

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 January 2024

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested information from the Cabinet Office regarding a potential surveillance operation. The Cabinet Office refused to confirm or deny that it held the requested information, citing sections 23(5), 27(4) and 44 (2) of FOIA.
2. The Commissioner's decision is that the Cabinet Office has correctly relied upon section 44 (2) of FOIA as a basis to neither confirm nor deny whether it holds the requested information.
3. The Commissioner's decision is also that the Cabinet Office has breached section 17 of FOIA as it did not provide the complainant with a refusal notice, specifying all the exemptions on which it came to rely, within the statutory time limit. The Commissioner requires no steps to be taken.

Request and response

4. On 12 May 2022 the complainant submitted a request for information as follows:-
 - a) documentation indicating whether a formal request was received by HMS from the U.S authorities (most probably the FBI either directly or through the U.S Embassy in London} in August or September 2016 for permission to conduct a surveillance operation on former Trump campaign staffer George Papadopoulos on British soil;
 - b) documentation indicating whether the then Prime-Minister Theresa May of the then Home-Secretary Amber Rudd or anyone else acting on-behalf of HMG authorised surveillance by the FBI or any other U.S. agency of former Trump campaign staffer George Papadopoulos on British soil, and, if so, whether any conditions were attached to the authorisation.
5. The Cabinet Office responded to the complainant on 13 June 2022 and informed them that the information was not held by the Cabinet Office.
6. In the complainant's request for internal review, they wrote:-

'I am requesting an Internal Review of the response to my FOI request (reference above) sent to me just over two weeks ago in which the Cabinet Office indicates that the information requested is not held. I find this hard to believe, and suspect strongly that the searches carried out were insufficiently diligent. A number of possibilities present themselves about an FBI-led surveillance operation on British soil in London in September, 2016 that targeted Trump presidential campaign staffer George Papadopoulos'.
7. The Cabinet Office in its internal review response of 8 December 2022 changed its stance to that of neither confirming or denying whether it holds the requested information. This was by virtue of sections 23(5), 24(2) and 27(4) of FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 30 September 2022 to complain about the way their request for information had been handled.
9. Following correspondence from the Commissioner, the Cabinet Office responded stating that it no longer considered that section 24(2) of

FOIA applied to the requested information, however it now considered that section 44(2) of FOIA applied.

10. The Commissioner considers that the scope of his investigation is to examine the Cabinet Office's handling of the complainant's request and in particular its application of the above exemptions.

Reasons for decision

11. Section 44 of FOIA allows a public authority to withhold information if another law would have prevented the information from being published. Section 44(2) allows a public authority to refuse to confirm or deny holding information if the mere act of confirming that information was (or was not) held would, in itself, reveal information whose disclosure is prohibited by law. In this case, the law in question is the Investigatory Powers Act 2016, specifically section 57, which the Cabinet Office states prevents it from disclosing the requested information.

12. The request asks for information about a potential surveillance operation conducted in the UK. 'Surveillance' could also be any activity conducted under The Investigatory Powers Act 2016. This Act contains a duty not to make unauthorised disclosure of the existence of certain warrants issued pursuant to the Act; this means the existence, details, content, requirements or materials obtained under any type of warrant cannot legally be disclosed. Section 57(2) of the Investigatory Powers Act 2016 states that:-

"A person makes an unauthorised disclosure for the purposes of this section if –

- (a) The person discloses any of the matters within subsection (4) in relation to –
 - (i) A warrant under Chapter 1 of this Part, or
 - (ii) A warrant under Chapter 1 of Part 1 of the Regulation of Investigatory Powers Act 2000, and
- (b) The disclosure is not an excepted disclosure (see section 58).

13. Section 132 of the Investigatory Powers Act 2016 states that:-

- (1) A person to whom this section applies must not make an unauthorised disclosure to another person.
- (2) A person makes an unauthorised disclosure for the purposes of this section if-

- (a) The person discloses any of the matters within subsection (4) in relation to a warrant under this Part, and
 - (b) The disclosure is not an excepted disclosure (see section 133).
- 14. Section 132 also defines "person" and "any person holding office under the Crown" clearly applies to employees of the Cabinet Office.
- 15. Sections 58 and 133 detail a small number of exceptions where such information can be disclosed. The complainant's request does not fall under those exceptions.
- 16. Sections 59 and 134 detail the offence of making unauthorised disclosures of such warrants (imprisonment or fine). The Cabinet Office considers that to confirm or deny whether or not information was held in relation to this request would in itself have the effect prohibited by the Investigatory Powers Act 2016, and referred to in section 44(1)(a) of the Freedom of Information Act, by confirming or denying the existence of a warrant issued pursuant to the Investigatory Powers Act 2016. The Cabinet Office considers that section 44(2) is therefore engaged by this request, and that therefore it is not obliged to confirm or deny whether information in scope of this request is held.
- 17. The Commissioner agrees that the requested information falls under the cited sections of the Investigatory Powers Act 2016. The Commissioner is therefore satisfied that section 44 (2) of FOIA is engaged. There is no requirement for him to consider the balance of the public interest as section 44 provides an absolute exemption from disclosure.
- 18. The Commissioner considers that section 44(2) of FOIA applies to all of the requested information, therefore he has not gone on to consider the Cabinet Office's application of sections 23(5) and 27(4) of FOIA.

Procedural matters

- 19. The Commissioner considers that the Cabinet Office has breached section 17 of FOIA in this case as it did not provide the complainant with a refusal notice stating all the exemptions on which it eventually came to rely within the statutory time limit.

Other matters

- 20. There is no obligation under FOIA for a public authority to provide an internal review process. However, it is good practice to do so and, where an authority chooses to offer one, the section 45 Code of Practice sets

out, in general terms, the procedure that should be followed. The code states that reviews should be conducted promptly and within reasonable timescales. The Commissioner has interpreted this to mean that internal reviews should take no longer than 20 working days in most cases, or 40 in exceptional circumstances.

21. In this case the complainant waited months for an internal review response. The Commissioner reminds the Cabinet Office of the Code of Practice and urges it to respond in a timely manner.

Right of appeal

22. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

23. 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.
24. 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

Deirdre Collins
Senior Case Officer
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