

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 August 2023

Public Authority: Home Office
Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant has requested a particular file about the Lockerbie bombing from the Home Office. The Home Office provided some of the information but refused to provide the remainder, citing sections 31(1)(a)(b)(c) (Law enforcement), 40(2) (Personal information) and 23(1) (Information supplied by, or relating to, bodies dealing with security matters) or 24(1) (National security) in the alternative, of FOIA.
2. For most of the information, the Commissioner's decision is that the Home Office was entitled to rely on sections 23(1) / 24(1) in the alternative and sections 31(1)(a)(b)(c) of FOIA to withhold it. However, for the one document referred to in paragraph 13 of this notice, the Home Office is required to take the following step:
 - either disclose the letter to the complainant or provide evidence to the Commissioner that it has already done so.
3. The Home Office must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. On 5 December 2022, the complainant wrote to the Home Office and requested the following information:

"I noted that in the National Archive, the following folder is being held by your department.

<https://discovery.nationalarchives.gov.uk/details/r/C17595038>

Lockerbie investigation: correspondence with the Lord Advocate

This record is retained by a government department

Reference: HO 504/41

Description: Lockerbie investigation: correspondence with the Lord Advocate

Date: 1989 Jan 1 - 1989 Dec 31

Held by: Creating government department or its successor, not available at The National Archives

Former reference in its original department: IC 91 0104/0104/003/

Legal status: Public Record(s)

Closure status: Closed Or Retained Document, Open Description

Access conditions: Retained by Department under Section 3.4

Could I please request a copy of this folder to be released to me".

5. Having received no acknowledgement, on 15 December 2022 the complainant chased a response. On the same day, the Home Office advised that it had no record of having received the request, so it acknowledged receiving it on that day.
6. On 13 February 2023, the Home Office responded. It confirmed that it held the file, but advised that it was exempt from disclosure, citing sections 31(1), 40(2) and 23(1) or 24(1) in the alternative.
7. The complainant requested an internal review on 16 February 2023. When doing so he included examples of information that he said he had obtained from the Lord Advocate's office. (For information, none of these form part of the withheld information.)
8. The Home Office provided an internal review on 31 March 2023, in which it revised its position and disclosed a small amount of information. For the remainder, it maintained reliance on the exemptions previously cited, clarifying that it was relying on subsections (a) and (b) of the exemption at section 31(1) of FOIA; in its response to the Commissioner's enquiries, the Home Office additionally cited section 31(1)(c).

Scope of the case

9. The complainant contacted the Commissioner on 5 April 2023 to complain about the way his request for information had been handled. In his grounds of complaint he said:

“Given the folder is from 1989, I have attached several letters from the Lord Advocate to the Home Office covering this period that were not released to me but which I obtained from the National Archive. I believe that the Home Office could release more documents from this folder”.

10. It is noted that one of the letters which the complainant has submitted in support of his arguments for further disclosure is also contained in the file. Whilst the Home Office has not disclosed this to him, it is not required to do so purely on the basis that another public authority has decided to do so. Each disclosure will be considered on the basis of the arguments presented by the owning party.
11. It is also noted that there are two letters in the withheld information which are a 'draft' and a 'final' version, ostensibly their content being the same. The Home Office had disclosed a redacted version of the final version (with some personal information removed) but not the draft one. It therefore asked the Commissioner whether it needed to consider disclosure of the draft version too.
12. The Commissioner considers that, where the actual information to be disclosed is identical in two documents then there is no reason to consider and disclose them each individually. This is because FOIA concerns the disclosure of information rather than documents. However, where there are any differences, then this approach would not be appropriate.
13. Having compared the two, whilst the content of the letters is the same, there is a small amount of information on the draft letter which is not on the final one. The Commissioner therefore considers that, on this occasion, the draft should also be disclosed. Having further liaised with the Home Office, it has indicated that it is happy to disclose it. If it has not done so by the time of issuing this notice, it should now disclose the draft letter.
14. The Commissioner will next consider the application of exemptions below. He has had access to the file.

Reasons for decision

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

Section 24(1) (National security)

15. These exemptions have been cited, in the alternative¹, for a small amount of information within the requested file.

16. 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)”.

17. 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.

18. 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”.

19. 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;

¹ https://ico.org.uk/media/for-organisations/documents/1196/how_sections_23_and_24_interact_foi.pdf

² 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 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.
20. 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.
21. 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.
22. 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' 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.
23. As the Commissioner's guidance on this issue explains (see footnote 2), 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.
24. The Commissioner has been advised what the withheld information says. Based on this, and the submissions provided to him by the Home 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.

25. The Commissioner's decision is therefore that the Home Office was entitled to rely on sections 23(1) and 24(1) in the alternative, to withhold the small amount of information that these were cited to cover.
26. 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.

Section 31 – Law enforcement

27. Sections 31(1)(a)(b) and (c) of FOIA state that:

“Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice”.

28. In order for a prejudice based exemption, such as section 31(1), to be engaged the Commissioner considers 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.

29. Consideration of the exemption at section 31 is a two-stage process: even if the exemption is engaged, the information must be disclosed

unless the public interest in maintaining the exemption outweighs the public interest in disclosure.

30. Although its refusal and internal review were very brief regarding the citing of section 31, in its response to the Commissioner the Home Office explained that:

“The requested information consists mainly of correspondences from the Lord Advocate’s Chambers. Please note that there is currently both a live criminal investigation in Scotland and the US, as well as an active US prosecution in relation to the Lockerbie investigation. Therefore, it is our view that disclosure of the information in the file would prejudice these investigations and prosecutions. In other words, disclosure of the information would prejudice the apprehension or prosecution of offenders (s31(1)(b)) and the administration of justice (s31(1)(c)).

More broadly, by serving to prevent further offending by those responsible for Lockerbie, by seeking to incarcerate them and deter their associates (or others) from committing similar outrages, disclosure of the information would prejudice the prevention or detection of crime (s31(1)(a))”.

31. The Home Office added that:

“This exemption has been applied to the entirety of the file because there are genuine concerns about the potential detrimental impact on both the live US prosecution of Abu Aguilá Masud and the ongoing investigation into others who are believed to have acted alongside Mr Masud and the late Abdulbaset Ali Mohamed Al Megrahi.

Investigative work may yet reveal further facets of Mr Masud's exact involvement in the crime as the prosecution continues to prepare its case, which is built on his involvement in a complex conspiracy involving multiple actors. Similarly, investigations continue into the actions of others believed to have been involved, both identified and unidentified.

... In relation to the relevant material as a whole and set against the background of both a live case and investigation, the release of information at such a high level is viewed as potentially restricting the continued exchange of information required at all levels in such a complex case of international terrorism and would clearly prejudice the apprehension and prosecution of offenders, and more broadly, the administration of justice”.

32. Further arguments were also submitted 'in confidence' to the Commissioner so they have not been included here. Nevertheless, they have been taken into account.

The applicable interests

33. The first step in considering whether this exemption is engaged is to address whether the prejudice predicted by the public authority is relevant to the law enforcement activities mentioned in sections 31(1)(a), (b) and (c).
34. With respect to law enforcement activities, the Commissioner recognises in his published guidance³ that section 31(1)(a) will cover all aspects of the prevention and detection of crime. With respect to section 31(1)(b), he recognises that this subsection: "... could potentially cover information on general procedures relating to the apprehension of offenders or the process for prosecuting offenders". And, regarding section 31(1)(c), amongst other interests, this limb will protect information if its disclosure would undermine particular proceedings.
35. With regard to the first criterion, the Commissioner is satisfied that the harm envisaged relates to the interests that section 31 seeks to protect against, namely prejudice to the prevention or detection of crime, the apprehension or prosecution of offenders and the administration of justice.

The nature of the prejudice

36. The Commissioner has next considered whether the prejudice being claimed is "real, actual or of substance", not trivial, and whether there is a causal link between disclosure and the prejudice claimed. In his view, disclosure must at least be capable of harming the interest in some way, ie have a damaging or detrimental effect on it.
37. He is satisfied that the prejudice being claimed is not trivial or insignificant and he accepts that it is plausible to argue that there is a causal link between disclosure of the information and prejudice occurring. The prejudice in this case would be to a major criminal investigation on a subject of international importance. There is a clear causal link between the disclosure of information being considered in

³ <https://ico.org.uk/media/for-organisations/documents/1207/law-enforcement-foi-section-31.pdf>

what remains a 'live' criminal investigation and any potential risk of undermining that investigation.

38. The Home Office has argued that disclosure of the withheld information would prejudice the prevention of crime, the apprehension or prosecution of offenders and the administration of justice. It said:

"It is our view that disclosure would prejudice law enforcement capabilities as listed at subsections (a)(b) and (c) in light of the significant international aspect to both the continuing prosecution of Masoud and the wider investigation into other potential suspects. While the material requested is now over 30 years old, depending on the progress of the investigations, it is possible that it could become more significant than it is currently, and so any disclosure now, would prejudice the potential gathering and presentation of evidence at trial".

39. With regard to the likelihood of prejudice in this case, the Home Office has confirmed it is relying on the higher level of likelihood, ie that prejudice 'would' occur were disclosure required.
40. 'Would' therefore means 'more probable than not'; in other words, there is a more than 50% chance of the disclosure causing the prejudice, even though it is not absolutely certain that it would do so.

Is the exemption engaged?

41. The international investigation into the events at Lockerbie remains ongoing. The Commissioner accepts that disclosure of information which forms part of that investigation would clearly be likely to prejudice that investigation. Consequently, the Commissioner accepts that disclosure of the withheld information would result in a more than 50% chance of prejudice to the law enforcement interests cited.
42. The Commissioner finds that the prejudice test has been satisfied in the circumstances of this case and consequently the exemptions at sections 31(1)(a), (b) and (c) are engaged.
43. Section 31 is qualified by a balance of the public interest test. The Home Office can only rely upon section 31 as a basis for withholding the information in question if the public interest in doing so outweighs the public interest in disclosure.
44. The Commissioner recognises that there is clearly some overlap between subsections 31(1)(a), (b) and (c) and he has therefore considered them together.

Public interest test

Arguments in favour of disclosure

45. The complainant did not provide any public interest arguments.
46. The Home Office recognised the general public interest in transparency and openness in Government, which, in this case, would include having access to information in relation to the Lockerbie bombing and investigation.

Arguments in favour of maintaining the exemption

47. The Home Office argued that access to the requested information would be to the detriment of any future prosecutions. It said:

“Because of the high-profile nature of this case, disclosure would interfere with, and compromise, the multifaceted work being conducted by the relevant legal authorities: this would not be in the wider public interest.

On balance, it is our view that the overall public interest in preserving the integrity of on-going legal proceedings in such a high-profile criminal investigation outweighs the public interest in disclosure, and therefore the information contained within this file should remain protected”.

Balance of the public interest arguments

48. In the Commissioner’s view, the fact that there remains a live investigation into this major catastrophe, which still has worldwide ramifications, means the public interest in maintaining the exemption is stronger than the public interest in disclosure. A safe space is needed to allow law enforcement bodies to consider all necessary material away from external interference, commentary and distraction. Clearly, the ongoing investigation could be readily undermined by premature disclosure and this is, of itself, contrary to the public interest.
49. Accordingly, and aside from the information referred to in paragraph 13, the Commissioner has concluded that the Home Office is entitled to rely on section 31 as its basis for withholding all the remaining information and finds that the public interest in maintaining the exemption outweighs the public interest in disclosure.
50. In the light of the Commissioner’s conclusion on section 31, he has not gone on to consider the application of section 40.

Right of appeal

51. 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

52. 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.

53. 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

**Carolyn Howes
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