

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 February 2012

Public Authority: Home Office
Address: Seacole Building
2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant made a number of requests for information relating to the blocking of URLs that contain terrorist-related material. The Home Office refused to confirm or deny whether it held some of the information requested, citing the exemptions provided by sections 23(5) (information relating to security bodies), 24(2) (national security) and 41(2) (actionable breach of confidence) of the FOIA. In relation to other information, it confirmed that this was held, but cited the exemption from the duty to disclose provided by section 24(1) (national security).
2. The Commissioner's decision is that the Home Office has applied the exemptions provided by sections 23(5), 24(2) and 24(1) correctly and so it is not required to provide any further confirmation or denials or, in relation to information it has previously confirmed is held, disclose that information in relation to the requests in response to which those exemptions were cited. However the Commissioner has also found that the exemption provided by section 41(2) was not engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Provide to the complainant confirmation or denial as to whether information falling within the scope of request (iii) is held. For any information that is held, either disclose this, or provide a valid reason for why this information will not be disclosed.

4. The Commissioner has found, however, that the Home Office failed to comply with the Act in that it did not respond to the request within 20 working days of receipt.

Request and response

5. On 13 November 2010, the complainant wrote to the Home Office and made the following information requests:
 - (i) *"Who is responsible for determining what URLs contain 'potentially unlawful terrorist-related material'?"*
 - (ii) *"What training is offered to those responsible for making this determination? Please furnish a copy of the training material used."*
 - (iii) *"What liability would be faced by the Home Office or filtering firms in relation to harm caused by wrongful inclusion of a site on this list? Please furnish copies of any documentation relating to same."*
 - (iv) *"How many URLs are on this list?"*
 - (v) *"Please furnish now a copy of this list."*
 - (vi) *"To what companies is this list provided?"*
6. The Home Office responded substantively on 10 January 2011. In relation to some of the information requested that it confirmed was held, it cited the exemptions provided by sections 31(1)(a) (prejudice to the prevention or detection of crime) and 24(1) (national security). It also stated that it neither confirmed nor denied if it held any further information falling within the scope of the requests, and cited the exemptions from the duty to confirm or deny provided by sections 23(5) (information relating to security bodies) and 24(2) (national security).
7. Following an internal review the Home Office wrote to the complainant on 5 April 2011. In response to request (iii) it now cited the exemptions from the duty to confirm or deny provided by section 41(2) (information provided in confidence), and, in response to request (vi), sections 24(1)

(national security), 43(2) (commercial interests) and 31(1)(a). In response to the remainder of the requests, it now stated that it refused to confirm or deny if it held this information and cited sections 23(5) and 24(2).

Scope of the case

8. The complainant contacted the Commissioner on 28 July 2011 to complain about the way his request for information had been handled. The complainant gave detailed grounds as to why he did not believe that the exemptions cited had been applied correctly.
9. The complainant made additional information requests in his correspondence of 13 November 2011 to those set out above. As the complainant was clear when making his complaint that the scope of this covered only the requests set out above, the other requests are not covered within this notice.

Reasons for decision

Section 23(5) and 24(2)

10. The Home Office refused to confirm or deny whether it held information falling within the scope of requests (i), (ii), (iv) and (v). In relation to these requests the Home Office has cited sections 23(5) and 24(2). Section 23(5) provides an exemption from the duty to confirm or deny if to do so would involve the disclosure of information that relates to, or was supplied by, any of a list of security bodies specified in section 23(3). Section 24(2) provides an exemption from the duty to confirm or deny where this is required for the purpose of safeguarding national security.
11. Unlike the related exemptions provided by sections 23(1) and 24(1), sections 23(5) and 24(2) are not mutually exclusive. This means that they can, where appropriate, both be cited in response to a request. However, the Commissioner is of the view that consistent citing of section 23(5) is usually sufficient to obscure the possibility of the involvement of security bodies and that citing this section in conjunction with section 24(2) is often not necessary to achieve this result.
12. In this case, the arguments advanced by the Home Office, and its statement that it did not wish to specify either section 23(5) or 24(2) as

the exemption that was actually engaged, suggested that it in fact believed that both of these exemptions were engaged. The Commissioner has therefore taken the approach that the position of the Home Office was that both sections 23(5) and 24(2) were engaged.

13. The Commissioner has considered first whether section 23(5) is engaged. This section provides an exemption from the duty to confirm or deny where any information falling within the scope of the request would relate to, or have been supplied by, any of the security bodies listed in section 23(3). The approach of the Commissioner to this exemption is that, if it is more probable than not that the confirmation or denial would relate to a security body, this exemption is engaged. The issue to be considered here is, therefore, whether it is more likely than not that a confirmation or denial of whether the Home Office holds information falling within the scope of requests (i), (ii), (iv) and (v) would relate to a security body.
14. In explanation on this point the Home Office relied on its relationship with the security bodies. It stated that it has a remit to protect national security and that the Home Secretary has a statutory relationship with the Security Service. The argument of the Home Office was that these facts about its remit and role indicate a sufficiently close relationship between it and the security bodies that it is likely that, if it did hold information falling within the scope of these requests, this would have been shared between it and security bodies.
15. The wording of the requests and what this suggests about the nature of any information relevant to them is also important here. Even accepting the closeness of the relationship between the Home Office and security bodies, if it were the case that the requests could not be reasonably considered to be within the territory of a security body or national security, the Commissioner would not accept that this exemption was engaged.
16. In this case the requests relate to the area of anti-terrorism. The Commissioner would accept that this is an area that clearly involves the bodies named in section 23(3) and so accepts that the requests are within the territory of security bodies and national security.
17. The conclusion of the Commissioner is that the exemption provided by section 23(5) is engaged. The basis for this conclusion is the relationship between the Home Office and security bodies and that the subject matter of the requests is both within the territory of the security bodies and relates to national security. The Home Office is not, therefore,

required to confirm or deny whether it holds information falling within the scope of requests (i), (ii), (iv) and (v).

18. As this conclusion has been reached, it has not been necessary to go on to also consider section 24(2). However, having established that section 23(5) is engaged, the Commissioner's view is that section 24(2) would almost certainly be engaged as well.

Section 41(2)

19. The Home Office has cited the exemption from the duty to confirm or deny provided by section 41(2) in response to request (iii). This section provides an exemption from the duty to confirm or deny where to do so would constitute an actionable breach of confidence. The central issue for the Commissioner here is therefore whether the provision of a confirmation or denial in response to this request would constitute an actionable breach of confidence. As any breach of confidence would not be actionable if a public interest defence were available, the Commissioner has also considered that to the extent that it is relevant in this case.
20. The analysis of the application of this exemption potentially includes exempt information. It is therefore set out in a confidential annex to this notice supplied to the Home Office only. The conclusion is given here, with the detailed reasons in the confidential annex.
21. The finding of the Commissioner is that the exemption provided by section 41(2) of the FOIA is not engaged. The Home Office is, therefore, required at paragraph 3 above to disclose whether it holds any information falling within the scope of request (iii).

Section 24(1)

22. The Home Office has cited the exemption provided by section 24(1) in relation to request (vi). Section 24(1) provides an exemption from the duty to disclose where this is required for the purpose of national security. Consideration of this exemption involves two stages; first, the exemption must be engaged due to the necessity of this for national security. Secondly, this exemption is qualified by the public interest, which means that the information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure. The Home Office has also cited sections 31(1)(a) and 43(2) in relation to this request, which the Commissioner will consider if his conclusion is that the use of section 24(1) is not upheld.

23. The Commissioner's approach to section 24(1) is that exemption must be reasonably necessary for national security purposes. It is necessary for a public authority to show that there is a risk of harm to national security through the disclosure of the information in question, but it is not necessary to prove that there is a specific threat.
24. The Home Office's approach here concerns the disclosure of the identity of those internet service providers that have assisted in blocking terrorism-related URLs. It believes that disclosure may reveal the extent to which this industry has participated with it in this program. If this revealed that this industry has not participated fully, those attempting to disseminate terrorist material online may seek to avoid those parts of the industry that have participated with the Home Office.
25. The complainant has argued that the Home Office has participated in a scheme whereby internet filtering software that includes measures to filter terrorist related material is identified by a 'kitemark' and therefore the position of the Home Office in relation to this request is not sustainable, as it is already taking steps to publicly identify products that prevent access to terrorist materials. The view of the Commissioner is that a product being identified as designed to filter terrorist-related websites does not amount to a disclosure of the information in question here. The information in question may include organisations not previously identified via a 'kitemark', and that filtering software is designed to identify content that relates to terrorism does not necessarily mean that the authors of that software would have been provided with the list referred to in the request. The Commissioner does not, therefore, regard the existence of these 'kitemarks' as fatal to the argument of the Home Office that this exemption is engaged.
26. The Commissioner accepts, first, that this argument is relevant to section 24(1) in that anti-terrorism measures are clearly related to national security. As to whether exemption from disclosure is reasonably necessary for national security purposes, it is clearly the case that identifying which organisations have participated in the blocking of offending URLs risks highlighting whether organisations have not participated in this process. The Commissioner also accepts that this could lead to the outcome predicted by the Home Office; those seeking to disseminate terrorist material online may attempt to avoid organisations working with the Home Office.
27. For these reasons the Commissioner accepts that exemption from the duty to disclose is reasonably necessary for the purposes of safeguarding national security. The exemption provided by section 24(1) is, therefore, engaged.

28. Having found that the exemption is engaged, the next step is to consider the balance of the public interest. In reaching a conclusion on the balance of the public interest here, the Commissioner has taken into account the very significant weight of the public interest inherent in the exemption; that is, the public interest in avoiding prejudice to national security. The general public interest in the openness and transparency of the Home Office has also been taken into account, as well as those factors that relate to the specific information in question.
29. Covering first those factors that favour disclosure of the information, the Home Office has acknowledged that there is public interest in information relating to the monitoring and attempted regulation of internet use. The Commissioner agrees that this is an issue that is the subject of comment and controversy and is of the view that disclosure of the information in question would serve the debate on this issue. The Commissioner regards this as a valid public interest factor in favour of disclosure of some weight.
30. Mentioned above is the public interest inherent in the exemption on the basis of avoiding prejudice to national security. That the information in question here relates to national security can also be cited as an argument in favour of disclosure. Efforts made by the government to ensure national security are the subject of legitimate public interest, and disclosure of the information in question would improve public understanding of government actions in this area. This is also a valid public interest factor in favour of disclosure of some weight.
31. Turning to those factors that favour maintenance of the exemption, reference is made above to the public interest in favour of the maintenance of this exemption. In any case where the exemption provided by section 24(1) is considered, that factor must be recognised as carrying very significant weight. Clearly, the protection of national security is in the public interest and, in this case, the Commissioner recognises that this is a factor in favour of maintenance of the exemptions of very significant weight.
32. The Commissioner has recognised valid public interest in the disclosure of this information on the basis of its subject matter. However, having recognised that the public interest inherent in the exemption is a factor that must be afforded very significant weight, the Commissioner does not believe that the weight of the factors in favour of disclosure matches this. The conclusion of the Commissioner is, therefore, that the public interest in the maintenance of the exemption outweighs the public interest in disclosure. The Home Office is not, therefore, required to disclose the information falling within the scope of request (vi).

33. The Commissioner notes finally that the Home Office breached the FOIA by failing to respond substantively to the request within 20 working days of receipt. Although a holding response dated 10 December 2010 was sent to the complainant, this did not specify all of the exemptions upon which the Home Office later relied, or provide any explanation as to why the information requested was believed to be exempt, and so was not a valid response for the purposes of section 17.

Right of appeal

34. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

35. 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.
36. 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

Graham Smith
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