

### **Balance of the public interest**

52. Information about the events that the complainant refers to can be found on the BBC website<sup>8</sup>. These events are clearly of considerable international significance and, of course, of significance to India and to the Sikh community across the world. In the Commissioner's view, disclosure of the withheld information could provide a detailed insight into the UK's relations with international partners at the time which would benefit the public interest.
53. However, in the Commissioner's view there is a very strong public interest in avoiding the prejudicial outcomes that the exemptions in
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<sup>8</sup> [http://news.bbc.co.uk/onthisday/hi/dates/stories/june/6/newsid\\_2499000/2499341.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/june/6/newsid_2499000/2499341.stm)

question protect. As noted above, the Commissioner is satisfied there is a real and significant risk of such prejudice occurring and despite the public interest in disclosure of this information, the Commissioner has decided that the public interest favours maintaining the exemption. In reaching this conclusion the Commissioner wishes to emphasise that she is not seeking to dispute the clear public interests in disclosure of the withheld information; simply that she is of the view that there is a more compelling case for maintaining the exemption.

## Section 23

54. Section 23(1) 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).'*

55. 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>9</sup> This means that if the requested information falls within this class it is absolutely exempt from disclosure under the FOIA. There is no requirement on the public authority to demonstrate that disclosure of the requested information would result in some sort of harm. This exemption is not subject to a balance of public interests test.

56. When investigating complaints about the application of section 23(1), the Commissioner will need to be satisfied that the information was in fact supplied by a security body or relates to such a body, if she is to find in favour of the public authority. In certain circumstances the Commissioner is able to be so satisfied without examining the withheld information herself. Where it appears likely that the information would engage the exemption, the Commissioner may accept a written assurance from the public authority provided by someone who, because of their seniority and responsibilities, has regular access to information relating to the security bodies and who has first-hand knowledge of the relationship between the public authority and those bodies. Furthermore, they must themselves have reviewed the disputed information in the particular case.

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<sup>9</sup> A full list of the bodies detailed in section 23(3) is available here: <http://www.legislation.gov.uk/ukpga/2000/36/section/23>

57. The Cabinet Office provided the Commissioner with a letter of assurance relating to this case from a relevant senior official (SO) within the department which confirmed that he had examined the information in question and was satisfied that all of it relates to, or was supplied by, one of the bodies specified in section 23(3) of FOIA. This official occupies a senior position at the Cabinet Office and meets the Commissioner's criteria outlined above.
58. In light of the above, the Commissioner is satisfied that the information in question is exempt from disclosure under section 23(1). The age of the information is not relevant for the purposes of considering section 23(1). It either falls within the class of information described in the withheld information or it does not, regardless of its age.
59. The Cabinet Office cited section 23 and section 24 in the alternative. As part of her investigation, the Commissioner has considered her own published guidance on the interaction between section 23 and section 24.<sup>10</sup> In such cases, the Commissioner needs to satisfy herself 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.
60. The Commissioner has considered all the submissions of both parties. She accepts that in the circumstances of this case, the assurance provided by the SO with regards to the application of section 23(1) to the withheld information is sufficient for her to be satisfied that section 23(1) can be engaged in relation to the remainder. As regards section 24(1) (cited in the alternative), the Commissioner notes the view of the SO in this regard and gives weight to it given the position and experience of the SO. She has also taken into account the submissions provided by the Cabinet Office by way of additional explanation. Unfortunately, she is unable to set those submissions out on the face of this Notice without disclosing sensitive information.
61. In light of the above, the Commissioner is satisfied that section 24 can be engaged in the alternative in relation to the withheld information.
62. Section 24(1) is a qualified exemption which means that it is subject to a public interest test. Therefore, the Commissioner also had to consider whether in all the circumstances of the case, the public interest in

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<sup>10</sup> [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) (see chapters 34 - 38)

maintaining the exemption outweighed the public interest in disclosing the information withheld on that basis.

63. The Cabinet Office acknowledged a general public interest in openness and transparency which would be served by disclosure in this case to increase public trust in and engagement with the government. It also acknowledged a public interest in improving the public's understanding of the steps the government takes with regard to national security.
64. The Cabinet Office asserted a stronger countervailing public interest in withholding the information. It argued that the information has continuing relevance which means that it should be withheld in order to safeguard national security. The Commissioner accepts this. The public interest in the safeguarding of national security remains particularly weighty. Where withholding information would greatly serve that interest, the Commissioner agrees that the exemption at section 24(1) should be maintained.
65. The Commissioner therefore finds that the public interest in maintaining the exemption at section 24(1) outweighs the public interest in disclosing the remainder where it can apply to it.

### **Procedural matters**

66. The Commissioner has commented extensively in this notice about the effect that the Cabinet Office's delay in handling this request has had. It has put the complainant to considerable inconvenience as consequence of the delay.

67. Section 1(1) of FOIA states:

*(1) Any person making a request for information to a public authority is entitled –*

*(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*

*(b) if that is the case, to have that information communicated to him.*

68. Section 10 of FOIA states:

*(1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.*

...

*(3) If, and to the extent that –*

*(a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or*

*(b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,*

*the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.*

69. In this case, the Cabinet Office took 45 working days to respond to the request where it had an obligation to respond within 20 working days following the date of receipt of the request. The Cabinet Office failed to respond to the request within the statutory timeframe, thereby breaching section 10(1) of FOIA. This resulted in considerable inconvenience for the complainant as detailed elsewhere in this Notice..

## **Other Matters**

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70. The Commissioner would comment that when faced with the unusual circumstances of this case, the Cabinet Office should have considered, at internal review, that the balance of public interest favoured disclosing those elements of the PREM files which were to be "open" at TNA. It may have been entitled to rely on section 22 for "open" information in the PREM files at the time for compliance with the request for reasons outlined above. However, in purely practical terms, there was such slippage in terms of compliance with the time requirements of the FOIA, it would have been wholly reasonable to reverse its position and to disclose the "open" information to the complainant by the time of the internal review.
71. The purpose of the internal review is to give an opportunity for the public authority to look afresh at an original decision and, if appropriate, to change its original decision. This is particularly the case where the review involves consideration of the balance of public interest.
72. The Cabinet Office advised the Commissioner that although there was no specific policy in terms of how it deals with information sought under FOIA that is being prepared for transfer, rather it deals with requests on a case by case basis. However, the Cabinet Office said that normally they would retain a file requested under FOIA which was scheduled for transfer but had not yet been transferred until the appeals procedures

had been exhausted by the requester. It argued that it did not do this because it was not clear whether the complainant was requesting an internal review in this case.

73. The Commissioner is unconvinced by this interpretation of the complainant's correspondence with the Cabinet Office. It is, to say the least, arguable that the Cabinet Office did not act in line with accepted practices here. If it was unclear as to whether the complainant wanted an internal review of its refusal (despite explicit reference to it in correspondence from the complainant in early July 2015), the Cabinet Office should have checked with the complainant.
74. In the Commissioner's view, it was also not fair to the complainant, in these circumstances, to transfer the closed information to TNA after he had requested an internal review. This means he now needs to resubmit his request to TNA in respect of the 'closed' elements of the file and consider the response he receives from TNA. A clear explanation to the complainant about this at a much earlier stage would have been more helpful.

## Right of appeal

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75. 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@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

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

76. 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.

77. 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**