

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 October 2024

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 records concerning political parties in Hong Kong in the 1970s. The FCDO applied sections 23(1) (information supplied by, or relating to, bodies dealing with security matters) and 24(1) (national security) of FOIA, in the alternative, to refuse the request.
2. The Commissioner's decision that the FCDO was entitled to apply sections 23(1) and 24(1) in the alternative, to withhold the requested information.
3. The Commissioner does not require further steps.

Request and response

4. On 6 November 2023, the complainant wrote to the FCDO and requested information in the following terms:

"Last week I consulted file FCO 40/700 "Political Parties in Hong Kong" (1976), at the National Archives in Kew Gardens. The file indicates that two items have been retained under Section 3(4) of the Public Records Act 1958: (1) Folio under 11 dated 19/3/1976 (2) Folio W11 minute of 14/10/1976 & 18/10/1976

National Archives staff have informed me that the markers in the file indicate that the pages have been retained by the FCDO. "These pages are therefore not publicly accessible and I'm afraid you will need to request access to the records by submitting a Freedom of Information request to the Departmental Record Officer (DRO) for that department."

I would hereby like to file a request to view the missing documents."

5. The FCDO responded on 5 February 2024 and confirmed that it held the information requested. However, it relied on sections 23(1) and 24(1), cited in the alternative, to withhold the information.
6. Following an internal review the FCDO wrote to the complainant on 9 April 2024. In this it upheld the application of sections 23(1) and 24(1), cited in the alternative.

Scope of the case

7. The complainant contacted the Commissioner on 10 May 2024 to complain about the way their request for information had been handled.
8. The complainant explained that he was not satisfied that section 23(1) could be engaged, or that the public interest test had been considered with respect to the age of the information. The complainant also questioned whether a time frame could be set for the transfer of the records to The National Archives.

Reasons for decision

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

Section 24 – national security

9. The FCDO withheld the information on the basis of sections 23(1) and 24(1), cited in the alternative.
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

directly or indirectly supplied to it by, or relates to, any of the bodies listed at section 23(3)¹.

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.

¹ 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>

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.
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, the Commissioner will allow public authorities to cite both exemptions 'in the alternative' when necessary². 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. The approach of applying these exemptions in the alternative has been accepted by the Upper Tribunal.
18. Based on the submissions provided to him by the FCDO during the course of his investigation, the Commissioner is satisfied that the two records 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.
19. 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.
20. The Commissioner also wishes to note that despite the age of the information, and the passage of time since it was created, he is satisfied that this does not undermine the FCDO's position that section 23(1) and section 24(1) applies in the alternative.
21. The Commissioner's decision is therefore that the FCDO was entitled to rely on sections 23(1) and 24(1) in the alternative, to refuse the request.

² <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/how-sections-23-and-24-interact/>

Other matters

22. The Commissioner notes, for the benefit of the complainant, that he cannot require a public authority to deposit records at The National Archives, nor set a timescale for doing so. This falls outside the Commissioner's authority.

Right of appeal

23. 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

24. 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.
25. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Daniel Perry
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF