

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 January 2020

Public Authority: Foreign and Commonwealth Office
Address: King Charles Street
London
SW1A 2AH

Decision (including any steps ordered)

1. The complainant submitted a request to the Foreign and Commonwealth Office (FCO) seeking information about general warrants concerning the interception of electronic devices. The FCO confirmed that it held information falling within the scope of the request but it considered this to be exempt from disclosure on the basis of sections 23(1) (security bodies), 40(2) (personal data) and 42(1) (legal professional privilege). The Commissioner has concluded the withheld information is exempt from disclosure on the basis of section 23(1) of FOIA.
2. No steps are required.

Request and response

3. The complainant submitted the following requests to the FCO on 15 May 2019:

`Background

"In 2014, following the Edward Snowden disclosures, it was revealed that the UK security and intelligence services use hacking techniques in bulk to gain access to potentially millions of devices, including computers and mobile phones.

Privacy International challenged these mass hacking practices in the IPT, which hears claims against the UK intelligence services. During the proceedings, the government asserted that it could rely on broad

'general warrants', not based on reasonable individual suspicion, to conduct hacking. The UK Government even argued that it would be lawful in principle to use a single warrant to hack every mobile phone in a UK city. In February 2016, the IPT held that this was lawful. " Our initial claim in the Investigatory Powers Tribunal (IPT) in 2014 was about GCHQ's computer hacking operations. We further alleged that GCHQ hacking violates Articles 8 and 10 of the European Convention on Human Rights, which respectively protect the right to privacy and the right to freedom of expression and also were unlawful under UK law. In February 2016, the IPT held that GCHQ hacking is lawful under UK law and the European Convention on Human Rights. The IPT further concluded that GCHQ may hack inside and outside of the UK using "thematic warrants." Thematic warrants are general warrants covering an entire class of property, persons or conduct, such as "all mobile phones in London."

Request number one:

I would like to see all the 'general warrants' and/or thematic warrants. These are ones which are not based on reasonable individual suspicion [FCO case reference 0454-19].

Request number two:

I would like a dated list of all the 'general warrants' and/or thematic warrants. These are ones which are not based on reasonable individual suspicion. Please state the start and end date of the warrant's duration. [FCO case reference 0455-19].'

4. The FCO responded on 14 June 2019 and confirmed that it held information falling within the scope of the requests but it considered this to be exempt from disclosure on the basis of sections 23(1) (security bodies), 40(2) (personal data) and 42 (legal professional privilege) of FOIA.
5. The complainant contacted the FCO on the same today and asked it to conduct an internal review of the response.
6. The FCO informed him of the outcome of the internal review on 12 July 2019. The review concluded that the exemptions set out in the refusal notice had been correctly applied.

Scope of the case

7. The complainant contacted the Commissioner on 12 July 2019 in order to complain about the FCO's refusal to provide him with the information falling within the scope of his request.

Reasons for decision

Section 23(1) – information supplied by or relating to bodies dealing with security matters

8. The FCO argued that all of the withheld information was exempt from disclosure on the basis of section 23(1) of FOIA. This states that:

'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).'

9. To successfully engage the exemption at section 23(1), a public authority needs only to demonstrate that the relevant information was directly or indirectly supplied to it by, or relates to, any of the bodies listed at section 23(3).¹ This means that if the requested information falls within this class it is absolutely exempt from disclosure under FOIA. There is no requirement on the public authority to demonstrate that disclosure of the requested information would result in some sort of harm. This exemption is not subject to a balance of public interests test.

The complainant's position

10. The complainant argued that the warrants do not relate to the work of the security services; rather the warrants are merely permission to *start* work.

The FCO's position

11. The FCO provided the Commissioner with submissions to support its position that the information was either supplied by, or relates to, the security bodies listed in section 23(3) of FOIA. These included a letter

¹ A full list of the bodies detailed in section 23(3) is available here: <http://www.legislation.gov.uk/ukpga/2000/36/section/23>

from a senior official in the FCO with the experience and authority to validate the provenance of the withheld information. This official assured the Commissioner that section 23(1) applied to the entirety of the withheld information and outlined why this was the case. The official also confirmed that they had considered whether there were any parts of the withheld information which were not supplied or related to the security bodies which could be disaggregated from the remainder of the information but they concluded that such disaggregation was not possible.

The Commissioner's position

12. The Commissioner's approach to investigating cases involving the application of section 23(1) is set out in a Memorandum of Understanding (MoU).² This explains that a public authority will provide the Commissioner with a reasoned explanation to justify the application of section 23(1). The MoU also explains that in all but exceptional cases, it is envisaged that such a reasoned explanation will be sufficient for the Commissioner to satisfy herself that section 23(1) has been correctly applied.
13. The Commissioner has considered the submissions made by the FCO in this case in respect of the application of section 23(1). She accepts that in the circumstances of this case, the assurance provided by the official in question with regards to the application of section 23(1) and the additional explanation provided by the public authority are sufficient for her to conclude that the withheld information is exempt from disclosure on the basis of section 23(1) of FOIA.
14. 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.
15. In light of this decision the Commissioner has not considered the FCO's reliance on sections 40(2) and 42(1) of FOIA to withhold parts of the withheld information.

² <https://ico.org.uk/media/about-the-ico/documents/1042533/mou-national-security-cases-foia-eir.pdf>

Right of appeal

16. 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@justice.gov.uk

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

17. 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.
18. 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

Jonathan Slee
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF