

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 April 2012

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

Decision (including any steps ordered)

1. The complainant requested information relating to an attempted murder. The Home Office refused to confirm or deny whether it held this information and cited the exemptions provided by sections 23(5) (information relating to, or supplied by, security bodies) and 24(2) (national security). The Information Commissioner's decision is that the Home Office applied sections 23(5) and 24(2) correctly and so it is not required to confirm or deny if it holds information falling within the scope of the complainant's request. However, the Commissioner also finds that the Home Office breached the requirement to provide advice and assistance imposed by section 16(1) in that it did not advise the complainant that requests for government information held elsewhere than the Home Office should be made to the appropriate government departments.

Request and response

2. On 8 July 2011, the complainant wrote to the Home Office and requested information in the following terms:

"I am requesting via the Freedom of Information Act access to the entirety of the information held on the attempted murder of Martin McGartland by the Home Office and [the Government] as follows;

1. *The facts known to [the Government] and or to the Home Office which links the IRA to the attempted murder of Martin McGartland on 17th June 1999.*

2. All recorded information (as detailed under section 84 of FOIA) held by the Home Office and [the Government] containing all/any references to, or otherwise, relating to the shooting of Martin McGartland on the 17th June 1999.

Please ensure you provide copies of those parts of the recorded information containing such references or related information, including the context in which the reference is made."

3. The Home Office responded substantively on 29 September 2011. It stated that it refused to confirm or deny whether it held information falling within the scope of the request and cited the exemptions provided by the following sections of the FOIA:

23(5) (information relating to, or supplied by, security bodies)

24(2) (national security)

31(3) (prejudice to law enforcement)

40(5) (personal information)

4. Following an internal review the Home Office wrote to the complainant on 28 October 2011. It stated that the refusal to confirm or deny under the exemptions cited previously was upheld.

Scope of the case

5. The complainant contacted the Commissioner on 18 November 2011 to complain about the way her request for information had been handled. The complainant indicated at this stage that she did not agree that the exemptions cited had been applied appropriately.

Reasons for decision

Sections 23(5) and 24(2)

6. Section 23(5) of the FOIA provides that a public authority is not required to confirm or deny if information is held where the information falling within the scope of the request relates to, or was supplied by, any of a list of security bodies specified in section 23(3). Consideration of this exemption requires forming a conclusion as to whether, if the Home

Office does hold information falling within the scope of the request, this information would relate to, or have been supplied by, any of the security bodies listed in section 23(3).

7. Section 24(2) provides an exemption from the duty to confirm or deny where this is required for the purpose of safeguarding national security. Consideration of this exemption is a two stage process, first the exemption must be engaged as a result of the exclusion of the duty to confirm or deny being required for the purpose of national security and, secondly, this exemption is qualified by the public interest. This means that the confirmation or denial should be provided unless the public interest in the maintenance of the exemption outweighs the public interest in confirming or denying.
8. The Home Office stated that it was citing both sections 23(5) and 24(2) jointly. Unlike the related exemptions provided by sections 23(1) and 24(1), sections 23(5) and 24(2) are not mutually exclusive. This means that they can, where appropriate, both be cited in response to a request.
9. Covering section 23(5) first, the Home Office advanced two main grounds in support of the citing of this exemption. The first of these is the implication in the wording of the request of IRA involvement in the shooting referred to in the request. The argument of the Home Office is that in any situation in which terrorist involvement is a possibility, involvement by security bodies would also be a strong possibility. The Home Office argued therefore that any information it might hold that fell within the scope of this request would likely relate to, or have been supplied by, a security body.
10. Secondly, the Home Office referred to its relationship with security bodies, stating that it *"has a clear remit on security matters, including counter terrorism"*. The Information Commissioner recognises the role of the Home Office as the lead government department on counter-terrorism. He also recognises that this adds to the likelihood that any relevant information held by it would relate to, or have been supplied by, security bodies.
11. In the case *Metropolitan Police v IC* (EA/2010/0008) the Information Tribunal stated that *"...the probability that the requested information, if held, came through a section 23 body"* (paragraph 20) was a sufficient basis on which to conclude that section 23(5) was engaged. Taking this approach here, the Information Commissioner concludes that it is probable that any information held by the Home Office that falls within the scope of the request would relate to, or have been supplied by, one

or more of the security bodies listed in section 23(3) of the FOIA. The exemption provided by section 23(5) is, therefore, engaged.

12. As to section 24(2), the Home Office has argued that confirmation or denial would “...have the consequence of betraying the capability, engagement and focus of [security] bodies”. Given the close relationship between the ability of the security bodies to function effectively and the safeguarding of national security, the Commissioner accepts that in many cases where section 23(5) is engaged, confirmation or denial of the involvement of security bodies would also undermine national security.
13. In this case the Commissioner would accept that, were any security body involved in the investigation of the incident referred to in the request, this would have been with the aim of safeguarding national security. He would also accept that in general disclosing the focus of security bodies could result in detriment to national security. For these reasons the conclusion of the Commissioner is that the exemption provided by section 24(2) does apply here.
14. Having found that this exemption is engaged it is necessary to go on to consider the balance of the public interest. In forming a conclusion on the balance of the public interest here the Commissioner has taken into account the public interest in the transparency and openness of the public authority, as well as the public interest inherent in the exemption in avoiding harm to national security. This is in addition to the specific factors that apply in relation to the information in question.
15. Covering first those factors that favour disclosure of the information, the Commissioner accepts that there is a public interest in understanding more about the response to the incident referred to in the request. Confirmation or denial would assist this in that it would provide an indication of the level and nature of the official response to this incident.
16. Turning to those factors that favour maintenance of the exemption, having accepted that it is reasonably necessary for the purpose of safeguarding national security to withhold this information from disclosure, the Commissioner must also accept the strong public interest inherent in the exemption and that this carries very significant weight in favour of maintenance of the exemption.
17. Whilst the Commissioner has recognised a degree of public interest in disclosure of the information in question, the public interest inherent in this exemption is clearly very strong and, where this exemption is engaged, it is likely that this public interest will outweigh all but the

weightiest factors in favour of disclosure. In this case the view of the Commissioner is that the public interest factors in favour of disclosure are not sufficiently weighty and so his conclusion is that the public interest in the maintenance of the exemption clearly outweighs the public interest in disclosure.

18. Given this conclusion on section 24(2) and that above on section 23(5), the Home Office is not required to confirm or deny if it holds information falling within the scope of the complainant's request.

Section 16

19. The request specifies information held by the wider Government, not only by the Home Office. In correspondence with the Information Commissioner's Office the Home Office noted that is not required to, and in any case could not, comment on information that may be held by other government departments.
20. The Commissioner accepts that the Home Office is correct that it is not required to comment on any information that may be held elsewhere, but also notes that the complainant was not advised of this. The view of the Commissioner is that the complainant should have been advised that information requests for information held by the Government should be made to individual government departments, each department being a separate public authority for the purposes of the FOIA, and that the Home Office breached the duty to provide advice and assistance imposed by section 16(1) in failing to explain this.
21. As the complainant is now being made aware of the necessity to make requests to individual government departments by this decision notice, no step has been included in this notice requiring the Home Office to do this as well.

Right of appeal

22. 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

23. 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.
24. 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
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