

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 March 2012

Public Authority: Department for Transport ("DFT")
Address: Great Minister House
33 Horseferry Road
London
SW1P 4DR

Decision (including any steps ordered)

1. The complainant has requested information about risk assessments conducted by the DFT that demonstrate the need for compulsory body scanners at UK airports.
2. The Commissioner's decision is that the DFT was correct to withhold the information on the basis of section 24(1) and to neither confirm nor deny that the risk assessment showed the UK to be at a greater or lesser risk of terrorist attack than the rest of the EU by virtue of section 24(2).
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 20 July 2011, the complainant wrote to the DFT and requested information in the following terms:

"The DfT have stated that the UK are permitted to employ 'more stringent' security measures than the rest of the EU. Both Heathrow and Gatwick airports currently use body scanners under article 6 of (EC) No300/2008. According to article 4 of (EC) 300/2008 'more stringent' security measures (compulsory body scanners) must be based on a RISK ASSESSMENT.

- (1) *Has the DfT conducted such a risk assessment which proves that the UK is at a greater risk/threat than the rest of the EU*

and that its 'more stringent' measures (compulsory body scanners as opposed to offering a choice of screening method of equal efficacy to body scanners) are necessary, proportionate and legal?

- (2) *If so, will it now publish this risk assessment?*
- (3) *If it has not conducted a risk assessment, or refuses to publish this, will it explain why?"*

5. The DFT responded on 16 August 2011. It stated that a risk assessment was conducted but it did not intend to publish this and was relying on section 24(1) of the FOIA – the national security exemption – to withhold it. The DFT did consider the public interest test but concluded that it favoured maintaining the exemption. The DFT also refused to either confirm or deny (section 24(2)) whether the risk assessment proved that the UK was at greater risk than other EU countries.
6. Following an internal review the DFT wrote to the complainant on 14 September 2011. It upheld the original decision to withhold the risk assessment under section 24(1) of the FOIA. The DFT also further explained its use of section 24(2) to neither confirm nor deny whether the risk assessment showed the UK to be at a greater threat level than the rest of the EU. It explained that it considered confirming the risk assessment did not show this could be potentially as sensitive as to confirm that it did as knowledge that the UK was or was not at a greater threat level could be potentially valuable information.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He specifically asked the Commissioner to determine whether the DFT had conducted a risk assessment and if so whether this risk assessment showed the UK to be at a greater risk of terrorist attacks than the rest of the EU. The complainant also asked the Commissioner to find out whether the risk assessment showed compulsory body scans to be a proportionate measure.
8. The Commissioner considers the DFT has already confirmed that a risk assessment was conducted but it was being withheld. The Commissioner therefore considers the scope of his investigation to be to determine whether the DFT were correct to withhold the risk assessment under section 24(1) of the FOIA and to use section 24(2) to neither confirm nor deny whether the risk assessment shows the UK to be at a higher risk than the rest of the EU. The Commissioner does not consider it to

be within his remit to comment on whether the introduction of compulsory body scanners is a proportionate response to any findings in the risk assessment but if he finds that the risk assessment should be disclosed then the public can form their own view on this issue based on the information in the risk assessment.

Reasons for decision

9. Due to the sensitivity of the withheld information, the DFT declined to either send it via email or in the post to the Commissioner. It instead requested for the information to be reviewed by the Commissioner at its London office. On 19 January 2012, the Commissioner's representative reviewed the withheld information in London as requested by the DFT.
10. A schedule of the withheld information can be found in the confidential annex to be disclosed to the public authority only. To reveal the information contained in the schedule in the main body of this decision notice would defeat the purpose of the exemption at section 24(1) of the FOIA.

Section 24(1)

11. Under section 24(1) of the FOIA, information is exempt from disclosure if the exemption from the duty to disclose the information is required for the purpose of safeguarding national security. It should be noted that in order to engage section 24(1) it is the exemption rather than the information which has to be required for the purpose of safeguarding national security. The Commissioner therefore considers that the focus under section 24(1) is on the effect of disclosing the withheld information rather than its purpose.
12. In the context of the exemption, the Commissioner considers the word 'required' to mean 'reasonably necessary' and it is not sufficient that the information withheld relates to national security. However, whilst it is important to demonstrate that there would be a real possibility of harm to national security should the information be disclosed, there is no need to prove that there is in fact a specific, direct, or imminent threat to national security. It is sufficient that the disclosure is capable of indirectly creating a real possibility of harm to national security.
13. The request in this case was for risk assessments conducted by the DfT showing the requirement for the introduction of full body scanners in airports and demonstrating that the UK has a higher threat level than the rest of the EU. Threats to UK aviation safety have been well documented. Some of the measures put in place by the Government to protect the public, including individuals who work at or travel to and

from UK airports, are also commonly known. For example, it is commonly known that security scanners, including full body scanners, are deployed at UK airports in an effort to prevent terrorist attacks.

14. The Commissioner therefore finds that the disputed information relates to the security of the UK and its citizens and by extension 'national security' within the meaning of section 24(1). He has next gone on to consider the effect of disclosure of this information.
15. The withheld information comprises of four documents which make up what the DFT considers to be a risk assessment into the use of compulsory body scanners at UK airports. These documents contain information on the strengths and weaknesses of different security options, potential threats and how body scanners may combat these.
16. The DFT asserted that if information relating to the risk assessment of airport security measures was to be made publicly available it may undermine security by helping individuals or groups intending to carry out criminal activities at, or through, UK airports, to circumvent security procedures.
17. The Commissioner agrees with the DFT that the requested information would be useful to those who wish to use UK airports for criminal activities including individuals or groups who pose a terrorist threat to the UK's aviation industry.
18. In view of the nature of the withheld information and the arguments provided by the public authority, the Commissioner finds that the exemption at section 24(1) is reasonably necessary in the circumstances to safeguard national security.
19. Section 24(1) is however subject to a public interest test. The Commissioner must therefore consider whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.

Public interest arguments in favour of disclosure

20. The DFT accepts that the public have a right to know about issues that may affect them, particularly regarding the use of new and potentially invasive technologies at UK airports. Moreover it is in the public interest to inform and reassure the travelling public that effective aviation security regulation exists and it is being applied and managed in an appropriate manner, proportionate to the level of risk. Disclosing the requested information could therefore reassure the public and increase public confidence in security arrangements at UK airports.

21. There is a general public interest in promoting openness and transparency and the DFT recognise this and consider that disclosure of the requested information could further the public interest in that respect.

Public interest arguments in favour of maintaining the exemption

22. The DFT maintain there is a clear and strong public interest in safeguarding the security of passengers and goods in the UK aviation sector.
23. It is well documented that terrorists continue to seek to avoid or subvert aviation security measures. The DFT states that disclosing the withheld information would undermine airport security by helping terrorists identify vulnerabilities or develop ways of circumventing the measures. The DFT believes it would not be in the public interest to compromise the national security of the UK by undermining the security measures deployed at airports.

Balance of the public interest arguments

24. The Commissioner agrees that there is a strong public interest in ensuring the public are aware of the nature of the scanners deployed at airports which the public might consider invasive. However, he also recognises that this has to be balanced against the need to maintain the effectiveness of the scanners as a security measure. Disclosing information which undermines their security effectiveness would not be in the public interest.
25. The Commissioner acknowledges there is an ongoing debate regarding the effectiveness of body scanners in detecting all prohibited items at airports and on aircrafts. Body scanners are part of a range of security measures deployed at UK airports and to diminish their effectiveness by exposing any vulnerability may undermine airport security.
26. The Commissioner considers this to be a strong and compelling argument and the possibility of terrorists exploiting any vulnerability highlighted in the withheld information and therefore compromising the national security of passengers at UK airports carries a significant weight. The Commissioner therefore finds that, on balance, the public interest in maintaining the exception at section 24(1) outweighs the public interest in disclosure.

Section 24(2)

27. Under section 1(1)(a) of the FOIA a public authority is generally obliged to advise a complainant whether or not it holds the requested

information. This is known as the duty to confirm or deny. This does not apply where an exemption from the duty to confirm or deny is engaged.

28. Where a public authority has relied on an exemption which involves a refusal to confirm or deny whether information is held, the Commissioner must ensure his decision notice does not give any indication as to whether or not information is in fact held by the public authority.
29. In this case the DFT applied section 24(2) to neither confirm nor deny whether the risk assessment confirmed the UK to be at a higher threat level than the rest of the EU. Section 24(2) provides that the duty to confirm or deny does not arise if it is required for the purpose of safeguarding national security. Specifically the DFT was of the view that confirming or denying whether the risk assessment contained information confirming the UK to be at a greater threat level than the rest of the EU would be likely to increase the UK's vulnerability to attack.
30. In relation to section 24(2) the Commissioner's view is that the exemption must be required for the purposes of safeguarding national security, as is the case with section 24(1). In this instance the Commissioner agrees that information on specific threat levels the UK may be facing is an important aspect of national security and that a neither confirm nor deny response to avoid revealing any details of the exact threat level when compared to the EU is reasonably necessary to meet that aim.
31. The Commissioner therefore considers that the section 24(2) exemption has been correctly applied in this case. However, this exemption is a qualified exemption and therefore subject to the public interest test.

Public interest arguments in favour of confirming or denying whether the requested information is held

32. The DFT did not identify any public interest argument in favour of confirming or denying whether the risk assessment contained this information. The complainant argues that knowing if the UK is at a greater threat level than the rest of the EU is in the public interest as it would help to reassure the public, if the threat level is greater, that the use of compulsory body scanners is a proportionate response to the threat to UK aviation security.
33. The complainant has also highlighted the view of the European Commission that security scanners should only be deployed at EU airports when responding to higher threat risk as assessed at national level. The DFT acknowledges that information on threat levels can be

accessed on the Home Office website¹. Similarly information on threats abroad is accessible from the Foreign and Commonwealth Office website². The complainant argues that the level of information available is such that it implies the UK's threat level must be higher in order to justify the deployment of body scanners in its airports. Therefore, the public interest in confirming or denying this is strong.

Public interest arguments in favour of neither confirming nor denying whether the requested information is held

34. The DFT stated that to confirm or deny whether the UK was at a higher threat level than the rest of the EU would not be in the public interest as this knowledge could be used by those with a hostile intent to commit acts of unlawful interference that may jeopardise the security of civil aviation and passengers in the UK. The DFT maintains this is because to reveal information on specific threat levels the UK may be facing, whether these are lesser or greater than the rest of the EU, could endanger national security and provide terrorists with information which may assist in exploiting any perceived vulnerabilities.

Balance of the public interest arguments

35. The Commissioner has considered these arguments and weighed the competing public interest factors for and against confirming or denying whether information is held. The Commissioner recognises that there is a general public interest in the DFT disclosing whether or not it holds information on a particular topic.
36. In addition, the Commissioner acknowledges that general information on threat levels is available from the Home Office and the Foreign and Commonwealth Office. However, the DFT has drawn a clear distinction between general threat levels and specific threat levels. Additionally, the Commissioner does not consider that the information which is publicly available on threat levels can be used to conclude that the UK is a greater threat level than the rest of the EU. Therefore, this does not weaken any arguments presented by the DFT for neither confirming nor denying information is held.
37. The Commissioner gives considerable weight to the need to safeguard national security. The inherent public interest in the exclusion from the

¹ www.homeoffice.gov.uk/counter-terrorism/current-threat-level/

² www.fco.gov.uk/en/travel-and-living-abroad/

duty to confirm or deny in this case is strong. The Commissioner considers that there must be equally strong public interest factors in favour of confirming or denying whether the requested information is held before he would order such confirmation or denial should be made. The Commissioner is not satisfied that there are strong enough public interest factors in this case for him to order the DFT to confirm or deny whether the risk assessment confirms the threat level faced by the UK when compared to the EU.

38. The Commissioner has therefore concluded on balance that the public interest in maintaining the exemption at section 24(2), excluding the DFT from the duty to confirm or deny if the risk assessment shows the UK to be at a higher threat level than the rest of the EU, outweighs that in disclosing whether this information is held.

Right of appeal

39. 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

40. 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.
41. 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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