

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 August 2016

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

Decision (including any steps ordered)

1. The complainant requested information relating to individuals who had returned to the UK after fighting for terrorist groups in Iraq and Syria. The Home Office refused to confirm or deny whether it held information within the scope of this request and cited the exemptions provided by sections 23(5) (information relating to, or supplied by, security bodies) and 24(2) (national security) of the FOIA.
2. The Commissioner's decision is that sections 23(5) and 24(2) were cited correctly so the Home Office was not obliged to confirm or deny whether the requested information was held.

Request and response

3. On 26 February 2016 the complainant wrote to the Home Office and requested information in the following terms:

"The number of individual people arrested after returning to the UK who were known or suspected of fighting for terrorist groups (e.g. so called Islamic State) in Iraq and Syria for each of the last 3 years. Please break down by gender and the organisation they were known or suspected of fighting for".

4. The Home Office responded on 23 March 2016. It refused to confirm or deny whether it held the requested information and cited the exemptions provided by sections 23(5) (information relating to, or supplied by, security bodies) and 24(2) (national security) of the FOIA.

5. The complainant responded on the same date and requested an internal review. The Home Office responded on 22 April 2016 with the outcome of the internal review. The conclusion of this was that the refusal to confirm or deny under the exemptions cited previously was upheld.

Scope of the case

6. The complainant contacted the Commissioner on 26 April 2016 to complain about the refusal of his information request. Although the complainant gave no grounds for complaint, it was evident, albeit only by omission, that the complainant did not agree with the reasoning given by the Home Office for the refusal of his request.

Reasons for decision

Section 23

7. Section 23(5) provides an exemption from the duty imposed by section 1(1)(a) to confirm or deny whether information is held if to do so would involve the disclosure of information, whether or not recorded, that relates to or was supplied by any of the security bodies listed in section 23(3). This is a class-based exemption, which means that if the confirmation or denial would have the result described in section 23(5), this exemption is engaged.
8. The argument from the Home Office on this exemption was that if the information specified in the request did exist, it is very likely that it would have come from, or be related to, section 23(3) bodies. Were it the case that absolute certainty of the connection with a section 23(3) body was required, this might mean that the possibility, however slim, of the Home Office holding relevant information that was not related to, or supplied by, a section 23(3) body would undermine its reliance on section 23(5).
9. However, in the Tribunal case *The Commissioner of Police of the Metropolis vs Information Commissioner* (EA/2010/0008) the argument was advanced that it was *highly likely* that any information held by the public authority that fell within the scope of the request would have been supplied to it by a section 23(3) body and, therefore, section 23(5) was engaged. The counterargument was made that only certainty as to the source of the information would be sufficient. The Tribunal rejected this counterargument and stated:

*"[The evidence provided] clearly establishes the **probability** that the requested information, if held, came through a section 23 body." (paragraph 20)*

10. The approach of the Commissioner on this point is that she accepts the Tribunal view that the balance of probabilities is the correct test to apply. This means that for section 23(5) to be engaged, the evidence must suggest to a sufficient degree of likelihood (rather than certainty) that any information held that falls within the scope of the request would relate to, or have been supplied by, a body specified in section 23(3).
11. In this case, the Commissioner considers it clear that the subject matter of the request – involvement with terrorist groups – is within the area of the work of bodies specified in section 23(3). She also accepts that it is likely that, if the information described in the request did exist, this would have been compiled with input from outside the Home Office, including from security bodies.
12. The Commissioner accepts that, on the balance of probabilities, any information held by the Home Office falling within the scope of the complainant's requests would relate to, or have been supplied by, a body or bodies listed in section 23(3). Her conclusion is therefore that section 23(5) is engaged.
13. As this conclusion has been reached on section 23(5), it is not strictly necessary to go on to also consider any other exemptions. However, as the Home Office also relied on section 24(2), the Commissioner has gone on to consider that exemption.

Section 24

14. Section 24(2) provides an exemption from the duty to confirm or deny where this is required for the purpose of safeguarding national security. Consideration of this exemption is a two-stage process. First, the exemption must be engaged due to the requirement of national security. Secondly, this exemption is qualified by the public interest, which means that the confirmation or denial must be provided if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.
15. The Commissioner has already accepted when finding that section 23(5) is engaged that revealing whether or not information is held within the scope of the request would reveal information relating to the role of the security bodies. The Commissioner also accepts that disclosure that touches on the work of the security bodies would consequentially undermine national security. For that reason section 24(2) is also

engaged as exemption from the duty to confirm or deny is required for the purposes of national security.

16. Turning to the balance of the public interest, the question here is whether the public interest in safeguarding national security is outweighed by the public interest in disclosure of the confirmation or denial. Clearly, the public interest in safeguarding national security carries very great weight. In order for the public interest to favour provision of the confirmation or denial, it will be necessary for there to be public interest factors in favour of this of at least equally significant weight.
17. The view of the Commissioner is that there is some valid public interest in confirmation or denial in response to this request. This would increase public knowledge of the work that the Home Office is involved in to counter participation with terrorist groups.
18. The Commissioner considers it to be clearly the case, however, that this public interest does not match the weight of the public interest in safeguarding national security. This means that her conclusion is that the public interest in the maintenance of the exemption provided by section 24(2) outweighs the public interest in disclosure of the confirmation or denial.
19. In view of this finding and that above on section 23(5), the Home Office was not required to confirm or deny whether it held the information requested by the complainant.

Other matters

20. Whilst the Commissioner has upheld the refusal of the request, she notes that the complainant was provided with little explanation by the Home Office for why it refused the request. Some explanation for the citing of section 24(2) was given, but none was given for section 23(5).
21. The Commissioner recognises that in cases where the information request is in the area of national security, it will often be possible to give only a limited explanation for the refusal of the request due to the need to maintain secrecy in that area. In this case, however, the Commissioner can see no reason why the complainant could not have been provided with the explanation the Home Office gave to her office for the citing of section 23(5) and that is referred to in the analysis above.
22. Had the complainant been provided with that explanation, his view might have been that a complaint to the Commissioner was not

necessary. In future cases where section 23(5) applies the Home Office should ensure that it provides to the requester as full an explanation as possible for the citing of that exemption.

Right of appeal

23. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

24. 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.
25. 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

Gerrard Tracey
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