

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 September 2016

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested information, concerning the expulsion of three Israeli diplomats after August 1987, from the Cabinet Office. The Cabinet Office refused to confirm or deny whether it held information within the scope of the request citing section 23(5) (security bodies) or section 24(2) (safeguarding national security) and section 27(4) (international relations) as its basis for doing so. The Cabinet Office upheld its position at internal review.
2. The Commissioner's decision is that the Cabinet Office is entitled to rely on section 23(5) and section 24(2) as its basis for refusing to provide confirmation or denial as to whether the requested information is held.
3. No steps are required.

Request and response

4. On 28 March 2015, the complainant requested information of the following description:

"I am writing to make an open government request for all the information to which I am entitled under the freedom of information act. In order to assist you with this request, I am outlining my query as specifically as possible. If however this request is too wide or too unclear, I would be grateful if you could contact me as I understand that under the act, you are required to advise and assist requesters.

I am looking for documents concerning the expulsion of three Israeli diplomats after August 1987.

I understand that under the act, I should be entitled to a response within 20 working days. I would be grateful if you could confirm in writing that you have received this request."

5. On 29 April 2015, the Cabinet Office wrote to advise it needed further time to consider the balance of public interest although it did not explain which qualified exemption it was referring to.
6. On 14 May 2015, the Cabinet Office responded. It refused to confirm or deny that it held the requested information and cited the following exclusions from this duty as its basis for doing so:
 - section 23(5) (security bodies) or section 24(2) (safeguarding national security); and
 - section 27(4) (international relations).
7. The complainant requested an internal review on 19 May 2015. The Cabinet Office upheld its position in a letter to the complainant dated 14 July 2015.

Scope of the case

8. The complainant had submitted complaints to the Commissioner about other requests he had made and had included reference to this matter as part of his series of complaints although he had not focussed on this request in that series and the Commissioner had not included it in the series. He confirmed to the Commissioner on 5 April 2016 that he also wished to complain to the Commissioner about the way the Cabinet Office had handled the above mentioned request of 28 March 2015. The Commissioner agreed to take the complaint forward in the circumstances.
9. The Commissioner has considered whether the Cabinet Office is entitled to rely on section 23(5) or section 24(2) and section 27(4) as its basis for refusing to confirm or deny whether it holds information within the scope of the request.

Reasons for decision

Background

10. In July 1987, a Palestinian cartoonist, Naji Salim al-Ali was shot in London and later died of his injuries.¹ It was alleged that Israeli intelligence services had prior knowledge of this assassination and three Israeli diplomats were expelled from the UK shortly afterwards.²

Section 1 (general right of access)

11. Section 1 creates a two part duty. Section 1(1)(a) requires a public authority to confirm or deny whether it holds requested information. Section 1(1)(b) requires a public authority to provide that information. Exemptions can apply to either part of section 1. If a public authority is excluded from its duty to provide confirmation or denial under section 1(1)(a) because an exemption applies, the further requirement to provide that information under section 1(1)(b) falls away.
12. In this case, the Cabinet Office argues that it is excluded from its obligation to provide confirmation or denial as to whether the requested information is held by virtue of section 23(5), section 24(2) and section 27(4) of the FOIA.

Section 23

13. Section 23(5) provides an exclusion from the duty imposed by section 1(1)(a) to confirm or deny whether information is held if to do so would involve the disclosure of information, whether or not recorded, that relates to or was supplied by any of the security bodies listed in section 23(3). This is a class-based exclusion, which means that if the confirmation or denial would have the result described in section 23(5), this exclusion is engaged.
14. In the Tribunal case *The Commissioner of Police of the Metropolis vs Information Commissioner* (EA/2010/0008) the argument was advanced that it was *highly likely* that any information held by the public authority that fell within the scope of the request would have been supplied to it by a section 23(3) body and, therefore, section 23(5) was engaged. The counterargument was made that only certainty as to the source of the

¹ http://news.bbc.co.uk/onthisday/hi/dates/stories/july/22/newsid_2516000/2516089.stm

² <http://www.independent.co.uk/news/world/mi5-was-feuding-with-mossad-while-known-terrorists-struck-in-london-1101024.html> and <http://www.nytimes.com/1988/06/18/world/britain-orders-israeli-diplomat-to-leave.html?scp=1&sq=Ishmail%20Hassan%20Sowan&st=cse>

information would be sufficient. The Tribunal rejected this counterargument and stated:

*"[The evidence provided] clearly establishes the **probability** that the requested information, if held, came through a section 23 body."* (paragraph 20)³

15. The approach of the Commissioner on this point is that she accepts the Tribunal view that the balance of probabilities is the correct test to apply. This means that for section 23(5) to be engaged, the evidence must suggest to a sufficient degree of likelihood (rather than certainty) that any information held that falls within the scope of the request would relate to, or have been supplied by, a body specified in section 23(3).
16. In this case, the Commissioner considers it clear that the subject matter of the request – controversy between UK and another nation regarding the activities of that nation's intelligence services – is within the area of the work of bodies specified in section 23(3). She also accepts that it is likely that, if the information described in the request did exist, this would have been compiled with input from outside the Cabinet Office, including from security bodies.
17. The Commissioner accepts that, on the balance of probabilities, any information held by the Home Office falling within the scope of the complainant's requests would relate to, or have been supplied by, a body or bodies listed in section 23(3). Her conclusion is therefore that section 23(5) is engaged.
18. As this conclusion has been reached on section 23(5), it is not strictly necessary to go on to also consider any other exclusions under FOIA. However, as the Cabinet Office also relied on section 24(2), the Commissioner has gone on to consider whether that exclusion applies. In doing so, she is also mindful of her own guidance on section 23(5) and section 24(2).⁴

Section 24

19. Section 24(2) provides an exclusion from the duty to confirm or deny where this is required for the purpose of safeguarding national security. Consideration of section 24(2) is a two-stage process. First, the exclusion must be engaged due to the requirement of national security.

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<http://www.informationtribunal.gov.uk/DBFiles/Decision/i678/20120222%20Open%20Decision%20EA20110118.pdf>

⁴ https://ico.org.uk/media/for-organisations/documents/1196/how_sections_23_and_24_interact_foi.pdf (paras 10-20)

Secondly, this exclusion is qualified by the public interest, which means that the confirmation or denial must be provided if the public interest in the maintenance of the exclusion does not outweigh the public interest in provision of the confirmation or denial.

20. The Commissioner has already accepted when finding that section 23(5) is engaged that revealing whether or not information is held within the scope of the request would reveal information relating to the role of the security bodies. The Commissioner also accepts that confirmation or denial in these circumstances would consequentially undermine national security. For that reason section 24(2) is also engaged as exclusion from the duty to confirm or deny is required for the purposes of national security.
21. Turning to the balance of the public interest, the question here is whether the public interest in safeguarding national security is outweighed by the public interest in disclosure of the confirmation or denial. Clearly, the public interest in safeguarding national security carries very great weight. In order for the public interest to favour provision of the confirmation or denial, it will be necessary for there to be public interest factors in favour of this of at least equally significant weight.
22. The Cabinet Office accepted that there is a general public interest in transparency in order to improve the public's understanding of the workings of government but argued that the public interest in maintaining the exclusion carried greater weight in this case.
23. The complainant noted that confidential matters were at least regularly acknowledged as having been discussed or addressed at The National Archives and, by implication, information of this age should be, at least, acknowledged as being held. He also noted contemporaneous reports of the events in question which made clear that Margaret Thatcher, the then Prime Minister, had a particular interest in the incident. The expulsion of the diplomats (a matter known and reported widely) would appear to point to the likelihood that recorded information is held.
24. The Commissioner acknowledges that there is some valid public interest in confirmation or denial in response to this request. This would increase public knowledge about the relationship between the UK and Israel. The Commissioner also acknowledges that the events referred to in the request took place nearly 30 years ago and were widely publicised. However, the Commissioner does not consider that this adds greater weight to the public interest in providing confirmation or denial in this case. She considers that there is a more compelling public interest in safeguarding national security in the circumstances of this case. She has had particular regard for her published guidance in reaching this view.

25. In view of this finding and that above on section 23(5), the Cabinet Office is not required to confirm or deny whether it held the information requested by the complainant.
26. The Commissioner has not gone on to consider the other exemption cited in this case given her conclusions about the applicability of section 23(5) and section 24(2).

Other matters

27. The Commissioner was extremely disappointed in this case to serve an Information Notice in order to obtain a substantive response from the Cabinet Office on this case. She wrote on three occasions to the Cabinet Office to ask for its arguments in support of its position. She served the Information Notice on 25 August 2016, when these informal attempts at obtaining a response proved fruitless.
28. The Commissioner acknowledges that cases involving exemptions at section 23 and section 24 can be sensitive such that a delay can arise. For this reason, in her opening letter to the Cabinet Office on this matter (notifying that the complaint had been received), she asked it to let her know as soon as any delay might be envisaged. Again, she is disappointed that the Cabinet Office did not let her know when it became clear to it that a delay might arise.

Right of appeal

29. 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

30. 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.
31. 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

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