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Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 January 2017

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant submitted a request to the public authority for the dates, times and locations of planned counter terrorism exercises.
2. The Commissioner has concluded that the public authority was entitled to withhold the information held within the scope of the request ("the withheld information") on the basis of the exemptions at sections 23(1) and 24(1) FOIA.
3. No steps are required.

Request and response

4. The complainant submitted a request for information to the public authority on 18 April 2016 in the following terms:

"Could you provide me with any record of the dates, times, and locations of any planned or proposed simulated terrorist attack known to you, whether in the UK or otherwise?"
5. The public authority issued its response to the request on 24 May 2016. It advised the complainant that it held some of the information requested which it considered was exempt from disclosure on the basis of the exemptions contained at sections 23(1) (information supplied by or relating to security bodies), 24(1) (national security), 31(1)(a)&(b) (law enforcement) and 35(1)(a) (formulation/development of government policy).

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6. The complainant requested an internal review on 13 June 2016 in which he disagreed with the public authority's refusal to disclose the information held within the scope of his request.
7. The public authority wrote back to the complainant on 27 June 2016 with details of the outcome of the internal review. The review upheld the decision to withhold the information held within the scope of the request.

Scope of the case

8. The complainant contacted the Commissioner on 29 June 2016 in order to complain about the public authority's decision to withhold the information held within the scope of his request.
9. During the course of the Commissioner's investigation, the public authority explained that, although it is a key stakeholder and therefore holds information relevant to the request, counter terrorism exercises are usually run by the Home Office. Consequently, it clarified that it did not hold a record of the timings of any of the planned/proposed counter terrorism exercises in scope as well as the locations of some of the planned/proposed exercises in scope.
10. To be clear, the public authority holds records of the dates of planned counter terrorism exercises within the scope of the request and the locations of some of the exercises.¹ While the public authority has not specifically informed the Commissioner where additional information relevant to the request might be held, given that the Home Office is the department primarily responsible for counter terrorism exercises, it is reasonable to assume that it is more likely to hold more of the requested information.
11. The scope of the Commissioner's decision is however limited to the information held by the public authority within the scope request.

¹ Additional comments with regard to the information held in relation to the locations of planned exercises further below.

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Reasons for decision

Section 23(1)

12. The public authority explained that it considered some of the withheld information exempt on the basis of section 23(1) because it had been supplied by one of the security bodies.
13. Section 23 (1) states:

“Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).”
14. In order to successfully engage the exemption, a public authority must be able to demonstrate that the relevant information was directly or indirectly supplied by, or relates to any of the bodies listed at section 23(3) FOIA.
15. In support of its position, the public authority provided the Commissioner with a letter from a very senior official in the Cabinet Office (SO) with the experience and authority to validate the provenance of the withheld information. The SO assured the Commissioner that the withheld information relates to one of the bodies listed in section 23(3). The public authority has further clarified that the information was supplied to it directly or indirectly by one of the security bodies.
16. The Commissioner accepts that in the circumstances of this case, the assurance provided by the SO with regards to the application of the exemption and the additional explanation provided by the public authority are sufficient.
17. She has therefore concluded that the relevant information is exempt on the basis of section 23(1) because it relates to one of the bodies listed in section 23(3).
18. Section 23(1) is an absolute exemption which means that there is no requirement to carry out a public interest test to determine whether or not the information withheld on that basis should have been disclosed in any event in the public interest.

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Section 24(1)

19. The public authority considers that the remaining information held which is not exempt on the basis of section 23(1) is exempt on the basis of the exemption at section 24(1).
20. Section 24(1) states:

“Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b)² is required for the purpose of safeguarding national security.”
21. The public authority has argued that it is important that programmes of counter terrorist exercises can be developed in confidence by the key participants including (but not limited to) the police and the military. It has further argued that if details of planned exercises were made public inappropriately, it may be possible for “potential hackers”³ to gain insights into the timing or type of such events. They may as a result tailor their approach based on the preparations undertaken, or to coincide with a training exercise when some of those who would respond to an actual event may be otherwise engaged. Additionally, release of such details would also be likely to create considerable public and media interest in events and therefore reduce their effectiveness as realistic real life scenarios.
22. The public authority acknowledged that the withheld information is, on the face of it, high level and does not provide details of exactly what an exercise will include or exactly where it would take place. It however argued that it would be erroneous in the circumstances where the likely impact of any failure in the United Kingdom’s (UK) counter terrorism preparations is enormously serious to consequently conclude that withholding the information is not necessary for safeguarding national security. It noted that disclosure under FOIA effectively places the withheld information in the public domain accessible to anyone including those who would wish to harm the UK and its interests. Therefore, although the withheld information may seem high level, it was reasonable to assume that, taken together with other information that

² The general right of applicants to have information requested from a public authority disclosed to them.

³ Presumably the public authority means potential attackers/terrorists rather than “potential hackers” given the generic term would be more relevant in this context.

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may come into the possession of potential attackers, it would help to build a picture of planned counter terrorist activities.

23. The Commissioner pointed out there was at least one instance she was aware of where the media have revealed planned counter terrorist exercises in advance so that the public, including businesses, could be reassured, plan and act accordingly. She noted that details of a planned counter terrorist exercise at the Trafford Centre in Manchester were revealed as recently as on 9 May 2016.⁴ She therefore requested clarification from the public authority in support of its position given that similar information has been revealed publicly in the past in advance of counter terrorism exercises.
24. The public authority explained that these exercises are delivered under a national programme of counter terrorist exercises overseen and managed by the Home Office and vary in size and scale. However, details of the exercises are not published in advance other than, on occasion, through a prepared police statement issued hours in advance for safety and assurance reasons. For those exercises which involve a live-play test of the multi-agency counter terrorism response at a public venue, the host police force will develop a media strategy in coordination with the Home Office. As part of this strategy, on the day of the exercise, hours before, a media statement would be issued by the local police force. This is to advise the public that an exercise is taking place, that as a result there would be increased police and other emergency service activity in and around the exercise venue, and to provide reassurance that there is no increased terrorist threat or reason to be alarmed. This also mitigates the risk of any disruption to regular, non-exercise, emergency service activity. Examples of this strategy are the May exercise in Manchester and the November exercise in London. It argued that more advanced public declarations of counter terrorist exercises raise the risk of disruption and exposure of the UK's counter terrorism response.

Commissioner's findings on whether the exemption is engaged.

25. In broad terms section 24(1) allows a public authority not to disclose information if it considers that releasing the information would make the UK and its citizens more vulnerable to a national security threat. There

⁴ <http://www.bbc.co.uk/news/uk-england-manchester-36227143> The public authority additionally pointed out that similar details were revealed by the Metropolitan Police on 28 November 2016 in advance of an exercise in London centred around Canary Wharf. <http://news.met.police.uk/news/counter-terrorism-training-exercise-202159>

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is no definition of national security. However, the Commissioner is guided by the Information Tribunal's⁵ interpretation of the House of Lords observations in relation to the meaning of national security in *Secretary of State for the Home Department v Rehman* [2001] UKHL 47. The Tribunal summarised the Lords' observations as follows:

- National security means the security of the UK and its people.
 - The interests of national security are not limited to actions by an individual which are targeted at the UK, its system of government or its people.
 - The protection of democracy and the legal and constitutional systems of the state are part of national security as well as military defence.
 - Action against a foreign state may be capable indirectly of affecting the security of the UK.
 - Reciprocal cooperation between the UK and other States in combating international terrorism is capable of promoting the UK's national security.
26. The exemption applies where withholding the information requested is "required for the purposes of safeguarding national security". The Commissioner considers this to mean that the exemption can be applied where it is reasonably necessary in order to safeguard national security. However, it is not sufficient for the information sought simply to relate to national security. In the Commissioner's view, there must be a clear basis for arguing that disclosure would have an adverse effect on national security.
27. This, however, does not mean that it is necessary to demonstrate that disclosing the requested information would lead to a direct or immediate threat to the UK. Support for this approach can be found in the *Rehman* case especially from the following observation by Lord Lynn:
- "To require the matters in question to be capable of resulting 'directly' in a threat to national security limits too tightly the discretion of the executive in deciding how the interests of the state, including not merely military defence but democracy, the legal and constitutional systems of the state need to be protected. I accept that there must be a real possibility of an adverse effect on the United Kingdom for what is done

⁵ In *Norman Baker v the Information Commissioner and the Cabinet Office* EA/2006/0045

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by the individual under inquiry but I do not accept that it has to be direct or immediate.”

28. In the Commissioner’s view, it also follows that although withheld information is always important when considering the applicability of most of the exemptions in Part II of the FOIA, this would not necessarily always be the case with regards to the exemption at section 24(1). The wording of the exemption suggests that although the withheld information may not be prejudicial to national security in and of itself, withholding it is nonetheless reasonably necessary in the circumstances in order to safeguard national security.
29. Having carefully considered the withheld information, the Commissioner is not fully persuaded that the withheld information would, in and of itself, be particularly insightful to those who wish to harm the UK and her interests. As the public authority has noted, it does not provide details of exactly where an exercise would take place and in most cases does not provide the exact dates either. While she is not completely dismissive of the view that it could be useful to potential terrorists, she is more prepared to conclude that it is of such a high level that the potential damage it could cause (in isolation) to national security has to be rather limited.
30. The Commissioner recognises that we live in very dangerous times and it is well documented that the threat of terrorist attacks against the UK is unprecedented. She also recognises the importance of openness in government because better informed citizens are more likely to trust in and engage meaningfully with their government. Needless to say, these competing interests require a careful balancing act so that in keeping citizens well informed, those who threaten national security are not at the same time given access to information which could assist them in achieving their objectives. Given the current climate, it is reasonable to assume that those intent on carrying out terrorist attacks against the UK would be prepared to go to great lengths to achieve their aims. On that basis she has attached significant weight to the view that, although seemingly anodyne, the withheld information is the sort of information those planning and/or preparing for an attack could use in conjunction with other information already in their possession or that is otherwise accessible to them to plan and execute a successful attack against the UK.⁶ For example, terrorists who have previously obtained information about potential targets could be able to extrapolate from the likely dates

⁶ This is sometimes referred to as “the mosaic effect”.

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and the general locations of planned counter terrorism exercises, the strength of the security presence that they are likely to face if counter terrorist officers are otherwise engaged. If they have this information well in advance, then they would have sufficient time to plan accordingly.

31. The fact that some of these exercises are revealed shortly before they are conducted is also significant as it increases openness in relation to the scheduling of counter terrorism exercises while also mitigating the risks from providing very advanced notice to potential terrorists. Furthermore, although not relevant to the consideration of whether any of the exemptions were correctly engaged, the Commissioner did ask the public authority whether it would consider disclosing information relevant to counter terrorism exercises which have taken place since the request was submitted.⁷ The public authority stated that while it would not disclose this information (and it is not obliged to) in the context of this investigation, a request for it would be properly considered with due regard for any relevant circumstances.
32. The Commissioner has therefore concluded that in the circumstances of this case, the exemption is reasonably necessary for the purpose of safeguarding national security.

Public interest test

33. The exemption is however qualified by the public interest test set out in section 2(2)(b) FOIA. This means that the Commissioner has considered whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.
34. The public authority acknowledged that there is a public interest in the public being reassured that the government is taking adequate steps to ensure public safety in the event of a terrorist incident. In recognition of this public interest, the government publishes a range of information about its work to counter the terrorist threat, for example through the CONTEST Annual report, the latest of which was published in July 2016.⁸

⁷ The public authority's consideration of the request, and the Commissioner's investigation, are both limited to circumstances as they were at the time of the request.

⁸ CONTEST is a UK strategy for countering terrorism. The 2015 annual report published in July 2016 can be found here:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/539683/55469_Cm_9310_Web_Accessible_v0.11.pdf

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35. It however submitted that it is clearly not in the public interest to publish information which is likely to be prejudicial to national security.
36. The Commissioner considers that disclosure of official information will generally always enhance the public interest in transparency and accountability. There will however always be a significant public interest in safeguarding national security. Having found that the withheld information would assist those intent on causing harm to the UK and its interests, she has concluded that there is a significant public interest in withholding it. Moreover, given that details relevant to some counter terrorism exercises are revealed in advance albeit at short notice, there is clearly a recognition that a balance needs to be struck so that the population is not completely in the dark concerning the scheduling of these important exercises. Conversely, it must also be recognised that there is a significant public interest in mitigating the harm that revealing the withheld information well in advance could cause to national security.
37. The Commissioner has therefore concluded that on balance, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.
38. She has not considered the applicability of the remaining exemptions in view of her decision that the public authority was entitled to rely on the exemptions at sections 23(1) and 24(1).

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Right of appeal

39. 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

40. 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.

41. 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

Gerrard Tracey
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