

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 January 2012

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

Decision (including any steps ordered)

1. The complainant requested information in connection with the attempted murder of Martin McGartland.
2. The Commissioner's decision is that the public authority was entitled to refuse to comply with the request by relying jointly on the exemptions at sections 23(5) and 24(2) of the Freedom of Information Act 2000 (the Act).
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. The request dated 16 January 2011 was worded as follows:

'Would you please sent[sic] me all the most up to date information you have concerning the attempted murder of a Mr Martin McGartland aka 'Agent Carol' who was shot in Whitley Bay on 17th June 1999 at his home. Could I also be given information on the following.....

1) Which variant of CZ75 combat pistol was used in connection with the shooting. There are approx 26 variants of this pistol from 1975 onwards to date. Which variant was the pistol?

5. The public authority responded on 31 March 2011. It explained that it could neither confirm nor deny it held the information requested on the basis of the exemptions at sections 23(5), 24(2), 31(3) and 40(5) of the Act.

6. Following an internal review the public authority wrote to the complainant on 3 May 2011. The original decision not to comply with the request on the basis of sections 23(5), 24(2), 31(3) and 40(5) was upheld.

Scope of the case

7. On 16 May 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
8. The scope of the Commissioner's investigation was to determine whether the public authority had been entitled to refuse to comply with the request on the basis of the exemptions at sections 23(5), 24(2), 31(3) and 40(5).

Reasons for decision

Findings of Fact

9. In June 1999, Martin McGartland, a former Provisional Irish Republican Army (IRA) informer was shot and seriously injured by unknown gunmen at his residence. The investigation of the shooting by Northumbria Police is still ongoing. Information in connection with Mr McGartland's identity as a former British Security Service agent is widely available on the internet.¹ In his published autobiography entitled '50 Dead Men Walking', Mr McGartland also provides details of some of his activities as an IRA informant.

Sections 23(5) and 24(2)

10. The public authority explained that given its statutory relationship with one of the bodies mentioned at section 23(3) of the Act, there is a high

¹ See for example:

http://news.bbc.co.uk/1/hi/northern_ireland/789276.stm

<http://news.bbc.co.uk/1/hi/england/tyne/8104618.stm>

http://www.bbc.co.uk/blogs/newsnight/fromthewebteam/2009/04/newsnight_newsnight_review_fri_2.html

<http://www.bbc.co.uk/news/10337772>

probability that if held, the requested information would fall within the scope of sections 23(1) and 24(1) of the Act.

11. Section 23(1) and (5) state that:

'(1) Information held by a public authority is exempt information if it was directly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3)...

'...(5) 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).'

12. Sections 24(1) and (2) state that:

'(1) 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.

(2) 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.'

13. Section 23 and 24 are obviously closely linked provisions. Section 23(1) and section 24(1) are mutually exclusive. That is to say if information is exempt from disclosure on the basis of the exemption contained at section 23, it cannot also be exempt under section 24.

14. However, in respect of the application of sections 23(5) and 24(2), i.e. when a public authority believes it is exempt from the duty contained at section 1(1)(a), the Commissioner accepts that a public authority may cite both exemptions in conjunction without specifically stating which of the two actually applies. Such an approach is calculated to avoid disclosure of the fact that a section 23 body is or isn't involved in the scenario described in a particular request. Obviously for such an approach to be effective, public authorities have to consistently cite both exemptions when responding to any similar requests.

15. The Commissioner therefore finds that in the circumstances of this case, the public authority was entitled to rely on the exemptions at sections 23(5) and 24(2) in conjunction to neither confirm nor deny it held the requested information.

Public Interest Test

16. Section 23 is an absolute exemption and not subject to a public interest test. Section 24 is however a qualified exemption and is therefore subject to a public interest test.
17. The Commissioner must therefore also consider whether in all the circumstances of the case, the public interest in maintaining the exclusion from the duty to confirm or deny the public authority held the requested information by virtue of section 24(2) outweighed the public interest in otherwise confirming or denying that it did.
18. The Commissioner considered all of the public authority's submissions on the public interest. He finds that although confirming or denying the requested information is held would increase transparency regarding the shooting of Mr McGartland, the public interest in maintaining the exclusion from the duty in section 1(1)(a) of the Act (i.e. the duty to confirm or deny) significantly outweighs this public interest. It is clearly not in the public interest to reveal information which could have a prejudicial effect on national security.
19. The Commissioner recognises that the brevity of his reasoning may prove to be frustrating to the complainant. However, in cases of this nature where sections 23(5) and 24(2) have been relied upon the Commissioner believes that this is an inevitable consequence of the required approach.
20. In view of his conclusions above, the Commissioner did not consider the applicability of the exemptions at sections 31(3) and 40(5).

Right of appeal

21. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

22. 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.
23. 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

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