

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 March 2016

Public Authority: Cabinet Office
Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested a file of Prime Ministerial correspondence on the matter of security which dates from the period 1964-70. The Cabinet Office refused to provide it citing the exemptions at section 23(1) (security bodies) and section 24(1) (national security) in the alternative as its basis for doing so. It also cited section 40 (unfair disclosure of personal data). It upheld this at internal review.
2. The Commissioner's decision is that the Cabinet Office is entitled to rely on section 23(1) and section 24(1) in the alternative as its basis for refusing to provide the requested information.
3. No steps are required.

Request and response

4. On 19 January 2015, the complainant requested information of the following description:

"Would you release this file PREM 13/274".¹
 5. On 28 January 2015, the Cabinet Office responded. It refused to provide the requested information and cited the following exemptions as its basis for doing so:
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¹ <http://discovery.nationalarchives.gov.uk/details/r/C5241151>

- Section 23(1) (Security bodies' information)
 - Section 24(1) in the alternative (National security)
 - Section 40(2) (Unfair disclosure of personal data)
6. The complainant requested an internal review on 25 February 2015.
7. On 12 May 2015, the Cabinet Office sent the outcome of its internal review. It upheld its original position with regard to the three exemptions cited at refusal.

Scope of the case

8. Following earlier correspondence, the complainant confirmed to the Commissioner on 29 October 2015 that he wished to complain about the way this request for information had been handled. He also provided copies of the relevant correspondence which the Commissioner needed to take the complaint forward.
9. The Commissioner has considered whether the Cabinet Office is entitled to rely on section 23(1) and section 24(1) in the alternative as a basis for withholding information in file PREM 13/2374. It will only be necessary for the Commissioner to consider the application of section 40(2) where he finds that section 23(1) and section 24(1) in the alternative do not apply.

Reasons for decision

10. Section 23(1) of the FOIA provides 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. Section 24(1) of the FOIA provides 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."
12. Sections 23(1) and 24(1) are mutually exclusive. Section 24(1) can only be applied to information that does not fall within section 23(1). This means that they cannot be applied to the same information. In his published guidance, however, the Commissioner has stated that he will

accept section 23(1) being cited with section 24(1) being cited in the alternative, in certain circumstances.²

13. The complainant's arguments focus primarily on the age of the requested information. He expressed considerable scepticism about the applicability of either of the exemptions given the age of the information.
14. In correspondence with the Cabinet Office, the complainant also 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.
15. Whilst the information here is a historical record due to its age, it has been retained by the Cabinet Office 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.
16. The complainant is strongly of the view that the Cabinet Office's decision not to transfer the records to TNA was erroneous and not in accordance with the law. He has further argued that the Commissioner has a duty to ensure that this error is corrected.
17. The Commissioner disagrees on both points. The general functions of the Commissioner are set out in section 47 of the FOIA.³ 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.
18. 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".⁴ It is this

² https://ico.org.uk/media/for-organisations/documents/1196/how_sections_23_and_24_interact_foi.pdf

³ <http://www.legislation.gov.uk/ukpga/2000/36/section/47>

⁴ <https://ico.org.uk/media/for-organisations/research-and-reports/1432475/foi-section-46-code-of-practice-1.pdf>

notion of “blanket retentions” which the complainant believes should be challenged in this case.

19. 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 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’⁵
20. The oversight of this decision making is by the Advisory Council on National Records and Archives (“ACNRA”) and not the Commissioner.⁶
21. In this case, the Commissioner is satisfied that the records have been retained by the Cabinet Office and that the Cabinet Office is not deviating from the Section 46 Code of Practice in doing so where it has applied a “blanket retention” to that information.
22. Turning now to the specifics of this case, the Cabinet Office provided the Commissioner with a letter from a very senior official in the Cabinet Office (SO) with the experience and authority to validate the provenance of the information. The SO assured the Commissioner that section 23(1) and section 24(1) in the alternative can be applied to the information in question.
23. 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 the withheld information is sufficient for him to be satisfied that section 23(1) is engaged. Section 23(1) is a class based absolute exemption. The age of the information is not relevant for the purposes of considering section 23(1). It either falls within the class of information described in the withheld information or it does not, regardless of its age. In this case, the Commissioner is satisfied that section 23(1) can be applied to the withheld information.

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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/notes-security-intelligence-instrument.pdf

⁶ <http://www.nationalarchives.gov.uk/advisorycouncil%5Cdefault.htm>

24. As regards section 24(1) cited in the alternative, the Commissioner notes the view of the SO in this regard and gives weight to it given the position and experience of the SO. He has also taken into account the submissions provided by the Cabinet Office by way of additional explanation. Unfortunately, he is unable to set those submissions out on the face of this notice without disclosing sensitive information.
25. In light of the above, the Commissioner is satisfied that section 24 can be engaged in the alternative in relation to the withheld information.
26. Section 24(1) is a qualified exemption which means that it is subject to a public interest test. Therefore, the Commissioner also had to consider whether in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosing the information withheld on that basis.
27. The Cabinet Office acknowledged a general public interest in openness and transparency which would be served by disclosure in this case to increase public trust in and engagement with the government. It also acknowledged a public interest in improving the public's understanding of the steps the government takes with regard to national security.
28. The Cabinet Office asserted a stronger countervailing public interest in withholding the information. It argued that the information has continuing relevance which means that, far from being obsolete, it must still be withheld in order to safeguard national security.
29. The Commissioner acknowledges the complainant's arguments as to the age of the information. Where information is old and of little relevance to ongoing national security matters, the public interest in disclosure of that information can carry greater weight. However, the Commissioner accepts the Cabinet Office's assertion that the information remains of continuing relevance. The public interest in the safeguarding of national security remains particularly weighty. Where withholding information would greatly serve that interest, the Commissioner agrees that the exemption at section 24(1) should be maintained.
30. The Commissioner therefore finds that the public interest in maintaining the exemption at section 24(1) outweighs the public interest in disclosing the information in PREM 13/274. In reaching this view, he has given particular weight to the Cabinet Office's assertion that the information has continuing relevance with respect to safeguarding national security.
31. In view of his decision above, the Commissioner did not need to consider the applicability of section 40(2).

Right of appeal

32. 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

33. 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.
34. 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
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