

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 17 April 2023

**Public Authority:** Ministry of Defence  
**Address:** Whitehall  
London  
SW1A 2HB

#### **Decision (including any steps ordered)**

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1. The complainant submitted a request to the Ministry of Defence (MOD) seeking information about the use of Hikvision cameras. The MOD refused to confirm or deny whether it held information falling within the scope of the request on the basis of sections 24(2) (national security), section 26(3) (defence) and 31(3) (law enforcement) of FOIA.
2. The Commissioner's decision is that the MOD is entitled to rely on section 24(2) of FOIA to refuse to confirm or deny whether it holds the requested information and that in all the circumstances of the case the public interest favours maintaining this exemption. However, the Commissioner has also concluded that the MOD breached section 17(1) of FOIA by the failing to provide a response to the request within 20 working days.
3. No steps are required.

#### **Request and response**

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4. The complainant submitted the following request to the MOD on 29 June 2022:  
"1. How many Hikvision cameras are in use in Ministry of Defence buildings?"

2. Copies of all correspondence and documentation regarding the plans to remove Hikvision products from the Ministry of Defence.
3. Copies of all correspondence and documentation that discuss or respond to the security recommendation by Professor Fraser Sampson, the Commissioner for the Retention and Use of Biometric Material and Surveillance Camera Commissioner outlined here<sup>1</sup>
5. The MOD responded on 28 September 2022. The MOD refused to confirm or deny whether it held any information falling within the scope of the request on the basis of sections 24(2) (national security) and 26(3) (defence) of FOIA.
6. The complainant contacted the MOD on 22 November 2022 and asked it to conduct an internal review of this refusal.
7. The MOD informed him of the outcome of the review on 27 January 2023. It upheld the application of sections 24(2) and 26(3) but also explained that it considered the exemption contained at section 31(3) (law enforcement) to apply.

## Scope of the case

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8. The complainant initially contacted the Commissioner on 3 January 2023 about the MOD's failure to complete the internal review in relation to this request. Following the completion of the internal review, the complainant confirmed his dissatisfaction with the MOD's refusal of his request. The complainant's grounds of complaint to support his position are set out below.
9. In relation to this complaint it is important to note that the right of access provided by FOIA is set out in section 1(1) and is separated into two parts: section 1(1)(a) gives an applicant the right to know whether a public authority holds the information that has been requested. Section 1(1)(b) gives an applicant the right to be provided with the requested information, if it is held. Both rights are subject to the application of exemptions.
10. As explained above, the MOD is seeking to rely on sections 24(2), 26(3) and 31(3) to refuse to confirm or deny whether it holds information falling within the scope of the request. Therefore, this notice only

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<sup>1</sup> The link provided by the complainant in the request is this:  
<https://www.gov.uk/government/publications/letters-from-the-biometrics-and-surveillance-camera-commissioner-april-2022/press-release-accessible>

considers whether the MOD is entitled, on the basis of any of these exemptions, to refuse to confirm or deny whether it holds the requested information. The Commissioner has not considered whether the requested information – if held – should be disclosed.

## **Reasons for decision**

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### **Section 24 – national security**

11. Section 24(2) provides an exemption from the duty to confirm or deny where this is required for the purpose of safeguarding national security.
12. FOIA does not define the term national security. However in *Norman Baker v the Information Commissioner and the Cabinet Office* (EA/2006/0045 4 April 2007) the Information Tribunal was guided by a House of Lords case, *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, concerning whether the risk posed by a foreign national provided grounds for his deportation. The Information Tribunal summarised the Lords' observations as follows:
  - 'national security' means the security of the United Kingdom 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; and,
  - reciprocal co-operation between the UK and other states in combating international terrorism is capable of promoting the United Kingdom's national security.
13. The approach that the Commissioner takes to the term 'required' as it is used in this exemption is that this means '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.
14. Therefore, section 24(2) is engaged if the exemption from the duty to confirm or deny is reasonably necessary for the purpose of safeguarding national security. The Commissioner considers that section 24(2) should be interpreted so that it is only necessary for a public authority to show either a confirmation or a denial of whether requested information is held would be likely to harm national security.

### The MOD's position

15. In support of its reliance on section 24(2) of FOIA, the MOD explained that it is defence policy not to comment on security arrangements of defence establishments on the grounds of national security and to confirm whether the requested information was held or not would, in itself, be a breach of that policy. Furthermore, the MOD argued that there is also a risk that any substantive information provided in response to this request could be used by those with malicious intent to make assumptions about current measures adopted as part of its strategy for safeguarding defence infrastructure. The MOD argued that this would ultimately increase the risk of potential harm to MOD establishments and could significantly undermine measures and infrastructure that are in place to ensure and protect the security of defence, and in turn, national security.
16. With regard to the complainant's grounds of complaint below in relation to how other government departments had responded to the same request, the MOD advised that it could not comment on the response issued by other departments. However, it did state that its response had been considered in the context of seeking information in relation to the whole defence estate and having done so, it considered section 24(2) to apply for the reasons set out above.

#### The complainant's position

17. In his submissions to the Commissioner the complainant explained that he had submitted the same request to a number of government departments, three of which had answered the request and did not rely on a neither confirm nor deny (NCND) exemption. (The departments in question being The Department for Health and Social Care, The Department for Work and Pensions and Office of the Secretary of State for Wales.<sup>2</sup>) The complainant argued that as these departments have not cited national security concerns to refuse to answer the question this undermined the MOD's reliance on section 24(2). He also noted the responses of other departments meant that it cannot be a blanket government policy not to comment on the security arrangements of government buildings.

#### The Commissioner's position

18. In this case the Commissioner appreciates that three government departments have complied with the same request which has been submitted the MOD. However, as noted above eight government departments, including the MOD, also refused the request on the basis

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<sup>2</sup> The Commissioner understand that eight government departments, including the MOD, adopted a NCND response to the requests.

of section 24(2) of FOIA. In any event, when considering how a public authority has responded to a request, the Commissioner has to consider the individual circumstances of each request to determine if exemptions have been applied correctly. Therefore, whilst it can be relevant to consider how other public authorities have handled the same request, their responses do not necessarily provide a precedent which must be followed. In other words, the responses by the three authorities cited by the complainant do not necessarily undermine the MOD's refusal of the request which is the focus of this complaint.

19. Furthermore, in considering the MOD's application of section 24(2), the Commissioner has taken into account his guidance on the NCND provisions within FOIA. This guidance explains that public authorities need to have a consistent approach to NCND exemptions in order for such provisions to be effective.<sup>3</sup> This does not mean applying the exemptions in a blanket fashion, but does mean identifying the type of information an authority might be asked about which might trigger the exclusion from the duty to confirm or deny, and taking a consistent approach to responding to requests for that type of information. Therefore, what may appear to a requester to be a 'blanket refusal' of a request could mean that a public authority is applying NCND exemptions in line with the approach advocated by the Commissioner's guidance.
20. Turning to the MOD's basis for relying on section 24(2) of FOIA, the notes that it is established defence policy not to comment on the nature of security arrangements at defence buildings. The Commissioner accepts the rationale behind such a policy, namely because disclosure of information about details of such arrangements could assist those with malicious intent to attack defence facilities. In the context of this request, if the MOD confirmed whether or not it held information about the use of Hikvision cameras this would obviously provide an insight into whether such technology was used at MOD establishments. The Commissioner accepts that such information would be likely to increase the risk of potential harm to such establishments as it would reveal whether or not a particular type of camera formed part of the MOD's security infrastructure, and in turn to the UK's national security.
21. Moreover, if the MOD were to comply with section 1(1)(a) of FOIA in respect of this request and it then received a request seeking information about whether a different type of camera or security system was in place, and it provided an NCND response to that request, inferences could be made from that response in comparison to the

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<sup>3</sup> <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/when-to-refuse-to-confirm-or-deny-holding-information/#consistent>

MOD's compliance to the Hikvision request. That is to say a NCND response to such a future request could well be interpreted, possibly correctly, as a confirmation that information of the nature requested was held. This demonstrates the importance of the MOD making consistent responses to similar requests it receives about security arrangements for defence establishments in order to protect the effectiveness of the NCND provisions.

22. For these reasons the Commissioner is therefore satisfied that the MOD is entitled to rely on section 24(2) of FOIA to refuse to confirm or deny whether it holds the requested information.

### **Public interest**

23. Section 24 is subject to the public interest test, as set out in section 2 of FOIA. This means that although section 24 is engaged, confirmation or denial must still be provided unless, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in confirming or denying.
24. The complainant argued that it was clearly in the public interest to confirm whether or not a government department contains Hikvision cameras.
25. The MOD acknowledged that confirming or denying whether information in scope of the request is held would provide openness and transparency about whether or not it uses Hikvision products and (if it were the case) their planned replacement. Furthermore, MOD recognised that it would also provide openness and transparency about what action, if any, the department maybe be required to take in response to the comments from Professor Fraser Sampson, the Commissioner for the Retention and Use of Biometric Material and Surveillance Camera Commissioner which were referred to in the request.
26. However, the MOD argued that it would be clearly against the wider public interest to undermine the security of defence buildings, and in turn, the UK's national security.
27. The Commissioner recognises that there is a clear public interest in the MOD complying with this request given the criticisms, including those made by Professor Sampson, surrounding the use of Hikvision cameras by government departments. As the MOD itself noted, compliance with the request would increase transparency in respect of this issue and what steps, (if relevant) the MOD may be intending to take in respect of such technology. Therefore, the public interest in complying with section 1(1)(a) should not be underestimated.
28. However, in the Commissioner's view there is a very clear and weighty public interest in safeguarding national security. In the particular

circumstances of this case the Commissioner accepts that it would be firmly against the public interest to compromise the security of defence establishments. Consequently, whilst the Commissioner appreciates the public interest in the possible use of Hikvision technology by government departments, in his view this is outweighed by the MOD neither confirming or denying whether it holds any information falling within the scope of this request.

29. As noted above, the Commissioner has to consider each individual request on its own merits. Nevertheless, he would note that this decision is inline with his findings in relation to a similar request submitted to the House of Commons.<sup>4</sup>
30. Given his findings in relation to section 24(2), the Commissioner has not considered the MOD's reliance on the two other exemptions cited.

### **Procedural matters**

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31. Section 10 of FOIA requires a public authority to respond to a request promptly, and in any event, within 20 working days. Section 17(1) of FOIA requires a public authority to issue a refusal notice to a requester within the same timeframe if it is relying on an exemption.
32. In this case the complainant submitted his request on 29 June 2022 but the MOD did not respond to the request by issuing its refusal notice until 28 September 2022. It therefore breached section 17(1) of FOIA.

### **Other matters**

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33. FOIA does not impose a statutory time within which internal reviews must be completed, albeit that the section 45 Code of Practice explains that such reviews should be completed within a reasonable timeframe.<sup>5</sup> The Commissioner expects that most internal reviews should be completed within 20 working days, and even for more complicated requests, reviews should be completed within a total of 40 working days.<sup>6</sup>

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<sup>4</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022713/ic-171986-s7y1.pdf>

<sup>5</sup> <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

<sup>6</sup> <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/request-handling-freedom-of-information/#internal>

34. In this case the complainant requested an internal review of the MOD's initial response on 22 November 2022 and the MOD informed him of the outcome of the review on 27 January 2022, a total of 45 working days. The MOD explained that the processing of this review had been impacted as a result of staff absences.



## Right of appeal

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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: 0203 936 8963  
Fax: 0870 739 5836  
Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://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 .....**

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