

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 12 December 2013

**Public Authority:** Foreign and Commonwealth Office  
**Address:** King Charles Street  
London  
SW1A 2AH

#### **Decision (including any steps ordered)**

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1. The complainant requested information relating to the arrest of several individuals in connection with the attempted murder of Lieutenant General Kuldeep Singh Brar. The public authority's position is to neither confirm nor deny holding any information by virtue of the exemptions at sections 23(5), 24(2), 27(4), 31(3) and 40(5) FOIA.
2. The Commissioner's decision is that the public authority was entitled to refuse to confirm or deny if holding information within the scope of the request by virtue of the exemptions at sections 23(5) and 24(2).
3. The Commissioner does not require the public authority to take any steps.

#### **Background**

4. The request relates to the stabbing of Lieutenant General Kuldeep Singh Brar whilst he was visiting London.
5. Related stories can be found on the BBC website<sup>1 2</sup>

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<sup>1</sup> <http://www.bbc.co.uk/news/world-asia-19790926>

<sup>2</sup> <http://www.bbc.co.uk/news/world-asia-india-19796418>

6. The public authority also provided the following background information to the Commissioner:

*'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'](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 then is 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**

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7. The Commissioner understands that the complainant wrote to the public authority on 11, 13 and 15 March 2013<sup>3</sup> and requested information in the following terms:

*'1. Whether the UK Government and/or authorities have informed the Indian authorities in writing, orally in meetings or otherwise of the names/identity of .....[their named clients] who was arrested and bailed for assisting those who attempted the murder of Lieutenant General Kuldeep Singh Brar on 30th September 2012?*

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<sup>3</sup> The complainant did not provide copies of the original requests.

- 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 including [redacted] 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 including [redacted] 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?*
- 7. We also specifically request a copy of a letter sent from Mr William Hague to SM Krishna the former Indian Foreign Minister following the incident in which Mr Hague gives an indication to keep the Indian authorities informed about the investigation.'*
8. The public authority responded on 15 April 2013. Although it was not very clear from the relevant email, the Commissioner understands that the public authority refused to confirm or deny if it held information within the scope of requests 1-6 above by virtue of the exemptions at sections 24(2) and 31(3) FOIA. It also refused to confirm or deny if it held information relevant to request 6 the by virtue of section 23(5) FOIA. In terms of request 7, the public authority explained that it could neither confirm nor deny if it held information within the scope of that request by virtue of the exemption at section 27(4).
9. The complainant requested an internal review on 10 May 2013. The public authority wrote to the complainant on 10 June 2013 with details of the outcome of the review. It explained that the exemption at section 23(5) additionally applied to requests 1- 5. The original decision was upheld save the revised position with regards the application of section 23(5).

## Scope of the case

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10. The complainant contacted the Commissioner on 3 July 2013 to complain about the way the request for information had been handled. The complainant argued that the public authority's response was inadequate and deficient.
11. Following the complaint, the public authority clarified its position to the Commissioner and introduced an additional exemption. The public authority claimed that the exemptions at sections 23(5) and 24(2) were jointly engaged in respect of the entire request (i.e. requests 1 – 7). The exemptions at sections 27(4) and 31(3) were also applied to the entire request. The exemption at section 40(5)<sup>4</sup> which was introduced following the complaint was also applied to the entire request.
12. The scope of the investigation therefore was to determine whether the public authority was entitled to neither confirm nor deny holding any of the information requested.
13. 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.

## Reasons for decision

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### Section 23 – security bodies and Section 24 – national security

14. 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.
15. 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.

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<sup>4</sup> A public authority may rely on this exemption to neither confirm nor deny holding personal data.

16. By virtue of section 23(5) the duty to confirm or deny does not arise if, or to 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).
17. 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.
18. As mentioned, the public authority explained that both sections 23(5) and 24(2) were engaged. The Commissioner does not consider the exemptions at sections 23(5) and 24(2) to be mutually exclusive and he accepts that they can be relied on 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.
19. 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.
20. 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.
21. 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 extremist groups may have been involved in the assassination attempt.<sup>5 6</sup> In

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<sup>5</sup> <http://www.bbc.co.uk/news/world-asia-19790926>

<sup>6</sup> <http://www.telegraph.co.uk/news/worldnews/asia/india/9584223/Indian-general-assassination-attempt-a-message-from-Sikh-separatists.html>

respect of its role, and the subject matter being requested, the Commissioner finds that, on the balance of probabilities, any information, if held, could be related to one or more bodies identified in section 23(3) FOIA.

22. 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 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 a specific, direct or imminent threat.
23. In relation to the application of section 24(2) the Commissioner notes that the First Tier Tribunal (Information Rights) 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.<sup>7</sup> 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.
24. The public authority explained 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 explained 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) UKHL 47 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.'*
25. 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

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<sup>7</sup> See for example, The All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner and the Foreign and Commonwealth Office – EA/2011/0049-0051

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).

26. On this occasion the 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 the 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.
27. The Commissioner is satisfied that the public authority is entitled to rely on both 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.

#### Public Interest Test

28. Section 23 is an absolute exemption and no public interest test is required once it is found to be engaged. However, this is not the case for section 24(2).

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

29. To confirm or deny whether the requested information is held would reveal whether the public authority has or has not had any interest – be it superficial or substantial – in the issues surrounding the attack on Lt-Gen Kuldeep Singh Brar.
30. There is speculation about the details of the incident, with little firm information in the public domain. Providing a confirmation or denial to the complainant's request would serve to allow an understanding of whether the public authority had engaged in dialogue with the Indian government on this matter.

31. 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 in the broadest public interest.

*Public interest considerations in favour of maintaining the exemption from the duty to either confirm or deny*

32. Maintenance of the exclusion of the duty to confirm or deny whether the public authority holds the information requested is required for the purpose of safeguarding national security.
33. 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.
34. As a consequence this could potentially benefit people who have threatened 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.
35. 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.

*Balance of the public interest*

36. 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 the complainant 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 over cautious, the public authority has to consider the effect of disclosure at large.
37. Knowledge as to whether or not enquiries were taking place (at the time of the request in March 2013) between the public authority and the Indian government in relation to the attack on Lt-Gen Kuldeep Singh Brar would have obviously been of significant interest to other parties,



including those who committed the attacks.<sup>8</sup> 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 in these circumstances.

38. 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).
39. In view of his findings, the Commissioner has not found it necessary to go on to consider the other exemptions cited.

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<sup>8</sup> For the avoidance of doubt, the perpetrators were convicted in July 2013.

## Right of appeal

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40. 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: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

41. 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.
42. 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**