

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 May 2022

Public Authority: Cabinet Office
Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested information relating to newspaper reports that a team from the Government Communications Headquarters (GCHQ) has been embedded within the Cabinet Office, giving the Prime Minister advice on emerging threats posed by Covid-19. The Cabinet Office relied on section 23(5) of FOIA to refuse to confirm or deny whether it held any relevant information.
2. The Commissioner's decision is that the Cabinet Office was entitled to rely on section 23(5) to refuse confirm nor deny whether it held the requested information. No steps are required.

Request and response

3. On 3 April 2021, the complainant wrote to the Cabinet Office and requested information in the following terms:

"I make the following request for disclosure regarding the Cabinet's Office's embedded GCHQ covid team ('the team') in relation to UK citizens in the UK ('citizens'), as revealed at <https://www.telegraph.co.uk/politics/2020/11/18/exclusive-gchq-cell-giving-boris-johnson-real-time-intelligence/>

I request:

1. Citation of the legal authority for the team processing health data or any data for the purpose of health, given its limited powers under ISA94 [the Intelligence Services Act 1994¹] s3.
2. Documents referring to or explaining the content and sources of data used by the team, eg test & trace, bank cards, Oyster cards, holiday bookings, job searches, satnavs, fitness trackers and mobile networks.
3. Codenames of programmes used by the team, eg successors to Memory Hole, Catsup and Enhanced Mutant Broth, so that further information can be sought from them.
4. Unredacted SPI-M comments from https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/890023/s0074-current-adherence-to-behavioural-social-interventions-uk-spi-b-redacted-220320-sage18.pdf and names of sources they say they 'were previously unaware of'."
4. The Cabinet Office responded to the request on 30 April 2021. It refused to confirm or deny whether it held the requested information at parts 1-3 of the request, citing section 23(5)(information supplied or relating to security bodies). It stated that it did not hold information relating to part 4 of the request.
5. The complainant requested an internal review on 30 April 2021, and the Cabinet Office provided him with the outcome of that review on 20 May 2021. The Cabinet Office upheld its original response.

Scope of the case

6. The complainant contacted the Commissioner on 24 May 2021 to complain about the Cabinet Office's refusal to confirm or deny that it held the information requested at parts 1-3 of his request. The complainant did not refer to the Cabinet Office's response to part 4 of the request, therefore the Commissioner has not considered it any further.

¹ <https://www.legislation.gov.uk/ukpga/1994/13/contents>

Reasons for decision

Section 23 – security bodies

7. Section 23(1) of FOIA states that:

“Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in sub-section (3).”

8. Section 23(5) of FOIA states that:

“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).”

9. The full list of bodies specified in section 23(3) can be viewed online.² Section 23(5)(c) lists “the Government Communications Headquarters” as a body subject to section 23.

10. To engage section 23(1), the requested information simply has to have been supplied directly or indirectly by one of the named security bodies, or relates to one of those bodies. As it is a class based exemption there is no need for the disclosure to prejudice the work of those bodies in anyway.

11. The test of whether a provision of a confirmation or denial 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 provision of a confirmation or denial would relate to a security body then the exemption would be engaged.

12. 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. 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.

² <http://www.legislation.gov.uk/ukpga/2000/36/section/23>

13. The complainant does not accept that section 23 is relevant in this case. In his request for internal review he expressed his position to the Cabinet Office as follows:

"Your response was to NCND [neither confirm nor deny] what power GCHQ are spying on the population, albeit ostensibly in bulk by metadata, and how, for health purposes. However, by definition, health cannot provide a national security exemption for GCHQ, as there is no enemy, language or crypt aspect, nor can GCHQ hide behind national security to avoid a challenge to ultra vires acts when it acts outside the sphere of national security - that would put it above parliament and the courts as an omnipotent supra governmental authority."

14. He added that

"Health is none of GCHQ's business. Its health work is thus too remote to engage."

15. The complainant also expressed his position to the Commissioner:

"...as a matter of statute in the ISA it does not relate to GCHQ as the Act precludes it, so public law cannot tolerate government taking the benefit of such a defence under FOIA, or at least only the administrative court can resolve the conflict between the Acts. If I am right then it would be the same if GCHQ purported to abolish the ICO and then hid behind FOIA to deny doing so, although of course they may say 'see us in court and apply for disclosure'."

16. However, the Commissioner observes that the complainant explicitly refers to "a team from GCHQ" as the subject of his request. If the Cabinet Office were to confirm or deny that it held relevant information, it would necessarily be confirming or denying that it held information relating to GCHQ. The Commissioner does not see how the Cabinet Office could respond without doing so.
17. Accordingly, the Commissioner is satisfied that confirming whether or not the Cabinet Office holds information falling within the scope of parts 1-3 of this request would reveal something about one of the security bodies, ie GCHQ. The Commissioner is therefore satisfied that the Cabinet Office is entitled to rely on section 23(5) to refuse to confirm or deny whether it holds any information falling within the scope of the request.

Right of appeal

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

18. 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.
19. 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

Sarah O'Cathain
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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Wilmslow
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SK9 5AF