

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 November 2015

Public Authority: Cabinet Office

Address: 70 Whitehall

London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested information relating to newspaper reports that FBI agents will be coming to the UK to guard UK airports against 'jihadi fanatics'. The Cabinet Office refused to confirm or deny whether it held any such information and cited the exemptions provided by sections 23(5) (information relating to or supplied by security bodies) and 24(2)(national security) of the FOIA.
2. The Commissioner's decision is that the Cabinet Office was entitled to rely on the exemptions at sections 23(5) and 24(2) to neither confirm nor deny whether it held information within the scope of the request which, if held, would be exempt by virtue of sections 23(1) and 24(1) FOIA.

Request and response

3. On 26 August 2014, the complainant wrote to the Cabinet Office and requested information in the following terms:

'The press are reporting that FBI agents are coming to work in Britain.

Is this correct? If so, who has authorised this?

What will they be doing?

What powers do they have?

How many will come?

Who will pay for them?

Who will they report to both here and in America?

Is this is a surrender of National Sovereignty?

4. The Cabinet Office responded to the request on 16 September 2014 and stated that it assumed the request stemmed from an article in the Sunday Express¹. The Cabinet Office refused to confirm or deny whether it held the requested information and cited the exemptions provided by sections 23(5)(information supplied or relating to security bodies) and 24(2)(national security) of the FOIA.
5. The complainant requested an internal review on 17 September 2014. Following an internal review the Cabinet Office wrote to the complainant on 14 October 2014 and upheld the refusal to neither confirm nor deny whether it held the requested information under sections 23(5) and 24(2).

Scope of the case

6. The complainant contacted the Commissioner on 8 November 2014 to complain about the way his request for information had been handled.

Reasons for decision

Sections 23(5) and 24(2)

7. Information supplied by or 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 the exemption is required for the purpose of safeguarding national security.
8. 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 where a confirmation or denial as to whether requested information is held is required for the purpose of safeguarding national security.
9. The Cabinet Office 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

¹ 'FBI agents to guard UK airports against jihadi fanatics' (Sunday Express 24 August 2014)

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.

10. The test as to whether a disclosure would relate to a security body is decided on the 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 section 23 exemption would be engaged.
11. 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 be applicable. This is consistent with the scheme of FOIA because the security bodies themselves are not subject to its provisions.
12. 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.
13. In this case the Commissioner considers that it is clear that the subject matter of the request – the possibility that FBI agents may be operating in the UK to assist with counter-terrorism efforts – is within the area of the work of bodies specified in section 23(3).
14. 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. The Cabinet Office provided the Commissioner with supporting arguments for its application of section 24(2) and these are contained in the Confidential Annex attached to this notice.
15. 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. 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.

16. 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. On this occasion the Commissioner is satisfied that complying with the requirements of section 1(1)(a) would be likely to reveal whether the security bodies were interested in the subject matter of the request. The need for the public authority to adopt a position on a consistent basis is of vital importance in considering the application of an NCND exemption.
17. The Commissioner is satisfied that the Cabinet Office 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 information is held is required for the purpose of safeguarding national security.

Public interest test

18. Section 23 is an absolute exemption and no public interest test is required once it is found to be engaged. However, section 24 is a qualified exemption and the Commissioner is required to consider whether the public interest in neither confirming nor denying whether the Cabinet Office holds information which would be exempt under section 24 outweighs the public interest in confirming or denying whether such information is held.
19. In submissions to the Commissioner the Cabinet Office recognised that there is a general public interest in openness in government because this increases public trust in and engagement with government. However, the Cabinet Office maintained that such public interest has to be weighed against a very strong public interest in safeguarding national security, which could only be overridden in exceptional circumstances.
20. In his request to the Cabinet Office the complainant contended that his request contained '*a set of very serious questions*' and asserted that the refusal had '*nothing to do with national security but is purely to prevent political embarrassment*'. In its internal review the Cabinet Office denied this allegation and stated that FOIA allowed government departments to NCND whether information is held in matters relating to national security.

21. The Commissioner considers that there is some valid public interest in confirmation or denial in response to the complainant's request. Any involvement of FBI agents on UK territory in connection with counter-terrorism measures and activities would pose legitimate public interest questions as to the jurisdiction and accountability of any such agents. Furthermore, in an age of global terrorism there is clearly an important public interest in the public being assured that their government is taking all necessary steps (including cooperation with other countries) to protect them from terrorist activity.
22. However, the Commissioner accepts that the public interest in protecting information for the purposes of safeguarding national security is a very strong one.
23. The Commissioner finds that in the circumstances of this case the public interest in protecting information for the purpose of safeguarding national security outweighs the public interest in favour of confirmation or denial.

Other matters

24. Whilst the Commissioner has upheld the refusal of the request, he notes that the complainant was provided with little explanation by the Cabinet Office for why it refused the request. The explanation for section 24(2) was generically worded with no reference to the specific information requested and no explanation at all was given for section 23(5).
25. The Commissioner recognises and accepts that in cases where the information request relates to issues of national security, public authority explanations for the refusal of the request will be necessarily limited. In this case, however, the Commissioner can see no reason why the complainant could not have been provided with an explanation for the citing of section 23(5). In future cases where these exemptions apply, the Cabinet Office should ensure that it provides to the requester as full an explanation as possible for citing the same, especially where (as appears to have been the case in this instance) the request stems from a report in the media on a matter which carries legitimate public interest.

Right of appeal

26. 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 123 4504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

27. 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.
28. 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

Alexander Ganotis
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