

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 July 2013

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

Decision (including any steps ordered)

1. The complainant has requested the names and ranks of the persons who currently hold, or had previously held, one of three roles under the Regulation of Investigatory Powers Act (RIPA) 2000, specifically, Senior Responsible Officer, Designated Person and Single Point of Contact on behalf of each of the police forces in England and Wales. The Home Office initially withheld the requested information under Section 40(2) of the Act (personal data). During the course of the Commissioner's investigation the Home Office also applied Section 31(1)(a) (prevention or detection of crime), Section 38 (health and safety) and Section 23(1) (security bodies) to the information falling within scope of the request. The Home Office also refused to confirm or deny whether it held any further information on the basis of Section 23(5) of FOIA.
2. The Commissioner finds that the Home Office correctly applied Section 23(1) to the information requested by the complainant and that it is therefore exempt by virtue of this exemption. However, the Commissioner finds that the Home Office incorrectly applied Section 23(5) to neither confirm nor deny whether it held any further information beyond that requested by the complainant.

Request and response

3. On 29 March 2012, the complainant wrote to the Home Office and requested information in the following terms:

'I am interested in the identity of Senior Responsible Officers (SROs) and Single Point(s) of Contact (SPoCs) for the purposes of s71 of the Regulation of Investigatory Powers Act (RIPA) 2000 and the Code of Practice for the Investigation of Protected Electronic Information.

Please could the Home Office provide me with the following:

- (a) A list of all current SROs (name and rank) for all police forces in England & Wales*
- (b) A list of all previous SROs (name and rank) for all police forces in England & Wales and the date they ceased to have this responsibility*
- (c) A list of all current SPoCs (name and rank) for all police forces in England & Wales*
- (d) A list of all previous SPoCs (name and rank) for all police forces in England & Wales and the date they ceased to have this responsibility*
- (e) A list of all current Designated Persons (name and rank) for all police forces in England & Wales*
- (f) A list of all previous Designated Persons (name and rank) for all police forces in England & Wales and the date they ceased to have this responsibility'*

Even if all of the information cannot be supplied, I would be grateful for the disclosure of as much of the remainder as is lawful and possible'.

4. The Home Office responded on 30 April 2012. It stated that the information requested was personal data and as such was exempt from disclosure by virtue of Section 40(2) of the Act which exempts such information from disclosure if this would breach any of the data protection principles.
5. Following an internal review the Home Office wrote to the complainant on 29 May 2012. It upheld the application of Section 40(2) to the request but stated that, *'However, it should have been made clear in the original response that the Home Office does not hold information regarding the 'rank' of Senior Responsible Officers (SROs) or Single*

Points of Contact (SPoCS)'. The internal review response confirmed that the responding unit within the Home Office had been the Office of Security and Counter-Terrorism (OSCT).

Scope of the case

6. The complainant contacted the Commissioner on 10 July 2012 to complain about the way his request for information had been handled.
7. In correspondence with the Commissioner dated 4 October 2012 the Home Office confirmed that it was maintaining reliance on Section 40(2) to withhold the requested information.
8. The Home Office wrote to the complainant on 27 November and provided information as to the role of the Single Point of Contact (SPoC). The Home Office also advised that Section 31(1)(a)(prevention or detection of crime) was being applied to the request and concluded that the balance of the public interest lay in maintaining the exemption.
9. The Commissioner wrote to the Home Office on 19 December 2012 with regard to the application of Section 31(1)(a). As the Home Office had also previously indicated to the Commissioner that it would be additionally relying upon Section 23(1) (information supplied by, or relating to, bodies dealing with security matters) the Commissioner sought further details with regard to this exemption.
10. The Home Office wrote to the Commissioner on 17 January 2013 and addressed the use of the Section 23(1) exemption. In more detailed correspondence with the Commissioner dated 25 January 2013 the Home Office provided what it confirmed was its final position and advised that in addition to the exemptions noted above, it was also applying Section 38(1) (health and safety) to the complainant's request. The Home Office also advised the Commissioner that it was refusing to confirm or deny whether it held any further information beyond that requested by the complainant on the basis of Section 23(5).
11. The Home Office wrote to the complainant on 11 February 2013 and provided him with similar information as that provided to the Commissioner, including confirmation of the new exemptions being applied to the request. However, no reference was made to Section 23. The Home Office apologised for this oversight in a letter to the complainant dated 19 February 2013, in which it confirmed that it was applying Section 23 to the request but provided no explanation for the use of the exemption. The Home Office subsequently wrote to the complainant on 14 March 2013 and provided him with an explanation for the application of Section 23.

12. On 15 April 2013 the complainant provided the Commissioner with very detailed and helpful submissions and supporting documentation which addressed all the exemptions applied by the Home Office to his request and put forward arguments for disclosure of the information requested.
13. During the course of the Commissioner's investigation the position of the Home Office as to what information it holds within scope of that requested by the complainant has shifted on a number of occasions, causing unhelpful confusion and uncertainty. It has therefore been necessary for the Commissioner to make searching enquiries with the Home Office so as to ascertain the actual position. These enquiries have included examination of screen shots of the relevant Home Office databases (see below) and questioning of a Home Office official with detailed knowledge and responsibility for the department's Communications Capabilities Development programme. The Commissioner is now satisfied, on the balance of probabilities, as to what relevant information the Home Office holds as regards this request and this is set out below.
14. The Home Office confirmed that, at the time of the complainant's request in March 2012, its then existing database held SPoC details (in respect of RIPA) for **all** of the police forces in England and Wales. However, these details did not differentiate between rank and status, such as Senior Responsible Officer (SRO) or Designated Person (DP). Although the database would, in appropriate cases, contain details of an 'inactive' SPoC, it contained no information as to how long that previous SPoC had held the role or when he/she had left. Therefore, at the time of the request the Home Office held the names of current (and previous) SPoCs, but not their individual rank or status or the dates when the 'inactive' SPoCs ceased to have this responsibility.
15. Prior to the Commissioner's enquiries into this issue, the Home Office position had been that at the time of the complainant's request it held *'only a very limited list of SPoCs for police forces'* and indeed this is what the complainant was advised in the Home Office letter of 11 February 2013. Since the Commissioner did not consider it reasonable, on the balance of probabilities, that the Home Office, as the central government department responsible for the police, would only hold a partially complete list of SPoCs for the police forces, the correction by the Home Office of its previously stated position is welcome and accords with what would be reasonably expected in terms of the information held. However, the Commissioner is critical of the inaccurate information provided in the Home Office's written submissions on this point.
16. The Home Office has explained that in December 2012, nine months after the complainant's request, a new database was created which

contains SPoC details (in respect of RIPA). This database, like its predecessor, contains such details for **all** of the police forces in England and Wales but also specifically identifies the respective Senior Responsible Officers (SROs) and SPoC Managers. The Home Office has advised the Commissioner that the SPoC Manager role is a separate position to that of a SPoC, SRO or DP and was set up in response to RIPA. Although senior to a SPoC, a SPoC Manager reports directly to an SRO. Details of the police rank are included on the database for all the SPoCs but not their titles for the purposes of RIPA, aside from the SROs and Managers. The current database does not contain information as to when previous SPoCs ceased to have such responsibility.

17. It therefore follows that the Home Office currently holds more information than it did at the time of the complainant's request (specificity as to SRO status). However, it is important that the Commissioner make clear that his consideration of the exemptions applied by the Home Office in this case is based upon the circumstances as they existed at the time of the request rather than at the time this notice is issued.
18. For this reason, the information within scope of the Commissioner's investigation is that held by the Home Office as of March 2012, this being the names of current and previous RIPA SPoCs for the 43 police forces in England and Wales.

Reasons for decision

Section 23(1) – Security Bodies

19. Section 23(1) is an absolute exemption and states as follows:

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

20. In this particular case the information the complainant requested were the names and ranks of all current and past SROs, SPoCs and DPs for the police forces in England and Wales (the SPoCs). None of the police forces, as the complainant has correctly pointed out, are security bodies for the purposes of Section 23(3)¹. There is no suggestion that any of

¹ The list of section 23(3) bodies can be viewed here:

<http://www.legislation.gov.uk/ukpga/2000/36/section/23>

the security bodies have directly or indirectly supplied the Home Office with the names of the SPoCs and it would reasonably be expected that the police forces would have provided this information to the Home Office themselves.

21. Therefore, the only basis upon which Section 23(1) could be applied in this instance is if the information requested relates to any of the bodies specified in Section 23(3). Whilst the term, '*relates to*' is given a wide interpretation, the request still has to be in the territory of a Section 23(3) body. Whether a request is in the territory of such security bodies can depend on the nature of the work undertaken by the public authority receiving the request, the subject area to which the request relates, the actual language of the request or combinations of these factors.
22. In the explanation for its reliance on Section 23 provided to the complainant the Home Office stated that:
23. '*Section 23 is being applied in this case as some of the individual SROs, SPoCs or DPs whose details you have requested may have worked alongside, with or in conjunction with any of the security bodies as listed under s.23. If individuals working in any of the police authorities in England and Wales have worked with or had involvement with any of the security bodies listed under s.23 as a part of their job the Home Office would be exempted from providing their details but, in confirming if specific individuals are not exempt under s.23 we would also be confirming that other individuals have had an involvement with the s.23 bodies which is why s23(5) has been used in the response*'.
24. The Commissioner will address the additional usage by the Home Office of Section 23(5) later in this notice.
25. In his submissions to the Commissioner, the complainant contended that, '*there are plenty of persons who, in the course of their employment may have on occasion worked with a s23(3) body*' and gave a number of examples such as a paramedic unit or fire station on terrorism training exercises or a Crown Prosecution Service prosecutor working on a case with SOCA (Serious Organised Crime Agency). The complainant observed that, '*these people will have at some point worked with the security bodies, but the non-s23(3) public authorities for whom they work would not be able to rely on s23 to stop them being named in relation to duties unrelated to national security*'.
26. As a general proposition the Commissioner would agree with the complainant's contention and he accepts that the number of individuals across the range of public authorities whose work may on occasion intersect with that of the security bodies will be considerable.

It is a question of degree and the Commissioner considers that a one-off or occasional involvement with a security body by an employee of a non-Section 23(3) public authority such as the above examples provided by the complainant would clearly be neither sufficient nor appropriate as a basis for withholding the identity of the individual concerned in respect of their normal duties unrelated to national security.

27. However, in this particular case the Commissioner notes that the complainant's explicitly stated context for his request was s71 of the Regulation of Investigatory Powers Act (RIPA) 2000 which deals with the issue and revision of codes of practice. In its supporting submissions for the maintenance of Section 23(1) the Home Office drew the Commissioner's attention, *'to the references made to the Intelligence Services and the Serious Organised Crime Agency (SOCA), who are classified under law as Section 23 bodies, throughout RIPA 2000. The legislation makes it clear that RIPA 2000 can act as a tool by which such bodies can request access communications'*.
28. In terms of the work which it undertakes, the Commissioner recognises that the Home Office has a clear remit for matters of national security, including liaison with the police. The Home Office also works with the bodies listed in Section 23(3) on a number of related issues.
29. When the nature of the work undertaken by the Home Office is combined with the close connection between RIPA 2000 and the Section 23(3) bodies, the Commissioner considers that the complainant's request could be considered to be within the territory of such bodies. That is to say, whilst none of the individual police forces are themselves Section 23(3) bodies, it could be reasonably assumed that of all the individuals working within any particular police force, it is those responsible for applying RIPA 2000, who would be most likely to have involvement with the Section 23(3) bodies. Furthermore, any such involvement could reasonably be expected to be closer and more extensive than the examples provided by the complainant.
30. Were it not for the fact that in the context of the complainant's request, the names of the individuals concerned are indivisible from their RIPA responsibilities, and those responsibilities could reasonably be expected to include involvement with the security bodies, the Commissioner would regard the rationale provided by the Home Office as too remote to establish the required degree of *'relates to'* between the police individuals concerned and the Section 23(3) bodies.
31. As it is however, the Home Office has provided the Commissioner with additional confidential information in support of its reliance on Section 23(1). That information is contained in a confidential annex to this notice and the Commissioner considers that it reinforces the applicability

of the 'relates to' provision of the exemption, and arguably provides a stronger basis for the use of Section 23(1) than that detailed in this notice.

32. The Commissioner both recognises and appreciates that the complainant may find the brevity of reasoning in this notice frustrating, but in cases concerning Section 23(1) this is an inevitable consequence of the need to be circumspect as to what can be publicly disclosed.
33. The Commissioner considers that what information the Home Office did hold which fell within scope of the complainant's request (the names of the SPoCs) is exempt from disclosure by virtue of Section 23(1). As Section 23(1) is a class based and absolute exemption, there is no requirement for the Home Office to show that the disclosure of the requested information would prejudice the work of the security bodies in any way. Nor is there a requirement for the Commissioner to consider the public interest test.

Section 23(5)

34. Section 23(5) states 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).'

35. As noted above, the Home Office have confirmed that at the time of the complainant's request it did hold some of the information which he was seeking (the names of the SPoCs) and this is the information which the Home Office has withheld under Section 23(1) and the other exemptions cited.
36. The Home Office has confirmed to the Commissioner that beyond the specific information requested by the complainant, it is seeking to neither confirm nor deny whether any further information is, or is not held. In adopting this position the Home Office is relying on Section 23(5).
37. However, the duty under Section 1(1)(a) of FOIA only applies to, *'information of the description specified in the request'*. That is to say, an exemption cannot be applied in respect of information that has not been requested. The information requested by the complainant was very specific and self-contained. The neither confirm nor deny exemption cannot be used pre-emptively in anticipation of possible future requests and in seeking to do so in this instance the Home Office wrongly applied Section 23(5).

Sections 40, 31 and 38

38. As the Commissioner has reached the above conclusion in respect of Section 23(1), he has not proceeded to consider the other exemptions cited by the Home Office in this case.

Procedural Requirements

39. As is evident from the chronology of this case detailed earlier in this notice, the handling of this particular request by the Home Office fell some way below expected standards and the changes in position in terms of both what information was held and which exemptions were being applied caused considerable confusion to all concerned. This lack of clarity and focus by the Home Office and the delays in providing supporting submissions to the Commissioner protracted this matter considerably.
40. Section 17(1)(b) of the Act requires that if a public authority wishes to rely on exemption(s) to refuse a request it must provide the applicant with a valid refusal notice specifying the exemption(s) in question within the time period set out in section 10(1) – twenty working days. In his correspondence with the Home Office the complainant was told that the information he had requested was being withheld under Section 40(2). It was only during the Commissioner's investigation of this matter that the Home Office then applied the further exemptions cited and then in piecemeal fashion. In the case of Section 23, this exemption was not formally applied by the Home Office until January 2013, some three months after the commencement of the Commissioner's investigation.
41. The Commissioner therefore finds the Home Office in breach of Sections 10(1) and 17(1)(b) for not informing the complainant within the statutory time period that (in addition to Section 40(2)), it was relying on the exemptions provided by Sections 31, 38 and 23 and for incorrectly applying Section 23(5) to the complainant's request. Given the nature of the interests which it is designed to protect, the Commissioner considers the very late reliance on Section 23(1) to be particularly poor practice.

Right of appeal

42. 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

43. 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.

Signed

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