Written Evidence from Tim Tate (FOI 08)

Public Administration and Constitutional Affairs Committee
The Cabinet Office Freedom of Information Clearing House inquiry

Summary

The Cabinet Office has adopted a tactic of delaying and obstructing legitimate Freedom of Information Act requests by changing – repeatedly – the grounds for refusing requests.

This results in a lengthy and expensive process in which researchers seeking historical government records are forced to play a convoluted 'game' of 'whack-a-mole' to challenge each of the successive grounds for refusal.

If, as or when, these challenges succeed, the Cabinet Office then falls back on a final defensive tactic: it exploits a loophole in the overlapping obligations concerning the disclosure of "historical records", placed on public authorities by the Public Records Act 1958 and the Freedom of Information Act 2000.

This loophole allows the Cabinet office to withhold - without penalty - files which should, under the PRA, have been transferred the National Archives, and then to exploit this failure as justification for claiming an exemption from the public interest test for disclosure under FOIA.

The Information Commissioner's Office asserts that it is powerless to address this since, in its view, a failure to comply with the PRA/FOIA obligations "is not in itself a breach of the FOIA".

Introduction

My name is Tim Tate. For more than 40 years I have worked as an investigative journalist, author and documentary film maker. I am the author of 18 published non-fiction books and have produced more than 80 documentaries; several of these have won major international awards.[1]

In recent years my work has focused on the historic actions of Britain's security and intelligence services; this involves accessing and analysing official records released under the Public Records Act 1958 (as amended), as well as using the Freedom of Information Act 2000 to seek the release of further files.

Legislative Background

[1] For full details see: www.timtate.co.uk

(i) The Public Records Act 1958 imposed a requirement on public authorities to transfer files, or records, which had been selected for preservation to the National Archives [TNA] unless the Lord Chancellor gave authorisation for them to be retained. "The Lord Chancellor's Code of Practice", laid before Parliament on July 16, 2009 stated:

> "Under the Public Records Act 1958, records selected for preservation **must** [my emphasis] be transferred by the time they are 30 years old unless the Lord Chancellor gives authorisation for them to be retained in the department for a further period under section 3(4) of the Public Records Act 1958." ["Retention or transfer of Public records; Section 17, clause 17.1][2]

(ii) Although PRA 1958 mandated that transfers were to take place 30 years after the records were created, the Freedom of Information Act 2000 amended PRA, specifically by imposing obligations contained in "the provisions of a code of practice on records management issued by the Secretary of State under section 46 of FOIA".[3]

(iii) Part 2 of Section 46 concerns the review of transfer of public records to an authorised place of deposit for public records. It "sets out the arrangements for authorities to follow in order to 'ensure the timely and effective review and transfer of public records', to TNA."[4]

(iv) From January 1, 2013, the Code also reduced the PRA's 30-year timeframe for the transfer of records from 30 years to 20 years. It granted "a ten year transition … covering records from the years 1984-2001 so that the timeframe is reduced progressively, until the new rule is fully in effect".[5]

(v) Whilst s.46 is a Code of Practice, or "guidance", to public authorities, the Lord Chancellor made expressly clear to Parliament that this does not absolve public authorities of their obligations under FOIA or PRA.

> "The Code is a supplement to the provisions in the Act" [Introduction, clause (vii)]

(vi) Further, the Lord Chancellor also made clear that a public authority failing to comply with the Code could place itself in legal jeopardy:

> "Authorities should note that if they fail to comply with the Code, they may also fail to comply with legislation relating to the creation, management, disposal, use and re-use of records and information, for example the Public Records Act 1958, the Data Protection Act 1998, and the Re-use of Public Sector Information Regulations 2005, and they may consequently be in breach of their statutory obligations." [Foreword/Introduction, clause (viii)]

(vii) FOIA does, of course, provide several exemptions by which documents/files may be withheld from release by public authorities. Two exemptions - s.23 and s.24 - concern national security.[6]

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[2] Lord Chancellor's Code of Practice on the management of records issued under section 46 of the Freedom of Information Act. Presented to Parliament, 16 July 2009.
[3] Information Commissioner's Office: Section 46 Code of Practice
[4] Ibid.
[5] Ibid.
[6] The exemptions are mutually exclusive; public authorities can not cite both as exemptions simultaneously.

(viii) s.24(1) provides that information is exempt from disclosure if such exemption "required for the purposes of safeguarding of national security."[7] However, the claimed exemption is subject to a public interest test.

(ix) s.23(1) "provides an exemption for information if it was directly or indirectly supplied to a public authority by, or relates to, any of the bodies specified in subsection (3)." These specified bodies include "the Security Service, the Secret Intelligence Service and other similar bodies."[8].

(x) Unlike s.24, the exemption under s.23(1) is "absolute" and is not subject to a public interest test – with one exception. If requested material qualifies as "a historical record" the decision on whether to release it is subject to the public interest test.

(xi) ICO's published guidance states that to qualify as "a historical record" material must be physically held by, or at, the National Archives; and that it must be 30 years old (though this threshold is reducing, year on year and is presently 21 years).[9]

Case Specifics

1. In 2019 I submitted a FOI request to the Cabinet Office for a series of 32 files, created by the Cabinet Office between 1986 and 1987 and which concerned a case of significant public interest.[10]

2. The case involved extensive international litigation and required the expenditure of several million pounds of public (ie: taxpayer) funds; it also caused significant controversy among the UK's allies.

3. The entire series of files should originally have been transferred to TNA, as required by the Public Records Act, by December 2016. Some of these files and their contents would then likely have been subject to redactions under s.23(1) or, in the alternative, s.24 of FOIA.

4. However, once transferred to TNA, any s.23(1) or s.24 redactions would have been subject to a public interest test before they could be withheld from researchers.

5. For unstated reasons, the Cabinet Office did not transfer the files to TNA in accordance with the requirements of PRA. Instead, in December 2016, it successfully sought an extension of the deadline from the Minister of State, DCMS. This provided the Cabinet Office with a further three years to transfer the files to TNA.

See: *Lownie & Others vs. The Information Commissioner and Foreign, Commonwealth & development Office* (First-Tier Tribunal Decision, 29 December 2020)

[7] Information Commissioner's Office: "Safeguarding national security (Section 24). https://ico.org.uk/media/fororganisations/documents/1174/safeguarding_national_security_section_24_foi.pdf

[8] The Information Commissioner's Office: "Section 23 – Security bodies". https://ico.org.uk/for-organisations/foi-guidance/section-23-security-bodies/

[9] Ibid.

[10] For reasons of commercial sensitivity I have not identified the file series reference or subject in this submission.

6. The new deadline was thus December 2019, **at the latest** (the DCMS certificate did not prevent any transfer(s) before the expiration of this deadline). No further extension has been sought by, or granted to, the Cabinet Office in respect of the series of files.

7. In response to my initial FOI request for these files, in May 2019 the Cabinet Office rejected the request as "vexatious", under s. 14(1), citing the number of files sought. (It did not cite any other objection or exemption.) Specifically, the Cabinet Office estimated that it would require 3,800 hours of staff time to assess the files for potential redactions.

8. It did, however, suggest that I submit a revised application for a smaller number – "one or two" – of the files, stating that this might be accepted as "a valid request". Once again, no mention was made of any other statutory exemption. The Cabinet Office subsequently (July 2019) confirmed its s.14(1) decision at Internal Review. I then complained to ICO, asking it to review the Cabinet Office decision.

9. Between August and October 2019, I corresponded with ICO. We discussed what I saw as a possible pitfall ahead – that even were ICO to rule against the Cabinet Office on s.14(1), the latter might simply pivot to an alternate exemption in order to continue withholding the files, and thus provoke further delays. I therefore asked ICO to consider whether there were <u>any</u> valid exemptions which would permit the Cabinet Office to withhold the files.

10. ICO replied that although had previously considered taking this broader approach, "it simply does not stand up in court". In December 2019, ICO affirmed the Cabinet Office s.14(1) decision. It cited a statement from the Cabinet Office that to review the files for potentially exempt information would require "3,800 hours" of staff time; this rendered my request "vexatious".

11. However, in affirming the Cabinet Office decision, ICO noted that the Cabinet Office had offered to examine a request for "considerably" reduced number of files "so that it could undertake consideration of other applicable exemptions more readily".

12. On December 12, 2019, I submitted a new request to the Cabinet Office, covering only the first two files in the series. FOIA required the Cabinet Office to provide a response within 20 working days. Allowing for the Christmas & New Year, including statutory holidays, this response was thus due, at the latest, by January 21, 2020.

13. However, on January 8, 2020, the Cabinet Office advised it was extending the 20 day time limit; it cited s.24 – national security. S.24 is subject to a public interest test and the Cabinet Office explained that it had "not yet reached a decision on whether the balance of the public interest favours disclosure of this information". It gave a new deadline for responding of February 5, 2020.

14. Between February 6 and April 14, 2020 I sent three reminders to the Cabinet Office pointing out that it had not provided the promised response.

15. On April 14, 2002, the Cabinet Office finally responded. Its senior FOI official, Ms. Eirian Atkins Walsh, refused the request under a different category - s.22(1) -, stating that:

> "The information you have requested is one of many records that is being prepared for transfer to The National Archives **later this year**. [My emphasis] There is a very strong public interest in maintaining established processes once they have been 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."

16. Ms. Walsh did not explain how this statement – that the files were to be transferred to TNA at some point in 2020 – could be reconciled with her statement six months earlier that it would require 3,800 hours of staff time to assess the files. If such staff examined these files continuously, on the standard of a 40-hour working week, this would equate to a minimum of 95 weeks, or almost two years.

17. Ms. Walsh noted that s.22 is a qualified exemption, subject to a public interest test. However, having applied this, she concluded that "the public interest in maintaining the exemption exceeds that of release". In the same response Ms. Walsh also, for the first time, cited s.23(1). (There was no reference to the previously-cited s.24).

> "Some of the information you have requested is exempt under section 23(1) of the Freedom of Information Act. Section 23 is an absolute exemption and the Cabinet Office is not required to consider whether the public interest favours disclosure of this information."

18. Between April and June 2020, in response to requests from me for clarification Ms. Walsh provided additional details relating to her s.22 decision. *Inter alia* she stated that not all of the files would be transferred to TNA, and that, at that point, work to determine redactions required was on going.

> "Some of the files **are still being reviewed by one department where additional redactions may be required**". [My emphasis]

19. The natural and ordinary meaning of this statement is that the Cabinet Office or other concerned department was <u>then</u> carrying out an examination of the files; and that some redactions had <u>already</u> been identified.

20. In June 2020 I complained to the ICO, asking it to examine the Cabinet Office's use to s.22 to refuse of my FOIA request. I cited a previous ICO decision which stated that s.22 could not be engaged where a public authority did not intend to release all the withheld information. The summary of Decision Notice FS50121803 in the ICO guidelines on s.22 exemptions, states:

> "The Commissioner rejected the public authority's argument that section 22 was engaged. Although the public authority intended to publish some of the information at a point in the future, the public authority could not identify which information that was.
>
> "At the date of the request, it was not possible to say that the public authority had an intention or even a settled expectation to publish all the withheld information."

21. ICO began an investigation in January 2021. Because ICO was unable to consider the position of the entire series of files, its enquiries were limited to the application of s.22 to the first two only. By May 2021 it had reached a provisional decision that the Cabinet Office was <u>not</u> entitled to claim that s.22 was engaged.

> "The Cabinet Office have stated that redactions will need to be made to some of the information contained within the two files prior to their transfer to TNA. However, at the time of your request, they could not have been sufficiently certain what information contained in the files was held with a view to publication, and not all of the information which you had requested would be published when the files were transferred to TNA.
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> "The Commissioner would therefore be highly likely to find (in any formal decision notice) that Section 22 was not engaged to the information which you had requested."

22. If ICO had issued a Decision Notice to this effect, the result would have been that the Cabinet Office would have had, immediately, to provide the first two files – subject, of course to any appeal against the decision.

23. But ICO was unwilling to issue the s.22 Decision Notice because the Cabinet Office had earlier also cited s.23(1) in relation to the entire series of files. In ICO's view, the "absolute exemption" provision of s.23(1) took precedence and therefore precluded it from reaching a formal decision on s.22.

> "In a case where a public authority was **only** [ICO emphasis] relying on section 22 to withhold requested information, but the exemption was not engaged for any reason, then any decision notice issued by the Commissioner in such a case would address the reasons why the exemption was not engaged.
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> "However, in cases where a public authority validly applies an absolute exemption (such as section 23(1)) in addition to another qualified exemption(s) (such as section 22) to information requested (either at the time of the request or subsequently during the Commissioner's investigation) then the Commissioner's well established approach is to consider the absolute exemption first."
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> "This is because if the absolute exemption applies there is no point in considering any other exemptions of a qualified nature (i.e. public interest arguments)."

24. However ICO also stated that had the Cabinet Office complied with the requirement to transfer the files to TNA, they would have qualified as "historical records" – defined as those created more than 30 years ago and physically in the possession of TNA. The effect of this would be that the s.23(1) "absolute exemption" would become less "absolute" because any decision to withhold would be subject to a public interest test.

> "It should be noted that once the files are transferred to TNA then they would at that point become subject to Section 64(2) of the FOIA and therefore subject to the public interest test. That is to say, at that point the information redacted in the files under Section 23(1) would become subject to the public interest test."

25. Because the Cabinet Office had failed as required by PRA/FOIA to make the physical transfer, the files do not fall within the definition of "historical records" exception – and thus the Cabinet Office was able to claim an "absolute exemption".

26. Further, although this claimed "absolute exemption" was, in itself, based on the Cabinet Office's own failure to meet its obligations, under PRA/FOIA s.46, to transfer the entire

series of files to TNA, ICO concluded that it is not empowered to investigate this because "failure to comply with the [s.46] code is not in itself a breach of the FOIA" [ICO emphasis].

> "The FOIA amends the Public Records Act 1958 and places obligations on public authorities to maintain their records in line with the provisions of the Code of Practice on records management issued by the Secretary of State under section 46 of FOIA. However, failure to comply with the code is not in itself a breach of the FOIA.
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> "Since any decision notice which the Commissioner were to issue in this matter would focus on section 23(1), the issue of whether the Cabinet Office should or should not have already transferred the files (in keeping with the Secretary of State's extension) would not have a bearing on the validity of the exemption. There would, as noted above, be no breach for the Commissioner to consider."

26. ICO's emails also showed that the Cabinet Office had made a series of statements to ICO concerning the circumstances of its failure to transfer the file series to TNA. These were variously untrue or substantially misleading.

(a) "The Cabinet Office are certain that, had it not been for the constraints caused by the pandemic, they would have been transferred to TNA in accordance with the timetable agreed with the Secretary of State."

(b) "The Cabinet Office have confirmed that the work on transferring the 32 files to TNA continues. However, it has been severely complicated by the necessity of redeploying resources to the COVID-19 pandemic"

(c) "The introduction of restrictions have severely reduced the access of officials to the Cabinet Office premises in which the files are stored. During the period of time when officials were able to access the premises, there were nonetheless too few who were present to undertake the reviewing work."

27. The assertion in (a) is simply false. The "timetable agreed with the Secretary of State" required the 32 files to be transferred to TNA by the end of December 2019 at the latest. The COVID-19 pandemic had not, by the end of December 2019, yet occurred and there were thus no "constraints" caused by it which could have affected compliance with the timetable.

28. In fact, *per* ICO's correspondence, "restrictions on social and workplace interaction" were imposed on March 16, 2020 – **fully two and a half months after the expiry of the deadline for transferring the files to TNA**.

29. The assertion in (b) appears to be misleading. In response to an FOIA request I submitted to the Cabinet Office in May 2021, it stated that in the calendar year 2020 none of its 15 FOIA staff had been re-assigned to other duties.

> "None of those working on Freedom of Information Act enquires were seconded to other teams in 2020."

30. Similarly, the Cabinet Office's claim in (c) that insufficient of its FOIA or PRA staff were unable "to access the premises" is – at best – questionable. In its June 15, 2021 response to my FOIA request, it stated that none of those staff members had been furloughed

(which would have meant they could not come to work); further, it stated that it does not know how many of its FOIA and PRA staff were required to work from home during the calendar year 2020.

> "This information is not held by the Cabinet Office. It might be helpful if I explain that Government guidance gives employers discretion over how employees can work safely, either at home or in a COVID-secure workplace. That means that the Cabinet Office has been looking to accelerate the return to the workplace, using the safe available office capacity."

31. Logically, if the Cabinet Office does not know how many of its relevant staff were required to work from home, it cannot truthfully assert that too few of them were able to be present in the Cabinet Offices to work on reviewing the files.

32. Nonetheless, the position now – more than two and a half years after the expiry of the Secretary of State's already-extended deadline for the Cabinet Office to transfer the entire file series to TNA – is that none of the files have been transferred, much less been opened to the public. Nor is there any prospect of the transfer, or opening, in the near future. *Per* ICO's summation:

> "The Cabinet Office have advised that, in the present circumstances, it is not clear when work on the review of the files will be able to commence again."

33. Worse, ICO has decided that it cannot investigate the Cabinet Office's failure to meet the Secretary of State's deadline for transfer, even though this failure is the sole reason the s.23(1) public interest test cannot be applied. In correspondence ICO explained that:

> "Failure to conform to the section 46 code is not in itself a breach of the FOIA".

34. This position essentially rewards the Cabinet Office for its own malfeasance. It allows a public authority to avoid its obligations under PRA/FOIA – and then use that same malfeasance as a means to avoid the statutory necessity of assessing the public interest.

35. This is – at best – allowing the exploitation of an apparent loophole in the overlapping Acts; more fundamentally, it permits a cynical evasion of the very principles underlying freedom of information and public records legislation.

36. The Cabinet Office has demonstrated bad faith throughout this case; over two years it has repeatedly failed to respond to FOIA requests within the statutory timeframes, then given a succession of differing reasons for refusing the requests.

37. Further, other public authority files have been successfully transferred to TNA in timely fashion, as required by PRA/FOIA. TNA reports that, in line with these obligations, in 2014 it "received records … from 1985 and 1986"; and that "Two further years' worth of government records are being transferred to us each year until 2022".

38. The Cabinet Office's explanations for its failure to meet the Secretary of State's December 2019 deadline for transferring the file series to TNA are variously untrue or misleading. It is not unreasonable to draw the inference that those files contain material

which is embarrassing or politically controversial. However, neither is a valid reason to evade the requirements of FOIA and/or PRA.

39. More disturbingly, the saga of these files appears not to be an isolated case. In March 2021 I submitted an FOI request to the Cabinet Office for an unrelated file – CAB 158/73 – whose existence is shown in TNA's catalogue. This file contains two reports submitted to the Joint Intelligence Committee by the Control Commission for Germany in December 1946 and January 1947.

40. The contents of these reports are extensively summarized in a Foreign Office file which is on open access at TNA: FO 1005/1744. This summary, in a letter by the author of the JIC reports, Maj. Gen. John Lethbridge, Chief of Intelligence for the Control Commission, specifically details the intelligence information which he submitted to the JIC.

41. Despite this, CAB 158/73 itself has been – and continues to be – withheld by the Cabinet Office. TNA lists the file, which was created 75 years ago, as "closed and retained" by the Cabinet Office, "under s.3.4".

42. TNA does not show any date on which this closure or retention was last considered; nor does it indicate whether a Lord Chancellor's Instrument (LCI) has been obtained. The Cabinet Office has repeatedly failed to respond to questions concerning the reasons for the withholding, including whether this has been authorised under a "blanket retention".

43. Files of this age would – had they been transferred to TNA – qualify as "historical records" and the question of whether or not to withhold them from scrutiny would be subject to a public interest test. Given its age – and the fact that its contents are so extensively detailed in an already-open file – it seems improbable that the public interest would be served by continuing secrecy.

44. However, the Cabinet Office now asserts the fact that the files have not been transferred to TNA as justification for refusing to apply the public interest test. As with the previous case of the series of 32 files, it apparently seeks to exploit its own failures to maintain a dubious secrecy.

Conclusion

Why - and how - is the Cabinet Office able to evade its obligations under FOIA and PRA ?

The answer is, sadly, that there is no mechanism to compel it to act within the law. Certainly, ICO – the only public-facing body with any responsibility under the Acts – professes itself powerless to police the Cabinet Office's malfeasance.

I would ask this committee to consider recommending an amendment to FOIA/PRA which would impose effective sanctions on any public authority which willfully, or repeatedly, breaches its statutory obligations concerning Freedom of Information. Unless and until this happens, the Cabinet Office – the lead department on FOI – seems unlikely to mend its ways.

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