

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 January 2018

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

Decision (including any steps ordered)

1. The complainant submitted a request to the Cabinet Office for a copy of a closed file, PREM 19/1828, which concerned UK relations with Libya following the shooting of WPC Yvonne Fletcher outside the Libyan People's Bureau in 12 April 1984. The Cabinet Office sought to withhold this information on the basis of the exemptions contained at sections 26(1) (defence), 27(1) and 27(2) (international relations), 41(1) (information provided in confidence), 38(1)(b) (health and safety) and 40(2) (personal data) of FOIA. The Cabinet Office also sought to rely on sections 23(5) (security bodies) and section 24(2) (national security) to refuse to confirm or deny whether it holds any further information. The Commissioner is satisfied that the withheld information is exempt from disclosure on the basis of sections 27(1)(a), (c) and (d). However, she has also concluded that sections 23(5) and 24(2) cannot be relied on in this case.

Request and response

2. The complainant submitted the following request to the Cabinet Office on 19 April 2017:

'I would like to request a copy of a closed file which has the reference PREM 19/1828

The file has the title: 'Libya – Internal Situation. Anglo-Libyan relations, aftermath of shooting WPC Yvonne Fletcher outside Libyan People's Bureau, 12 April 1984, severance of diplomatic relations, part 3B'

3. The Cabinet Office responded on 19 June 2017 and confirmed that it held information falling within the scope of this request. However, the Cabinet Office explained that it considered this information to be exempt from disclosure on the basis of the exemptions contained at sections 26(1)(a) and (b) (defence) and sections 27(1)(a), (c) and (d) (international relations). The Cabinet Office also refused to confirm or deny whether it held any further information on the basis of sections 23(5) (security bodies) and 24(2) (national security) of FOIA.
4. The complainant contacted the Cabinet Office on 20 June 2017 in order to ask for an internal review of this decision.
5. The Cabinet Office informed him of the outcome of this review on 27 July 2017. The review upheld the application of the various exemptions cited in the refusal notice.

Scope of the case

6. The complainant contacted the Commissioner on 28 July 2017 in order to complain about the Cabinet Office's refusal to provide him with the information falling within the scope of request.
7. During the course of the Commissioner's investigation the Cabinet Office explained that it that considered **all** of the withheld information to be exempt from disclosure on the basis of sections 26(1) and 27(1) of FOIA. Furthermore, it also explained that it considered parts of the withheld information to also attract the exemptions at the following sections of FOIA: 27(2) (international relations), 41(1) (information provided in confidence), 38(1)(b) (health and safety) and 40(2) (personal data). It also remained of the view that it was entitled to rely on sections 23(5) and 24(2) to refuse to confirm or deny whether it held any further information falling within the scope of the request.

Reasons for decision

Section 27 – international relations

8. The FCO sought to withhold all of the requested information on the basis of sections 27(1)(a), (c) and (d) of FOIA. These sections state that:

'Information is exempt information if its disclosure would, or would be likely to, prejudice –

(a) relations between the United Kingdom and any other State...

(c) the interests of the United Kingdom abroad

(d) the promotion or protection by the United Kingdom of its interests abroad'

9. In order for a prejudice based exemption, such as 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 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 to discharge.

10. Furthermore, the Commissioner has been guided by the comments of the Information Tribunal which suggested 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 have been necessary'*.¹

The Cabinet Office's position

11. In its refusal notice the Cabinet Office argued that disclosure of the withheld information would contravene the conventions of international behaviour, give offence to other nations and lead to the UK struggling to retain the trust of international partners.
12. The Cabinet Office's detailed submissions to the Commissioner elaborate on this position and also make specific references to the withheld information itself. However, for the purposes of this decision notice the Cabinet Office's further submissions can be summarised as follows:
13. The information contains information the UK government received in confidence from representatives of a number of states. Disclosure of such information would violate the norms of international diplomatic behaviour and would undermine the trust these states would place in the UK government. More broadly, the Cabinet Office argued that disclosure of the withheld information would signal to all other states with which the UK interacts that the UK may not be prepared to follow such diplomatic conventions. This would lead other states to be less willing to share sensitive information with the UK.
14. The Cabinet Office argued that disclosure would also prejudice the UK's protection of its interests because the information reveals aspects of the UK's strategy and methodology when handling matters of complex diplomacy.
15. Furthermore, the Cabinet Office explained that the information contained adverse commentary on the actions and motivations of some other states and representatives of governments. It argued that disclosure of this information would be likely to prejudice the UK's interests with these states not least because many of the individuals concerned are still alive and active on the world stage.

¹ [Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence \(EA/2006/0040\)](#), paragraph 81.

The complainant's position

16. The complainant acknowledged that as the requested file was closed he had no knowledge of its contents however, he suggested that in general there was a tendency by public authorities to apply section 27(1) in a blanket way to any information which touched upon diplomatic or foreign affairs. More specifically, the complainant emphasised the significant changes that had occurred in Libya since 1984 which he suggested undermined the view that disclosure of the withheld information would be likely to prejudice the UK's relations with Libya.

The Commissioner's position

17. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the Cabinet Office clearly relates to the interests which the exemptions contained at sections 27(1)(a), (c) and (d) are designed to protect. With regard to the second criterion the Commissioner is satisfied that disclosure of the information also has the potential to result in prejudice to the UK's relationships with the other countries identified by the Cabinet Office. She has reached this conclusion given the sensitivity of the subject matter in question. Thirdly, the Commissioner is persuaded that if the withheld information was disclosed there is more than a hypothetical risk of prejudice occurring; rather there is a real and significant risk. The Commissioner has reached this conclusion, again given the sensitive nature of the subject matter, but also because in light of the Cabinet Office's submissions she accepts that prejudice to the UK's international relations could occur in a number of different ways if the information was disclosed. In this context the Commissioner considers it likely that disclosure of the withheld information would be likely to result in some element of a damage limitation exercise on the part of the UK government. The Commissioner appreciates that the complainant has emphasised the significant change that has occurred in Libya since the events of 1984. However, as explained it is not simply the UK's relations with Libya which the Cabinet Office believes could be harmed if this information was disclosed. Rather the risk extends to other countries in the region and indeed to the UK's relations with states more generally. Consequently, the Commissioner is satisfied that sections 27(1)(a), (c) and (d) are therefore engaged.

Public interest test

18. Section 27 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest in maintaining the exemption

19. The Cabinet Office argued that there is a clear public interest in ensuring that the UK does not breach diplomatic confidences and protects its relations with other states in order to ensure that it can effectively protect and promote its interests abroad. The Cabinet Office argued that these public interests are particularly weighty in relation to the countries of the Middle East where reputation and trust are critical assets. The Cabinet Office argued that although the regime in Libya has changed since the withheld information was produced, the situation there remains volatile and disclosure of this information would hinder the UK's diplomatic objectives in Libya. Furthermore, the Cabinet Office argued that the UK has many and varied interests in this region and for this reason, and because of the wider impact of disclosure the UK's international reputation, the public interest favoured maintaining the exemptions contained at sections 27(1)(a), (c) and (d).

Public interest in disclosing the withheld information

20. The Cabinet Office acknowledged that there is a general public interest in openness in government and it recognised that transparency may contribute to greater public understanding of, and participation in, public affairs. The Cabinet Office also noted that there is a general public interest in understanding how the government interacts with foreign governments and how the government uses diplomacy to mobilise international support to secure its objectives. It also acknowledged that there is also a public interest in understanding the United Kingdom's relations with states in the Middle East and that disclosure of this information would contribute to satisfying these public interests.
21. The complainant argued that there remains widespread concern about whether the UK government has done enough to apprehend WPC Fletcher's killer or whether it could have avoided the tragedy altogether by acting on advanced intelligence. More specifically he argued that there would be strong grounds for disclosing the requested information if it could shed light on any of the following: the supposed/actual identity and whereabouts of the individual(s) who killed WPC Yvonne Fletcher; the role of the Libyan authorities in WPC Yvonne Fletcher's murder; whether the UK Government received prior warning of unrest and violence outside The Embassy in London; the UK Government's failure to act upon any such warning; the UK Government's approaches to Libya about the killing and that regime's response; and/or the failure to bring the killers to justice.
22. More broadly, the complainant argued that the principles of the rule of law, the right to life and the pursuit of justice are of course vital to any liberal democracy and the suggestion that international relations or

diplomatic niceties should be allowed to trump any of these values is of course unthinkable.

23. The complainant also argued that it was difficult to see how the public can make judgements about the conduct of foreign policy if they cannot even get access to historical information on an issue of genuine public concern.

Balance of the public interest test

24. The Commissioner recognises that the shooting of WPC Fletcher continues to generate public concern and press interest. She also acknowledges that there are a number of aspects of case, as set out by the complainant, where there remains some uncertainty as to the actions of the UK government. The Commissioner cannot comment on whether the information holds the answer to the specific questions raised by the complainant without potentially divulging the content of the information itself. However, for the purposes of this notice she would agree that to the extent that the withheld information could address some of these matters then disclosure would be in the public interest. In any event, the Commissioner recognises the significance of the case and legitimate public interest in understanding the role and actions of the UK government and as a result the public interest in this information being disclosed. The Commissioner also agrees with the complainant's point that it is difficult for the public to fully understand the actions of the UK government in relation to this case if information such as this is withheld from disclosure. More broadly, the Commissioner agrees with the Cabinet Office that there is a wider public interest in allowing the public to understand how the UK interacts with other states. In light of the above, the Commissioner believes that there are strong public interest arguments in favour of disclosing the withheld information.
25. However, in the Commissioner's opinion this is nevertheless outweighed by the public interest in maintaining the exemptions contained at sections 27(1)(a), (c) and (d) of FOIA. The Commissioner has reached this finding because in her view it is firmly against the public interest for the UK to breach diplomatic conventions, especially in relation to countries in the Middle East where reputation and trust are critical assets. She also recognises that the UK has many and varied interests in the region. Furthermore, the Commissioner appreciates that disclosure of the withheld information also risks having a wider impact on the UK's international reputation if the information was disclosed. Taken collectively, the Commissioner believes that these arguments provide a compelling case for concluding that the public interest favours maintaining the exemptions despite the strong case she accepts can be made for disclosure of the information.

26. In light of this finding the Commissioner has not considered the Cabinet Office's reliance on sections 26(1), 27(2), 38(1)(b), 41(1) and 40(2) of FOIA.

Section 23 – security bodies

Section 24 – national security

27. Before addressing the Cabinet Office's reliance on sections 23 and 24 of FOIA, the Commissioner wishes to clarify that the right of access under FOIA which is set out in section 1(1) of the legislation, is in two parts.
28. Firstly, section 1(1)(a) provides requesters with the right to be told whether the information that they have requested is held. Secondly, section 1(1)(b) provides requesters with the right to be provided with that information (assuming of course that the requested information is held). Both rights of access are subject to the application of exemptions.
29. In the circumstances of this case, as the Cabinet Office's refusal notice explains:

*'In addition to the above information withheld and in line with s23(5) and s24(2) we are unable to confirm or deny whether **further information** is held that would engage s23 or s24 of the Act' (emphasis added)*

30. Section 23(5) 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 by, or relates to, any of the bodies specified in subsection (3).'

31. Section 24(2) states that:

'The duty to confirm or deny does not arise if, or to the extent that, exemption from 1(1)(a) is required for the purposes of safeguarding national security.'

32. In the Commissioner's view determining whether a public authority can correctly adopt a neither confirm nor deny (NCND) position requires careful consideration of the wording of the request. In her guidance on these exemptions the Commissioner recognises that there may be scenarios where a public authority is prepared to confirm that it holds information captured by the request but wishes to NCND whether

additional information is held on the basis of sections 23(5) and section 24(2).²

33. However, in the particular circumstances of this case the complainant submitted a request for a specific file, namely PREM 19/1828. The Cabinet Office has, under FOIA, confirmed that it holds this file. Therefore, given the specific wording of this request, it is illogical for the Cabinet Office to adopt a NCND position in relation to any '*further information*' simply because the complainant has not actually requested any further information. Rather he had simply asked for a named file which the Cabinet Office has confirmed that it holds. Consequently, given that sections 23(5) and 24(2) simply remove the obligation to confirm or deny whether the requested information is held, and in this case such confirmation has already been given, then there is no basis for the Cabinet Office to now seek to adopt a NCND position.

² https://ico.org.uk/media/for-organisations/documents/1196/how_sections_23_and_24_interact_foi.pdf - see paragraphs 41 and 42.

Right of appeal

34. 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

35. 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.
36. 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

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