

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 15 November 2010

Public Authority: Ministry of Justice
Address: 102 Petty France
London
SW1H 9AJ

Summary

The complainant requested a list of prisoners who had been subject to covert surveillance in either Belgium, HMP Belmarsh or the Old Bailey during a specified period. The public authority refused to confirm or deny if it held information falling within the scope of this request, citing the exemptions provided by sections 23(5) (information relating to, or supplied by, security bodies), 24(2) (national security), 31(3) (prejudice to law enforcement), 40(5) (personal information) and 44(2) (statutory prohibitions to disclosure) of the Act in relation to HMP Belmarsh. In relation to Belgium and the Old Bailey, the complainant was advised to redirect his requests elsewhere. In relation to the HMP Belmarsh request, the Commissioner finds that the public authority applied the exemptions provided by sections 23(5) and 24(2) correctly. However, in relation to the Belgium and Old Bailey requests, the Commissioner finds that the public authority failed to confirm or deny whether it held information falling within the scope of these requests and, in so doing, did not comply with sections 1(1)(a) and 10(1). The public authority is now required to remedy this breach. The Commissioner also finds that the public authority breached sections 17(1), 17(1)(c) and 17(3)(a).

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. The complainant made the following information requests on 10 April 2008:

"The list of prisoners in

[(a)] Belgium,

[(b)] HMP Belmarsh, and

[(c)] Old Bailey

whose conversations with their legal advisers were subject to covert surveillance between the beginning of 2003 and the end of 2005."

3. After a severe delay, the public authority responded to these requests substantively on 5 June 2009. In relation to request (a), the complainant was advised to contact the Belgian authorities and, in relation to request (c), City of London Police. The public authority did not explicitly confirm or deny whether it held information relevant to these requests. Nor did it state that it was refusing to confirm or deny in relation to these requests.
4. In relation to request (b), the public authority did state that it was refusing to confirm or deny whether it held information falling within the scope of this request. The exemptions provided by sections 23(5) (information relating to, or supplied by, security bodies), 24(2) (national security), 31(3) (prejudice to law enforcement), 40(5) (personal information) and 44(2) (statutory prohibitions to disclosure) of the Act were cited. The refusal notice did not provide an explanation as to why these exemptions were believed to be engaged. The public interest was addressed jointly, rather than separately in relation to each of the qualified exemptions cited.
5. The complainant responded to this on 14 July 2009 and requested that the public authority carry out an internal review. The public authority responded with the outcome of the internal review on 11 September 2009. The refusal to confirm or deny under the exemptions cited previously was upheld. Again no explanation was given as to why the exemptions cited were believed to be engaged and, in relation to the qualified exemptions cited, the balance of the public interest was addressed jointly rather than separately in relation to each exemption cited.

The Investigation

Scope of the case

6. The complainant contacted the Commissioner initially on 12 January 2010 and stated at that stage that he had not received an internal review outcome from the public authority. At the time of the allocation of this case to a case officer, the complainant was contacted again and asked to confirm if he had received an internal review outcome. The complainant responded to this on 26 May 2010 and confirmed that he had received an internal review outcome and provided a copy of this to the Commissioner's office. This correspondence setting out the conclusion of the internal review was dated 11 September 2009. The Commissioner is not aware of the reason for this discrepancy between the date of the letter and the complainant's statement upon initially contacting the Commissioner that he had not received an internal review outcome. However, the Commissioner has concluded that it is not necessary to his decision in this case to resolve the discrepancy.
7. The complainant also confirmed on 26 May 2010 that he wished the Commissioner to consider whether the public authority was correct to neither confirm nor deny whether it held relevant information.

Chronology

8. The Commissioner contacted the public authority initially on 2 June 2010. The public authority was asked to respond with further explanation for the exemptions cited and with an explanation as to why the complainant had been advised to contact City of London Police in connection with request (c).
9. The public authority responded to this on 19 July 2010 and gave further explanation for the exemptions cited. It also gave an explanation in relation to request (c), with the public authority stating that any covert surveillance carried out in a court building would be undertaken by the police.

Analysis

Exemptions

Sections 23 and 24

10. In relation to request (b), the public authority has cited sections 23(5) and 24(2) in conjunction. The Commissioner accepts that this is a valid approach where this is necessary in order to obscure the involvement, or non-involvement, of any of the security bodies specified in section 23(3). This approach was also endorsed by the Information Tribunal in the case *Baker v the Information Commissioner and the Cabinet Office* (EA/2006/0045). In that case the Tribunal concurred with the following representations made by the Cabinet Office:

"it is important that any response under FOIA does not allow any deduction as to whether or not there is any involvement by a section 23 body. It is equally important to protect the fact of whether or not an intercepting body which is not listed in section 23 is involved."

11. Section 23(5) provides an exemption from the duty to confirm or deny where to do so would involve the disclosure of information that relates to, or was supplied by, any of the security bodies specified in section 23(3). This section is set out in full in the attached legal annex, as are all other sections of the Act referred to in this Notice. Section 24(2) provides an exemption from the duty to confirm or deny where this is required for the purpose of safeguarding national security. Section 24(2) is also qualified by the public interest. This means that the confirmation or denial should be provided if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, as long as this confirmation or denial is not subject to any other exemption.
12. In its explanation for the citing of these exemptions, the public authority has referred to applications under the Regulation of Investigatory Powers Act 2000 (RIPA) to carry out covert surveillance. It has stated that any applications made for 'intrusive surveillance warrants' (which it describes as 'eavesdropping') for national security purposes would be made by, or on the behalf of, the Security Service, which is one of the bodies specified in section 23(3). The public authority has also stated that applications for 'interception warrants' (which it describes as 'telephone intercept') 'or for other covert surveillance methods' could be made by bodies specified in section 23(3), but could also be made by bodies not listed in that section.

Section 23(5) may only be applied to requests for information relating to or supplied by bodies specified in section 23(3).

13. The point made by the public authority here is that security related surveillance could be carried out both by bodies that are specified in section 23(3), and by bodies that are not specified in that section. Refusal under both sections 23(5) and 24(2) is, therefore, necessary to avoid revealing anything about the involvement, or otherwise, of any of the bodies specified in section 23(3) and to avoid revealing anything about covert surveillance carried out by a body not specified in section 23(3). The task for the Commissioner here is to consider whether confirmation or denial would reveal anything about the involvement or otherwise of any body specified in section 23(3) and whether exemption from the duty to confirm or deny is required for the purpose of safeguarding national security.
14. As to whether confirmation or denial would reveal anything about the involvement or otherwise of any of the bodies specified in section 23(3), the Commissioner accepts that denial in response to the request would do so. This is because such a response would indicate that no covert surveillance at the location and during the dates specified by the complainant had taken place.
15. The Commissioner also believes that it is possible that confirmation could confirm the involvement of a security body. However, as noted above, covert surveillance could be carried out by a body not specified in section 23(3). Confirmation in response to the request would only, therefore, show that covert surveillance had been carried out by *either* one of the bodies specified in section 23(3), *or* by a body not specified in that section. As it is possible that confirmation in response to the request would not reveal anything about a section 23(3) body, the Commissioner has also gone on to consider section 24(2).
16. As to whether exemption from the duty to confirm or deny is required for the purposes of national security, the first step is to consider what constitutes national security as it is referred to in the Act. On this issue the Commissioner has followed the approach taken by the Information Tribunal in the case *Baker v the Information Commissioner and the Cabinet Office* (EA/2006/0045). The Tribunal noted that it had been unable to find an exhaustive definition of national security, but referred to a House of Lords decision (*Secretary of State for the Home Department v Rehman* [2001] UKHL 47; [2003] 1 AC 153), which made the following observations on this issue:

“(i) ‘national security’ means the ‘security of the United Kingdom and its people’ (para 50 per Lord Hoffman);

(ii) the interests of national security are not limited to action by an individual which can be said to be 'targeted at' the UK, its system of government or its people (para 15 per Lord Slynn);
(iii) the protection of democracy and the legal and constitutional systems of the state is part of national security as well as military defence (para 16 per Lord Slynn);
(iv) 'action against a foreign state may be capable indirectly of affecting the security of the United Kingdom' (para 16-17 Lord Slynn); and
(v) 'reciprocal co-operation between the United Kingdom and other states in combating international terrorism is capable of promoting the United Kingdom's national security' (para 17 Lord Slynn)."

17. The public authority has argued that the refusal to confirm or deny in this case is required in order to avoid prejudice to counter-terrorism operations. The Commissioner considers it clear that counterterrorist operations are for the purpose of protecting the security of the UK and its people and, therefore, the argument of the public authority is relevant to this exemption.
18. The wording of the exemption is that the duty to confirm or deny does not arise if exemption is *required* for the purpose of safeguarding national security. The approach of the Commissioner is that *required* in this context means reasonably necessary. The question here is, therefore, whether exemption from the duty to confirm or deny is reasonably necessary for the purpose of safeguarding national security.
19. The argument of the public authority relates to what it believes could be revealed through confirmation or denial in response to a succession of requests concerning counterterrorist activities. The public authority believes that inconsistency in the response to the requests, whereby confirmation or denial would be given in response to some requests but not others, would render neither confirm nor deny responses ineffective in obscuring whether or not counterterrorist investigations had taken place. This would then provide an advantage to those engaged in terrorist activities as it would be possible for them to gain knowledge of whether their activities have been detected and so whether they are or were under investigation.
20. The public authority has also made an argument that relates to this specific request. As the complainant has specified a specific location and time period in his request, the public authority believes that confirmation or denial in response to this request could reveal to individuals who were in HMP Belmarsh during this period whether they were subject to covert surveillance.

21. The Commissioner accepts the argument from the public authority that confirmation or denial would provide an indication to individuals who were in HMP Belmarsh during the period specified by the complainant as to whether they may have been the subject of covert surveillance during this period.
22. The next step is to consider whether knowledge that covert surveillance had taken place would have an adverse impact on national security. The suggestion of the argument made by the public authority is that the usefulness of covert surveillance as an anti-terrorism tool would be reduced if the covert nature of this surveillance was threatened through confirmation. The Commissioner accepts that for *covert* surveillance to remain effective as an anti-terrorism tool, the subjects of this surveillance must not be provided with any indication that it has taken place. The Commissioner accepts that knowledge that covert surveillance had taken place would have an adverse impact on the usefulness of this type of surveillance in preventing terrorism and, therefore, also accepts that confirmation in response to the request would have an adverse impact on national security.
23. As to the other argument made by the public authority, that it is important to maintain a consistent “neither confirm nor deny” stance where national security may be an issue, this is a wider argument and relates less closely to the specific information request in question here. Nevertheless, the Commissioner accepts that this adds some weight in favour of the exemption being engaged as a confirmation would disclose additional information into the public domain concerning covert surveillance than would otherwise be available.
24. The conclusion of the Commissioner is that the public authority was correct to cite the exemptions provided by section 23(5) and 24(2) in conjunction. Having reached this conclusion, it is necessary to go on to consider the balance of the public interest in connection with section 24(2).

The public interest

25. In reaching a conclusion on the balance of the public interest here, the Commissioner has taken into account those factors that relate to the specific confirmation or denial in question. This is in addition to the public interest inherent in the exemption, that is the public interest in avoiding prejudice to the safeguarding of national security, and the general public interest in improving the transparency and openness of the public authority.

26. Covering first those factors that relate to the specific information in question here, the use of covert surveillance is controversial. This controversy stems from questions as to how compatible the use of these techniques is with the rights and freedoms expected in a democracy. Covert surveillance of exchanges between individuals and their legal advisers is particularly controversial, given that such exchanges would typically be regarded as subject to a high level of confidentiality and to legal professional privilege. It is also the case that, albeit by necessity, limited information is currently available about the use of such techniques.
27. The public authority may argue that RIPA provides a rigorous set of safeguards that ensure that covert surveillance is used sparingly and only where appropriate and that, as a result, the weight of this public interest factor in favour of disclosure is reduced. However, despite the safeguards provided by RIPA, the Commissioner believes that, given the controversy associated with the use of covert surveillance and the legitimate questions that exist about whether the use of such techniques is compatible with the rights and freedoms expected in a democracy, there is a significant public interest in disclosure. The Commissioner regards this as a factor in favour of disclosure of significant weight.
28. Turning to those factors that favour maintenance of the exemption, as noted above the public interest inherent in the exemption is relevant here. Given that this public interest is in avoiding harm to the safeguarding of national security, this is inevitably a significant factor in any case where the exemption provided by section 24(2) is engaged. Having concluded that exemption from the duty to confirm or deny is required for the purpose of safeguarding national security, the Commissioner recognises that the public interest in the maintenance of this exemption is significant.
29. The Commissioner also notes that it is widely recognised that there is a heightened threat from terrorism currently and was at the time of the request. Given this, he believes that the weight of the public interest inherent in the exemption is increased.
30. The conclusion of the Commissioner is that the public interest in the maintenance of the exemption outweighs the public interest in disclosure. Whilst the Commissioner has recognised that the subject matter of the confirmation or denial in question is a factor in favour of disclosure of significant weight, he concludes that this is outweighed by the substantial public interest in avoiding harm to the safeguarding of national security.

Procedural Requirements

Section 1

31. As noted above, in response to requests (a) and (c) the complainant was referred to the Belgian authorities and to City of London Police. Whilst it is appropriate (and in line with the guidance laid down in the section 45 Code of Practice) to refer a requester to a public authority that is more likely to hold information falling within the scope of a request if the public authority to which the request has been made does not hold this information, the duty of section 1(1)(a) still applies and the public authority is required to confirm or deny whether it holds this information.
32. The public authority in this case failed to specifically state that it did not hold information falling within the scope of requests (a) and (c). In so doing the public authority failed to comply with the requirement of section 1(1)(a).

Section 10

33. The public authority failed to respond substantively to the request for approximately 14 months. In failing to provide confirmation or denial within twenty working days of receipt, the public authority did not comply with the requirement of section 10(1) to respond within 20 working days.

Section 17

34. By failing to provide a refusal notice within twenty working days of receipt of the request, the public authority did not comply with the requirement of section 17(1).
35. In neither the refusal notice nor the internal review response did the public authority provide a clear description of the reasons as to why each exemption was believed to be engaged. In so doing the public authority failed to comply with the requirement of section 17(1)(c).
36. In both the refusal notice and internal review response, the public interest for sections 24(2) and 31(3) was addressed jointly, rather than separately for each of these qualified exemptions. In failing to provide an adequate explanation concerning the balance of the public interest, the public authority did not comply with the requirement of section 17(3)(a).

37. As well as recording these procedural breaches, the Commissioner would also note that he considers a delay of 14 months in responding to any request to be grossly excessive.

The Decision

38. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act in that it applied the exemptions provided by sections 23(5) and 24(2) correctly in relation to request (b) and so was not required to comply with section 1(1)(a) in relation to this request. However, the Commissioner also finds that the public authority breached the requirement of section 1(1)(a) in failing to confirm or deny whether it held information falling within the scope of requests (a) and (c), section 10(1) in failing to confirm or deny within twenty working days, section 17(1) in failing to issue a refusal notice within twenty working days of receipt and sections 17(1)(c) and 17(3)(a) in issuing an inadequate refusal notice.

Steps Required

39. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- provide to the complainant a response to requests (a) and (c) that is compliant with section 1(1)(a); that is, confirmation or denial of whether the public authority holds information falling within the scope of these requests, or a refusal notice valid for the purposes of section 17. In relation to any information that the public authority confirms is held, this should either be disclosed in line with section 1(1)(b), or a valid refusal notice should be issued setting out why this information will not be disclosed.
40. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

41. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court

(or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Other matters

42. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern. The Commissioner's published guidance on internal reviews states that a review should be conducted within 20 working days, unless there are exceptional circumstances, in which case the review period may be extended to 40 working days. In this case the Commissioner notes that there appeared to be no exceptional circumstances, but that the public authority failed to provide the outcome to the review within 20 working days. The public authority should ensure that internal reviews are carried out promptly in future.

Right of Appeal

43. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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.

44. Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is sent.

Dated the 15th day of November 2010

Signed

**Graham Smith
Deputy Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 1

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

Section 10

Section 10(1) provides that –

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

Section 17

Section 17(1) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies."

Section 17(3) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a

separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

Section 23

Section 23(3) provides that –

"The bodies referred to in subsections (1) and (2) are-

- (a) the Security Service,
- (b) the Secret Intelligence Service,
- (c) the Government Communications Headquarters,
- (d) the special forces,
- (e) the Tribunal established under section 65 of the Regulation of Investigatory Powers Act 2000,
- (f) the Tribunal established under section 7 of the Interception of Communications Act 1985,
- (g) the Tribunal established under section 5 of the Security Service Act 1989,
- (h) the Tribunal established under section 9 of the Intelligence Services Act 1994,
- (i) the Security Vetting Appeals Panel,
- (j) the Security Commission,
- (k) the National Criminal Intelligence Service, and
- (l) the Service Authority for the National Criminal Intelligence Service."

Section 23(5) provides that –

"The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3)."

Section 24

Section 24(2) provides that –

“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.”