

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 July 2013

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

Decision (including any steps ordered)

1. The complainant has requested information relating to the alleged arrest of several Indian males in connection with an attempt to kill Lieutenant General Kuldeep Singh Brar. The public authority's position is to neither confirm nor deny holding any information by virtue of the exemptions in sections 23(5), 24(2), 31(3) and 40(5) of the FOIA, adding 27(4) during the course of the Commissioner's investigation. The Commissioner accepts that it had no duty to confirm or deny holding information in this case. He does not require the public authority to take any steps.

Background

2. The request relates to the stabbing of Lieutenant General Kuldeep Singh Brar whilst he was visiting London.
3. Related stories can be found on the BBC website^{1, 2}.
4. The public authority also provided the following background information to the Commissioner:

¹ <http://www.bbc.co.uk/news/world-asia-india-19796418>

² <http://www.bbc.co.uk/news/uk-england-london-19841314>

"Lt-Gen Kuldeep Singh Brar is a high profile figure who held a senior position within the Indian army. The attack against Lt-Gen Kuldeep Singh Brar was widely reported in the public domain and accompanied by a great deal of conjecture with regards to the apparent motive of the perpetrators. A number of media organisations speculated that the attack might be linked to an extremist or terrorist group:

<http://www.telegraph.co.uk/news/worldnews/asia/india/9584223/Indian-general-assassination-attempt-a-message-from-Sikh-separatists.html>"

It added:

"Despite this speculation no comment has been provided by any government department or law enforcement agency with regard to the scope or extent of the investigation into this matter. Similarly no confirmation or denial has been issued as to whether a terrorist group orchestrated the attack on Lt-Gen Kuldeep Singh Brar.

The sensitivity around this request arises then to the extent that the applicant's questions, if answered by either a confirmation or denial, would serve to reveal sensitive information as to progress and character of the investigation into the attack on Lt-Gen Kuldeep Singh Brar".

Request and response

5. On 29 October 2012, the complainant wrote to the public authority and requested information in the following terms:

"We write further to the Police operation on 5th October 2012 at 60 Queensdale Road, London, where several Indian males were arrested on suspicion of conspiracy to kill Lieutenant General Kuldeep Singh Brar in an incident in central London on 30th September 2012. We understand that the terrorism team SO15 were also involved in the operation. Numerous individuals who were detained on the day but not ultimately charged with the offence were referred to the Immigration Authorities. These individuals now fear persecution upon return to India.

Accordingly, we seek disclosure of information with regards to:

- 1. Whether the UK government and / authorities have informed the Indian authorities in writing, orally in meetings or otherwise of the names / identity of the individuals who were arrested or*

charged with regards to Lieutenant General Kuldeep Singh Brar's attempted murder?

- 2. Have the Indian Authorities requested in writing, orally in meetings or otherwise the identity of the individuals arrested or charged with regards to Lieutenant General Kuldeep Singh Brar's attempted murder?*
- 3. Whether the UK government and / authorities have informed the Indian authorities in writing, orally in meetings or otherwise of the locations raided in relation to Lieutenant General Kuldeep Singh Brar's attempted murder?*
- 4. Have the Indian Authorities requested in writing, orally in meetings or otherwise information on the locations raided and / or investigated with regards to Lieutenant General Kuldeep Singh Brar's attempted murder?*
- 5. Are the UK government or authorities planning on ever divulging the aforementioned information to the Indian Authorities?*
- 6. Whether the Indian Authorities have a regular monthly meeting with the Scotland Yard to exchange information on crime, suspects and / or terrorists?*

You are requested to kindly provide us with the above as a matter of urgency. We thank you for your cooperation and look forward to hearing from you soon".

6. The public authority responded on 7 December 2012, outside the statutory time for compliance. It stated that it held no information.
7. Following an internal review the public authority wrote to the complainant on 4 January 2013. It changed its position and sought to rely on the exemptions at sections 23(5), 24(2), 31(3) and 40(5) of the FOIA. During the course of the Commissioner's investigation it also introduced the exemption at section 27(4) of the FOIA.

Scope of the case

8. The complainant wrote to the Commissioner on 8 January 2013 to complain about the way his request for information had been handled.
9. The Commissioner confirmed that he would consider whether the public authority was correct to neither confirm nor deny holding any of the information requested.

Reasons for decision

Section 23 – security bodies

Section 24 - national security

10. Information relating to security bodies specified in section 23(3) is exempt information by virtue of section 23(1). Information which does not fall under section 23(1) is exempt from disclosure under section 24(1), if it is required for the purpose of safeguarding national security.
11. Sections 23(5) and 24(2) exclude the duty of a public authority to confirm or deny whether it holds information which, if held, would be exempt under section 23(1) or 24(1) respectively.
12. By virtue of section 23(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 section 23(3).
13. By virtue of section 24(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.
14. The public authority explained that both sections 23(5) and 24(2) were engaged and that this approach had been endorsed by the Commissioner and the First-tier Tribunal. The Commissioner does not consider the exclusions at section 23(5) and 24(2) to be mutually exclusive and he accepts that they can be relied upon independently or jointly in order to conceal whether or not one or more of the security bodies has been involved in an issue which might impact on national security. However, each exemption must be applied independently on its own merits. In addition, the section 24 exemption is qualified and is therefore subject to the public interest test.
15. In the Commissioner's opinion the exemption contained at section 23(5) should be interpreted so that it is only necessary for a public authority to show that either confirmation or denial as to whether the requested information is held would involve the disclosure of information relating to a security body. Whether or not a security body is interested or involved in a particular issue is in itself information relating to a security body.
16. Furthermore, the Commissioner believes that the phrase 'relates to' should be interpreted broadly. Such an interpretation has been accepted by the First-Tier Tribunal (Information Rights) in a number of different

decisions. Therefore, in the Commissioner's opinion, section 23(5) could be used by a public authority to avoid issuing a response to a request which revealed either that a security body was involved in an issue or that it was not involved in an issue.

17. The test as to whether a disclosure would relate to a security body is decided on the normal civil standard of proof, that is, the balance of probabilities. In other words, if it is more likely than not that the disclosure would relate to a security body then the exemption would be engaged.
18. From the above it can be seen that section 23(5) has a very wide application. If the information requested is within what could be described as the ambit of security bodies' operations, section 23(5) is likely to apply. This is consistent with the scheme of FOIA because the security bodies themselves are not subject to its provisions. Factors indicating whether a request is of this nature will include the functions of the public authority receiving the request, the subject area to which the request relates and the actual wording of the request
19. There is clearly a close relationship between the public authority and the security bodies, particularly its statutory relationship with the Security Service. The Commissioner also notes the speculation that terrorist groups may have been involved in the assassination attempt, as shown in the newspaper report which can be viewed in the link in paragraph 4 above. In respect of its role, and the subject matter being requested, the Commissioner is satisfied that, on the balance of probabilities, any information, if held, could be related to one or more of the bodies identified in section 23(3) of the FOIA.
20. With regard to section 24(2), the Commissioner again considers that this exemption should be interpreted so that it is only necessary for a public authority to show that either a confirmation or denial of whether requested information is held would be likely to harm national security. The Commissioner interprets the phrase 'required' in the context of this exemption to mean 'reasonably necessary'. In effect this means that there has to be a risk of harm to national security for the exemption to be relied upon, but there is no need for a public authority to prove that there is specific, direct or imminent threat.
21. In relation to the application of section 24(2) the Commissioner notes that the Tribunal has indicated that only a consistent use of a 'neither confirm nor deny' (NCND) response on matters of national security can secure its proper purpose. Therefore, in considering whether the exemption is engaged, and the balance of the public interest test, regard has to be given to the need to adopt a consistent NCND position

and not simply to the consequences of confirming whether the specific requested information in this case is held or not.

22. The public authority has advised the Commissioner that it considers the subject matter to relate to section 24: "... on account of the speculation that exists as to the extremist and/or terrorist associations of Lt-Gen Kuldeep Singh Brar's assailants". It has further advised that on this occasion it has considered the term 'national security' in line with part of the decision in *Secretary of State for the Home Department v. Rehman (2001)* which provided the following consideration:

"...reciprocal co-operation between United Kingdom and other states in combating international terrorism is capable of promoting the United Kingdom's national security".

23. In the context of section 24 the Commissioner notes that the threshold to engage the exemption is relatively low. Furthermore, as a general approach the Commissioner accepts that withholding information in order to ensure the protection of national security can extend, in some circumstances, to ensuring that matters which are of interest to the security bodies are not revealed. Moreover, it is not simply the consequences of revealing whether information is held in respect of a particular request that is relevant to the assessment as to whether the application of the exemption is required for the purposes of safeguarding national security, but the consequences of maintaining a consistent approach to the application of section 24(2).
24. On this occasion, the Information Commissioner is satisfied that complying with the requirements of section 1(1)(a) would be likely to reveal whether or not the security bodies were interested in the subject matter which is focus of these requests. The need for a public authority to adopt a position on a consistent basis is of vital importance in considering the application of an NCND exemption.
25. The Information Commissioner is satisfied that the public authority is entitled to rely on sections 23(5) and 24(2) in the circumstances of this case. He accepts that revealing whether or not information is held within the scope of the request which relates to security bodies would reveal information relating to the role of the security bodies. It would also undermine national security and for that reason section 24(2) also applies because neither confirming nor denying if further information is held is required for the purpose of safeguarding national security.

The public interest

26. Section 23 affords an absolute exemption and no public interest test is required once it is found to be engaged. However, this is not the case of section 24.
27. In its internal review the public authority provided the following public interest submission in respect of 24(2):

"The Home Office recognises there is a general public interest in transparency and openness in Government, which increases public trust and engagement".

It did not provide any further related arguments.

28. In later correspondence with the Commissioner it provided the following:

"Public interest considerations in favour of confirming or denying whether information is held

To confirm or deny whether the requested information is held would reveal whether the Home Office has or has not had any interest – be it superficial or substantial – in the issues surrounding the attack on Lt-Gen Kuldeep Singh Brar.

There is speculation about the details of the incident, with little firm information in the public domain. Providing a confirmation or denial to the applicant's request would serve to allow an understanding of whether the Home Office had sought to engage in dialogue with the Indian government on this matter.

Increased openness about the information which may or may not be held would increase understanding and transparency in this area and inform the public debate. This is in the broadest public interest.

Public interest considerations in favour of maintaining the exclusion of the duty to either confirm or deny.

Maintenance of the exclusion of the duty to confirm or deny whether the department holds the information requested is required for the purpose of safeguarding national security.

It is important to protect the space within which government discusses issues that might concern national security. The purpose of doing so being to enable the widest possible range of information gathering and analysis. To reveal what discussions, if any, have taken place with Indian authorities around this particular matter

would be prejudicial to that process and would be likely to undermine intelligence gathering that might have occurred, or remain ongoing.

As a consequence this could potentially benefit people who have, or are intending to, threaten UK security. It could affect the behaviour of those subject to investigation and possibly harm the efficacy of any such investigations that are ongoing.

Confirmation or denial of whether liaisons are ongoing with Indian authorities in this matter could lead to a lack of trust and undermine national security co-operation not only in respect of this matter, should such be ongoing, but more generally with other states and governments in the future”.

29. The Commissioner would at this point like to stress that he is not personally aware whether or not the public authority holds any related information as he does not consider this necessary in order for him to make a determination in respect of the NCND principles in this case.
30. The Commissioner understands that the request centres on the complainant's concerns about a number of individuals, and what may or may not happen to them, but the response considers matters from the perspective of national security. It is important for the complainant to recognise that a response to him must be viewed as a response to the world at large, as is the case with all information requests made under the FOIA. Therefore, whilst on the surface the public authority's stance may seem to be overcautious, the public authority has to consider the effect of disclosure at large.
31. The Commissioner recognises that little confirmed information has been released into the public domain about the incident, which occurred only shortly before the request was made. In view of the short timeframe between the attack and the request, the Commissioner considers that there may well have been ongoing investigations, possibly still at a comparatively early stage, which could obviously include collaboration with India were this the case. Knowledge of whether or not such enquiries were taking place could obviously be of significant interest to other parties, including those who committed the attack. Therefore, whilst the information requested may appear to the complainant to be relatively harmless in its nature, the Commissioner considers that the public interest in safeguarding national security is of such weight that it can only be outweighed in exceptional circumstances. He also places significant weight on the requirement to maintain consistency when applying an NCND exemption in these circumstances.

32. The Commissioner accepts that in the circumstances of this case the public interest in protecting information required for the purposes of safeguarding national security outweighs the public interest in favour of confirmation or denial. He therefore finds that, in all the circumstances of this case, the public interest in maintaining the exemption at section 24(2) outweighs the public interest in complying with the duty imposed by section 1(1)(a).
33. In view of these findings, the Commissioner has not found it necessary to go on to consider the other exemptions cited.

Right of appeal

34. 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

35. 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.
36. 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