

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 June 2013

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

Decision (including any steps ordered)

1. The complainant requested submissions to Home Office Ministers regarding the proposed filtering mechanism set out in the draft Communications Data Bill. In particular the complainant sought (a) submissions on the operation of the mechanism; (b) submissions on the risks associated with the mechanism; and (c) submissions on the costs of operating the mechanism. The Home Office withheld information falling within the scope of parts (a) and (b) on the basis of section 35(1)(a) (government policy) of FOIA but refused to confirm or deny whether it held any further information on the basis of section 23(5) (security bodies) of FOIA. The Home Office argued that all of the information it held falling within the scope of part (c) was available online and thus was exempt on the basis of section 21 (information reasonably accessible via other means). The Commissioner is satisfied that the Home Office is entitled to rely on all three of these exemptions. However, by only citing section 21 during the course of the Commissioner's investigation the Home Office has breached section 17(1) of FOIA by failing to issue a timely refusal notice.

Request and response

2. On 30 June 2012, the complainant wrote to the Home Office and requested information in the following terms:

'Further to the proposed filtering arrangements for communications data set out in clauses 14 to 16 of the Draft Communications Data Bill published in June 2012, I wish to request the following information:

- (a) All submissions, plans and advice ministers received from officials concerning the design and practical operation of the filtering mechanism;*
- (b) Any advice ministers have received (i) internally and (ii) from external experts regarding the operational risks associated with the operation of the filtering mechanism;*
- (c) Any advice ministers have received (i) internally and (ii) from external experts regarding the costs of the operation of the filtering mechanism.'*

3. The Home Office responded on 28 August 2012 and explained that it considered section 35(1)(a) of FOIA to apply to the information requested but it needed further time to consider the balance of the public interest test.
4. The Home Office contacted the complainant again on 25 September 2012 and explained that it had concluded that the information he had requested was exempt from disclosure on the basis of section 23(1) (information supplied by or relating to the security bodies), section 24(1) (national security) and section 35(1)(a) (formulation and development of government policy). The Home Office explained that in relation to the qualified exemptions, section 24(1) and 35(1)(a), it had concluded that the public interest favoured maintaining each of these exemptions. The Home Office also explained that it was relying on sections 23(5) and 24(2) to refuse to confirm or deny whether it held any 'further information'.
5. The complainant contacted the Home Office on 22 October 2012 and explained that he wished to appeal against its decision in respect of the exemptions contained at sections 24(1) and 35(1)(a) because he believed that there was an overwhelming public interest in disclosure of the requested information. He noted that any truly sensitive operational information could be redacted prior to disclosure.
6. The Home Office responded on 19 November 2012 and explained that it remained of the view that the requested information was exempt from

disclosure on the basis sections 24(1) and 35(1)(a) and the public interest favoured maintaining each exemption.

Scope of the case

7. The complainant contacted the Commissioner 22 November 2012 in order to complain about the way his request for information had been handled. The complainant initially asked the Commissioner to consider all of the exemptions cited by the Home Office in its refusal notice of 25 September 2012.
8. However, during the course of the Commissioner's investigation the Home Office revised its position with regard to this request. The Home Office's revised position is as follows:
9. It holds a Ministerial submission that contains information falling within the scope of parts (a) and (b) of the request. The Home Office considers this information to be exempt from disclosure on the basis of section 35(1)(a). It is no longer seeking to rely on any further exemptions to withhold this information.
10. However, the Home Office's position is that beyond the submission in question, it is seeking to neither confirm nor deny whether any further information is, or is not held, falling within the scope of parts (a) and (b) of the request. In adopting this position it is seeking to rely on section 23(5) of FOIA.
11. In relation to the information that is held within the scope of part (c) of the request, the Home Office has explained that the full extent of the relevant information is reasonably accessible in the public domain at the following website link:

<http://www.homeoffice.gov.uk/publications/counter-terrorism/comms-data-bill/communications-data-ia?view=Binary>
12. The Home Office's position is that this information is therefore exempt from disclosure on the basis of section 21 of FOIA which states that information is exempt from disclosure if it is reasonably accessible to the applicant via other means.
13. Following the Home Office's clarification of its position, the complainant explained to the Commissioner that he wished to dispute all of three of the exemptions that the Home Office was seeking to rely. That is to say, section 35(1)(a), section 23(5) and section 21.

14. This decision notice therefore considers the application of all three of these exemptions. At this point the Commissioner should explain that his consideration of these exemptions is based upon the circumstances as they existed at the time of the request rather than at the point this notice is being issued.

Reasons for decision

15. Section 35(1)(a) of FOIA states that:

'Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

(a) the formulation or development of government policy'

16. Section 35 is a class based exemption, therefore if information falls within the scope of a particular sub-section of 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes.
17. The Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a Minister or decision makers. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy. At the very least 'formulation or development' suggests something dynamic, i.e. something that is actually happening to policy. Once a decision has been taken on a policy line and it is not under review or analysis, then it is no longer in the formulation or development stage. Although section 35(1)(a) can be applied to information relating to the formulation or development stage of a policy that has been decided and is currently being implemented, it cannot apply to information which purely relates to the implementation stage.
18. The Home Office has argued that the withheld information was clearly exempt on the basis of section 35(1)(a) given that it constituted advice by officials to Ministers on an area of government policy presently under discussion and development. That is to say the information focuses on the operation of, and potential risks associated with, communications filtering arrangements contained in government proposals to maintain law enforcement access to communications data.

19. The Commissioner agrees with the Home Office's position and is satisfied that the withheld information clearly relates to the development of government policy in relation to communications data and thus is exempt from disclosure on the basis of section 35(1)(a) of FOIA.

Public interest test

20. However section 35(1)(a) is a qualified exemption and therefore the Commissioner must consider the public interest test at section 2 of the FOIA and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of maintaining the exemption

21. Firstly, the Home Office argued that good government required a 'safe space' in order for officials to fully and properly consider the formulation and development of government policy. This safe space allows for a considered assessment of the respective merits or de-merits of different course of action, something which is key to the foundation and delivery of effective policy. The value in the safe space is that it allows officials and Ministers to partake in this dialogue without the risk of premature external criticism that misrepresents or otherwise inhibits discussion and debate of the policy in question.
22. The Home Office argued that the need for this safe space in this present case was particular strong, firstly because the policy making process in this area remained live, but secondly because of the subject matter of the policy area. The Home Office explained access to communications data by public authorities is a policy area that engenders strong feelings across the political spectrum with the proposals for a filtering mechanism having been a matter of particular sensitivity. Consequently, more so than many other current government policy areas, with regard to this policy there is pressure from various interested groups to shape the debate and influence the development of nascent policy.
23. The Home Office emphasised that without the protection of the safe space the policy development process would be markedly more difficult. In this case, if the withheld information were disclosed in response to the request the government would be forced to issue a point by point justification of its formative discussions before a finalised policy had been established. This would inhibit the ability of the government to exercise its full latitude in considering what policy options it may seek to take forward.
24. The Home Office explained that it was not implying that government policy was a private matter that should be developed in a vacuum

without external input or scrutiny; rather it acknowledged that transparency is key to raising awareness and building engagement. In light of this, Home Officials had consulted widely around communications data policy and would continue to do so. However, the need for transparency did not, the Home Office argued, equate to the actual substance of discussions of particular policy and implementation being disclosed in every instance.

25. Secondly, the Home Office argued that disclosure of this information risked creating a 'chilling effect'. As discussed above, access to communications data in a high profile issue with the operation of the filtering mechanisms potentially one of the more controversial aspects of it. The Home Office explained that it is important that officials, when discussing this sensitive matter, can feel unconstrained in putting forward their views to Ministers as to how such technology may or may not operate, and what the risks may or may not be. This was particularly important given the complexity of the subject matter; it was vital that advice provided to Ministers is as comprehensive and cogent as possible.
26. The Home Office argued that if there was anticipation that the disputed information would be disclosed during policy formulation, officials would be likely to become more circumspect in their frankness with which they discuss issues associated with the filtering mechanism. Whilst the substance of their advice would likely be of similar nature, they might speak in more general terms and avoid presenting technical information about operational matters with the same degree of detail. There is a significant difference between presenting a view and being forthright in how it is conveyed. Disclosure may not prohibit communication but it would impair the quality and directness of such.
27. The Home Office emphasised that it was not seeking to make a general case regards to the validity or otherwise of the chilling effect argument to policy papers per se. Rather, it was arguing that the policy issue in question has an inherent sensitivity and the withheld information contains a frank assessment of those issues. The Home Office's arguments in relation to the chilling effect were therefore in the context of harm that would occur to further policy discussions on this specific ongoing matter if this particular information was disclosed.

Public interest arguments in favour of disclosure

28. The complainant argued that without details of how the filtering arrangements will operate in practice proper debate and scrutiny cannot take place if Parliament and the public are expected to form an opinion about such a critical component of the Communications Data Bill, and the viability of the government's Communications Capabilities

Development Programme in the absence of key factual information. The complainant noted that at the point he submitted his request, no information was available whatsoever about the operation of clauses 14 to 16, or an explanation of whether data mining and deep packet inspection and related techniques would be used.

29. Furthermore, the complainant argued that it was in the public interest to know whether the balance of objective and impartial information that Ministers are receiving supports or undermines government policy in this area. Furthermore, the advice given by technical experts – especially external sources – should feed into and inform public debate on this important topic.
30. The Commissioner recognises the significance of the Bill in terms of many different public interest issues – enabling the security services and other public authorities to have the right information to fight terrorism and crime – balanced against important issues related to privacy, surveillance and human rights. There is a significant public debate about how this balance should be struck, and if a system is to be put in place what the safeguards should be.

Balance of the public interest arguments

31. In considering the balance of the public interest arguments outlined above, the Commissioner has taken into account the comments of a key Information Tribunal decision involving the application of the section 35(1)(a). In that case the Tribunal confirmed that there were two key principles that had to be taken into account when considering the balance of the public interest test: firstly the timing of the request and secondly the content of the requested information itself.¹
32. The Commissioner has initially considered the weight that should be attributed to the public interest arguments in favour of maintaining the exemption:
33. With regard to the safe space arguments, these are only relevant if at the time of the request, the policy formulation and development was ongoing. This is because such arguments are focused on the need for a private space in which to develop **live** policy. In light of the Home Office's submissions the Commissioner is satisfied that at the time of request it is clear that the formulation of policy in relation to the

¹ *DFES v Information Commissioner and Evening Standard* (EA/2006/0006)

Communications Data Bill, and more specifically the filtering arrangements, was ongoing.

34. In line with the comments of the Tribunal decision referenced above, the Commissioner believes that significant and notable weight should be given to the safe space arguments in cases such as this where the policy making process is live and the requested information relates directly to that policy making. In such scenarios the public interest is very unlikely to favour disclosure without specific and compelling arguments, often linked to what the content of the information will reveal. Furthermore in the Commissioner's opinion it is clearly in the public interest for Home Office Ministers and officials to be able to candidly discuss issues associated with the draft Communications Data Bill away from public scrutiny given the significant public interest in this aspect of government policy.
35. With regard to attributing weight to the chilling effect arguments, the Commissioner recognises that civil servants are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. Nonetheless, chilling effect arguments cannot be dismissed out of hand and are likely to carry some weight in most section 35 cases. If the policy in question is still live, the Commissioner accepts that arguments about a chilling effect on those ongoing policy discussions are likely to carry significant weight. Arguments about the effect on closely related live policies may also carry weight. However, once the policy in question is finalised, the arguments become more and more speculative as time passes. It will be difficult to make convincing arguments about a generalised chilling effect on all future discussions.
36. In the circumstances of this case the Commissioner is satisfied that the chilling effect arguments need to be given notable weight in light of the fact that they relate to ongoing policy discussions and because of the candid and uninhibited advice contained in the withheld information. Furthermore, the Commissioner finds the Home Office's arguments around a potential chilling effect more plausible given it is only arguing that the disclosure would undermine future discussions on this particular area of government policy.
37. With regard to attributing weight to the public interest arguments in the favour of disclosure the Commissioner recognises that the Communications Data Bill, and in particular the provisions which are the focus of this request, have generated a significant amount of public interest, and indeed public concern. In light of this the Commissioner agrees with the complainant that there is a considerable public interest in disclosure of information which would help inform the public debate on this aspect of the draft Bill. Consequently, the Commissioner believes

that the public interest arguments in favour of disclosing the withheld information should be accorded notable weight. However, having considered the content the Commissioner finds that there is not a compelling case for disclosing the information, despite the generally strong public interest in informing the public about these aspects of the policy.

38. In conclusion the Commissioner finds that the public interest favours maintaining the exemption. He has reached this finding for two primary reasons: firstly, the strong weight that should be attributed to the safe space arguments in the particular circumstances of this case, notably the sensitive nature of the policy under discussion, and secondly the weight that should be correctly attributed to the Home Office's tightly drawn and focused chilling effect arguments. In reaching this conclusion the Commissioner is not dismissing the significance of the arguments in favour of disclosure. However, given the timing of the request, (i.e. the policy making process was very much live) and the frank nature of the discussions set out in the information, the Commissioner believes that this tips the balance in favour of maintaining the exemption.

Section 21 – information available by other means

39. As explained above, during the course of the Commissioner's investigation the Home Office argued that the information which it held falling within the scope of part (c) of the request was available online and thus was exempt from disclosure on the basis of section 21 of FOIA.
40. This section states that information is exempt from disclosure if it is reasonably accessible to the requestor via other means. Having examined the website link identified by the Home Office, the Commissioner is satisfied that the information falling within the scope of part (c) of the request is reasonably available via the link and thus is reasonably available to the complainant via other means. The Commissioner therefore accepts that the Home Office can rely, albeit belatedly, on section 21 to refuse to disclose the information falling within the scope of part (c) of the request.
41. However, by failing to cite this exemption in its refusal notice the Home Office breached section 17(1) of FOIA. This section of FOIA requires public authorities to issue requesters with a refusal notice within 20 working days of the request which states which exemptions it is seeking to rely on to refuse the request. By failing to inform the complainant within this timeframe of its reliance on section 21, the Home Office breached section 17(1), in effect because it issued part of its refusal notice too late.

Section 23 - Security bodies

42. As noted explained above, the Home Office is seeking to rely on section 23(5) to refuse to confirm or deny whether it holds any further information falling within the scope of parts (a) and (b) of the request beyond that which it acknowledges holding and has been withheld on the basis of section 35(1)(a) of FOIA.

43. 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).'

44. 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).'

45. 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 believes 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.²

46. 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.

² See for example [Dowling v Information Commissioner and The Police Service for Northern Ireland](#), EA/2011/0118, paras 17 to 22.

47. 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.
48. From the above it can be seen that section 23(5) has a very wide application. If the information requested is in what could be described as within 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.
49. In support of its application of section 23(5) the Home Office explained that it has an obvious remit on security matters, specifically counter terrorism. Furthermore, the avowed purpose of the Bill which is the focus of the request is to build the capability of the law enforcement and security agencies and corollary to this the Home Secretary has a statutory relationship with Security Service.
50. The Commissioner is satisfied that on the balance of probabilities confirming whether or not the Home Office holds further information, beyond that which has been withheld on the basis of section 35(1)(a), would be likely to reveal something about the security bodies. He has reached this conclusion for three reasons: Firstly, the close relationship that exists between the Home Office and the security bodies, notably the Security Service. Secondly his view that section 23(5) has a very broad application. And, thirdly, and most importantly, the specific circumstances of this case, in particular the fact that the request only seeks information about one particular aspect of the draft Bill, an aspect which it could be reasonably assumed that the security bodies may have an interest in.
51. In other words the Commissioner is satisfied that if the Home Office confirmed that it did hold further information - but sought to withhold this on the basis of section 23(1) - then it would be confirming that the security bodies had been involved in advising Ministers on the operation and associated risks with the filtering mechanism. Conversely, if the Home Office confirmed that no further information was held beyond that which had been withheld on the basis of section 35(1)(a) then it would, in effect, be revealing that the security bodies had not been involved in advising Ministers on the operation and associated risks connected with the filtering mechanism. Either response would clearly reveal something about the security bodies listed in section 23(3). The Commissioner is therefore satisfied that the Home Office is entitled to rely on section 23(5) to refuse to confirm whether or not it holds any further information falling within the scope of parts (a) and (b) of the request.

Right of appeal

52. 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

53. 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.
54. 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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