

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 August 2016

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

Decision (including any steps ordered)

1. The complainant submitted a request to the Foreign and Commonwealth Office (FCO) for correspondence it had exchanged with British American Tobacco concerning allegations of corruption by the company in East Africa. The FCO refused to confirm or deny whether it held any information falling within the scope of the request on the basis of sections 23(5) (security bodies), 27(4) (international relations) and 31(3) (law enforcement). The Commissioner has concluded that the FCO is entitled to rely on section 23(5) to refuse to confirm or deny whether it holds the requested information. Furthermore, the Commissioner has also concluded that disclosure of the FCO's rationale for relying on the three exemptions would involve the disclosure of information that is itself exempt and thus the FCO is entitled to rely on section 17(4) of FOIA as a basis not to explain to the complainant why these exemptions apply.

Request and response

2. The complainant submitted the following request to the FCO on 21 January 2016:

'This is a FOI request for details of correspondence (emails, diplomatic communication between London and Nairobi, letters, FCO briefing papers) and meetings (dates, agendas, minutes) between:

The British High Commissioner (Nic Hailey/ Dr. Christian Turner), to Kenya;

The First secretary (political) in Kenya;

Senior officials on the Kenya desk back at the FCO in London;

And senior executives (including board members) of British American Tobacco, concerning Paul Hopkins and/or alleged corruption by BAT in East Africa, from 1 June 2015 until today;'

3. The FCO responded on 17 March 2016 and refused to confirm or deny whether it held information falling within the scope of the request on the basis of sections 23(5) (security bodies), 27(4) (international relations) and 31(3) (law enforcement) of FOIA.
4. The complainant contacted the FCO on 18 March 2016 and asked for an internal review of this response.
5. The FCO informed him of the outcome of the internal review on 11 April 2016. The review upheld the application of the various exemptions cited in the refusal notice. The FCO also explained that it could not provide the complainant with a statement of reasons setting out why the exemptions applied as to do so would involve the disclosure of exempt information.

Scope of the case

6. The complainant contacted the Commissioner on 12 April 2016 to complain about the FCO's handling of his request. The complainant outlined why he believed that there was a compelling public interest in the FCO complying with his request. He explained that he was also dissatisfied with the FCO's failure to explain why the various exemptions applied.
7. In relation to this complaint it is important to note that the right of access provided by FOIA is set out in section 1(1) and is separated into two parts: Section 1(1)(a) gives an applicant the right to know whether a public authority holds the information that has been requested. Section 1(1)(b) gives an applicant the right to be provided with the requested information, if it is held. Both rights are subject to the application of exemptions.
8. As explained above, the FCO is seeking to rely on sections 23(5), 27(4) and 31(3) to refuse to confirm or deny whether it holds information falling within the scope of the requests. Therefore this notice only considers whether the FCO is entitled, on the basis of any these exemptions, to refuse to confirm or deny whether it holds the requested information. The Commissioner has not considered whether the requested information – if held – should be disclosed.

Reasons for decision

Section 23 – information supplied by, or relating to, bodies dealing with security matters

9. Section 23(1) of FOIA states 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 sub-section (3).'

10. Section 23(5) of FOIA 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).'

11. The full list of bodies specified in section 23(3) can be viewed online.¹

12. Section 23(5) is an absolute exemption and therefore it is not subject to the public interest test set out in section 2 of FOIA.

13. In the Commissioner's opinion the exemption contained at section 23(5) should be interpreted so that it is only necessary for a public authority to show that **either** a confirmation **or** denial of whether requested information is held would involve the disclosure of information relating to a security body. It is not necessary for a public authority to demonstrate that both responses would disclose such information. Furthermore, the Commissioner considers that the phrase 'relates to' should be interpreted broadly. Such an interpretation has been accepted by the First-Tier Tribunal (Information Rights) in a number of different decisions.²

14. Consequently, whether or not a security body is interested or involved in a particular issue is in itself information relating to a security body. Therefore in the Commissioner's opinion section 23(5) could be used by a public authority to avoid issuing a response to a request which

¹ <http://www.legislation.gov.uk/ukpga/2000/36/section/23>

² See for example [Dowling v Information Commissioner and The Police Service for Northern Ireland](#), EA/2011/0118, paras 17 to 22.

revealed either that a security body was involved in an issue or that it was not involved in an issue.

15. The test of whether a disclosure would relate to a security body is decided on the normal civil standard of proof, that is, the balance of probabilities. In other words, if it is more likely than not that the disclosure would relate to a security body then the exemption would be engaged.
16. From the above it can be seen that section 23(5) has a very wide application. If the information requested is within what could be described as the ambit of security bodies' operations, section 23(5) is likely to apply. Factors indicating whether a request is of this nature will include the functions of the public authority receiving the request, the subject area to which the request relates and the actual wording of the request.
17. The FCO has provided the Commissioner with submissions which explain why in its view, confirmation as to whether or not the requested information is held would be likely to reveal whether or not a section 23(3) body, or bodies, may have had some involvement with this matter. Having considered these submissions, and in particular having taken into account the subject matter of the request referring as it does to allegations of international bribery and corruption, the Commissioner is persuaded that the FCO can rely on section 23(5) of FOIA. The Commissioner is unable to comment further in this notice on the content of the FCO's submissions to her as to do so would, in her view, risk disclosing information that is also exempt from disclosure.
18. In light of her findings in respect of section 23(5), the Commissioner has not gone on to consider the FCO's reliance on sections 27(4) and 31(3).

Section 17(4) – refusal notice

19. Section 17 of FOIA places a number of requirements on public authorities when they seek to refuse a request for information. Section 17(1)(a) states 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'

20. Section 17(3) places a duty on public authorities, who are relying on a qualified exemption, to state its reasons for concluding that the balance of the public interest test favoured maintaining the exemption.

21. Section 17(4) of FOIA states that:

'A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.'

22. As implied by the Commissioner's analysis of section 23(5) above, the FCO relied on the provisions of section 17(4) in respect of its reliance on section 23(5) of FOIA. It also sought to rely on section 17(4) as a basis not to provide an explanation as to why it considered sections 27(4) and 31(3) to apply.

23. The Commissioner has carefully considered the FCO's rationale for relying on section 17(4) in respect of each of the exemptions. Having done so, and taking into account the arguments the Commissioner has received from the FCO to justify its reliance on the three exemptions, she is persuaded that disclosure of these arguments would result in the disclosure of information that is itself exempt. The FCO is therefore entitled to rely on section 17(4) of FOIA in relation to each of the three exemptions.

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,
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

25. 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.
26. 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

Jonathan Slee
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