

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 July 2014

Public Authority: Commissioner of the Metropolitan Police
Service

Address: New Scotland Yard
Broadway
London
SW1H 0BG

Decision (including any steps ordered)

1. The complainant has requested information relating to the legality of aiding non-proscribed Syrian military forces. Having initially advised him that it considered the request to be a series of questions the Metropolitan Police Service (the "MPS") subsequently amended its position to rely on sections 24(1) (national security) and 31(1) (law enforcement) of the FOIA to forego disclosure. The Commissioner's decision is that the MPS was correct to rely on section 24(1). He requires no steps.

Request and response

2. On 19 October 2013, the complainant wrote to the MPS and requested information in the following terms:
 - "1) *Is it Currently legal (i.e Not illegal) to raise financial funds within the UK and then conduit those funds directly (or in-directly) to non-proscribed Syrian Opposition / Rebel Forces?*
 - 2) *Is it currently legal (i.e not illegal) to pro-activley [sic] recruit within the UK for volunteers willing to join Non-proscribed Syrian opposition / Rebel Forces?*
 - 3) *Is it currently legal (i.e: not illegal) to train the above volunteers within the UK? By "Train" I mean training using leagl [sic] and lawful apparatus (ie: No equipment requiring any form of license, no firearms requiring fac section 1 or*

section 5, no munitions requiring license, any such training not causing criminal affray or breach [sic] of the peace, nor trespass offences (ie: in a classroom environment [sic])?

**Bearing in mind that the current UK policy is to aid non proscribed Syrian Military opposition [sic] forces with armoured vehicles, body armour, NBC kits, comms equipment (ECT)."*

3. The MPS received the request on 30 October 2013 and wrote to him on 19 November 2013. It advised him:

"I am refusing your request under section 8 of the Freedom of Information Act as it is not a valid request. You are seeking answers to questions not recorded information.

The questions that you have posed are not questions I could answer within the Freedom of Information Act process. The Freedom of Information Act is to provide access to specific recorded information and documents. I believe that you are requesting legal advice or opinion which does not fall within the framework of the Act".

4. When asking for an internal review the complainant revised the wording of his request. He asked for any information which would demonstrate whether the issues within his request were unlawful or illegal.
5. In its internal review the MPS advised:

"The review is satisfied that you are seeking an opinion to three questions that you have posed surrounding '... raising financial funds, pro-actively [sic] recruit and train the above volunteers ... within the UK...' And therefore supports the initial decision that this is not a request for recorded information held by a public authority, but rather seeking an opinion on the questions posed".

6. On 9 June 2014, during the course of the Commissioner's investigation, the MPS revised its position. It advised both the Commissioner and the complainant that it now wished to rely on the exemptions at sections 24(1) and 31(1)(a) to withhold any information held.

7. In revising its position to the complainant, the MPS advised him:

"... it would be helpful to clarify that the MPS references an extensive amount of UK and international legislation during the course of our duties. Whilst the MPS seeks to prevent and detect crime and apprehend suspects / offenders we do not pertain to be the legal experts / advisors, which is why we cannot be called upon to give legal advice or comment as to whether an activity is illegal. It is for this reason that we normally seek the guidance of our

colleagues within the Crown Prosecution Service in terms of applicable laws that can be evoked through unlawful acts. Indeed, each investigation is treated on strict case-by-case bases; therefore, it would be misleading to suggest that a list of activities, as outlined within your original request, may fall under the criteria for investigation under a limited list of applicable legislations. This is due to the fact that other legislation may be applicable given the unique circumstances of each investigation”.

8. It also explained its change in position regarding the citing of exemptions as follows:

“... since our initial response to you on the 30th October 2013, the MPS and our ACPO colleagues have made a number of public statements regarding our increasing concerns around the numbers of young people who have, or, are intending to travel to Syria to join the conflict. Indeed, we have also issued separate guidance to members of the public on this issue which I have enclosed for your reference...

It would, therefore, be disingenuous of the MPS to state that we do not hold any information that details as to whether certain activities relating to the support or otherwise of the Syrian conflict are unlawful”.

Scope of the case

9. The complainant first wrote to the Commissioner on 1 April 2014 to complain about the way his request for information had been handled. At that time he raised several points to support his position that information is held

10. Following the MPS’s change of position the complainant submitted further grounds of complaint to the Commissioner. He included:

“My request is not about any terrorist group...

- (i) The Free Syrian Army is legal*
- (ii) It is not a listed terrorist group*
- (iii) It has never been a terrorist group*
- (iv) It was / is funded by the U.K Government [sic]*
- (v) It was / is equipped by the U.K Government [sic]*
- (vi) It is armed by the U.K’s allies (Qatar and Kingdom of Saudi Arabia)*
- (vii) No such group would be legal, financed, equipped and armed if it poses a threat to national security!!”*

11. The Commissioner has considered whether the MPS is entitled to rely on the exemptions cited.

Reasons for decision

Section 24 – national security

12. Section 24(1) of the FOIA states that:

"Information which does not fall within section 23(1) [information supplied by, or relating to, bodies dealing with security matters] is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding the national security."

13. In broad terms section 24(1) allows a public authority not to disclose information if it considers that the release of the information would make the United Kingdom or its citizens vulnerable to a national security threat.

14. The term "national security" is not specifically defined by UK or European law. However in *Norman Baker v the Information Commissioner and the Cabinet Office* (EA/2006/0045 4 April 2007) the Information Tribunal was guided by a House of Lords case, *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, concerning whether the risk posed by a foreign national provided grounds for his deportation. The Information Tribunal summarised the Lords' observations as:

- "national security" means the security of the United Kingdom and its people;
- the interests of national security are not limited to actions by the individual which are targeted at the UK, its system of government or its people;
- the protection of democracy and the legal and constitutional systems of the state are part of national security as well as military defence;
- action against a foreign state may be capable indirectly of affecting the security of the UK; and,
- reciprocal cooperation between the UK and other states in combating international terrorism is capable of promoting the United Kingdom's national security.

15. The exemption provided by section 24 applies in circumstances where withholding the requested information is "*required for the purpose of safeguarding national security*". Required is taken to mean that the use of the exemption is reasonably necessary.

16. "Required" is defined by the Oxford English Dictionary as 'to need something for a purpose'. This could suggest that the exemption can only be applied if it is absolutely necessary to do so to protect national security. However, the Commissioner's interpretation is informed by the approach taken in the European Court of Human Rights, where the interference of human rights can be justified where it is 'necessary' in a democratic society for safeguarding national security. 'Necessary' in this context is taken to mean something less than absolutely essential but more than simply being useful or desirable. The Commissioner therefore interprets 'required' as meaning 'reasonably necessary'.
17. It is not necessary to show that disclosing the withheld information would lead to a direct threat to the United Kingdom. The Commissioner's approach is set out by the House of Lords in Secretary of State for the Home Department v Rehman (as referred to above). Lord Slynn found that:

"To require the matters in question to be capable or resulting 'directly' in a threat to national security limits too tightly the discretion of the executive in deciding how the interests of the state, including not merely military defence but democracy, the legal and constitutional systems of the state need to be protected. I accept that there must be a real possibility of an adverse effect on the United Kingdom for what is done by the individual under inquiry but I do not accept that it has to be direct or immediate."

18. The Commissioner considers that safeguarding national security also includes protecting potential targets even if there is no evidence that an attack is imminent.
19. In its submission to the Commissioner the MPS also referred to the same case law, citing the following points:

"...If an act is capable of creating indirectly a real possibility of harm to national security it is in principle wrong to say that the state must wait until action is taken which has a direct effect against the United Kingdom..." [Para' 17]

And:

"...Even democracies are entitled to protect themselves, and the executive is the best judge of the need for international co-operation to combat terrorism and counter-terrorist strategies..." [Para' 28].

20. The MPS further added:

"It is important to highlight at this stage that it is the MPS view that terrorist activities are not limited to the actions that are conducted within the UK or against the UK. Lord Slynn also took this view when presiding over the case of Secretary of State for the Home Department v Rehman 2011 in which he stated:

'...It seems to me that, in contemporary world conditions, action against a foreign state may be capable indirectly of affecting the security of the United Kingdom. The means open to terrorists both in attacking another state and attacking international or global activity by the community of nations, whatever the objectives of the terrorist, may well be capable of reflecting on the safety and well-being of the United Kingdom or its citizens...'
[Para' 16]".

21. The MPS summed up its position in engaging this exemption by saying:

"... it is the MPS view that the disclosure of this information would be of significant interest and use to those who are considering, or, who are actively partaking in activities linked to the Syrian conflict. If disclosed it would not be implausible to suggest that this would be used as a referenced guide as to what activities could be pursued to aid terrorist related criminality in this area without attracting a criminal conviction within the UK".

22. The Commissioner notes the complainant's arguments where he states that his request specifies an organisation which is in itself 'legal' and therefore not associated with terrorism. However, in response to this point, the Commissioner also notes that the MPS does not argue at any time that the organisation concerned is 'illegal' or that it is associated with terrorism. It merely advises that, were it to provide any related information that it does hold, this would risk having an adverse effect on national security were it relied on by parties who could choose to use it to that effect.

23. The Commissioner has viewed the, very limited, information which is held by the MPS and he is satisfied that this exemption is appropriately engaged on the basis that exemption is reasonably necessary for the purposes of national security. Unfortunately he is not in a position to be more descriptive regarding its content as this would in itself be harmful.

Balance of the public interest test

24. Section 24(1) is a qualified exemption. In order for the MPS to rely on this exemption the public interest favouring maintenance of the

exemption must outweigh the public interest in disclosure of the requested information.

Public interest arguments in favour of disclosure

25. The MPS advised the Commissioner that:

"The MPS notes the fact that arguably it is in the public interest to highlight to those who may be swayed to take part in terrorist related activities linked to the Syrian conflict that such activities do attract a number of criminal offences, including those listed within the Terrorism Act 2000".

Public interest arguments in favour of maintaining the exemption

26. The MPS advised the Commissioner that:

" ... it is our view that it is not in the public interest to highlight the extent to which our legislation criminalises such activities or indeed to highlight any limitations (if any) as to what actions the police service (and others) may take in this regard".

And

"... it is the MPS view that the disclosure of this information would be of significant interest and use to those who are considering, or, who are actively partaking in activities linked to the Syrian conflict. If disclosed it would not be implausible to suggest that this would be used as a referenced guide as to what activities could be pursued to aid terrorist related criminality in this area without attracting a criminal conviction within the UK".

Balance of the public interest

27. In cases where the Commissioner considers that section 24(1) is engaged, there will always be a compelling argument in maintaining the exemption as the preservation of national security is clearly in the public interest. For the public interest to favour disclosure there must be specific and clearly decisive factors in favour of that disclosure. Without such evidence the Commissioner is compelled to recognise the public interest inherent in the exemption and afford this appropriate weight.
28. The Commissioner has taken into account the public interest in the accountability and transparency of the practices of the MPS and also recognises the public interest in learning more about the legal system and whether or not certain actions are prohibited by the law. This would educate the general public and help to ensure that it knows how to keep

its actions within the limits of the law. The Commissioner is always sympathetic to such arguments which genuinely promote the accountability and transparency of public authorities in respect of their work and the decisions they make. In this case however these arguments cannot be reconciled with the necessary weight which must be given to maintaining the national security of the United Kingdom.

29. The Commissioner would also like to point out that the complainant is very prescriptive in the information he has requested. It is the Commissioner's view that it would be difficult, if not impossible, for the MPS to provide a full, accurate and 'legally-binding' response to his request, which is what the complainant appears to be seeking. This is because, as it has tried to explain, the MPS itself does not give a legal opinion on such matters. As a police force it is responsible for gathering evidence in relation to alleged crimes but this will then be passed on to the CPS which will determine whether or not a particular case is likely to succeed at court and then, ultimately, it is the court itself which determines whether or not an activity is in breach of any law.
30. Nevertheless, it is the Commissioner's view that the information held by the MPS could clearly be open to misuse and be potentially damaging to our national security. This is because the withheld information may indicate that any number of the activities caught by the information request have the potential to be considered to be 'legal' or 'illegal' and disclosure of the information could clearly indicate to those who wish to partake in such activities whether or not their actions are likely to be considered legal or illegal under any UK legislation. When the public interest in the transparency of the processes of the MPS is weighed against that in the preservation of national security, the view of the Commissioner is that it is clearly the case that the balance of the public interest significantly favours maintaining the section 24(1) exemption.
31. Given that the Commissioner is satisfied that the MPS can rely on section 24(1) as a basis for withholding the information sought he has not gone on to consider the application of section 31.

Right of appeal

32. 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: GRC@hmcts.gsi.gov.uk

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

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.

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
Principal Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF