

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 October 2023

Public Authority: Ministry of Defence
Address: Whitehall
London
SW1A 2HB

Decision (including any steps ordered)

1. The complainant has requested from the Ministry of Defence ("MoD") all information contained in two files that are referenced in The National Archives as retained by MoD. MoD refused to provide this information citing section 23 (security bodies) as its basis for doing so. It upheld this at internal review.
2. The Commissioner's decision is that MoD is entitled to rely on section 23 as its basis for refusing to provide the requested information.
3. The Commissioner does not require further steps.

Request and response

4. On 18 March 2023, the complainant requested information of the following description:

"Please provide copies of the following two files that are referenced in the National Archives as held by your department."
 1. Reference: DEFE 48/992

Description: Exercise Badgers Lair II: vulnerability of SAS stay behind parties

Date: 1976 Jan 01 - 1976 Dec 31

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

Former reference in its original department: Report 7605

Legal status: Public Record(s)

Closure status: Closed Or Retained Document, Open Description Access conditions: Retained by Department under Section 3.4

2. Reference: DEFE 48/931

Description: Detectability of stay-behind parties

Date: 1974 Jan 01 - 1974 Dec 31

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

Former reference in its original department: M 7404 Addendum

Legal status: Public Record(s)

Closure status: Closed Or Retained Document, Open Description

Access conditions: Retained by Department under Section 3.4

Closure criterion: Retained in departments on security or other specified grounds

Lord Chancellor's Instrument: LCI 71 - Series containing retention instruments

LCI signed date: 2003 November 01

Reconsideration due in: 2013".

5. On 3 April 2023 MoD refused to provide this information. It cited the following exemption as its basis for doing so:

- section 23 (security bodies).

6. The complainant requested an internal review on the same day. They said:

"1. I wish to challenge the application of section 23. These files are over 40 years old. It cannot be right that they continue to relate to security bodies today. Even if that were true they it cannot be right are entirely related to current security bodies and parts of them cannot be disaggregated.

2. I note that the National Archive now contains FCO files previously classified Secret on Operation Gladio from 1990-91 that relate to UK stay behind units.

3. How can it be correct that these much older MOD files are withheld under section 23?"

7. MoD wrote to the complainant on 15 May 2023 and upheld its use of section 23. It added that "the requirement to continue retaining these

files within the department will be next reviewed under the PRA [Public Records Act] in 2033. If, at that time, the Department finds that the information is no longer sensitive, they will be transferred to TNA. It also explained that each decision to transfer was undertaken 'on a case-by-case' basis and the outcomes depend upon the continued sensitivity of the information contained in each record".

Scope of the case

8. The complainant contacted the Commissioner on 16 May 2023 to complain about the way their request for information had been handled.
9. As well as querying the application of section 23 in general, the complainant specifically asked the Commissioner to consider whether the information could be disaggregated so that any remaining information could be disclosed.
10. The Commissioner considers that the scope of his investigation is to decide whether MoD is entitled to withhold the requested information on the basis of section 23. He has taken into account the specific points raised by the complainant regarding disaggregation.

Reasons for decision

11. Public authorities are allowed to rely on section 23 of FOIA to withhold information that was either supplied by or relates to a specific list of security bodies. Section 23 is a class based absolute exemption. Information is exempt if it falls within the class of information described in section 23.
12. Section 23(3) sets out the list of security bodies covered.
13. In its submission to the Commissioner, MoD identified from section 23(3) why section 23(1) was applicable. It also provided further details about this. The Commissioner does not propose to set out that detail on the face of this notice because to do so would, in itself, reveal the withheld information. The Commissioner is satisfied that the MoD's explanation supports its argument that the withheld information is caught by section 23.
14. The Commissioner also asked MoD to consider whether any of the information to which section 23 had been applied could be disaggregated from the whole of the withheld information and the remainder considered separately.

15. MoD explained the steps it had taken to consider this point and why it had concluded that it could not apply disaggregation in this case. The Commissioner is satisfied with this explanation.
16. The Commissioner put to MoD the points raised by the complainant with regard to other information which is in the public domain or to which journalists have had access. The Commissioner is satisfied that MoD has considered this request on its own merits and that it has addressed the points raised by the complainant. Again, the Commissioner regrets that he is unable to set out further details about the explanation given by MoD in this regard because, to do so, would disclose the withheld information.

Conclusion

17. Having considered MoD's explanation, the Commissioner is satisfied that the requested information is all exempt from disclosure under section 23.
18. MoD also argued that some of the information may also be exempt under section 40 (personal data) and section 26 (defence). The Commissioner has not gone on to consider whether either or both of these exemptions also apply because he is satisfied that all the information is exempt from disclosure under section 23 of the FOIA.

Right of appeal

19. 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

20. 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.
21. 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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