

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 8 November 2010

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

Summary

The complainant submitted a request to the Foreign and Commonwealth Office (FCO) which asked for documents concerning discussions between a particular FCO official and a particular Iraqi minister in 2003. The FCO refused to confirm or deny whether it held information of the nature requested on the basis of sections 23(5) and 24(2) of the Act. Having investigated the circumstances of this request the Commissioner is satisfied that the FCO complied with the requirements of the Act in refusing this request on this basis. The Commissioner does not require the FCO to take any steps in order to ensure compliance with the Act.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. The complainant submitted the following request to the Foreign and Commonwealth Office (FCO) on 28 November 2008:

'I would like to see any documents from 2003 that refer to the meetings and talks between Foreign Office official (named person A) and Iraqi minister (named person B) of 2003.'

3. The FCO contacted the complainant on 29 December 2008 and explained that it was refusing to confirm or deny whether it held any information falling within the scope of the request on the basis of sections 23(5) and 24(2) of the Act. The response explained that with regard to the application of section 24(2) it was satisfied that the public interest favoured maintaining the exemption because:

'...any case relating to information held by the FCO about unorthodox diplomacy, particularly one about which there has been media speculation regarding the alleged role of intelligence organisations, assumptions (mistaken or otherwise) might be made that such information, may include information supplied by the security bodies covered by section 23 of the Act. To confirm or deny whether this was in fact the case would harm national security. If we were to confirm or deny that that information existed in one case, inferences, whether correct or not, might be drawn in those instances where we were unable to do so, which would have similar effects, as it would effectively confirm the involvement of one or more section 23 bodies in the investigation. It is important that consistency is maintained. For these reasons, we consider that in this case the public interest favours neither confirming nor denying whether further information is held. This is in line with usual practice in not commenting on the existence of reporting from the security and intelligence agencies and should not be taken as evidence that any such information does or does not exist'.

4. The complainant contacted the FCO on 5 January 2009 and asked for an internal review of this decision to be undertaken. In asking for this review the complainant suggested that in his opinion the comments regarding national security were not really credible. This was because the media reports were not based on speculation but on interviews by a journalist Ron Suskind with former senior UK intelligence officials. The complainant suggested that if these former senior officials could discuss the '(named person A and named person B) issue' without any apparent prejudice to national security then the FCO could release any

information it may hold on the same matter. Furthermore the complainant argued that there was clearly a pressing public interest in disclosure of information concerning Iraq and matters of intelligence.

5. The FCO informed the complainant of the outcome of the internal review on 13 February 2009; the review upheld the application of the exemptions as set out in the refusal notice.

The Investigation

Scope of the case

6. The complainant contacted the Commissioner on 20 May 2009 in order to complain about the FCO's decision to refuse to confirm or deny whether it held information falling within the scope of his request, and if it held such information, the FCO's failure to disclose it. In his submission to the Commissioner the complainant highlighted the points he had made in his request for an internal review, i.e. the fact that details of the talks between (named person A) and (named person B) had been published in a book by the author Ron Suskind based on interviews with Sir Richard Dearlove and Nigel Inkster. (The book in question was entitled *The Way of the World*.) It was therefore illogical for the FCO to argue that simply confirming whether it held information falling with the scope of his request would harm national security.

Chronology

7. Unfortunately, due to a backlog of complaints about public authorities' compliance with the Act, it was not until 15 January 2010 that the Commissioner contacted the FCO with regard to this complaint. In this letter the Commissioner asked the FCO to provide further detailed arguments to support its reliance on the exemptions contained at sections 23(2) and 24(5). The Commissioner also asked the FCO to confirm to him whether it held information falling within the scope of the request, and if so, to provide him with a copy.
8. The FCO responded on 25 February 2010 and provided some further reasoning to support its reliance on sections 23(2) and 24(5). However, the FCO emphasised that in response to a request for information of this nature it would always refuse to confirm or deny whether it held information, regardless of whether or not it did in fact hold information relevant to the request in question. On this basis it assumed that such knowledge was not necessary for the purposes of the Commissioner's investigation, although the FCO confirmed that it

had established whether or not it held information relevant to the request.

9. The Commissioner wrote to the FCO again on 6 May 2010 and explained that he accepted that he could possibly reach a conclusion on the application of the two exemptions without knowledge of whether information was actually held. However, in order to be in such a position the Commissioner explained that he needed to be provided with clarification on a number of specific issues concerning the relevant background to this request. The Commissioner therefore set out a number of further questions to which he asked the FCO to respond.
10. The FCO wrote to the Commissioner on 20 May 2010 and provided him with further background details concerning the application of the two exemptions cited in the refusal notice.

Findings of fact

11. The complainant also submitted an identical request to the Cabinet Office. The Cabinet Office refused to confirm or deny whether it held any information on the basis of the same exemptions cited by the FCO. The complainant has also complained to the Commissioner about the Cabinet Office's handling of this linked request and the Commissioner has issued a Decision Notice under reference number FS50249872. As part of his investigation of the Cabinet Office complaint representatives of the Commissioner's office (namely the Deputy Commissioner and the Head of Policy Delivery) attended a meeting on 9 July 2010 with a representative of the Cabinet Office at which issues pertinent to both requests were discussed.

Analysis

Exemptions

12. Section 1(1) of the Act provides a right of access to information held by public authorities. It states that:

'Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.'

13. In this case the FCO has argued that it is exempt from having to comply with the duty contained at section 1(1)(a) by virtue of the application of section 23(5) and section 24(2).
14. Section 23(5) states that:

'The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).'
15. The full list of the bodies contained in section 23(3) is included in the legal annex appended to this notice.
16. Sections 24(1) and (2) states that:

'(1) 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.
(2) The duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security.'
17. Section 23 and 24 are obviously closely linked provisions and, as the above quotes suggest, are mutually exclusive. That is to say if information is exempt from disclosure on the basis of the exemption contained at section 23, it cannot also be exempt under section 24. Indeed, in such circumstances exemption of the information cannot be required for the purposes of safeguarding national security because it is already exempt by virtue of the provisions of the previous section.
18. However, in respect of the application of sections 23(5) and 24(2), i.e. when a public authority believes it is exempt from the duty contained at section 1(1)(a), it is accepted practice to rely on both provisions without specifically stating which of the two actually applies. Such an approach is calculated to avoid disclosure of the fact that a section 23 body is or isn't involved in the scenario described in a particular request and was approved by the Information Tribunal in *Baker v Information Commissioner and the Cabinet Office* (EA/2006/0045). Obviously for such an approach to be effective, public authorities have to consistently cite both exemptions when responding to any similar requests.

19. Based upon the written submissions the FCO has provided, along with the discussions the Commissioner's representatives had with the Cabinet Office at the meeting referenced above, the Commissioner is satisfied that the FCO was entitled to rely on one of the exemptions cited in the refusal notice when refusing this request. Clearly in this Decision Notice the Commissioner cannot reveal which exemption he considers this to be. However, he is therefore fully satisfied that this exemption has been correctly relied upon and in the circumstances of this case the FCO was not required to comply with the requirements of section 1(1)(a) when responding to this request.
20. In the Commissioner's opinion to include any further details in this Decision Notice explaining the basis upon which he has reached this conclusion risks revealing the exemption that has in fact been cited by the FCO and/or revealing whether the FCO actually holds information falling within the scope of this request. The Commissioner recognises that the brevity of his reasoning may prove to be frustrating to the complainant, particularly in light of the specific arguments he has advanced in support of his complaint. However, in cases of this nature the Commissioner believes that this is an inevitable consequence of the required approach.
21. Furthermore, in setting out his conclusion in this way, the Commissioner wishes to emphasise that it should not be inferred that one exemption is more likely to have been relied upon than another, nor should any inference be made as to whether the FCO actually holds any information falling within the scope of this request.

The Decision

22. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

23. The Commissioner requires no steps to be taken.

Right of Appeal

24. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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.

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

Dated the 8th day of November 2010

Signed

**Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Freedom of Information Act 2000

General Right of Access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

Section 1(2) provides that -

"Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14."

Effect of Exemptions

Section 2(1) provides that –

"Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that either –

(a) the provision confers absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information

section 1(1)(a) does not apply."

Information supplied by, or relating to, bodies dealing with security matters

Section 23(1) 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)."

Section 23(3) provides that –

"The bodies referred to in subsections (1) and (2) are-

- (a) the Security Service,
- (b) the Secret Intelligence Service,
- (c) the Government Communications Headquarters,
- (d) the special forces,
- (e) the Tribunal established under section 65 of the Regulation of Investigatory Powers Act 2000,
- (f) the Tribunal established under section 7 of the Interception of Communications Act 1985,
- (g) the Tribunal established under section 5 of the Security Service Act 1989,
- (h) the Tribunal established under section 9 of the Intelligence Services Act 1994,
- (i) the Security Vetting Appeals Panel,
- (j) the Security Commission,
- (k) the National Criminal Intelligence Service, and
- (l) the Service Authority for the National Criminal Intelligence Service."

Section 23(4) provides that –

"In subsection (3)(c) "the Government Communications Headquarters" includes any unit or part of a unit of the armed forces of the Crown which is for the time being required by the Secretary of State to assist the Government Communications Headquarters in carrying out its functions."

Section 23(5) provides that –

"The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3)."

National Security

Section 24(1) 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."

Section 24(2) provides that –

"The duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security."

Section 24(4) provides that –

"A certificate under subsection (3) may identify the information to which it applies by means of a general description and may be expressed to have prospective effect."