

## **Freedom of Information Act 2000 (Section 50)**

### **Decision Notice**

**Date: 21 July 2011**

**Public Authority:** Home Office  
**Address:** Peel Building  
2 Marsham Street  
London  
SW1P 4DF

### **Summary**

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The complainant requested information relating to Authorisations for stop and search powers under section 44 of the Terrorism Act 2000. The public authority withheld the information on the basis of the exemption at section 24(1), and further decided that, in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosure.

The Commissioner upheld the public authority's decision to withhold the information on the basis of section 24(1). He however found the public authority in procedural breach of the Act.

### **The Commissioner's Role**

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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.

### **Background**

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2. Prior to 18 March 2011, Authorisations for stop and search powers under section 44 of the Terrorism Act 2000 could be granted by the Secretary of State to police forces across the United Kingdom for a maximum of 28 days. In November 2007 the complainant requested information from the public authority regarding Authorisations approved for stop and search powers under the Terrorism Act 2000.

The public authority's refusal to disclose the information requested on the basis of the exemption at section 24(1) was subsequently upheld by the Commissioner in a decision notice issued on 8 February 2010.<sup>1</sup>

3. Following the European Court of Justice's (ECJ) decision in *Gillan and Quinton v the United Kingdom* (Application no. 4158/05) in January 2010, the Secretary of State issued a Remedial Order<sup>2</sup> amending parts of the Terrorism Act 2000. The Order which came into force on 18 March 2011 repealed sections 44 to 47(g) relating to Authorisations for stop and search powers. The repealed sections were however replaced with provisions which include granting senior police officers the power to authorise the use of stop and search powers for a maximum of 14 days.

## The Request

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4. On 11 June 2010 the complainant requested the following information in relation to stop and search powers under the Terrorism Act 2000:

The Time, Date, Duration, and Geographical extent (either in words or on a map or plan etc) of:

1. Authorisations which the Secretary of State has been informed of under section 46(3)
2. Authorisations which have not been confirmed by the Secretary of State and which have lapsed under section 46(4)
3. Authorisations modified by the Secretary of State under section 46(5)
4. Authorisations which have been cancelled by the Secretary of State under section 46(6), and
5. Authorisations renewed in writing under section 46(7)
6. The name of the Minister who signed each authorisation and when the approval was given.

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<sup>1</sup> The decision is available at:

[http://www.ico.gov.uk/~media/documents/decisionnotices/2010/FS\\_50198733.ashx](http://www.ico.gov.uk/~media/documents/decisionnotices/2010/FS_50198733.ashx)

<sup>2</sup> Prevention and Suppression of Terrorism. Terrorism Act 2000 (Remedial) Order 2011 No. 631

5. He specified that the information provided should cover the period from when the Terrorism Act 2000 (referred to hereinafter as the Terrorism Act) came into force to the date of the request. The public authority confirmed that the Terrorism Act came into force in February 2001. The request was therefore treated as covering related information from February 2001 to 11 June 2010.
6. The complainant had made substantively the same request to the public authority in November 2007 regarding Authorisations for the power to stop and search under the Terrorism Act 2000.
7. On 6 July 2010 the public authority issued a refusal notice relying on the exemptions at sections 24(1) and 31. It however advised the complainant that it needed additional time to consider the public interest fully.
8. On 27 September 2010 the public authority responded following a number of additional extensions to consider the public interest. It noted that the complainant had requested similar information in November 2007 which was refused. The public authority further noted that the Commissioner did not uphold the subsequent complaint in relation to the refusal to disclose the information in November 2007. The public authority therefore explained that it was withholding the information requested on the basis of section 24(1) for the same reasons already considered by the Commissioner in the previous complaint. It however provided the complainant with a list of Ministers who had confirmed authorisations within the period covered by the request.
9. On 7 November 2010 the complainant requested a review of the public authority's decision.
10. On 6 December 2010 the public authority wrote back to the complainant with details of the outcome of the internal review. The original decision to withhold the information requested was upheld.

## **The Investigation**

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### **Scope of the case**

11. On 7 February 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
12. In light of the disclosure by the public authority in relation to item 6 of the request, the Commissioner clarified with the complainant (on 21 March 2011) that the scope of the investigation in relation to item 6

would still cover 'the name of the Minister who signed each authorisation issued between February 2001 and 11 June 2010 and when their approval was given'.

13. The information covered by the scope of the investigation in relation to items 1-5 of the request also remained as outlined in paragraph 5 above.
14. The complainant specifically asked the Commissioner to consider the points outlined below.
15. According to the complainant, the balance of the public interest had changed substantially (since his previous request in November 2007) in favour of full disclosure for the following reasons:
  - The Coalition Government had effectively suspended the use of section 44 stop and search powers,
  - The public authority had admitted many clerical errors which resulted in hundreds or thousands of illegal stops and searches, something which could not have happened if the limits and geographical extent of each section 44 Authorisation had been made public,
  - The ECJ judgement in *Gillan and Quinton v the United Kingdom* made the Terrorism Act illegal, and
  - It is important for public debate and for Parliamentary scrutiny of new legislation that the geographical locations and the dates and times of the 'use and abuse' of these section 44 powers should be clear and transparent.
  - The complainant also suggested that subsequent to both his requests of 2007 and 2010, individual Police forces had disclosed information relevant to his requests. In his own words, ".....it appears that individual Police forces such as the Metropolitan Police Service have disclosed, the time, date, and geographical extent of the Section 44 Authorisation requests they have made to the Home Secretary."

## Analysis

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### Exemptions

16. It is important to note from the outset that the Commissioner's investigation was restricted to matters which were relevant at the time of the request and not after the request was made.

17. As noted above, the Commissioner issued a decision notice on 8 February 2010 in case FS50198733 in relation to the request of November 2007 ("the previous decision notice").
18. Items 1-5 of both requests (i.e. November 2007 and June 2010) are substantively the same. However, the request of November 2007 was not restricted to the time, date, duration, and geographical extent (either in words or on a map or plan etc) of the Authorisations.
19. Item 6 was not part of the request of November 2007.
20. The public authority explained in its letters of 27 September and 6 December that, in its view, paragraph 58 of the decision notice in case FS50198733 had satisfactorily dealt with the issue of the time, date, duration, and geographical extent of the Authorisations.
21. The public authority further explained to the complainant that section 24(1) equally applied to item 6 of the request for the same reasons considered by the Commissioner in the previous decision notice.

#### Section 24(1)

22. Information is exempt on the basis of section 24(1) if it does not fall within section 23(1) and is required for the purpose of safeguarding national security.
23. The Commissioner finds that items 1-5 of the request were exempt on the basis of section 24(1) for the same reasons already explained in the previous decision notice especially at paragraph 58.
24. In terms of item 6, the public authority further relied on the previous decision notice to the extent that the Commissioner had specifically noted that disclosure of details of the Authorisations such as dates, times, and geographical extent could enable terrorists ascertain the likelihood of their activities coming to the attention of the police or anti-terrorist agencies.
25. The Commissioner also considers that disclosing the information requested under item 6 would have revealed information about the Authorisations and the dates they were approved. This information could be used by terrorists in conjunction with information obtained from reconnaissance activities to ascertain the likelihood of their activities coming to the attention of security agencies.
26. In summary, the Commissioner finds that the information requested in items 1-6 above was correctly withheld on the basis of the exemption at section 24(1).

### Public Interest Test

27. The exemption at section 24(1) is qualified by the public interest test. The Commissioner has therefore to consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighed the public interest in disclosure.
28. The public authority relied fully on the public interest arguments considered in the previous decision notice in support of its decision to withhold the information requested.
29. The Commissioner is persuaded that the public interest assessment in the decision notice applies equally to this request. He has however further considered whether the specific public interest arguments advanced by the complainant had shifted the balance in favour of disclosure at the time of the request in June 2010.

### **Balance of the public interest arguments**

30. According to the complainant, the Coalition Government had effectively suspended the use of section 44 stop and search powers.
31. The Commissioner agrees that the power to grant Authorisations under section 44 to 47(g) of the Terrorism Act was repealed by the Remedial Order. However, Authorisations to stop and search under the Terrorism Act can still be granted by senior police officers. The difference is that the provisions in sections 44 to 47(g) of the Terrorism Act no longer apply. Also, given that the request was made in June 2010 before the Remedial Order came into force in March 2011, sections 44 to 47(g) were in any event still in force at the time of the request.
32. Therefore, at the time of the request, the public interest was certainly not in favour of disclosure on the grounds that the use of section 44 had been suspended. In addition, the public interest was not then in favour of disclosure on the grounds that powers for Authorisations for stop and search under the Terrorism Act no longer existed. Indeed, the powers are still in use, but no longer by virtue of sections 44 to 47(g). Therefore, for the same reasons he found in the previous decision notice that there was a stronger public interest in not disclosing details of the Authorisations, he also finds that the public interest in disclosure did not outweigh the public interest in maintaining the exemption at the time of the request in June 2010.
33. According to the complainant, the public authority had admitted many clerical errors which resulted in hundreds or thousands of illegal stops and searches, something which could not have happened if the limits and geographical extent of each section 44 Authorisation had been made public.

34. The complainant further argued that it is important for public debate and for Parliamentary scrutiny of new legislation that the geographical locations and the dates and times of the 'use and abuse' of these section 44 powers should be clear and transparent.
35. Whilst the complainant did not provide any specific evidence to support the above assertion, the Commissioner is aware that there have been quite a number of incidents where the use of section 44 powers was questioned by the media, courts and politicians. It is accurate to say therefore that the use of section 44 powers has not been without controversy.
36. However, the balance the Commissioner has to strike is between protecting information on national security grounds and disclosure to promote transparency and accountability. The Commissioner is not persuaded that the public interest in disclosing the information about Authorisations requested in items 1-6 outweighs the significant public interest in protecting the security of the United Kingdom and its citizens.
37. According to the complainant, the ECJ judgement in *Gillan and Quinton v the United Kingdom* made the Terrorism Act illegal.
38. The Commissioner has already noted that the government introduced a Remedial Order amending part of the Terrorism Act following the ECJ ruling in *Gillan and Quinton v the United Kingdom*.
39. The ECJ judgement was handed down on 12 January 2010. Given that Authorisations for stop and search powers under the Terrorism Act could still be granted up until 18 March 2011, the Commissioner finds that, at the time of the request in June 2010, the public interest was still in favour of maintaining the exemption at section 24(1). Also, for the reasons already noted above at paragraph 32 alone the Commissioner in any event finds that the public interest in maintaining the exemption outweighed the public interest in disclosure.
40. The complainant also suggested that subsequent to both his requests of 2007 and 2010, individual Police forces had disclosed information relevant to his requests. In his own words, ".....it appears that individual Police forces such as the Metropolitan Police Service have disclosed, the time, date, and geographical extent of the Section 44 Authorisation requests they have made to the Home Secretary."
41. The complainant did not provide any specific evidence in support of the above assertion. In any event, the Commissioner would not have taken into account information which was disclosed after the request of 11 June 2010.

## Procedural Requirements

42. Under section 10(1) a public authority must comply with the provisions of section 1(1) promptly and in any event no later than 20 working days.
43. Under section 10(3) a public authority may extend the time for compliance where it is necessary to do so in order to properly consider the public interest.
44. Under section 17(3)(b) a public authority must complete its public interest test within a reasonable period in the circumstances.
45. The Commissioner considers that in no case should a public authority take more than 40 working days to consider the public interest. The public authority took over three months to conduct the public interest test in relation to the information withheld on the basis of the section 24(1) exemption.
46. The Commissioner therefore finds the public authority in breach of section 17(3)(b).

## The Decision

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47. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
  - The public authority correctly withheld the information requested in items 1-6 on the basis of the exemption at section 24(1).
48. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
  - The public authority breached section 17(3)(b).

## Steps Required

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49. The Commissioner requires no steps to be taken.



## Right of Appeal

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50. 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: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

51. 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.
52. 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 21<sup>st</sup> day of July 2011**

**Signed .....**

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

## Legal Annex

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### General Right of Access

#### **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 1(2) provides that -**

"Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14."

#### **Section 1(3) provides that –**

"Where a public authority –

- (a) reasonably requires further information in order to identify and locate the information requested, and
- (b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information."

#### **Section 1(4) provides that –**

"The information –

- (a) in respect of which the applicant is to be informed under subsection (1)(a), or
- (b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request."

**Section 1(5) provides that –**

“A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).”

**Section 1(6) provides that –**

“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.

**Effect of Exemptions**

**Section 2(1) provides that –**

“Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that either –

- (a) the provision confers absolute exemption, or
- (b) 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 public authority holds the information

section 1(1)(a) does not apply.”

**Section 2(2) provides that –**

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

**Section 2(3) provides that –**

“For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

- (a) section 21

- (b) section 23
- (c) section 32
- (d) section 34
- (e) section 36 so far as relating to information held by the House of Commons or the House of Lords
- (f) in section 40 –
  - 1. subsection (1), and
  - 2. subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
  - 3. section 41, and section 44"

### **Time for Compliance**

#### **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 10(2) provides that –**

"Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt."

#### **Section 10(3) provides that –**

"If, and to the extent that –

- (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
- (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given."

**Section 10(4) provides that –**

“The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.”

**Section 10(5) provides that –**

“Regulations under subsection (4) may –

- (a) prescribe different days in relation to different cases, and
- (b) confer a discretion on the Commissioner.”

**Section 10(6) provides that –**

“In this section –

“the date of receipt” means –

- (a) the day on which the public authority receives the request for information, or
- (b) if later, the day on which it receives the information referred to in section 1(3);
  - (i) “working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and
  - (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
  - (iii) section 41, and
  - (iv) section 44”

**Refusal of Request**

**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(2) states –**

"Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
  - i. that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
  - ii. that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached."

**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 17(4) provides that -**

"A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

**Section 17(5) provides that -**

"A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact."

**Section 17(6) provides that -**

"Subsection (5) does not apply where -

- (a) the public authority is relying on a claim that section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request."

**Section 17(7) provides that -**

"A notice under section (1), (3) or (5) must -

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50."

**National Security**

**Section 24(1) provides that -**

"Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security."

**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.”

**Section 24(3) provides that –**

“A certificate signed by a Minister of the Crown certifying that exemption from section 1(1)(b), or from section 1(1)(a) and (b), is, or at any time was, required for the purpose of safeguarding national security shall, subject to section 60, be conclusive evidence of that fact.”

**Section 24(4) provides that –**

“A certificate under subsection (3) may identify the information to which it applies by means of a general description and may be expressed to have prospective effect.”