

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 May 2016

Public Authority: Foreign and Commonwealth Office
Address: King Charles Street
London
SW1A 2AH

Decision (including any steps ordered)

1. The complainant submitted two requests to the Foreign and Commonwealth Office (FCO) seeking information about the guidance provided to intelligence officers and personnel applicable to the passing of intelligence relating to individuals who are at risk of targeted lethal strikes outside traditional battlefields. The FCO refused to confirm or deny whether it held the requested information on the basis of sections 23(5) (security bodies) and section 24(2) (national security) of FOIA. The FCO also declined to provide its reasoning to the complainant for relying on these exemptions citing section 17(4) of FOIA as a basis upon which to do so.
2. The Commissioner's decision is that the FCO is entitled to rely on both sections 23(5) and 24(2) to refuse to confirm or deny whether it holds the requested information. Furthermore the Commissioner has also concluded that disclosure of the FCO's rationale for relying on these exemptions would involve the disclosure of information that is itself exempt and thus the FCO is entitled to rely on section 17(4) of FOIA.

Request and response

3. The complainant submitted the following two requests on 2 March 2015:
'Disclose the following information and relevant documentation, including any paper and electronic records, concerning the Guidance to Intelligence Officers and Personnel applicable to the passing of

intelligence relating to individuals who are at risk of targeted lethal strikes outside traditional battlefields ('the Guidance'):

- (i) The dates of training courses concerning the Guidance attended by any officers and/or personnel;*
- (ii) The dates of training courses concerning the Guidance proposed for any officers and/or personnel;*
- (iii) Any hand-outs, power points or other presentations concerning the Guidance;*
- (iv) Any policy or update to policy pertaining to such training'.*

And:

'Disclose the Guidance to Intelligence Officers and Personnel applicable to the passing of intelligence relating to individuals who are at risk of targeted lethal strikes outside traditional battlefields'.

4. The FCO responded on 17 March 2015 and refused to confirm or deny whether it held information falling within the scope of either request on the basis of sections 23(5) and 24(2) of FOIA. The FCO explained that by virtue of section 17(4) it was not obliged to explain why the exemptions applied.¹
5. The complainant contacted the FCO on 3 June 2015 in order to ask for an internal review of this decision. In doing so, the complainant sought to challenge the FCO's reliance on both exemptions and the FCO's reliance on section 17(4) as a basis to refuse to explain why it considered these exemptions to apply.
6. The FCO informed the complainant of the outcome of the review on 31 July 2015. The review upheld the reliance on sections 23(5) and 24(2) of FOIA and also confirmed that in the FCO's opinion it was correct to rely on section 17(4) of FOIA.

¹ Section 17(4) of FOIA explains that when issuing a refusal notice, a public authority is not obliged to explain why an exemption applies or why the public interest favours maintaining a qualified exemption if to do so would involve the disclosure of information which would itself be exempt from disclosure.

Scope of the case

7. The complainant contacted the Commissioner on 5 October 2015 to complain about the way the requests for information had been handled. The complainant disputed the FCO's reliance on both exemptions as a basis to refuse to confirm or deny whether it held the requested information and also the FCO's reliance on section 17(4). The complainant provided the Commissioner with detailed submissions to support the complaint and these are referred to below.
8. In relation to this complaint it is important to note that the right of access provided by FOIA is set out in section 1(1) and is separated into two parts: Section 1(1)(a) gives an applicant the right to know whether a public authority holds the information that has been requested. Section 1(1)(b) gives an applicant the right to be provided with the requested information, if it is held. Both rights are subject to the application of exemptions.
9. As explained above, the FCO is seeking to rely on sections 23(5) and 24(2) to refuse to confirm or deny whether it holds information falling within the scope of the requests. Therefore this notice only considers whether the FCO is entitled, on the basis of these exemptions, to refuse to confirm or deny whether it holds the requested information. The Commissioner has not considered whether the requested information – if held – should be disclosed.

Reasons for decision

Section 23 – information supplied by, or relating to, bodies dealing with security matters

10. 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).'

11. 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).'

12. The full list of bodies specified in section 23(3) can be viewed online.²
13. 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** a confirmation **or** denial of whether 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. Furthermore, the Commissioner considers 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.³
14. Consequently, whether or not a security body is interested or involved in a particular issue is in itself information relating to a security body. 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.
15. The test of 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.
16. 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.
17. The Commissioner is satisfied that on the balance of probabilities, confirming whether or not the FCO holds information falling within the scope of this request would clearly reveal something about the security bodies. He has reached this conclusion given the subject matter of both requests, focusing as they do on matters of intelligence and in particular

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

³ See for example [Dowling v Information Commissioner and The Police Service for Northern Ireland](#), EA/2011/0118, paras 17 to 22.

seeking copies of guidance provided to intelligence officers. These are issues within the areas of work of the bodies listed in section 23(3) of FOIA.

18. With regard to the FCO's reliance on section 23(5) the complainant argued that this exemption – and indeed section 24(2) – did not displace the common law right to information preserved by section 78 of FOIA and as acknowledged by the majority in *Kennedy v Charity Commission*.⁴ More specifically, the complainant noted that section 78 of FOIA states that '*nothing in this Act is to be taken to limit the powers of a public authority to disclose information held by it*' and argued that these powers include existing common law powers of disclosure. The complainant argued that Lord Mance held in *Kennedy* – which also concerned information subject to an absolute exemption under FOIA, namely section 32, the court records exemption – that the '*public interest in openness*' in that case and the need for '*appropriate public scrutiny and awareness of the adequacy of the functioning and regulation*' of a particular charity meant that a request should be acceded to in the public interest, '*except so far as the public interest in disclosure is demonstrably outweighed by any countervailing arguments that may be advanced*'. The complainant argued that such concerns applied to this case which concerned the guidance to British officials providing information that may result in the unlawful killing of individuals overseas. Furthermore, the complainant argued that these rights to information are underscored by the right to information under Article 10 ECHR which the complainant argued is engaged in this case, as per *Kennedy*.
19. The Commissioner disagrees with the complainant's interpretation of *Kennedy* and its implications for this case. In the Commissioner's view it is important to recognise that the *Kennedy* appeal was dismissed on the basis of the interpretation of s32(2)(a) of FOIA. Therefore the lengthy discussions of Article 10 ECHR in the judgement are therefore obiter (made in passing). Moreover, the majority in this case found that Article 10 does not provide a general right of access to information from public authorities.
20. Consequently, the Commissioner is satisfied that the FCO can rely on section 23(5) as basis to refuse to confirm or deny whether it holds information falling within the scope of the requests.

⁴ *Kennedy v Charity Commission* [2014] UKSC 20 at [47-50, 133-135].

Section 24 – national security

21. In light of his finding in relation to section 23(5), there is no need – in terms of the outcome of this decision notice – for the Commissioner to also consider the FCO's reliance on section 24(2) of FOIA. This is because, even if the Commissioner rejected the FCO's reliance on section 24(2), the FCO would not have to comply with the requirements of section 1(1)(a) in light of the Commissioner's finding in relation to section 23(5).
22. However, as the Commissioner has made clear in his guidance on the use of these exemptions, he recognises that some public authorities are concerned that inferences would be drawn if they were to rely on only one exemption.⁵ As a consequence some public authorities consider it prudent to apply both NCND provisions and in such scenarios the Commissioner will consider the application of both exemptions in a decision notice.
23. Section 24(2) provides an exemption from the duty to confirm or deny where this is required for the purpose of safeguarding national security. The approach that the Commissioner takes to the term required as it is used in this exemption is that this means '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. Therefore, section 24(2) is engaged if exemption from the duty to confirm or deny is reasonably necessary for the purpose of safeguarding national security. Moreover, as with section 23(5), the Commissioner considers that section 24(2) 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.
24. In the context of section 24, the Commissioner accepts that withholding information in order to ensure the protection of national security can extend 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 such 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

⁵ https://ico.org.uk/media/for-organisations/documents/1196/how_sections_23_and_24_interact_foi.pdf paragraphs 10 to 20.

security, but the need to maintain a consistent approach to the application of section 24(2).

25. The complainant provided the Commissioner with submissions to support the view that section 24(2) of FOIA was not engaged. The complainant argued that the FCO could comply with the requirements of section (1)(1)(a) of FOIA without harming national security. In support of this view the complainant made the following points:

- Similar guidance in relation to the supply and receipt of intelligence material in the context of torture, rather than killing, has already been published.⁶ Other guidance relating to intelligence matters is already published and in some cases has been recently disclosed by the FCO. For example, the policies applicable to the interception of legally privileged material; the Code of Practice for the Interception of Communications and arrangements for the receipt of foreign intelligence material and bulk interception.
- Furthermore, the government had not maintained a strict NCND position in respect of the requested guidance. The complainant argued that this was because the requested guidance had already been the subject of considerable public discussion, including by representatives of the security services, Defence Committee and Intelligence and Security Committee. In support of this point, the complainant referred to the Birmingham Policy Commission on the Security Impact on Drones and quoted the following passage:

'The UK government, in its response to the Defence Committee's recommendations, restated its position that, "All activities of the UK intelligence community are subject to careful oversight to ensure that they comply with obligations under national and international law." This reinforces the UK government's long-standing position, as expressed in the House of Commons Intelligence and Security Committee (ISC) 2007 report on Rendition. The Committee stated that: "Where there are concerns, the Agencies seek credible assurances that any action taken on the basis of intelligence provided by the UK Agencies would be humane and lawful. Where credible assurances cannot be obtained, the Chief of SIS [Secret Intelligence Service] explained "...then we cannot provide the information. Therefore

⁶ [Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees](#)

you have the dilemma [of perhaps not being able to prevent attacks] that flows from that.” The Director General of the SIS further informed the ISC that:

We do a lot of exchange of highly sensitive intelligence in a very trusting way, but we now [sic] all of us, including the Americans, have a clear understanding of the legal constraints on that exchange...So when you are talking about sharing secret intelligence, we still trust them, but we have a better recognition that their standards, their laws, their approaches are different, and therefore we still have to work with them, but we work with them in a rather different fashion.”⁷

- The complainant also noted that in response to questions about the guidance the government stated in Parliament that *'all of the UK's intelligence sharing with Foreign States is undertaken within a robust legal framework, and is subject to rigorous ministerial, parliamentary and judicial oversight'*.⁸
26. The FCO provided the Commissioner with submissions to support its view that adopting a NCND approach was necessary in order to protect national security. On the basis of these submissions the Commissioner is satisfied that the FCO is entitled to rely on section 24(2). The Commissioner cannot reproduce the content of the submissions in this notice (or explain why he agrees with them) as they relate directly to information which is itself exempt from disclosure. However, the Commissioner can confirm that in reaching this conclusion he has taken into careful consideration the complainant's submissions, as summarised above, in particular the line of argument that the government has already breached the NCND position with regard to the requested information.

Public interest test

27. Section 24(2) is a qualified exemption. Therefore, the Commissioner is required to consider whether, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or

⁷ <http://www.birmingham.ac.uk/Documents/research/policycommission/remotewarfare/final-report-october-2014.pdf> page 49

⁸ <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2014-09-26/209539/>

deny outweighs the public interest in confirming whether the FCO holds the requested information.

28. The complainant argued that there was an overwhelming public interest in disclosure of the requested information for the following reasons:
29. There is currently enormous uncertainty around the extent to which, as a matter of principle, information which may facilitate lethal drone strikes perpetrated by agencies of a foreign government complies with domestic and international law. Not least, there are issues as to whether a person who passes to an agent of a foreign government intelligence organisation information on the location of an individual, foreseeing a serious risk that the information will be used to target or kill that individual, may be liable under domestic and international criminal law.
30. If the requested guidance and training is designed to ensure that officials are acting properly and in accordance with the law, there is an overwhelming public interest in transparency as to both the existence and contents of the requested information. This, the complainant argued, was essential in terms of building trust in government and otherwise reassuring the world at large that the UK acts consistently with domestic and international legal obligations.
31. Conversely, if the requested guidance and training operate so as to implicitly or explicitly authorise, justify and/or facilitate breach of relevant legal obligations, then there is an overwhelming public interest in disclosure of the information in order to highlight both the failure of the government to comply with its international legal obligations and the likely unlawful nature of the requested information.
32. Moreover, the complainant emphasised that the public interest in creating transparency around information of this nature is now consistently recognised by academic institutions, think tanks, human rights NGOs and within the intelligence services. The complainant emphasised that it had been the subject of court proceedings and several UN reports.
33. The FCO argued that the public interest firmly favoured maintaining section 24(2) in order to ensure that national security was not compromised. It emphasised that in reaching this conclusion it had also taken into account the need to adopt a consistent NCND approach and not simply the consequences of confirming whether the particular information in this case is held or not.
34. The Commissioner recognises that there is a substantial inherent public interest in safeguarding national security. In the particular circumstances of this case, based upon risks to the UK's national

security identified by the FCO if it complied with the requirements of section 1(1)(a), the Commissioner considers that the public interest attracts significant weight. That said, the Commissioner accepts that the arguments advanced by the complainant can clearly not be dismissed lightly. Confirmation as to whether or not the FCO holds information falling within the scope of the requests could significantly increase the government's commitment to transparency in an area of intelligence sharing where there is significant public interest.

35. However, despite the weight that the Commissioner considers should be attributed to the public interest in confirming whether the information is held, he has concluded that this is not as great as the public interest in maintaining the exclusion from the duty to confirm or deny whether the requested information is held.

Section 17(4) – refusal notice

36. Section 17 of FOIA places a number of requirements on public authorities when they seek to refuse a request for information. Section 17(1)(a) states that:

'A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which—

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies'

37. Section 17(3) places a duty on public authorities, who are relying on a qualified exemption, to state its reasons for concluding that the balance of the public interest test favoured maintaining the exemption.

38. Section 17(4) of FOIA states that:

'A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.'

39. As is explained above, the FCO relied on the provisions of section 17(4) both in respect of its reliance on section 23(5) and 24(2) of FOIA.

40. The complainant disputed this position. The complainant argued that government departments are regularly able to defend legal proceedings on the basis of assumed facts without prejudice to a NCND position. The complainant argued that such a position could have been adopted in this case even if the FCO's reliance on the two exemptions was correct.
41. The Commissioner has carefully considered the FCO's rationale to support its application of the two exemptions. Having done so he is satisfied that the disclosure of this rationale would result in the disclosure of information that is itself exempt from disclosure. The FCO is therefore entitled to rely on section 17(4) of FOIA.

Right of appeal

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

43. 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.
44. 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

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