

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 January 2016

Public Authority: Foreign and Commonwealth Office
Address: King Charles Street
London
SW1A 2AH

Decision (including any steps ordered)

1. The complainant has requested information from the Foreign and Commonwealth Office ("FCO") which, although they are over 30 years old, have not been transferred to The National Archives. The FCO refused to provide some of the requested information citing section 23 (security bodies exemption) as its basis for doing so. It upheld its use of section 23 at internal review.
2. The Commissioner's decision is that the FCO is entitled to rely on Section 23 as its basis for withholding the requested information.
3. No steps are required.

Request and response

4. On 25 January 2015, the complainant requested information of the following description:

"I'd be grateful if you would make available the following retained folios:

Reference: FO1110/127/1

Description: Retained extracts: Letters of 25/9/1948, 4/10/1948 and 27/10/1948, draft of 22/10/1948

Date: 1948

Reference: FO110/4/1

Description: Retained extracts: Jacket PR125/1: telegram no. 170 dated 24/3/1948, whole jacket PR149

Date: 1948

Reference: FO1110/3/1

Description: Retained extracts: Whole jacket PR70/1, whole jacket PR72/1, whole jacket PR77/1, whole jacket PR 85/1, jacket PR86/1: telegram no. 148 dated 19/3/1948, whole jacket PR 107/1, whole jacket PR108/1, jacket PR109: letter dated 18/2/1948, jacket PR11/1: minutes of meeting

Date: 1948"

5. FCO replied on 23 February 2015. It withheld FO 1110/127/1 and FO 1110/4/1 in full under section 23. It withheld most of FO 1110/3/1 under section 23 but disclosed the information contained within the jackets PR 77/1 and PR 85/1.
6. On 23 February 2015, the complainant requested an internal review of this refusal. He reiterated this on 20 March 2015. FCO sent him the outcome of its internal review on 23 April 2015. It upheld its original position with regard to its use of section 23.

Scope of the case

7. The complainant contacted the Commissioner on 15 July 2015 to complain about the way the FCO handled his request.
8. The Commissioner has considered whether the FCO is entitled to rely on section 23 as a basis for withholding the information described in requests 1 and 2 which has not been disclosed. This information is as follows:
 - FO1110/127/1 and FO 1110/4/1 and those sections of FO 1110/3/1 that remain withheld.

Reasons for decision

9. Section 23 (1) states:

'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).'
10. To successfully engage the exemption at section 23(1), a public authority must be able to demonstrate that the relevant information was

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

11. In correspondence with the FCO, the complainant referred to section 64(2), which provides that section 23 is qualified by the public interest where the information in relation to which it was cited is a historical record, the threshold for which is currently being reduced from 30 years to 20, *and* it has been passed by the originating body to the National Archives.
12. Whilst the information here is a historical record due to its age, it has been retained by the FCO and not been passed to TNA. This means that section 64(2) does not have effect, so section 23(1) remains an absolute exemption in relation to the information in question.
13. The complainant was strongly of the view that the FCO's decision not to transfer the records to TNA was erroneous and not in accordance with the law. He further argued that the Commissioner has a duty to ensure that this error is corrected.
14. The Commissioner disagrees on both points.¹ The general functions of the Commissioner are set out in section 47 of the FOIA. It includes the Commissioner's duty to assess a public authority's good practice. The Commissioner must also promote observance with the FOIA section 46 Code of Practice. Section 47(3) specifies that the Commissioner is only able to consider whether a public authority is following good practice with the consent of that public authority.
15. Paragraph 17 of the Section 46 Code of Practice ("Retention or Transfer of Public Records") envisages that "Some categories of records are covered by a standard authorisation by the Lord Chancellor (known as 'blanket retentions') which are reviewed every 10 years".² It is this notion of "blanket retentions" which the complainant believes should be challenged in this case.
16. The Commissioner is not responsible for determining whether information has been properly held back under the Public Records Act 1958 ("PRA"). The Commissioner notes that under Section 3(4) of the PRA, the Lord Chancellor has made an instrument (the most recent

¹ <http://www.legislation.gov.uk/ukpga/2000/36/section/47>

² <https://ico.org.uk/media/for-organisations/research-and-reports/1432475/foi-section-46-code-of-practice-1.pdf>

dated 19 December 2011; expiring 31 December 2021), which allows documents to be retained in the department concerned beyond 30 years (now 28 years) because the transfer of the records to TNA 'will create a real risk of prejudice to national security'³

17. The oversight of this decision making is by the Advisory Council on National Records and Archives ("ACNRA") and not the Commissioner.⁴
18. In this case, the Commissioner is satisfied that the records have been retained by the FCO and that the FCO is not deviating from the Section 46 Code of Practice in doing so where it has applied a "blanket retention" to that information.
19. The FCO provided the Commissioner with a letter from a very senior official in the FCO (SO) with the experience and authority to validate the provenance of the information. The SO assured the Commissioner that the information in question was either received from one of the bodies listed in section 23(3) or is directly related to them.
20. The Commissioner has considered all the submissions of both parties. He accepts that in the circumstances of this case, the assurance provided by the SO with regards to the application of section 23(1) to all the withheld information is sufficient for him to be satisfied that section 23(1) is engaged.
21. The Commissioner therefore finds that the requested information that remains withheld is exempt from disclosure on the basis of section 23(1) because it was supplied by, or relates to, one of the bodies listed in section 23(3).
22. Section 23(1) is an absolute exemption which means that there is no requirement to carry out a public interest test to determine whether or not the information withheld on that basis should have been disclosed in any event in the public interest.

3

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/219904/security-intelligence-instrument.pdf and

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/219905/not-es-security-intelligence-instrument.pdf

⁴ <http://www.nationalarchives.gov.uk/advisorycouncil%5Cdefault.htm>

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: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.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.

Signed

Gerrard Tracey
Principal Adviser
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Wilmslow
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SK9 5AF