

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 17 October 2023

**Public Authority:** Foreign, Commonwealth & Development Office  
**Address:** King Charles Street  
London  
SW1A 2AH

#### **Decision (including any steps ordered)**

---

1. The complainant submitted a request to the Foreign, Commonwealth and Development Office (FCDO) seeking two files concerning Guy Burgess. The FCDO sought to withhold the requested files on the basis of section 23(1) (security bodies) or, in the alternative, section 24(1) (national security) of FOIA. The Commissioner has concluded that the files are exempt from disclosure on the basis of section 23(1) or section 24(1) of FOIA.
2. The Commissioner does not require further steps.

#### **Request and response**

---

3. The complainant submitted the following request to the FCDO on 14 June 2023:  
  
'Disclose files FCO 158/15 ['Guy Burgess's private papers: C D W O'Neill'] and FCO 158/16 ['Guy Burgess: contacts with other government officials']. If either file is subject to s24, please state to which file the exemption applies and explain the PIBT [public interest balance test].'
4. The FCDO responded on 10 July 2023 and confirmed that it held the information requested. However, it relied on sections 23(1) (security

bodies) and 24(1) (national security), cited in the alternative, to withhold the information.

5. The complainant contacted the FCDO on the same day and asked it conduct an internal review of this decision. He noted that the refusal notice stated that:

"Section 24 is a qualified exemption, which is subject to a public interest test. This means that a public interest test must be carried out to determine whether maintaining the exemption outweighs the public interest in disclosing the information. We acknowledge the public interest in openness and transparency, but after reviewing the material we consider that there is a stronger public interest in protecting national security."

6. The complainant argued that:

"You claim to have carried out the public interest balancing test to the information under s24. S24(1) excludes s23 information. Explain how you can carry out the PIBT to information which does not exist. The statute states:

24 National security.

(1) 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.

Please explain how you can know the result of the test unless the test was conducted."

7. The complainant contacted the FCDO on 11 July 2023 and provided further submissions in support of his request for an internal review as follows:

"If the information is exempt under s23 it is not s24 information. You cannot conduct the s24 PIBT to s23 information. A PIBT balancing test can only be conducted when there is a duty to do so... [He then quoted sections 2 and 24 of FOIA]...

If the information is exempt under s23 then there is no 'Information'.

I want the IR [internal review] to say this:

"We confirm that we have conducted the public interest under s24 to the information we hold."

or

"We do not hold information, in scope, to which s24 applies."

8. The FCDO responded on 7 August 2023. The internal review upheld the application of sections 23(1) and 24(1), cited in the alternative. It also noted that the approach of applying these exemptions in the alternative was supported by both the ICO's guidance<sup>1</sup> and a recent Upper Tribunal decision.<sup>2</sup>

## Scope of the case

---

9. The complainant contacted the Commissioner on 7 August 2023 in order to complain about the FCDO's handling of his request. He explained that he disagreed with the Upper Tribunal's decision on whether sections 23(1) and 24(1) of FOIA could be applied in the alternative; in his view the application of the exemptions in this manner was unlawful. Furthermore, the complainant argued that in the circumstances of this case section 24(1) did not apply, and even if it did, then the public interest favoured disclosure.

## Reasons for decision

---

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

### **Section 24 – national security**

10. 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)."

11. To successfully engage the exemption at section 23(1), a public authority needs only to demonstrate that the relevant information was

---

<sup>1</sup> <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/how-sections-23-and-24-interact/>

<sup>2</sup> Foreign, Commonwealth and Development Office v Information Commissioner, Williams & Others, [2021] UKUT 248 (AAC)  
<https://www.gov.uk/administrative-appeals-tribunal-decisions/foreign-commonwealth-and-development-office-v-information-commissioner-williams-and-others-sections-23-and-24-2021-ukut-248-aac>

directly or indirectly supplied to it by, or relates to, any of the bodies listed at section 23(3).<sup>3</sup>

12. 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”.

13. 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;
- 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.

14. Furthermore, in this context the Commissioner interprets ‘required for the purpose 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.

15. 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.

---

<sup>3</sup> 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>

16. 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, 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.
17. 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.
18. As referred to by the FCDO in its internal review response, this approach of applying these exemptions in the alternative has been accepted by the Upper Tribunal. The Commissioner appreciates that the complainant disagrees with Upper Tribunal's decision. However, a decision by the Upper Tribunal provides a binding decision which the Commissioner must follow, and any event, as set out above, the Upper Tribunal's decision endorses the approach to these exemptions previously set out in the Commissioner's guidance.
19. The information that is the scope of this complaint has already been the subject of a previous decision notice issued by the Commissioner. In that case the Commissioner accepted that the files FCO 158/15 and FCO 158/16 either fall within the scope of the exemption provided by section 23(1) of FOIA or fall 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.<sup>4</sup>
20. This finding was upheld by the First-tier Tribunal in its decision of 28 April 2023 in appeal EA/2020/0142.<sup>5</sup> The Commissioner notes that this decision was issued after the Upper Tribunal considered the preliminary issue as to whether the exemptions in question could be applied in the alternative.

---

<sup>4</sup> FS50864309 <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2617403/fs50864309.pdf>

<sup>5</sup> The decision in EA/2020/0142 has not been published by the Tribunal Service and is not therefore available online.

21. In view of these previous decisions the Commissioner is satisfied that the FCDO was entitled to withhold the information sought by the complainant's request on the basis of section 23(1) or section 24(1) of FOIA. Furthermore, the FCDO is not obliged to say which of these exemptions it is seeking to rely on to withhold the information. To the extent that section 24(1) may apply, the Commissioner is satisfied that the public interest still favours maintaining the exemption.

## Right of appeal

---

22. 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](mailto:grc@justice.gov.uk)

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

23. 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.
24. 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 .....**

**Jonathan Slee**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**