

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 27 June 2016

**Public Authority:** Cabinet Office

**Address:** 70 Whitehall  
London  
SW1A 2AS

#### Decision (including any steps ordered)

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1. The complainant has requested a copy of correspondence sent by John Scarlett on approximately 8 March 2004 to the Iraq Survey Group, which the complainant suggests was probably addressed to Charles Duelfer. The Cabinet Office refused to provide it citing section 23(1) (security bodies' information). Where section 23 did not apply, it relied on section 24(1)(safeguarding national security), it also relied on section 27 (prejudice to international relations). It upheld this at internal review. During the Commissioner's investigation the Cabinet Office explained that the information was now going to be published by the Iraq Inquiry (due to report on 6 July 2016). It sought to rely on section 22 (information intended for future publication) in respect of this information.
2. The Commissioner's decision is that the Cabinet Office is not entitled to rely on section 22 as its basis for withholding the information but that all the requested information is exempt from disclosure under section 23(1) of the FOIA.
3. No steps are required.

#### Request and response

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4. On 16 September 2015, the complainant requested information of the following description from the Cabinet Office:

"I would like a copy of the email/letter sent by John Scarlett on approximately 8 March 2004 to the Iraq Survey Group, probably addressed to Charles Duelfer.

(You may note that this request is identical to an earlier request 258988 from 2008. However, the passage of time requires that this request be considered afresh.)"

5. On 14 October 2015, the Cabinet Office responded. It confirmed it held information within the scope of the request but refused to provide it citing section 23(1) (security bodies information) as its basis for doing so. All of the information within the scope of the request which was not exempt under section 23(1) was, in its view, exempt under section 24(1) (national security). Further, it stated that some of the information within scope was, in its view, exempt under section 27 (prejudice to international relations).
6. The complainant requested an internal review on 15 October 2015. The Cabinet Office sent him the outcome of its internal review on 15 December 2015. It upheld its original position.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 11 December 2015 to complain about the way his request for information had been handled. His primary concern was about the Cabinet Office's use of exemptions. He received the outcome of the Cabinet Office's internal review shortly after this date and provided it to the Commissioner.
8. During the course of the Commissioner's investigation, the Cabinet Office changed its position. It explained that the requested information would now be disclosed as part of the report of the Iraq Inquiry<sup>1</sup>. That report is due to be published on 6 July 2016. The Cabinet Office then claimed section 22 (information intended for future publication) in respect of the withheld information.
9. In accordance with his standard published practice, the Commissioner invited the complainant to consider withdrawing his complaint in the light of the impending publication of the information in question.<sup>2</sup> The complainant argued that this was inappropriate and declined the Commissioner's suggestion.

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<sup>1</sup> <http://www.iraqinquiry.org.uk/>

<sup>2</sup> [https://ico.org.uk//media/report-a-concern/documents/1043094/how\\_we\\_deal\\_with\\_complaints\\_guidance\\_for\\_complainants.pdf](https://ico.org.uk//media/report-a-concern/documents/1043094/how_we_deal_with_complaints_guidance_for_complainants.pdf)

10. The Commissioner has therefore considered whether the Cabinet Office can rely on any of the exemptions it has cited as a basis for refusing to provide the withheld requested information. It should be noted when citing section 22, the Cabinet Office explained it was withdrawing its reliance on section 24 and section 27 noting that the balance of public interest had changed in respect of the requested information given its impending publication.

## Reasons for decision

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11. Section 22 states:

“Information is exempt information if-

(a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),

(b) the information was already held with a view to such publication at the time when the request for information was made, and

it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).”

12. At the time of the request and the internal review, the requested information was not held by the Cabinet Office with a view to future publication whether published or not. The decision to publish the information came after these two events. The Cabinet Office confirmed this to the Commissioner in a letter to him dated 7 June 2016.
13. Section 22 therefore fails on that point. There was no settled intention to publish the information at the time of the request.
14. Even if the Cabinet Office has changed its position at some point after the request and the internal review, it cannot rely on section 22 as a basis for withholding the information that has been requested. While the Commissioner welcomes the Cabinet Office’s intention to publish, that is clearly a relatively new development which post-dates the request itself. If someone made a fresh request for this information now (in advance of the proposed publication date of 6 July 2016), the Cabinet Office may well be able to rely on section 22 as a basis for refusal. However, the Cabinet Office cannot apply this exemption retrospectively to a live request such as the one under consideration in this case, when it has already refused to provide the requested information and has already upheld that decision at internal review.

15. The Commissioner has therefore considered the other exemptions that the Cabinet Office sought to rely as its basis for refusing to provide the requested information. As noted above, the Cabinet Office said that the balance of public interest had changed since the request given the impending publication of the withheld information. It said that section 24 and section 27 could now not apply to the requested information because the balance of public interest did not now favour maintaining those exemptions where engaged. It explained it was withdrawing its reliance upon them in light of the impending publication. As noted above, it argued that the information was now exempt under section 22. However, the Commissioner has dismissed this argument for reasons also set out above.
16. Following the Tribunal's comment in the case of the *Department for Business, Enterprise and Regulatory Reform (DBERR) and the Friends of the Earth (EA/2007/0072)*, the Commissioner notes that "*the timing of the application of the [public interest] test is at the date of the request or at least by the time of the compliance with ss.10 and 17 FOIA*" (para 110)<sup>3</sup>. At the time for compliance with the request, the Cabinet Office's position was that section 24 applied to all that information which was not exempt under section 23 and further, that section 27 applied to some of it.
17. Section 23(1) provides that:

“(1) 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)”.
18. A full and up-to-date list of the security bodies referred to in section 23(3) (as referred to in section 23(1)) can be found online at the [legislation.gov.uk](http://legislation.gov.uk) website which is delivered by The National Archives<sup>4</sup> on behalf of the UK government. The Commissioner will now refer to these as the “listed bodies”.
19. Section 23 is one of the few class-based absolute exemptions in the FOIA. If the information in question falls within the class of information referred to in section 23(1), it is absolutely exempt from disclosure.

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[http://www.informationtribunal.gov.uk/DBFiles/Decision/i181/DBERRvIC\\_FOEFinaldecision\\_w eb0408.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i181/DBERRvIC_FOEFinaldecision_w eb0408.pdf)

<sup>4</sup> <http://www.legislation.gov.uk/ukpga/2000/36/section/23>

There is no requirement to consider the balance of public interest. To fall within the exemption, information is not only that which was supplied directly or indirectly to the Cabinet Office by any of the listed bodies, it is also that information which relates to any of the listed bodies. Strictly speaking, this can include information as trivial as the address of GCHQ (the Government Communications Headquarters listed at section 23(3)(c)). It is a widely known fact that GCHQ is based in Cheltenham.<sup>5</sup> A public authority may choose to disapply section 23(1) when it receives a request for information but if the information falls within the class of information described in section 23(1), it is exempt from disclosure under FOIA. The Commissioner has no remit to decide whether section 23(1) should be disapplied. The information in question either falls within the class of information set out in section 23(1) and is therefore exempt under FOIA or it does not and is not.

20. A senior member of the Commissioner's team viewed the withheld information at the Cabinet Office on 2 June 2016. He considered the information thoroughly and considered its provenance and its subject matter carefully. He also considered whether the information was all exempt under section 23(1) or whether (and to what extent) section 23(1) could only be said to apply in part. Unfortunately, the Commissioner is unable to set out the detail of these deliberations on the face of this notice without disclosing the information itself.
21. Based on the above, the Commissioner is satisfied that all the requested information is exempt under section 23(1) of the FOIA. He notes that the information will be published as part of the Iraq Inquiry's report but this does not alter his conclusion in this case. If the Cabinet Office chooses to provide the information for publication to the Iraq Inquiry, that is a matter for the Cabinet Office. The Commissioner welcomes its decision to do so.
22. In light of the Commissioner's decision regarding section 23, he has not gone on to consider whether, at the time for compliance with the request, the Cabinet Office would have been entitled to rely on either section 24 or section 27 in respect of the same information.

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<sup>5</sup> <https://www.gchq.gov.uk/news-article/minister-cabinet-office-visits-gchq-0>

## Right of appeal

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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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://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**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**