

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 October 2012

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

Decision (including any steps ordered)

1. The complainant has requested information from the Home Office regarding the use of firearms by foreign protection officers who accompany Heads of State (and other individuals) on visits to the UK. The Home Office refused to confirm whether or not it held information falling within the scope of the complainant's requests relying on, amongst other exemptions, section 23(5) - information supplied by or relating to bodies dealing with security matters - and section 24(2) - national security - of FOIA. The Commissioner has concluded that the Home Office is entitled to rely on both exemptions as a basis upon which to refuse to confirm whether or not it holds the information requested.

Request and response

2. On 11 July 2011 the complainant wrote to the Home Office and requested information in the following terms:

'During the recent visit to the UK by the US President it was well documented by the media that US Secret Service personnel were authorised to carry a wide range of weapons. I would be grateful if you could clarify the following points in relation to this practice:

[1] Under what legal authority are US personnel (including non-military personnel) authorised to carry arms within the UK?

[2] How many other Nation States enjoy such authorisation for their personnel? (Please note that I am not requesting that you name the particular States involved, as I appreciate that this would have significant security implications, simply the number of States).

[3] On how many occasions has authority to carry arms within the UK been given to personnel of foreign States in the past five years?

[4] What procedures would be followed in the event of a discharge of firearms by such foreign personnel?

[5] On how many occasions has there been a recorded discharge of firearms in the UK by such foreign personnel in the past five years? (Please note that, once again, I am not requesting that you name the particular States involved or provide any details whatsoever of the incidents, as I appreciate that this would have significant security implications. I am simply requesting the number of occasions).'

3. The Home Office responded on 5 September 2011 and refused to confirm or deny whether it held the information requested on the basis of the following exemptions contained within FOIA: section 23(5) – information supplied by or relating to bodies dealing with security matters; section 24(2) – national security; section 31(3) – law enforcement; and section 38(2) – health and safety.
4. The complainant contacted the Home Office on 14 October 2011 and agreed to withdraw requests 2 and 3 but asked it to conduct an internal review into its handling of the three remaining requests.
5. The Home Office informed him of the outcome of the internal review on 16 December 2011. The review upheld the position originally adopted, i.e. to refuse to confirm whether or not it held information falling within the scope of these requests.

Scope of the case

6. The complainant contacted the Commissioner about the Home Office's position in respect of requests 1, 4 and 5. He argued that the information falling within the scope of these requests, if held, could be disclosed without any of the prejudicial effects envisaged by the Home Office. Furthermore he argued that there were compelling reasons why disclosure of the requested information was in the public interest. The complainant provided detailed arguments to support his position and the Commissioner has referred to these in his analysis below.

Reasons for decision

Section 23 – security bodies

Section 24 - national security

The Commissioner's interpretation of the relevant legislation

Section 1(1) of FOIA provides requestors with the right of access to information held by public authorities. The right of access is in two parts with section 1(1)(a) providing the right to be told whether a public authority holds the requested information and section 1(1)(b) provided the right to be provided with the information if it is held. Both rights are subject to the application of exemptions.

7. The parts of the exemption contained at section 23 of FOIA relevant to this case state that:

'(1) Information held by a public authority is exempt information if it was directly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3)...

...(5) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).¹

8. Section provides a class based exemption which means that a public authority does not need to demonstrate a likelihood that prejudice would occur if it complied with a request, simply whether the requested information (if held) would fall within the description set out in section 23(1). Furthermore, the exemption is absolute and thus not subject to the public interest test.

9. The parts of section 24 of FOIA relevant to this case state that:

'(1) Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security.

¹ The list of section 23(3) bodies can be viewed here:
<http://www.legislation.gov.uk/ukpga/2000/36/section/23>

(2) The duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security.'

10. The section 24 exemption is qualified and is therefore subject to the public interest test.
11. Sections 23 and 24 are closely linked provisions. Sections 23(1) and 24(1) are mutually exclusive. However, sections 23(5) and sections 24(2) are not mutually exclusive and therefore a public authority can apply just one exemption or both in order to refuse to confirm or deny whether or not it holds requested information. However in the Commissioner's opinion each exemption must be applied independently on its own merits.
12. In the Commissioner's opinion the exemption contained at section 23(5) should be interpreted so that it is only necessary for a public authority to show that **either** confirmation **or** denial as to whether the requested information is held would involve the disclosure of information relating to a security body. It is not necessary for a public authority to demonstrate that both responses would disclose such information. Whether or not a security body is interested or involved in a particular issue is in itself information relating to a security body.
13. Furthermore, the Commissioner believes that the phrase 'relates to' should be interpreted broadly. Such an interpretation has been accepted by the First-Tier Tribunal (Information Rights) in a number of different decisions.² Therefore in the Commissioner's opinion section 23(5) could be used by a public authority to avoid issuing a response to a request which revealed either that a security body was involved in an issue or that it was not involved in an issue.
14. The test as to whether a disclosure would relate to a security body is decided on the normal civil standard of proof, that is, the balance of probabilities. In other words, if it is more likely than not that the disclosure would relate to a security body then the exemption would be engaged.
15. From the above it can be seen that section 23(5) has a very wide application. If the information requested is within what could be described as the ambit of security bodies' operations, section 23(5) is

² See for example [Dowling v Information Commissioner and The Police Service for Northern Ireland](#), EA/2011/0118, paras 17 to 22.

likely to apply. This is consistent with the scheme of FOIA because the security bodies themselves are not subject to its provisions. Factors indicating whether a request is of this nature will include the functions of the public authority receiving the request, the subject area to which the request relates and the actual wording of the request.

16. With regard to section 24(2), the Commissioner again considers that this exemption should be interpreted so that it is only necessary for a public authority to show that **either** a confirmation **or** denial of whether requested information is held would be likely to harm national security. It is not necessary for a public authority to demonstrate that both responses would have such an effect. The Commissioner interprets the phrase 'required' in the context of this exemption to mean '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 specific, direct or imminent threat.
17. In relation to the application of section 24(2) the Commissioner notes that the Tribunal has indicated that only a consistent use of a neither confirm nor deny (NCND) response on matters of national security can secure its proper purpose. Therefore, in considering both whether the exemption is engaged and the balance of the public interest test, regard has to be given to the need to adopt a consistent NCND position and not simply the consequences of confirming whether the specific requested information in this case is held or not.

The Home Office's position

18. In its submissions to the Commissioner to support the application of sections 23(5) and 24(2) the Home Office emphasised that in its view the complainant's requests were not simply seeking clarification of the legal framework regarding foreign personnel carrying weapons in the UK. Rather, in the Home Office's view the requests were worded in such a way as to infer that it is an accepted fact that on his visit to the UK President Obama was protected by armed US personnel, including non-military personnel. This was evidenced by the complainant's comment that 'it was well documented by the media that US Secret Service personnel were authorised to carry a wide range of weapons'. The Home Office noted that the complainant then goes on to explain that in relation to request 1 he wished to know the legal authority under which US personnel had been authorised to carry such arms.
19. The Home Office explained that it was vital to note that media reports do not constitute official government confirmation and that the government would always decline to comment on specific matters of security such as this.

20. In respect of request 1 and the application of section 23(5) the Home Office explained that it has an obvious remit involving national security, specifically protection, counter terrorism and liaison with the Police. The Home Office has a statutory relationship with the Security Service and the department also works with other bodies listed in section 23(3) on these issues.
21. The Home Office emphasised that the Tribunal has previously commented that the '...probability that the requested information, if held, came through a section 23 body...' was sufficient to engage section 23 (EA/2010/0008, paragraph 20). The Home Office argued that in this respect the Tribunal had recognised that there exists a relationship between certain public authorities such that were information to be held by one party it would be reasonable to assume that, if held, providence would suggest that it would be likely to have been supplied by another in that relationship. The Home Office explained that the protection of the US President on a visit to the UK raised issues of protecting the public and preventing counter terrorist initiatives, both key national security functions. Therefore, if it was confirmed whether or not information was held in respect of request 1 then this would reveal whether or not the security bodies also had an interest in this subject matter given the interest of such bodies in matters of national security.
22. The Home Office argued that such a position was supported by considering the consequences of it actually complying with the duty contained at section 1(1)(a). For example, if in theory the Home Office had confirmed that it held information falling within the scope of request 1, and it then engaged section 23(1), then the department would be have been alerting the requestor, and thus placing into the public domain, information that confirmed the involvement of one of more of the security bodies listed at section 23(3), contrary to the purpose of 23(5).
23. Conversely, if in theory the Home Office had explained that it did not hold any information, then this would have revealed that the Home Office had no information about an issue which fell within one of its statutory remits which, given the links between the Home Office and security bodies, would itself have disclosed significant information about the section 23(3) bodies.
24. In respect of request 1 and the application of section 24(2) the Home Office emphasised that, as discussed in relation to its application of section 23(5), if it held information falling within the scope of the request this would clearly pertain to matters of national security. The information requested concerns the legal authority as to whether or not US personnel – both military and non-military – were armed during a Presidential visit to the UK. In light of this, to disclose information about

the details of such an operation, be it to confirm or deny whether particular data is held, would serve to indirectly reveal the scope of such an initiative and what bodies may or may not be responsible for its implementation, i.e. the interest and involvement of the security bodies themselves. This would be to the detriment of national security as it would undermine the avowed purpose of the original undertaking, i.e. by compromising the nature of actual operations designed to protect the security of the UK, including the security of visiting Heads of State.

25. In relation to request 4, the Home Office suggested that the requestor had linked this request to request 1 by inclusion of the reference to 'such' foreign personnel. The Home Office argued that by inference request 4 assumes that foreign personnel are given authority to carry firearms. Furthermore, the Home Office confirmed that the reference to 'procedures' in request 4 could potentially encompass operational and intelligence led activities. Therefore, the Home Office argued that, on the basis of this interpretation of the request, if it complied with the requirements of section 1(1)(a) this would undermine its position to adopt an NCND position in respect of request 1.
26. In relation to request 5, the Home Office referred the Commissioner to the detailed arguments it had submitted in respect of request 1. It also argued that, as with request 4, if confirmed it whether it held information falling within the scope of request 5 this would undermine the NCND position it had adopted in respect of request 1.
27. To illustrate this the Home Office explained that if it had confirmed that it held information falling within the scope of request 5 (if that was in fact the case) then this would disclose that there had been at least one occasion where a firearm had been discharged. This could be valuable information to a potential assailant and/or terrorist group. Similarly, if there had been no instances of a recorded discharge and the Home Office confirmed this, this again would provide valuable information to a potential assailant and/or terrorist group by revealing the success of protection measures.

The complainant's position

28. The complainant argued that the position taken by the Home Office in relation to all three of the requests which are the focus of this complaint were not credible. The complainant suggested that the Home Office's response to his requests suggested that confirming whether or not information was held would provide criminals or terrorists with information which would undermine national security. However, he argued that such a position was untenable.

29. In the complainant's opinion the fact that the President of the USA is accompanied by armed security staff during visits to the UK is entirely within the public domain to the extent that the issue is extensively covered by the national press during such visits, even to the extent of listing the make and calibre of weapons involved. Against this background the complainant suggested that it was farcical for the Home Office to argue that fulfilling these requests would help criminals and terrorists identify and subsequently target individuals who may hold weapons and to then use these weapons for criminal activity. The complainant suggested that such a line of argument assumed that criminals and terrorists did not already know that such armed personnel accompanied foreign Heads of State and moreover that disclosure of the withheld information would allow such criminals and terrorists to target, for example, US Secret Service personnel in order to steal their weapons to use for criminal activity. In the complainant's view such a consequence seemed very unlikely.
30. With regard to request 1 the complainant emphasised that this was a simple request for a statement of which legal provisions confer authority for foreign personnel to carry firearms in the UK. He argued that it was not at all clear how stating what this authority is, for example, under a particular statute, prerogative power, convention or protocol could justify any of the prejudicial effects anticipated by the Home Office. The complainant argued that this was akin to stating that confirming that the police surveillance is authorised under the Regulation of Investigatory Powers Act 2000 somehow jeopardises operational police surveillance activities.
31. Similarly, the complainant argued that the Home Office's position in relation to request 4 seemed untenable as it was not at all clear how explaining the administrative process which would follow a discharge of firearms would assist criminals and terrorists in the manner envisaged by the Home Office.
32. In relation to both requests 1 and 4 there is an important public policy argument for making this information available. It is trite law that the Crown must act within the law. Therefore, the rules and procedures under which armed police operate within the UK are both clear and accountable. One element of this accountability is that any discharge of firearms by the police is subject to automatic investigation by the IPCC. In the context of these requests, the complainant explained that whilst he was not suggesting that the presence of armed foreign personnel posed a threat to the public, it would seem an inescapable conclusion that were such personnel to face a threat to their Heads of State, this would be their first priority with the welfare of UK citizens as a secondary consideration. In this context it is important that the

mechanisms under which any discharge of firearms would be investigated are clearly understood.

33. With regard to request 5, the complainant emphasised that he had only requested the number of occasions on which there had been a recorded discharge of firearms by such personnel. He argued that it was inconceivable that providing a number without any further information whatsoever could possibly pose the threats envisaged by the Home Office.

The Commissioner's position

34. The Commissioner has initially considered the Home Office's reliance on section 23(5) before going on to consider the Home Office's reliance on section 24(2). However, before setting out his views on the applicability of these exemptions the Commissioner wishes to clarify what he considers to be the nature of the information actually being sought by the three disputed requests.
35. With regard to request 1, the Commissioner agrees with the Home Office that given the way this request is phrased it does not simply ask for details of the legislation under which all foreign protection officers can be granted the right to carry firearms in the UK. Instead it asks for the actual legislation under which US personnel were potentially granted the use of firearms during President Obama's visit.
36. Nevertheless, because the request focuses specifically on the US personnel accompanying President Obama, the Commissioner agrees that if the Home Office complied with this request by confirming that it held details of the relevant legislation then in effect it would be confirming that the US personnel accompanying the President had been carrying firearms. In effect then the consequences of confirming whether or not information is held in respect of request 1 are the same as answering a request which says 'Were the US Secret Service personnel accompanying President Obama on his visit to the UK carrying firearms'?
37. In contrast, the Commissioner considers that, when read in the context of the complainant's entire email of 11 July 2011, requests 4 and 5 cannot be said to be linked to any particular decision to authorise foreign protection personnel to carry arms on a particular visit to the UK. This is because the reference to 'such foreign personnel' in both requests simply refers, in the Commissioner's opinion, to any personnel, of any country, who have accompanied their Head to State to the UK at some point in the past (or in the case of request 5 over the last five years). Therefore in the Commissioner's opinion if the Home Office complied with the requirements of section 1(1)(a) of FOIA then it would

not be revealing details as to whether foreign protection officers from a specific country had in fact been authorised, and thus armed, on a particular visit.

38. For example, if the Home Office confirmed that it held information falling within the scope of request 4 (assuming of course that is the case) then it is very difficult for the Commissioner to see how such a response would reveal whether or not foreign protection officers on a particular visit to the UK were armed. Similarly, if the Home Office confirmed that it did not hold information falling within the scope of request then once again it is difficult for the Commissioner to see how such a response would provide any real insight into whether or not foreign protection officers had been armed on a particular visit to the UK.
39. Turning to the application of section 23(5), the Commissioner is satisfied that on the balance of probabilities that if the Home Office confirmed whether or not it held information of the nature sought by request 1 then this would reveal something about the security bodies. The Commissioner has reached this conclusion for two reasons.
40. Firstly, the nature of the requested information itself. As discussed above although the request ostensibly asks for the legal basis of authorisation used for all visits by foreign protection personnel, by default the request actually seeks confirmation as to whether President Obama's protection personnel were armed during his last visit to the UK. The visit of the US President to the UK is obviously a subject in which there are direct national security concerns and the UK's national security is a clearly a matter of interest to the security bodies.
41. Secondly, there is clearly a close relationship between the Home Office and the security bodies, particularly the statutory relationship between the Home Office and the Security Service. In other words the Commissioner is satisfied that if the Home Office confirmed that it held information falling within the subject of the request 1 then it would, in effect, be confirming that the security bodies had an interest in the potential use of firearms by foreign protection officers during President Obama's visit. Conversely, if the Home Office confirmed that it did not hold information falling within the scope of request 1, then in effect it would be confirming that the security bodies did not have an interest in the potential use of firearms by foreign protection officers during the visit in question. Therefore, the Home Office is entitled to rely on section 23(5) to refuse to confirm or deny whether not it held information falling within the scope of request 1.
42. For the similar reasons the Commissioner is prepared to accept that the Home Office can rely on section 23(5) to refuse to confirm or deny whether it holds information falling within the scope of requests 4 and 5.

In reaching this decision the Commissioner recognises, as noted above, that in his opinion these two requests cannot be said to be linked any particular decision to authorise particular foreign protection personnel to carry arms on a particular visit by a Head of State to the UK. Therefore confirming whether or not information is held in respect of these two requests would not reveal whether the security services had an interest in decisions to authorise particular foreign protection officers on particular visits beyond President Obama's visit to the UK to carry arms. Rather given the less specific nature of the requests, confirmation or denial would simply reveal whether security bodies had an interest in the general issue of the arming of foreign protection officers. However, given the fact that the phrase 'relates to' section 23 should be interpreted broadly the Commissioner believes that even on this basis the Home Office can rely on sections 23(5) to refuse to confirm or deny whether it holds information falling within the scope of requests 4 and 5.

43. With regard to the application of section 24(2), the Commissioner has carefully considered the complainant's submissions that complying with these requests would be very unlikely to result in any of the prejudicial consequences as envisaged by the Home Office. However, in the context of section 24 the Commissioner notes that the threshold to engage the exemption is relatively low. Furthermore, as a general approach the Commissioner accepts that withholding information in order to ensure the protection of national security can extend, in some circumstances, to ensuring that matters which are of interest to the security bodies are not revealed. Moreover, it is not simply the consequences of revealing whether information is held in respect of a particular request that is relevant to the assessment as to whether the application of the exemption is required for the purposes of safeguarding national security, but the consequences of maintaining a consistent approach to the application of section 24(2).
44. Given the role of the security bodies in protecting the UK's national security, the Commissioner accepts that it could be prejudicial to national security if the subject matters which the security bodies were interested in (and were not interested in) were disclosed so that those with criminal intentions could build up a picture of issues which would attract the interest of the security bodies. For the reasons set out above, the Commissioner is satisfied that complying with the requirements of section 1(1)(a) in respect of requests 1, 4 and 5 would be likely to reveal whether or not the security bodies were interested in the subject matter which is focus of these requests. For the reasons submitted by the complainant the Commissioner accepts that it is possible that section 1(1)(a) could be complied with without some the prejudicial consequences envisaged by the Home Office. However, as also noted above, of vital importance in considering the application of a NCND exemption is the need for a public authority to adopt a position on a

consistent basis. The Commissioner is therefore satisfied that in the circumstances of this case it is sustainable for the Home Office to argue that a NCND approach to requests 1, 4 and 5 is required for the purposes of national security.

45. Although the Commissioner has concluded that section 24(2) is engaged, section 24 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
46. The Commissioner recognises the validity of the public interest arguments identified by the complainant and he agrees that such arguments deserve notable weight. However, the Commissioner also believes that there is a very strong public interest in ensuring that the UK's national security is not compromised by responses given by public authorities to requests submitted under FOIA. In the circumstances of this case the Commissioner believes that the public interest tips in favour of maintaining the exemption given the need to adopt a consistent NCND position to ensure that information about the operational interests of the security bodies is not revealed.
47. However, it is important to remember that even if the Commissioner had concluded that section 24(2) was not engaged, or that the public interest favoured confirming whether or not information was held, then the Home Office would still have been absolved from the duty contained at section 1(1)(a) of FOIA given the Commissioner's decision in respect of section 23(5).

Right of appeal

48. 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

49. 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.
50. 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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