

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 May 2015

Public Authority: Chief Constable of North Wales Police
Address: Police Headquarters
Glan-y-Don
Abergele Road
Colwyn Bay
LL29 8AW

Decision (including any steps ordered)

1. The complainant requested a copy of the authorisation under the Regulation of Investigatory Powers Act 2000 ('RIPA') or other legislation to carry out surveillance at Borrass Farm. North Wales Police refused to confirm or deny whether it held the requested information by virtue of sections 23(5), 24(2), 30(3), 31(3), 40(5) and 44(2) of the FOIA. The Commissioner's decision is that North Wales Police was entitled to rely on the exemptions at sections 23(5) and 24(2) of the FOIA. He does not require any steps to be taken.

Request and response

2. On 30 November 2014 the complainant wrote to North Wales Police and requested information in the following terms:

"I would like to make a request for a copy of the authorisation under the Regulation of Investigatory Powers Act or other legislation to carry out targeted surveillance on both protectors AND supporters in and around land belonging to Borrass Head Farm, Borrass, Wrexham, and which is subject to Planning consent P/2013/0660 for exploratory drilling".

3. North Wales Police responded on 30 December 2014 and refused to confirm or deny whether it held information relating to the request by virtue of:

Section 44(2)	Prohibitions on disclosure
Section 40(5)	Personal information
Section 23(5)	Information relating to the security bodies
Section 24(2)	National security
Section 30(3)	Investigations
Section 31(3)	Law enforcement
4. The complainant subsequently requested an internal review of North Wales Police's handling of the request. He pointed out that the photography and filming on the site was done openly and not covertly "so it is common knowledge that you need a RIPA authorisation. He also said that, in his view, confirming that North Wales Police had RIPA authorisation did not reveal operational or state secrets.
5. North Wales Police provided the outcome of its internal review on 26 January 2015 and upheld its decision to neither confirm nor deny whether the requested information was held, by virtue of the exemptions quoted in its refusal notice.

Scope of the case

6. The complainant contacted the Commissioner on 10 February 2015 to complain about the way his request for information had been handled.
7. In his internal review request, the complainant said he believed it was "common knowledge" that authorisation under 'RIPA' was required for the filming at Borrás Farm because "the photography and filming was done openly and not covertly". During the course of the Commissioner's investigation North Wales Police contacted the complainant and explained that RIPA authorisation was required for covert and not overt surveillance. North Wales Police offered to provide details in respect of the authority used to overtly film protestors and supporters at the site in question, including the use of helicopters at the site. The complainant indicated however, that he wanted a decision in relation to the request he had submitted related to RIPA authorisation for surveillance at the site.
8. The scope of the Commissioner's investigation is to consider whether North Wales Police was entitled to rely on the exemptions at sections 23(5), 24(2), 30(3), 31(3), 40(5) and 44(2) to refuse to confirm or deny whether it holds the information requested.

Reasons for decision

Section 23 – security bodies and Section 24 – national security

9. 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.
10. 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.
11. 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)¹ 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).
12. 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.
13. North Wales Police considers that both sections 23(5) and 24(2) are engaged in this case. The Commissioner does not consider the exemptions 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.
14. North Wales Police explained that confirming or denying many of the police actions associated around RIPA, and in particular specialist tactical areas, would undermine ongoing investigations, reveal policing techniques, risk the identification of individuals, potentially reveal the involvement of any exempt bodies and undermine national security. Confirming or denying whether a RIPA application had been made in order to carry out surveillance at a named location would highlight to individuals that covert surveillance has or has not taken place. This would ultimately increase the risk of harm to the general public and significantly undermine any ongoing or future operations to protect the

¹ Section 1(1)(a) provides that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information of the description specified by the request.

security or infrastructure of the United Kingdom. Confirmation or denial that the information requested is held would also be in breach of regulation 19 of RIPA.

15. North Wales Police advised that on occasions where overt filming has been conducted this does not mean that other covert activities or surveillance is or is not being undertaken. North Wales Police contend that to confirm or deny whether it holds information would allow inferences to be made about the nature and extent of national security related activities which may or may not take place in a given area. Any information identifying the focus of policing activity could be used to the advantage of criminal or terrorist organisations. This in turn would undermine the operational integrity of these activities, adversely affect public safety and have a negative impact on both national security and law enforcement.
16. The test as to whether a disclosure would relate to a security body is decided on the normal 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.
17. 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.
18. There is clearly a close relationship between the public authority in this case and security bodies. It is inevitable that it works closely with security bodies in carrying out its role. Therefore, in respect of the public authority's role and the subject matter being requested, the Commissioner finds that, on the balance of probabilities, any information about covert policing, if held, could be related to one or more bodies identified in section 23(3) of the FOIA. The Commissioner is therefore satisfied that North Wales Police is entitled to rely upon section 23(5) in the circumstances of this case.
19. 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 a 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 as '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.

20. 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.² Therefore, in considering whether the exemption is engaged, and the balance of the public interest, 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.
21. The public authority explained that to confirm it holds any information pertinent to the request about covert policing (if that is in fact the case) would be of use to criminals including terrorists who may use the information to try and circumvent its law enforcement capabilities which in turn could have a detrimental effect on national security. Conversely, should the information not be held (if that is in fact the case) and the public authority confirms that is the case, it could also be used by criminals including terrorists to try and circumvent its law enforcement capabilities.
22. 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).
23. 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.

² See for example, The All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner and the Foreign and Commonwealth Office – EA/2011/0049-0051

24. For the reasons set out above, the Commissioner is satisfied that North Wales Police is entitled to rely on sections 23(5) and 24(2) in the circumstances of this case. The Commissioner wishes to emphasise that nothing should be inferred from this notice as to whether North Wales Police actually holds any information within the scope of the request which, if held, would be exempt by virtue of sections 23(1) or 24(1).
25. Section 23(5) provides an absolute exemption, but section 24(2) is qualified. Therefore the Commissioner is required to consider whether, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether North Wales Police holds relevant information.

Public interest arguments in favour of confirming or denying that information is held

26. North Wales Police acknowledge that the public are entitled to know how public funds are spent and resources distributed within the area of policing. It also accepts that:

“confirming or denying whether information exists relating to a specific tactic would enable the general public to hold North Wales Police to account where RIPA applications are concerned. In the current climate of cuts and with the call for transparency of public spending this would enable improved public debate”.

27. The complainant argues that not confirming or denying whether RIPA authorisation was obtained for the overt photography and filming undertaken in the site could lead to the presumption that there was no such authorisation and that North Wales Police were acting unlawfully.

Public interest arguments in favour of maintaining the refusal to confirm or deny that information is held

28. To confirm or deny whether North Wales Police hold information relevant to the request would allow inferences to be made about the nature and extent of national security related activities which may or may not have taken place in a given area. This could enable a terrorist group to take steps to avoid detection.
29. Since 2006, the UK Government has published the threat level, based upon current intelligence. The current security level for England and

Wales is set at severe³. Taking this into account, North Wales Police considers that no information (such as the citing of an exemption which confirms the existence of relevant information, or conversely, stating 'no information is held') which may aid a terrorist should be disclosed. The extent to which such information may aid a terrorist is unknown, but North Wales Police consider that such disclosure would have an impact on the ability to monitor terrorist activity.

30. North Wales is committed to demonstrating proportionality and accountability regarding surveillance techniques to the appropriate authority. However, it considers that confirming or denying whether the requested information is held, would compromise or significantly weaken other covert surveillance tactics. To confirm when RIPA authority may or may not have been obtained would highlight to criminals and possible terrorists details of which locations may be monitored. North Wales Police is of the opinion that any information identifying the focus of policing activity and covert surveillance tactics would undermine the operational integrity of these activities, adversely affect public safety and have a negative impact on both national security and law enforcement.

Balance of the public interest arguments

31. The Commissioner recognises that there is a substantial inherent public interest in safeguarding national security. Although section 24(2) is qualified, the Commissioner believes that there would need to be truly exceptional circumstances in order to override national security considerations which justify the exclusion from the duty to confirm or deny that information is held. The Commissioner acknowledges that the subject matter associated with the request, ie hydraulic fracturing, known as fracking (which was the reason for the demonstration at Borrás Farm), has generated a large amount of controversy within the UK generally. However, it is important to recognise that North Wales Police's response considers matters from a national security perspective. 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 to the public at large, not just to the complainant, and the wider ramifications of any such disclosure.
32. The Commissioner accepts that knowledge as to whether or not North Wales Police holds any information relevant to the request insofar as it

³ <https://www.mi5.gov.uk/home/about-us/what-we-do/the-threats/terrorism/threat-levels.html>

relates to covert policing would be of significant interest to criminals including terrorists. Therefore, whilst the information requested may appear to the complainant to be relatively harmless in 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 a neither confirm nor deny response in these circumstances.

33. The Commissioner accepts that in this case, the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether North Wales Police holds the information. He therefore finds that, in all the circumstances of the 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).
34. In view of his findings, the Commissioner has not found it necessary to consider North Wales Police's application of sections 30(3), 31(3), 40(5) and 44(2) of the FOIA.

Right of appeal

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

36. 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.
37. 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

Anne Jones
Assistant Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF