Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 27 July 2011

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

Summary

The complainant requested information dating from the 1970s concerning relations between the UK and Portugal. The public authority part-refused the request, citing the exemption provided by section 23(1) (information relating to, or supplied by, security bodies). The Commissioner finds that the public authority cited this exemption correctly and so it is not required to disclose this information, but also finds that the public authority breached section 17(1)(c) of the Act in that it failed to provide an explanation for the citing of this exemption.

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 made the following information request to the Foreign and Commonwealth Office (FCO) on 23 July 2010:

> *"Please…provide copies of all…documents withheld from release to the National Archives from the following files:*
>
> - *Relations between Portugal and UK National Archives catalogue number: FCO 9/2069 FCO catalogue number: WSP 3/548/2 PART A*

- *Relations between Portugal and UK National Archives catalogue number: FCO 9/2070 FCO catalogue number: WSP 3/548/2 PART B*

- *Relations between Portugal and UK National Archives catalogue number: FCO 9/2071 FCO catalogue number: WSP 3/548/2 PART C"*.

3. The response to this request was dated 16 August 2010. The complainant was advised at this stage that files 9/2069 and 9/2071 had been released in full to The National Archives (TNA). In relation to file 9/2070, the exemption provided by section 23(1) (information relating to, or supplied by, security bodies) was cited. No explanation for the citing of this exemption was given.

4. The complainant subsequently requested an internal review, the outcome of which was provided in a letter dated 4 October 2010. The conclusion of this was that the citing of section 23(1) was upheld. Although not stated specifically, it was made somewhat clearer at this stage that section 23(1) was believed to be engaged in relation to excerpts from FCO 9/2070, rather than to the entirety of this file. Again no explanation for the citing of section 23(1) was given.

5. In a subsequent exchange of correspondence, it was clarified to the complainant that the information withheld had been retained by the public authority, rather than having been transferred to TNA. This meant that section 64(2) of the Act did not provide that section 23(1) was qualified by the public interest, despite the age of the information.

The Investigation

Scope of the case

6. The complainant contacted the Commissioner's office on 4 November 2010. At this stage the complainant indicated that he did not agree with the reasoning given by the public authority for the refusal of his request.

7. The complainant was contacted by the Commissioner's office on 12 January 2011. In order to clarify the scope of the complaint, the complainant was asked to respond confirming whether his complaint related only to the portion of file FCO 9/2070 that the public authority had not disclosed, or if there were other elements to his complaint.

8. The complainant responded to this on 31 January 2011 and confirmed that this complaint did relate to the retained portions of file FCO 9/2070 and to the citing of section 23(1) in relation to this information. The

complainant also stated at this stage that he did not believe that the responses from the public authority had been clear as to the extent to which the content of this file had been transferred to TNA, and he asked the Commissioner to consider whether section 64(2) now provided that section 23(1) was qualified by the public interest in relation to this information.

Chronology

9. The Commissioner's office contacted the public authority in connection with this case on 1 February 2011. The public authority was asked to respond with further explanation about the refusal of this request and, in particular, with clarification as to whether section 23(1) was cited only in relation to excerpts from file FCO 9/2070, rather than in relation to the whole of this file. The public authority was also asked to confirm if the information in relation to which section 23(1) was cited had been retained by it, rather than having been transferred to TNA.

10. The public authority responded to this on 23 February 2011 and confirmed that section 23(1) had been cited in relation to one extract from file FCO 9/2070 and that this extract had been retained by it rather than having been transferred to TNA. The public authority also at this stage supplied a letter from a senior official in the relevant area of the public authority that confirmed that the information does relate to a body specified in section 23(3).

Background

11. The TNA website records that file FCO 9/2070 covers relations between Portugal and UK and that it covers dates 1 January to 31 December 1974.

Analysis

Exemptions

Section 23

12. The public authority has cited section 23(1). This section is set out in full in the attached Legal Annex, as are all other sections of the Act referred to in this Notice. Section 23(1) provides an exemption for information that relates to, or was supplied by, either directly or indirectly, any of the bodies specified in section 23(3). This exemption is not subject to the public interest, meaning that if the information in question conforms to the class specified in this exemption, it is exempt from disclosure.

13. In a letter to the Commissioner dated 18 February 2011 the FCO's Director, Intelligence and National Security, explained that the information in question does relate to one of the bodies specified in section 23(3). The Commissioner is prepared, in limited circumstances, to accept the assurance of a senior official that information withheld under section 23(1) has indeed been supplied by or is related to security bodies specified in section 23(3). He will only do so where the official occupies a position in relation to the security bodies which allows them genuinely to validate the provenance of the information, and where the official is independent of the public authority's process for dealing with freedom of information requests.

14. In the circumstances of this case, which include general public knowledge regarding the events that took place in Portugal during the period in question, the Commissioner accepts the Director's assurance. His conclusion is, therefore, that the exemption provided by section 23(1) is engaged in relation to the information in question.

15. The Commissioner will also address here two issues raised by the complainant, the first of which is whether the information has been retained by the public authority, or has been transferred to TNA. The Commissioner agrees with the complainant that the public authority was less than entirely clear in its correspondence with the complainant as to whether file FCO 9/2070 was withheld in its entirety or only partially and as to whether the information in relation to which section 23(1) was cited was held by it or had been transferred to TNA. Whilst this does not change the Commissioner's decision in this case, he expects the public authority to provide greater clarity in relation to any future requests which present similar issues and would observe that this complaint may not have come about had the public authority provided greater clarity in its correspondence with the complainant.

16. Secondly, the complainant raised specifically the issue of section 64(2) and whether the age of the information indicated that section 23(1) provided an exemption qualified by the public interest in this case. Section 64(2) provides that, where section 23(1) is cited in relation to information that is at least thirty years old *and* that is held in TNA, this is a qualified exemption. This means that, if section 23(1) applied to such information, it should in any event be disclosed unless the public interest in the maintenance of the exemption outweighed the public interest in disclosure.

17. In this case, whilst the information in question is over thirty years old, it has been retained by the public authority, rather than having been transferred to TNA. This means that section 23(1) remains an absolute exemption in relation to this information.

Procedural Requirements

Section 17

18. In failing to provide any explanation as to why the exemption provided by section 23(1) was believed to be engaged, the public authority did not comply with the requirement of section 17(1)(c).

The Decision

19. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act in that it applied the exemption provided by section 23(1) correctly, but also that the public authority breached section 17(1)(c) in failing to explain the citing of this exemption.

Right of Appeal

20. 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

21. 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.

22. 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 27th day of July 2011

Signed ……

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

Legal Annex

Section 17(1) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies."

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(2) provides that –

"A certificate signed by a Minister of the Crown certifying that the information to which it applies was directly or indirectly supplied by, or relates to, any of the bodies specified in subsection (3) shall, subject to section 60, be conclusive evidence of that fact."

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."