

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 March 2015

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

Decision (including any steps ordered)

1. The complainant requested a copy of a notice that he believed had been served upon the telecommunications service provider Talktalk requiring it to retain communications data. The Home Office refused to confirm or deny whether it held this information and cited the exemptions provided by the following sections of the FOIA:

24(2) (national security)

31(3) (prejudice to law enforcement)

43(3) (prejudice to commercial interests)
2. The Commissioner's decision is that the Home Office applied section 24(2) correctly and so it was not obliged to confirm or deny whether it held the requested information.

Background

3. The request refers to the power of the Home Secretary to require a public telecommunications operator to retain communications data where it is necessary and proportionate to do so under one or more of the purposes listed in section 22(2) of the Regulation of Investigatory Powers Act 2000. Amongst these purposes is the interests of national security.

Request and response

4. On 15 May 2014, the complainant wrote to the Home Office and requested information in the following terms:

"Please provide me with a copy of the Notice of Commencement under section 10 of the [Data Retention Regulations 2014] issued to the internet service provider Talktalk."

5. The Home Office responded on 12 June 2014. It refused to confirm or deny whether it held the requested information and cited the exemptions provided by the following sections of the FOIA:

24(2) (national security)

31(3) (prejudice to law enforcement)

43(3) (prejudice to commercial interests)

6. The complainant responded on the same date and requested an internal review. The Home Office responded with the outcome of the internal review on 23 July 2014. The refusal to confirm or deny was upheld on the same grounds as cited previously.

Scope of the case

7. Following the completion of the internal review, the complainant contacted the Commissioner on 8 September 2014 to complain about the refusal of his information request. The complainant indicated that he did not agree with the exemptions cited by the Home Office.

Reasons for decision

Section 24(2)

8. Section 24(2) provides an exemption from the duty to confirm or deny where this is required for the purpose of safeguarding national security. The approach that the Commissioner takes to the term "required" as it is used in this exemption is that this means "reasonably necessary". Therefore, section 24(2) is engaged if exemption from the duty to confirm or deny is reasonably necessary for the purpose of safeguarding national security.

9. This exemption is qualified by the public interest. This means that if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information must be disclosed.
10. Covering first whether this exemption is engaged, the argument of the Home Office concerned obscuring where notices of the type referred to in the request are used. It argued that a consistent neither confirm nor deny response was necessary for requests on this subject in order to avoid a picture emerging through responses to a number of requests.
11. The Home Office considered that if, for example, a similar request to that above was made about a particular service provider and it responded denying that information was held, a subsequent neither confirm nor deny response about a different service provider would be an indication that information was held. It believed that consistently refusing to confirm or deny whether information on this subject matter was held was necessary in order to avoid that result.
12. The Commissioner agrees with the basis of the Home Office argument. An inconsistent approach across a number of requests could lead to a picture emerging of whether information is held. As to whether that argument is relevant to section 24(2), the Commissioner notes that the subject matter of the request is within the arena of national security. One of the purposes for which a notice of the type referred to in the request can be issued is where this is in the interests of national security.
13. He also agrees that enabling a picture to emerge of where these notices have been issued could be harmful to national security by enabling those involved in attempts to harm national security to use service providers that have not been issued with a notice. As a result, the Commissioner accepts that disclosure from the duty to confirm or deny is reasonably necessary in this case for the purpose of safeguarding national security. The exemption provided by section 24(2) is, therefore, engaged.
14. Having found that the exemption is engaged, the next step is to consider the balance of the public interest. In forming a conclusion on the balance of the public interest in this case, the Commissioner has taken into account the considerable public interest inherent in the maintenance of the exemption, as well as the specific factors that apply due to the subject matter of the information request.
15. Covering first factors in favour of confirmation or denial, the issue of telecommunications suppliers being legally obliged to retain communications data so that this may be available to the authorities has been a matter of controversy. Many people believe that the powers

granted to the authorities in this area are disproportionate and in contravention of civil liberties. Given this background there is a public interest in confirmation or denial in order to add to public knowledge on how the law in this area is operating in practice.

16. The Commissioner has carried out brief desk-top research on the issue of whether there was any particular controversy in relation to retention of data by the service provider Talktalk. No evidence of this was found.
17. Turning to the public interest in the maintenance of the exemption, in any situation where section 24(2) is found to be engaged, the Commissioner must recognise the public interest inherent in this exemption. Safeguarding of national security is a matter of the most fundamental public interest; its weight can be matched only where there are also fundamental public interests in favour of confirmation or denial as to whether the particular information requested is held by the public authority.
18. In this case, the Commissioner has recognised the valid public interest in favour of confirmation or denial arising from the subject matter of this information request. However, he considers it clear that this does not equal the weight of the public interest in safeguarding national security. His conclusion is, therefore, that in all the circumstances the public interest in the maintenance of the exemption outweighs the public interest in disclosure. The Home Office was not, therefore, obliged to confirm or deny whether it held the information requested by the complainant.
19. Having reached this conclusion it has not been necessary to go on to also consider sections 31(3) or 43(3).

Right of appeal

20. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

21. 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.
22. 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