

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 28 March 2018

**Public Authority:** The Department for Education

#### Decision (including any steps ordered)

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1. The complainant has requested information in relation to the number, nature, and effects of cyber attacks on the Department for Education. The department relied on the exclusion at section 31(3) FOIA as its basis for neither confirming nor denying whether it held information within the scope of the request.
2. The Commissioner's decision is that:
  - The Department for Education was not entitled to neither confirm nor deny holding information within scope of the first part of the request.<sup>1</sup>
  - The Department for Education was entitled to neither confirm nor deny whether it held information within the scope of the second part of the request.<sup>2</sup>
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Confirm or deny whether it holds information within the scope of the first part of the request.
4. The Department for Education must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High

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<sup>1</sup> The Commissioner has highlighted this as Part 1 of the request in the main body of this notice.

<sup>2</sup> The Commissioner has highlighted this as Part 2 of the request in the main body of this notice.

Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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5. On 3 November 2016 the complainant wrote to The Department for Education (DfE) and requested information in the following terms:

"I write with a request for information about cyber attacks on the department....

Please disclose the number of recorded cyber attacks in 2015;

Please disclose the number of recorded cyber attacks to date in 2016;

For 2016, please provide:

A month-by-month breakdown;

The number of successful attacks – i.e. where there was a breach;

In the cases of a breach, please disclose:

the nature of the attack (DDOS, phishing etc),

the nature of the breach,

how many individuals' information were affected,

whether any classified information was affected,

what organisations or individual/s are suspected to known to have made the attack."

6. DfE responded on 30 November 2016. It neither confirmed nor denied holding information within the description specified in the request by virtue of the provisions in section 31(3) (Law enforcement) FOIA.
7. Following an internal review DfE wrote to the complainant on 22 December 2016. The original decision to rely on section 31(3) was upheld.

## Scope of the case

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8. The complainant contacted the Commissioner on 11 January 2016 to complain about the way his request for information had been handled.

The Commissioner has referred to his submissions at the relevant parts of her analysis below.

9. The scope of the Commissioner's investigation therefore was to determine whether the public authority was entitled to neither confirm nor deny holding information within the scope of the request on the basis of section 31(3) FOIA.

## Reasons for decision

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10. For ease of reference, the Commissioner has divided the request into two parts. Part 1 covers the first part of the request for the number of recorded cyber attacks in 2015 and 2016. Part 2 covers the second part of the request for details about cyber attacks for 2016 including the number of attacks broken down by month, the nature, and the effects of those attacks.

## Section 31(3)

11. DfE has relied on this exemption on the basis that confirming or denying whether it holds information within the scope of the request would be likely to prejudice the prevention or detection of crime.
12. The relevant provisions in section 31 state:
  1. Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice
    - a. The prevention or detection of crime.....
  3. The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).
13. DfE pointed out if it was to confirm or deny whether it holds information within the scope of the request, it would effectively reveal whether or not the department had been affected by cyber attacks over the period of the dates specified. It argued that this information could be used maliciously against its ICT systems which contain a range of sensitive and, at times, personal data. For example, it would enable malicious actors to determine whether their attacks against the departments ICT systems had gone undetected or not. This may assist such parties in determining the level of effectiveness of the department's cyber security and countermeasures and leave its ICT systems vulnerable.

14. DfE further explained that the neither confirm nor deny stance (NCND) was applied not only to protect departments that are in a position to confirm that they hold the information requested, but to protect departments that are not currently in a position to state that they hold the information. In the absence of a consistent application of NCND there is a risk that responses from individual departments would impact on cross government cyber security and leave such departments vulnerable to attacks.
15. In response to a comment by the complainant, DfE confirmed that it has not released any detailed information such as that requested by the complainant, in relation to cyber attacks. Furthermore, it did not consider that the Ministry of Justice's response to a Denial of Service attack in the Sky news item mentioned by the complainant (further below) revealed the level of detail requested in this case.
16. With respect to the balance of the public interest, DfE acknowledged that there is a general public interest in openness and accountability. More specifically, confirming or denying whether it holds information within the scope of the request would reveal how the department protects its ICT systems and data, and how it monitors and records cyber attacks.
17. It however argued that there is a strong public interest in not revealing information that would make the department's ICT systems vulnerable to targeted cyber attacks. As well as disruption to services caused by such attacks, resources and public funding are required to rectify their impact and any damage caused. Therefore, confirming or denying whether it holds information within the scope of the request would risk unnecessary expenditure which cannot be in the public interest.

### **Complainant's position**

18. The complainant's position is reproduced below.

"The neither confirm nor deny response itself is untenable. It is clear that DfE does record cyber attacks. The Government has previously spoken about the many thousands of attacks on departments each month and other departments have previously confirmed attacks, including: <http://news.sky.com/story/cyber-attack-on-ministry-of-justice-website-10417630>

To be clear: the request is for \* numbers of attacks \* numbers of successful attacks and in those cases the type of attacks etc. There is a compelling public interest in disclosure of information capable of informing people how many attacks there have been and how many have been successful or not. Transparency allows the public to scrutinise

whether the millions of pounds of public money being spent on secure systems is adequate and provides sufficiently robust protection for data held by DfE. Only recently the Government announced that £1.9 billion of public money is being spent on cyber security. This alone provides a compelling justification for transparency surrounding this issue.

It must also be pointed out that transparency will increase public confidence in Government security.

None of the information requested would help hackers. It doesn't reveal the hacks they used to penetrate the systems. It simply reveals how many attacks have been successful and how many people were affected etc.

There is a compelling and legitimate public interest in knowing how secure DfE's systems are. Information concerning Britons relies on DfE having resilient systems and it is paramount that the public is able to obtain basic information about how secure those systems are. It must be pointed out that the numbers are capable of demonstrating how many attacks have failed. This shows that public money DfE has spent on secure systems has been well spent and, as mentioned, improves confidence in DfE."

### **Commissioner's position**

19. Including this complaint, the complainant submitted complaints against 13 departments in total pursuant to the same request under consideration in this case. In addition to DfE's submissions in this case, the Commissioner has received a confidential submission from the Cabinet Office in support of reliance on NCND by 11 of the departments including DfE. The remaining two departments have not relied on NCND.
20. For the avoidance of doubt, the Commissioner has considered all of the submissions received in this case including the complainant's above.
21. The duty imposed on public authorities to either confirm or deny whether they hold information of the description requested by an applicant is enshrined in section 1(1)(a) FOIA (commonly referred to as the duty to confirm or deny).
22. Part II of the FOIA contains a number of exclusions from the duty to confirm or deny. Section 31(3) FOIA is one of those exclusions from the duty to confirm or deny.
23. A public authority may withhold information on the basis of section 31(1)(a) if its disclosure would be likely to prejudice the prevention or detection of crime. Section 31(3) is available to a public authority if it

considers that compliance with the duty in section 1(1)(a) would be likely to prejudice the prevention or detection of crime.

24. Clearly, exclusions from the duty to confirm or deny and exemptions from compliance with the requirement in section 1(1)(b)<sup>3</sup> cannot be relied on simultaneously in response to the same request.
25. Therefore, the question for the Commissioner with respect to the application of section 31(3) is whether confirming or denying information is held within the scope of the request would be likely to prejudice the prevention or detection of crime. In other words, would compliance with the duty to confirm or deny pose a real and significant risk of prejudice to the prevention or detection of crime?
26. The Commissioner has not seen evidence inconsistent with DfE's statement that it has not released any detailed information in relation to cyber attacks. Nevertheless, there is sufficient information in the public domain in the Commissioner's view which at least suggests that as a government department, it is more probable than not that it has been the subject of cyber attacks. For example, on 1 November 2016 the Chancellor of the Exchequer published the National Cyber Security Strategy 2016-2021 which contains the following statement: "We regularly see attempts by states and state-sponsored groups to penetrate UK networks for political, diplomatic, technological, commercial and strategic advantage, with a principal focus on the government, defence, finance, energy and telecommunications sectors."<sup>4</sup> Furthermore, in a speech given at the Billington Cyber Security Summit on 13 September 2016 by the Chief Executive of the National Cyber Security Centre (NCSC) he stated, "...last year we detected twice as many national security level cyber incidents – 200 per month – than we did the year before."<sup>5</sup>
27. Therefore, in the Commissioner's view the prejudicial effect of issuing a response which effectively confirms or denies whether there were recorded incidents of cyber attacks at DfE in 2015 and 2016 would be minimal. Revelatory public pronouncements at such high levels of government undermine the view that confirming or denying whether

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<sup>3</sup> To release requested information to an applicant.

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[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/567242/national\\_cyber\\_security\\_strategy\\_2016.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/567242/national_cyber_security_strategy_2016.pdf)

<sup>5</sup> <https://www.ncsc.gov.uk/news/new-approach-cyber-security-uk>

these attacks occurred would pose a real and significant risk of prejudice to the prevention or detection of crime. The Commissioner has also considered the confidential submission by the Cabinet Office and has concluded that it supports her position in the circumstances of this case. She has explained the rationale for this conclusion in a confidential annex.

28. However, the Commissioner considers that DfE's response to the second part of the request for a detailed breakdown of the number of cyber attacks, the nature, and effects of the attacks is likely to be more useful to malicious actors. Confirming or denying whether information is held in relation to this part of the request would reveal something about the way cyber attacks are recorded including whether or not certain details about the nature and effects of attacks are held. A confirmation that information is held for example may give an indication to the success or otherwise of an attack. A denial on the other hand may indicate vulnerabilities in the system or that a particular type of attack was unsuccessful. The Commissioner recognises that terrorists and other malicious actors can be highly motivated and may go to great lengths to gather intelligence. Therefore, although seemingly harmless, confirming or denying whether information such as a monthly breakdown of the number of recorded cyber attacks, the nature, and effects of those attacks is held, may assist malicious actors when pieced together with existing or prospectively available information whether gathered lawfully or not.
29. The Commissioner has therefore concluded that DfE was not entitled to rely on section 31(3) with respect to Part 1 of the request but was entitled to engage same with respect to Part 2 of the request.

### **Public interest test**

30. The Commissioner next considered 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 it holds information within the scope of Part 2 of the request. Having found that section 31(3) was not engaged with respect to Part 1 of the request, there is no requirement for her to conduct a public interest test.
31. The complainant has correctly pointed out that given the amounts spent by the government on cyber security there is a public interest in knowing how robust the systems in place are. In the Commissioner's view, confirming or denying whether information is held would only provide limited insight in that regard. However, this limited benefit would clearly be outweighed by the damage such confirmation or denial is ultimately likely to cause to the prevention or detection of crime. The complainant is right to point out that transparency would increase public

confidence in government ICT systems and that this would be in the public interest. However, this must be balanced against the stronger public interest in not undermining confidence in government ICT systems by revealing information which would be useful to malicious actors intent on causing criminal damage to the UK and its institutions.

32. Therefore, the Commissioner has concluded that in all the circumstances of the case the public interest in maintaining the exclusion at section 31(3) outweighs the public interest in confirming or denying whether any information is held with respect to Part 2 of the request.



## Right of appeal

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

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

34. 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.
35. 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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**Information Commissioner's Office**  
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