

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 December 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 & Development Office (FCDO) seeking documents relating to the accidental shooting down of an Iranian passenger aircraft by the USS Vincennes in July 1988. The FCDO disclosed some information but withheld further information on the basis of section 21 (information reasonably accessible by other means), and section 23(1) (security bodies) or, in the alternative, section 24(1) of FOIA. The complainant disputed the application of the latter two exemptions.
2. The Commissioner has concluded that the disputed information is exempt from disclosure on the basis of section 23(1) or section 24(1) of FOIA.
3. The Commissioner does not require further steps.

Request and response

4. The complainant submitted the following request to the FCDO on 6 February 2024:

"I am interested in documents relating to the accidental shooting down of Iran Air flight 655 by the USS Vincennes on the 3rd July 1988. The files I would be interested in would have likely been produced during July-Sept 1988."

5. The FCDO confirmed that it held information falling within the scope of this request but it considered this to be exempt from disclosure on the basis of section 27 (international relations) of FOIA and that it needed additional time to consider the balance of the public interest.
6. The FCDO provided the complainant with a substantive response on 13 March 2024. It explained that a review of the material had concluded that some of this could now be disclosed and this was provided to him. However, the FCDO explained that further information, namely two extracts, were exempt on the basis of section 21 (information reasonably accessible to the applicant) as this material was available to view at the National Archives (TNA). The FCDO also explained that further material had been withheld on the basis that it was exempt from disclosure under sections 23 (security bodies) and 24 (national security) with these exemptions cited in the alternative.¹ The FCDO no longer sought to rely on section 27 of FOIA to withhold any information.
7. The complainant contacted the FCDO on 14 March 2024 and sought an internal review of this decision. He argued that, given the nature of the material on this subject which was available at TNA, the FCDO should be able to release further information that it held falling within the scope of this request. He cited a number of specific files at TNA to support this position.
8. The FCDO informed him of the outcome of the internal review on 18 September 2024. It explained that it had considered the information cited by the complainant at TNA and could confirm that the FCDO had not retained material relevant to this request relating to these files. Furthermore, the FCDO explained that it was satisfied that the three exemptions cited in the refusal notice applied to the withheld information that it still held.

¹ Citing the sections 23(1) and 24(1) of FOIA in the alternative means that although only one exemption is engaged the other one is also cited so as to disguise which exemption is in fact being relied upon. This approach may be necessary in instances where citing one exemption would in itself be harmful. Further information on this issue is contained in the ICO's guidance <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/#text4>

Scope of the case

9. The complainant contacted the Commissioner on 25 September 2024 to complain about the FCDO's decision to withhold information on the basis of sections 23 and 24 of FOIA. In his view, given the material that had already been disclosed on this topic, further disclosures could be made. The complainant did not seek to contest the FCDO's reliance on section 21 of FOIA.
10. During the course of his investigation the Commissioner raised a query with the FCDO regarding the scope of the request. This was on the basis that in his request the complainant explained that "The files I would be interested in would have **likely** been produced during July-Sept 1988" (Commissioner's emphasis) and this was the only period searched by the FCDO. In response the FCDO explained that the subject line of complainant's request read "FOI REQUEST: Iran Air Flight 655 crash - July-Sept 1988" and therefore it considered it reasonable to interpret the request as **only** seeking information falling within this period. In view of the title of the email containing the request the Commissioner is satisfied that the FCDO's interpretation of this request was a reasonable one.

Reasons for decision

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

Section 24(1) – national security

11. 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)."

12. 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

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>

13. 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”.

14. 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.

15. 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.

16. 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.

17. 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.

18. 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.
19. Based on the submissions provided to him by the FCDO during the course of his investigation, and his examination of the withheld information, the Commissioner is satisfied that the withheld information falls either 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 section 24(1) is engaged then the public interest favours maintaining the exemption.
20. 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.

Right of appeal

21. 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

22. 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.
23. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Jonathan Slee
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