

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 22 November 2021

**Public Authority:** The Cabinet Office

**Address:** 70 Whitehall

London

SW1A 2AS

### Decision (including any steps ordered)

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1. The complainant has requested the first two of 32 files relating to the 'Spycatcher'/Peter Wright case between 1986 and 1987. The Cabinet Office withheld the information requested under section 22(1) (information intended for future publication) and section 23(1)(information supplied by, or relating to, bodies dealing with security matters) of the Freedom of Information Act 2000.
2. The Commissioner has concluded that the Cabinet Office was entitled to withhold the information requested under section 23(1) of the Act.
3. No steps are required.

### Request and response

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4. On 12 December 2019 the complainant wrote to the Cabinet Office and requested information in the following terms:

*'I am an investigative journalist and published author. I write to make a Freedom of Information Act request for the first two of a series of Cabinet Office files relating to the 'Spycatcher'/Peter Wright case between 1986 and 1987. The files, as listed on the National Archives website, are as follows:*

*CAB 164/1870 & CAB 164/1871*

*The National Archives lists these files as "closed or retained document[s]". It cites Lord Chancellor's Instrument LCI 126 as the reason for their withholding, and states that this will be reconsidered in 2019 (no month or date is shown).*

*I now request that these files are released to the National Archives on the following basis.*

- The fundamental FOIA presumption that the public has a right to view documents created by a public authority;*
- The events to which they refer are now more than 30 years in the past;*
- The chief protagonist, Peter Wright, died in 1995 and therefore has no claim of privacy;*
- The book, Spycatcher, which contained the information H.M. Government sought to suppress, was published more than 30 years ago and remains available today. There is therefore no likely national security justification for withholding these Cabinet Office files.*

*You will be aware that in April 2019 I made an FOIA request for the entire series of Cabinet Office 32 files relating to this case. In May, you rejected this, citing Section 14(1) of FOIA, which covers requests which are considered vexatious. You explained that you invoked this section because the large number of files meant that the request had "the potential to cause a disproportionate or unjustified level of disruption". You affirmed this decision at Internal Review, and on 10 December 2019 the Information Commissioner's Office ruled that you were entitled to rely on section 14(1).*

*However, in your original rejection letter (May 17, 2019) you indicated that if I selected "one or two files" to request under FOIA you would be willing to consider this. I replied (17 May) requesting an Internal Review, but advising you that whilst doing so I reserved my right to submit the suggested request for "one or two files".*

*I have confirmed with the ICO that doing so does not conflict with any decision I may make to apply for a First Tier Tribunal decision on the release of the entire series. Accordingly, I am now submitting the request for the first two files in the series.*

*Please let me know if there is anything further you require at this stage'.*

- 5. On 8 January 2020 the Cabinet Office wrote to the complainant and informed him that they were extending the 20 working day period for providing a response as the information he had requested 'is exempt under Section 24 of the Act'. The Cabinet Office stated that they had*

not yet reached a decision on the balance of the public interest and that they hoped to have a response for the complainant by 5 February 2020.

6. On 6 February 2020, having received no response, the complainant wrote to the Cabinet Office but received no reply. On 18 February the complainant again wrote to the Cabinet Office and asked them to either provide a substantive response to his request or a date when he could expect to receive the same. The Cabinet Office failed to provide a response. The complainant sent a further chaser email to the Cabinet Office on 7 April 2020.
7. The Cabinet Office provided the complainant with their substantive response to his request on 14 April 2020. The response made no mention of section 24 and instead advised the complainant that the information he had requested was exempt from disclosure by virtue of section 22(1)(information intended for future publication).
8. In respect of the public interest test, the Cabinet Office simply provided the generic statement that, *'there is a general public interest in favour of release, and the Cabinet Office remains committed to releasing an ever increasing number of records in our annual release'*.
9. However, the Cabinet Office advised the complainant that:  
  
*'The information you have requested is one of many records that is being prepared for transfer to The National Archives later this year. There is a very strong public interest in maintaining established processes once they have started and it is important that release work being conducted on very many records isn't interrupted to accelerate one of the many records. To do so would disrupt the preparation of other records due for release'*.
10. The Cabinet Office therefore concluded that the public interest in maintaining the section 22 exemption exceeded the public interest in disclosure of the requested information.
11. The Cabinet Office advised the complainant that on 18 March 2020 the Keeper of the Public Records stated that they had decided to suspend all incoming paper transfer to The National Archives (TNA) until further notice (due to the unfolding COVID-19 pandemic). The Cabinet Office stated that it remained their intention to transfer records to TNA as soon as they were in a position to do so, and suggested that the complainant continue to check TNA website for more details.
12. The Cabinet Office also informed the complainant that *'some'* of the information he had requested was exempt under section 23(1)(information supplied by, or relating to, bodies dealing with security matters). They noted that as section 23 is an absolute exemption they were not required to carry out a public interest test.

13. The complainant wrote to the Cabinet Office on 14 April 2020 and asked them to clarify certain points in order to assist him in deciding whether or not to ask for an internal review. The complainant asked the following queries:

*'1) You state that the files I have requested are "one [sic] of many records that is being prepared for transfer to The National Archives later this year". Could you please advise whether the files will be transferred to TNA for immediate (or imminent) release to public examination, or whether they will be sent to TNA but remain closed under one of the sections of the Freedom of Information Act.*

*2) If you anticipate that the files will remain closed, although held at TNA: Could you please advise the expected date which the Cabinet Office expects to impose on public release.*

*3) If you anticipate that the files will be open once they have been delivered to TNA: Could you please advise:*

*a) Whether a draft publication timetable has been prepared.*

*b) Whether the files will be released in their entirety, or whether redactions will be made.*

*c) If redactions are anticipated, whether the Cabinet Office has already identified the pages/sections to be withheld'.*

14. The Cabinet Office responded to the complainant's queries on 29 April 2020 and advised they were treating them as a follow up request, assigning it a separate FOI reference number. The Commissioner would note that this separate reference number was unnecessary, as the complainant had not made a new information request but rather had asked for clarification of the file transfer process.

15. The Cabinet Office advised the complainant as follows:

*'As you will appreciate, the current COVID-19 lockdown requirements has created difficulties for business as usual activities to be carried out. For example, from 18 March The National Archives (TNA) have not been accepting new record transfers. Similarly, travel and health restrictions have prevented us from progressing our own preparations for transferring files.*

*We will restart the process of transferring records to TNA as soon as possible. At this stage we do not know when we will be able to restart this process.*

*Our application of Section 22 FOIA applies because the intent to transfer existed prior to the lockdown measures being put in place. That intent*

*remains and we will reinstate the transfer records to TNA when we are next able to do so.*

*The public interest in maintaining the exemption also still applies; although the public interest in withholding the information until it is safe and practical to carry out transfer arrangements is stronger now than it was before the lockdown'.*

16. The complainant replied to the Cabinet Office on the same date and advised them that as their response had not answered the questions he had asked, he was now requesting an internal review. He stated that in deciding whether the Cabinet Office decision to apply section 22 was justified, he would expect the review to provide specific answers to the following questions:

*'1) On what date was the decision to move these files to the National Archives recorded?*

*2) At that date, was a timetable established for the transfer?*

*3) At that date, by what date did the Cabinet Office expect to have completed the transfer?*

*4) Does the decision to transfer cover only these two files, or all of those in the series (you will appreciate from previous correspondence that the Cabinet Office has previously rejected as "vexatious" a request for all the files in the series)?*

*5) Once physically delivered to the National Archives, will the files be subject to any time restrictions – i.e. will they remain closed to public inspection for a further specified period?*

*6) If so, on what date does the Cabinet Office expect these files to be open to public inspection?*

*7) Once physically delivered to The National Archives, will the files thereafter be subject to redactions?*

*8) If so, has the Cabinet Office already identified the pages/sections to be redacted?'*

17. The Cabinet Office provided the complainant with their internal review on 16 June 2020. The review found that section 22 had been properly applied and upheld the application of the exemption. The review provided the following responses to the questions posed by the complainant:

1) The decision was taken in May 2019 to transfer some files to TNA.

- 2) A date for transfer to TNA had not been established as some files take longer than others to prepare for transfer, and only transfer once internal processes have been completed and checked. The Cabinet Office noted that the absence of a date for transfer did not preclude the application of section 22, as the exemption provides that information is exempt if it is held by the public authority at the time of the request '*with a view to its publication, by the authority or any other person, at some future date (whether determined or not)*'. The Cabinet Office stated that it is the public interest test which determines whether withholding the requested information is reasonable in the circumstances.
  - 3) The Cabinet Office advised that once the internal processes are completed a date is confirmed with TNA, and that this can take up to four months in normal circumstances. However, with COVID-19 adding additional burdens to procedures, this would be likely to take significantly longer.
  - 4) The Cabinet Office confirmed that some, but not all, of the *Spycatcher* files would be transferred to TNA.
  - 5) The Cabinet Office confirmed that the files would be open, with some redactions.
  - 6) The Cabinet Office stated that it was for TNA to advise when the files would be open for public inspection, as they are responsible for updating their catalogue as to the condition and openness of files.
  - 7) The Cabinet Office confirmed that redactions would be carried out prior to transfer by the originating department, and no further redactions would take place once deposited at TNA.
  - 8) The Cabinet Office advised the complainant that, '*some of the files are still being reviewed by one department where additional redactions may be identified*'.
18. The review advised that as TNA was closed to transfer at the time of writing, the Cabinet Office was unable to confirm when these files, with redactions, would be available to the public.

### **Scope of the case**

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19. The complainant contacted the Commissioner on 22 June 2020 to complain about the way his request for information had been handled.
20. During the course of the Commissioner's investigation, the Cabinet Office confirmed in submissions to the Commissioner that in addition to

section 22(1) of the FOIA, they were also relying upon section 23(1) of the Act to withhold the requested information. The Cabinet Office stated that the information contained in the files at least 'relates' to one or more of the bodies listed in section 23(3) of the FOIA. The Cabinet Office confirmed that they considered that section 23(1) applied to **all** the information contained in the two files and that separately, under the Public Records Act 1958, they were considering whether any of the information needed to be retained.

21. The Cabinet Office advised the Commissioner that the two files were undergoing review for transfer to TNA and it would become apparent during that process what proportion of the information is exempt from disclosure under section 23(1) of the Act (i.e. what information would not be in the public domain even after the files had been transferred to TNA for publication). The Cabinet Office noted that the COVID-19 pandemic was an extraordinary time, and whilst they would ordinarily be better placed to determine with certainty the extent to which section 23(1) applied to the information contained in the two files, it was currently difficult to do so without the Cabinet Office having direct access to the two files. The Cabinet Office hoped that the Commissioner was appreciative of this predicament.
22. The Commissioner's approach when considering multiple exemptions in relation to the same information is to consider absolute exemptions in the first instance and then only consider qualified exemptions should the absolute exemption not be engaged.
23. The Commissioner will therefore consider the Cabinet Office's reliance on section 23(1) first. Should she determine that section 23(1) is not engaged, she will consider whether section 22(1) is engaged.

## Reasons for decision

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### **Section 23: Information supplied by, or relating to, bodies dealing with security matters**

24. Section 23(1) of the FOIA states:

*'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)'*

25. To successfully engage the exemption at section 23(1), a public authority needs only to demonstrate one of the following:

- That the information was supplied by any of the named security bodies, either directly or indirectly
- That the information relates to any of the named security bodies

26. The relevant security bodies are listed at section 23(3).<sup>1</sup>

27. If the requested information falls within either of the above classes, it is absolutely exempt from disclosure under the Act. There is no requirement on the public authority to demonstrate that disclosure of the requested information would result in harm. The exemption is not subject to the public interest test.

#### *The Cabinet Office's position*

28. In submissions to the Commissioner the Cabinet Office advised that as the two files refer to a publication by a former member of the intelligence services (former MI5 officer, Peter Wright) of a memoir about his service, the information which they contain relates to the security bodies listed in section 23(3) of the FOIA. Consequently, the information was exempt from disclosure under section 23(1).

#### *The complainant's position*

29. In submissions to the Commissioner the complainant correctly noted that whilst section 23(1), as an absolute exemption, is not generally subject to the public interest test set out in section 2(2) of FOIA, section 64(2) of the Act provides an exception in the case of some historical records. Originally, a historical record was one over 30 years old, or, if forming part of a file, the last entry on that file must be over 30 years old. However, this was amended to 20 years by the Constitutional Reform and Governance Act 2010. This reduction is being phased in gradually over 10 years.

30. Section 64(2) of the FOIA provides that section 23(1) is subject to the public interest test when it is applied to information in a historical record in the Public Record Office (TNA) or the Public Records Office Northern Ireland.

#### *The Commissioner's position*

31. The term 'relates to' is interpreted widely and includes any information concerning or linked to the activities of a security body. The Commissioner is therefore satisfied that the information requested,

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



being two files which refer to the publication of former MI5 officer, Peter Wright's memoirs, clearly relates to the security bodies listed in section 23(3) of the FOIA. Consequently, the Commissioner considers that the information requested is exempt from disclosure under section 23(1) of the FOIA.

32. As the complainant has correctly noted, section 23(1) is subject to the public interest test when the information concerned is a historical record and is in TNA or the Public Record Office of Northern Ireland.
33. However, in this case, at the time of the request and at the time of the Commissioner's investigation, the two files (withheld information) had not yet been transferred to TNA and so did not meet the requirements of section 64(2) of the Act. Therefore, the exemption is not subject to the public interest test in this instance.
34. In main submissions to the Commissioner, the Cabinet Office advised that in 2016 the Secretary of State for Digital, Culture, Media and Sport granted the Cabinet Office a three year extension of the deadline to transfer the Spycatcher series of files to TNA. That was due to expire in December 2019.
35. As the two files requested by the complainant are at the beginning of the Spycatcher series of files the Cabinet Office advised the Commissioner that they are certain that (had it not been for the disruption caused by the COVID-19 pandemic) the files would have been transferred to TNA in accordance with the timetable agreed with the Secretary of State.
36. In submissions to the Commissioner, the complainant queried this assertion and stated that:

*'That 'timetable' – in reality a binding deadline – expired at least two months prior to the COVID-19 pandemic and the precautionary restrictions on working which the Government introduced in mid-March 2020. It therefore appears that the pandemic could have had no possible bearing on the Cabinet Office's ability to comply with the deadline'.*
37. The complainant contended that as *'no further LCI (Lord Chancellor's Instrument) or DCMS instrument appears to have been issued, and therefore that, in its absence, prima facie the Cabinet Office is in breach of the provisions of PRA (Public Records Act 1958)'*.
38. As it was clear that the COVID-19 pandemic, as reasonably and correctly noted by the complainant, could not possibly have played a role in the Cabinet Office failing to have transferred the files by the agreed timetable (i.e. December 2019), this date having preceded the pandemic by at least two months, the Commissioner sought an

explanation from the Cabinet Office for this discrepancy. The Commissioner also enquired as to whether there had been any further extension to the deadline for transfer of the files (i.e. beyond December 2019) by the Secretary of State.

39. In supplemental submissions to the Commissioner the Cabinet Office stated that the Public Records Act 1958 (PRA) imposes a general duty on departments to transfer records to TNA once they have reached the age of being treated as an historic record(s), previously 30 years after creation but falling to 20 years. Section 3(4) of the PRA 1958 permits departments to retain records if *'they are required for administrative purposes or ought to be retained for any other special reason'*, subject to the approval of the Secretary of State for DCMS.
40. Before a machinery of government change in 2015, the responsibilities of the Secretary of State in relation to public records were the responsibilities of the Lord Chancellor. The Cabinet Office advised that successive Lord Chancellors have accepted that records relating to security and intelligence fall within the 'other special reason' requirement of section 3(4) of the Act and have, at the request of departments and other bodies likely to hold such records, issued a blanket authority to retain them beyond the point laid down in the PRA 1958. This is the Security and Intelligence Instrument (SII).
41. The Cabinet Office advised the Commissioner that the SIIs are generally issued every 10 years and, during the period they are in force, records that meet the criteria set down in the SII may be retained when they fall due for transfer. The current SII was issued by the then Lord Chancellor Kenneth Clarke and commenced on 1 January 2012. The Cabinet Office provided the Commissioner with a link to the publicly viewable current SII<sup>2</sup> which provides for the retention of public records under section 3(4) of the PRA 1958.
42. The Commissioner notes that on the government's website along with the above SII it is stated that:  
  
*'On 19 December 2011 the Lord Chancellor made a new instrument to authorise the retention beyond 30 years of public records where this is necessary for national security reasons'.*
43. Similarly, in the SII itself it is stated that the special reason (i.e. for retaining the records which would ordinarily be transferred to TNA, 'is

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<sup>2</sup> [www.gov.uk/government/publications/signed-instrument-for-the-retention-of-public-records](http://www.gov.uk/government/publications/signed-instrument-for-the-retention-of-public-records)

*that transfer of the records after that period to the Public Record Office or a place of deposit appointed by the Lord Chancellor under the Act will create a real risk of prejudice to national security'.*

44. In submissions to the Commissioner, the Cabinet Office advised that, *'the practical effect of the SII is to make it unnecessary for security and intelligence records to be listed individually or for those holding the records to make formal applications to retain them under the PRA 1958. The PRA 1958 lays down no specific procedures for the operation of section 3(4) and there are no formal procedures that have to be followed to include records under the protection of the SII'.*
45. The Cabinet Office advised the Commissioner that the two files which are the subject of the complainant's request *'were not transferred to TNA before the end of December 2019 because they were withheld under the SII and, that being so, were not subject to the usual rules that apply to non-SII files. It also follows that there was not a breach of the PRA 1958 because SIIs are made under that legislation'.*
46. Although grateful for the explanation and clarification provided by the Cabinet Office in supplemental submissions, the Commissioner notes that the above reason (i.e. the files being withheld under the SII) was not the reason provided by the Cabinet Office to the Commissioner in their original main submissions for the files not having been transferred to TNA by the end of December 2019. There was no mention of the above SII by the Cabinet Office in those submissions. Had the Cabinet Office been clear about the operation of the SII at the outset, the complainant would not have reasonably queried the COVID-19 pandemic as being the purported reason for the failure to meet the earlier deadline, and the Commissioner would not have needed to obtain further submissions on the matter.
47. The Cabinet Office have explained why the non-transfer of the relevant files by the end of December 2019 was not a breach of the PRA 1958. In any event the Commissioner is not responsible for ensuring observance and compliance with the PRA 1958, this being the responsibility of TNA.
48. However, as noted above, the key fact for the purposes of the Commissioner's finding that the requested information (the two files) were not, at the time of the request, subject to the public interest test, is that they were not a historical record in TNA as required by section 64(2) of the FOIA.

## **Other matters**

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49. The Commissioner has not formally considered whether the Cabinet Office was entitled to rely on section 22(1)(information intended for future publication) to withhold the information requested by the complainant. However, the Commissioner would remind the Cabinet Office that in order for section 22(1) to apply, a general intention to publish some information will not suffice. It is not enough for a public authority to note that it will identify some, but not all, of the information within scope of the request for future publication. The information that the public authority (or some other person) intends to be published must be the specific information the applicant has requested.
50. In cases such as this, where although some (even the majority) of the information contained in files is intended for future publication (i.e. once transferred to TNA) it is clear from the outset that some of the information contained in the files will not be so published (e.g. redactions for information exempt under section 23(1)) it will obviously not be possible or appropriate to apply section 22(1) to such a request since not all of the information within scope of the request is intended for future publication.
51. In this case it would have been more helpful to the complainant, with a view to the section 16 duty to provide advice and assistance, for the Cabinet Office to have initially refused the request on the basis of section 23(1) but provided the complainant with a reliable estimation as to when the files would be transferred to TNA, so that he could obtain the information sought from TNA at that point subsequently.

## Right of appeal

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52. 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: 0203 936 8963  
Fax: 0870 739 5836  
Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

53. 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.

54. 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  
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