

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 January 2014

Public Authority: Metropolitan Police Service

Address: Public Access Office
PO Box 57192
London
SW6 1SF

Decision (including any steps ordered)

1. The complainant requested information relating to Unmanned Aerial Vehicles (UAVs). The public authority informed the complainant it did not hold information relating to the request insofar as it is relevant to overt policing methods. However, it refused to confirm or deny whether it held information within the scope of the request relevant to covert policing by virtue of the exemptions at sections 23(5), 24(2) and 31(3) FOIA.
2. The Commissioner's decision is that the public authority was entitled to rely on the exemptions at sections 23(5) and 24(2) FOIA.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 19 March 2013, the complainant wrote to the public authority and requested information in the following terms:

'.....In November 2011, it was reported in the press that the MPS would use UAVs¹ to patrol the Olympic games (<http://www.independent.co.uk/news/uk/cri..>)

- 1) Were UAVs ever deployed by MPS during the Olympic games?*
 - 2) If so, under what circumstances and under whose control?*
 - 3) What models of UAV does the MPS currently possess?*
 - 4) Does the MPS currently have Civil Aviation Authority clearance to deploy UAVs?*
 - 5) Has the MPS applied for CAA clearance for UAV flights in the past?*
5. The public authority responded on 25 March 2013. It refused to confirm or deny whether it held information within the scope of the request on the basis of the exemptions at sections 23(5), 24(2) and 31(3) FOIA.
 6. The complainant requested an internal review on 26 March 2013. He accepted the public authority's position above in relation to items 1 and 2 of his request. The complainant however disputed the application of the exemptions to items 3, 4 and 5 of his request.
 7. The public authority wrote to the complainant on 28 May 2013 with details of the outcome of the internal review. It upheld the original decision in full.

Scope of the case

8. The complainant contacted the Commissioner on 27 June 2013 to complain about the way his request for information had been handled. He specifically asked the Commissioner to determine whether the public authority was entitled to refuse to comply with items 3, 4 and 5 of his request on the basis of the exemptions at sections 23(5), 24(2) and 31(3).
 9. However, following his complaint, the public authority revised its position as follows.
-

¹ Unmanned Aerial Vehicle – commonly referred to as 'drones'

10. The public authority does not hold any information within the scope of items 3, 4 and 5 of the request. However, the public authority neither confirms nor denies that it holds any other information relevant to the request by virtue of sections 23(5), 24(2) and 31(3).
11. On 7 December 2013 the public authority wrote to the complainant again and further clarified its position as follows.
12. The public authority does not hold any information in relation to overt policing methods within the scope of items 3, 4 and 5 of the request. However, in regard to any information relating to covert policing, the public authority neither confirms nor denies that it holds any other information within the scope of items 3, 4 and 5 of the request by virtue of sections 23(5), 24(2) and 31(3).
13. The complainant did not agree with the application of the exemptions at sections 23(5), 24(2) and 31(3). He did not dispute the public authority's position that it did not hold information relevant to his request insofar as it is relevant to overt policing methods.
14. The scope of the Commissioner's investigation therefore was to consider whether the public authority was entitled to rely on the exemptions at sections 23(5), 24(2) and 31(3) in relation to items 3, 4 and 5 of the request. Specifically in relation to whether or not it holds information relevant to covert policing.

Reasons for decision

Section 23 – security bodies and Section 24 – national security

15. Information relating to security bodies specified in section 23(3) is exempt information by virtue of section 23(1). Information which does not fall under section 23(1) is exempt from disclosure under section 24(1), if it is required for the purpose of safeguarding national security.
16. Sections 23(5) and 24(2) exclude the duty of a public authority to confirm or deny whether it holds information which, if held, would be exempt under section 23(1) or 24(1) respectively.
17. By virtue of section 23(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 section 23(3).

18. By virtue of section 24(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.
19. The Commissioner does not consider the exemptions at sections 23(5) and 24(2) to be mutually exclusive and he accepts that they can be relied on independently or jointly in order to conceal whether or not one or more of the security bodies has been involved in an issue which might impact on national security. However, each exemption must be applied independently on its own merits. In addition, the section 24 exemption is qualified and is therefore subject to the public interest test.
20. The test as to whether a disclosure would relate to a security body is decided on the normal 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.
21. 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 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.
22. There is clearly a close relationship between the public authority and security bodies. The public authority plays a key role in protecting the United Kingdom (UK) from the threat of organised criminals including terrorists. It is inevitable that it works closely with security bodies in carrying out its role. It is well documented that UAVs are now a part of the surveillance measures used by the UK's military forces.² Therefore, in respect of the public authority's role and the subject matter being requested, the Commissioner finds that, on the balance of probabilities, any information about covert policing if held, could be related to one or more bodies identified in section 23(3) FOIA.
23. 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 either a confirmation or a denial of whether requested information is held would be likely to harm national security. The

² <http://www.bbc.co.uk/news/world-africa-22320767>

Commissioner interprets the phrase '*required*' in the context of this exemption '*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.

24. In relation to the application of section 24(2) the Commissioner notes that the First Tier Tribunal (Information Rights) 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.³ Therefore, in considering whether the exemption is engaged, and the balance of the public interest, regard has to be given to the need to adopt a consistent NCND position and not simply to the consequences of confirming whether the specific requested information in this case is held or not.
25. The public authority explained that to confirm that it holds any information about covert policing (if that is in fact the case) pertinent to items 3, 4 and 5 of the request would be of use to criminals including terrorists who may use the information to try and circumvent its law enforcement capabilities which in turn could have a detrimental effect on national security. Conversely, should the information not be held (if that is in fact the case) and the public authority confirms that is the case, it could also be used by criminals including terrorists to try and circumvent its law enforcement capabilities.
26. 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 be extended, 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).
27. On this occasion the Commissioner is satisfied that complying with the requirements of section 1(1)(a) would be likely to reveal whether or not the security bodies were interested in the subject matter which is the focus of these requests. The need for a public authority to adopt a

³ See for example, The All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner and the Foreign and Commonwealth Office – EA/2011/0049-0051

position on a consistent basis is of vital importance in considering the application of an NCND exemption.

28. The Commissioner is satisfied that the public authority is entitled to rely on sections 23(5) and 24(2) in the circumstances of this case. He accepts that revealing whether or not information about covert policing is held within the scope of items 3, 4 and 5 of the request which relates to security bodies would reveal information relating to the role of the security bodies. It would also undermine national security and for that reason section 24(2) also applies because neither confirming nor denying if additional information is held is required for the purpose of safeguarding national security.

Public Interest Test

29. Section 23 is an absolute exemption and no public interest test is required once it is found to be engaged. However, this is not the case for section 24(2).

Public interest considerations in favour of confirming or denying whether information is held

30. There is a public interest in understanding exactly how public funds may be spent on law enforcement capabilities.

Public interest considerations in favour of maintaining the exemption from the duty to either confirm or deny

31. To confirm or deny whether any information about covert policing is held could render national security measures less effective. It would not be in the public interest to provide criminal groups/individuals with information which they could use to circumvent the public authorities law enforcement capabilities which in turn could be detrimental to national security.

Balance of the public interest

32. The Commissioner appreciates the complainant's position that the public is entitled to know how public funds are spent. Confirming or denying whether the public authority holds any information about covert policing methods would meet the public interest in that regard. However, it is important to recognise that the public authority's response considers matters from a national security perspective. Therefore, whilst on the surface the public authority's stance may seem to be over cautious, the public authority has to consider the effect of disclosure to the public at large, not just to the complainant, and the wider ramifications of any such disclosure.

33. Knowledge as to whether or not the public authority holds any information relevant to the request insofar as it relates to covert policing would be of significant interest to criminals including terrorists. Therefore, whilst the information requested may appear to the complainant to be relatively harmless in nature, the Commissioner considers that the public interest in safeguarding national security is of such weight that it can only be outweighed in exceptional circumstances. He also places significant weight on the requirement to maintain consistency when applying an NCND in these circumstances.
34. The Commissioner accepts that in the circumstances of this case the public interest in protecting information required for the purposes of national security outweighs the public interest in favour of confirmation or denial. He therefore finds that, in all the circumstances of this case, the public interest in maintaining the exemption at section 24(2) outweighs the public interest in complying with the duty imposed by section 1(1)(a).
35. In view of his findings, the Commissioner has not found it necessary to consider the exemption at section 31(3).

Other matters

36. The FOIA does not stipulate a time limit for public authorities to issue internal reviews. However, as a matter of good practice, the Commissioner considers that a public authority should take not more than 20 working days to issue an internal review and in exceptional circumstances, 40 working days.
37. The Commissioner therefore wishes to record his concern that it took the public authority over 40 working days to issue the outcome of its internal review to the complainant. He expects the public authority to complete internal reviews of responses to requests for information more promptly in future.

Right of appeal

38. 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: GRC@hmcts.gsi.gov.uk

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

39. 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.
40. 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
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF