

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 10 November 2016

**Public Authority:** Cabinet Office  
**Address:** 70 Whitehall  
London  
SW1A 2AS

#### **Decision (including any steps ordered)**

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1. The complainant requested information relating to the kidnapping and murder of British journalist and United Nations aid worker, Alec Collett in Lebanon in 1985.
2. The Commissioner has decided that the public authority was entitled to rely on the exclusions contained in sections 23(5) and 24(2) FOIA to neither confirm nor deny whether it holds any information within the scope of the request which would be exempt on the basis of sections 23(1) and 24(1) FOIA.
3. The Commissioner has also decided that the public authority was not entitled to withhold information within the scope of the request on the basis of the exemptions at sections 27(1)(a), (c) and (d) FOIA.
4. The Commissioner additionally finds the public authority in breach of the procedural requirement in section 17(1)(b) FOIA.
5. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the information identified in the confidential annex to this notice.
6. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## **Request and response**

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7. The complainant submitted a request for information to the public authority on 17 December 2015 in the following terms:  
  
" I am looking for documents relating to the kidnapping and murder of British journalist and UN aid worker, Alec Collett that took place in Beirut during March 1985. I am looking for documents between the period of 1985-87."
8. The public authority wrote to the complainant on 19 January 2016 and advised that it held information relevant to his request which it considered exempt from disclosure on the basis of section 27 FOIA. However, relying on the provision in section 10(3) FOIA, the public authority further advised the complainant that it needed more time to reach a decision on whether the balance of the public interest was in favour of disclosing the withheld information.
9. The public authority issued a substantive response to the request on 3 February 2016. It explained that the withheld information was considered exempt from disclosure on the basis of the exemptions contained at sections 27(1)(a), (c) and (d) and 40(2) FOIA. In reliance on the exclusions contained at 23(5) and 24(2) FOIA, the public authority also explained that it could neither confirm nor deny whether it held any information within the scope of the request subject to the exemptions at sections 23(1) or 24(1) FOIA.
10. The complainant requested an internal review of the public authority's decision above on 4 February 2016
11. The public authority wrote back to the complainant on 7 April 2016 with details of the outcome of the internal review. The review upheld the original decision.

## **Scope of the case**

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12. The complainant contacted the Commissioner on 28 April 2016 to complain about the way his request for information had been handled. He disagreed with the public authority's decision to rely on the exemptions and exclusions at sections 27(1), 40(2), sections 23(5) and 24(2) respectively.
13. During the course of the Commissioner's investigation the public authority withdrew its reliance on the exemption at section 40(2).

14. Consequently, the scope of the Commissioner's investigation was to determine whether the public authority was entitled to rely on the exemptions contained at sections 27(1)(a), (c) and (d) and the exclusions contained at sections 23(5) and 24(2).

## **Reasons for decision**

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### Section 23 – security bodies and Section 24 - national security

15. Information relating to security bodies specified in section 23(3) is exempt information by virtue of section 23(1). Information which does not fall under section 23(1) is exempt from disclosure under section 24(1) if it is required for the purpose of safeguarding national security.
16. Sections 23(5) and 24(2) exclude the duty of a public authority to confirm or deny whether it holds information which, if held, would be exempt under section 23(1) or 24(1) respectively.
17. By virtue of section 23(5) the duty to confirm or deny does not arise if, or to 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 section 23(3).
18. By virtue of section 24(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.
19. The public authority explained that both sections 23(5) and 24(2) were engaged. The Commissioner does not consider the exclusions at sections 23(5) and 24(2) to be mutually exclusive and he accepts that they can be relied on independently or jointly in order to conceal whether or not one or more of the security bodies has been involved in an issue which might impact on national security. However, each exemption must be applied independently on its own merits. In addition, the section 24 exclusion is qualified and is therefore subject to the public interest test.
20. The test as to 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.
21. 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. This is consistent with the scheme of FOIA because the security bodies themselves are not subject to its provisions. 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.

22. There is clearly a close relationship between the public authority and the security bodies. In light of the public authority's relationship with the security bodies and the nature of the request (on the subject of terrorism), the Commissioner finds that on the balance of probabilities any information if held could be related to one or more bodies identified in section 23(3) FOIA.
23. With regard to section 24(2), the Commissioner again considers that this exclusion should be interpreted so that it is only necessary for a public authority to show either a confirmation or denial of whether requested information is held would be likely to harm national security. The Commissioner interprets the phrase '*required*' in the context of this exemption to mean '*reasonably necessary*'. In effect this means that there has to be a risk of harm to national security for the exemption to be relied upon, but there is no need for a public authority to prove that there is a specific, direct or imminent threat.
24. In relation to the application of section 24(2) the Commissioner notes that the First Tier Tribunal (Information Rights) has indicated that only a consistent use of a '*neither confirm nor deny*' (NCND) response on matters of national security can secure its proper purpose. Therefore, in considering whether the exemption is engaged, and the balance of the public interest test, regard has to be given to the need to adopt a consistent NCND position and not simply to the consequences of confirming whether the specific requested information in this case is held or not.
25. The public authority explained that it considers the subject matter of the request to relate to section 24.
26. In the context of section 24 the Commissioner notes that the threshold to engage the exemption is relatively low. Furthermore, as a general approach the Commissioner accepts that withholding information in order to ensure the protection of national security can extend, in some circumstances, to ensuring that matters which are of interest to the security bodies are not revealed. Moreover, it is not simply the consequences of revealing whether information is held in respect of a particular request that is relevant to the assessment as to whether the application of the exemption is required for the purposes of safeguarding national security, but the consequences of maintaining a consistent approach to the application of section 24(2).

27. On this occasion the Commissioner is satisfied that complying with the requirements of section 1(1)(a) would be likely to reveal whether or not the security bodies were interested in the subject matter which is the focus of these requests. The need for a public authority to adopt a position on a consistent basis is of vital importance in considering the application of an NCND exemption.
28. The Commissioner is satisfied that the public authority is entitled to rely on both sections 23(5) and 24(2) in the circumstances of this case. He accepts that revealing whether or not information is held within the scope of the request which relates to security bodies would reveal information relating to the role of the security bodies. It would also undermine national security and for that reason section 24(2) also applies because neither confirming nor denying if information is held is required for the purpose of safeguarding national security.

### **Public interest test**

29. Section 23 is an absolute exclusion. Therefore, a public interest test is not required once it is found to be engaged. However, this is not the case for section 24(2).
30. The public authority acknowledged that there is a general public interest in openness and transparency in all aspects of government because it increases public trust in, and engagement with, the government. However, this has to be weighed against a very strong public interest in safeguarding national security and in this case, the balance is in favour of maintaining national security.
31. In addition to the general public interest in openness and transparency, the Commissioner considers that confirming or denying whether any information subject to section 24(1) is held within the scope of the request would, albeit to a limited extent, shed additional light on the kidnapping and subsequent murder of Alec Collett.
32. However, the Commissioner accepts that the public interest in protecting information required for the purposes of safeguarding national security is a very strong one, and in the circumstances of this case, she has concluded that on balance, this public interest in maintaining the exclusion outweighs the public interest in revealing whether or not the public authority holds information subject to the exemption at section 24(1).

Section 27(1) (a), (c) and (d) – international relations

33. The withheld information has been withheld on the basis of sections 27(1)(a), (c) and (d).
34. Information is exempt on the basis of the above exemptions if its disclosure would or would be likely to prejudice, relations between the United Kingdom (UK) and any other State<sup>1</sup>, the interests of the UK abroad<sup>2</sup>, or the promotion or protection by the UK of its interests abroad<sup>3</sup>.
35. The public authority considers that disclosure of the withheld information would be likely to prejudice relations between the UK and other States or international organisations, as well as the UK's interests abroad and its ability to promote and protect those interests.
36. The public authority has argued that the relationship of trust and goodwill in diplomatic relations between HM Government and her international partners would be damaged if it were to disclose the withheld information. It argued that the UK's diplomats would acquire a reputation in the diplomatic community for indiscretion, and this would make it more difficult for HM Diplomatic Service to pursue the UK's national interests. It argued, although the withheld information is 30 years old, disclosure could still damage relations with some of the UK's international partners.

Commissioner's findings

37. In order for a prejudice based exemption such as those contained within section 27(1) to be engaged the Commissioner considers that three criteria must be met.
  - Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
  - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is

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<sup>1</sup> Section 27(1)(a)

<sup>2</sup> Section 27(1)(c)

<sup>3</sup> Section 27(1)(d)

designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and

- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.
38. Furthermore, the Commissioner has been guided by the Information Tribunal's observation that in the context of section 27(1), prejudice can be real and of substance "if it makes relations more difficult or calls for a particular damage limitation response to contain or limit damage which would not have otherwise been necessary."<sup>4</sup>
  39. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the public authority clearly relates to the interests which the exemptions contained at sections 27(1)(a), (c) and (d) are designed to protect.
  40. The Commissioner is satisfied that the prejudice alleged by the public authority is real and of substance, and there is a causal relationship between the disclosure of the withheld information and the prejudice which the exemptions are designed to protect. However, the Commissioner must establish whether disclosure would be likely to result in the prejudice alleged (ie the third criterion).
  41. Having inspected the withheld information, the Commissioner has concluded, on the basis of the public authority's submissions, that disclosure would not pose a real and significant risk of damage to the UK's relations with other States, or the UK's interests abroad, or its ability to promote and protect those interests. She has explained the reasons for her decision more fully in a confidential annex.

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<sup>4</sup> Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence (EA/2006/0040), paragraph 81.

## **Procedural matters**

42. In response to the request which was submitted on 17 December 2015 the public authority issued what was purportedly a notice under section 10(3) to the complainant on 19 January 2016. However section 10(3) only permits a public authority to extend the 20 working day time limit to respond to a request in order to specifically consider where the balance of the public interest lies. It consequently also does not permit a public authority to extend the 20 working day deadline imposed by section 17(1) FOIA for an authority to issue a refusal notice in response to a request.
43. The Commissioner therefore finds the public authority in breach of section 17(1)(b) for failing to specify that it was relying on the exemptions at sections 27(1)(a), (c) and (d), and 40(2) within 20 working days of the request.

## Right of appeal

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44. 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)

45. 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.
46. 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**