

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 March 2020

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

Decision (including any steps ordered)

1. The complainant submitted a request to the Foreign and Commonwealth Office (FCO) seeking a list of all persons who the FCO or Her Majesty's Government has been involved with regarding rendition to Libya when Colonel Gaddafi was in power. The FCO refused to confirm or deny whether it held information falling within the scope of his request on the basis of 23(5) (security bodies), 24(2) (national security) and 27(4) (international relations) of FOIA. The Commissioner has concluded that sections 23(5) and 24(2) are engaged and that in relation to section 24(2) the public interest favoured maintaining that exemption. The FCO is therefore entitled to refuse to confirm or deny whether it holds any information falling within the scope of the request.
2. The Commissioner does not require any steps to be taken.

Request and response

3. The complainant submitted the following request to the FCO on 22 May 2019:

'Provide a list of all persons who you/HM Govt. has been involved with as regards rendition to Libya when Colonel Gaddafi was in power. On the list state if the U.S. CIA was involved.'

4. The FCO contacted the complainant on 21 June 2019 and explained that it considered a qualified exemption within FOIA to apply to his request and it needed additional time to consider the balance of the public interest.
5. The FCO provided him with a substantive response to his request on 18 July 2019. The FCO refused to confirm or deny whether it held any information falling within the scope of the request on the basis of the following exemptions within FOIA: 23(5) (security bodies), 24(2) (national security), 27(4) (international relations), 40(5) (personal data) and 42(2) (legal professional privilege). The FCO explained that in relation to the qualified exemptions, section 17(4) of FOIA applied and therefore it could not explain why it had concluded that the public interest favoured maintaining the exemptions without revealing information that is itself exempt from disclosure.
6. The complainant contacted the FCO on 18 July 2019 and asked it to conduct an internal review.
7. The FCO informed him of the outcome of the internal review on 19 August 2019. The review upheld the application of the exemptions cited in the refusal notice.

Scope of the case

8. The complainant contacted the Commissioner on 13 August 2019 in order to dispute the FCO's reliance on the various exemptions it had cited to refuse to confirm or deny whether it held the requested information.¹

¹ During the course of the Commissioner's investigation the FCO explained to her that it was no longer seeking to rely on sections 40(5) and 42(2) of FOIA.

9. 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.
10. As explained above, the FCO is seeking to rely on sections 23(5), 24(2) and 27(4) to neither confirm nor deny (NCND) whether it holds information falling within the scope of the request. 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 – security bodies

11. 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).'

12. 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).'

13. The full list of bodies specified in section 23(3) can be viewed online.²
14. 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

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

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

15. 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.
16. 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.
17. 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.
18. 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 reveal something about the security bodies. Given the FCO's reliance on section 17(4) of FOIA, the Commissioner has not set out why she has reached this conclusion in this notice but rather has explained why in a confidential annex, a copy of which will be provided to the FCO only.

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

Section 24 – national security

19. In light of her 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).
20. However, as the Commissioner has made clear in her guidance on the use of these exemptions, she recognises that some public authorities are concerned that inferences would be drawn if they were to rely on only section 23(5) or section 24(2) of FOIA. 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.
21. 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.
22. Therefore, section 24(2) is engaged if the 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.
23. 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 security, but the need to maintain a consistent approach to the application of section 24(2).
24. 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). Again, given

the effect of section 17(4) of FOIA the Commissioner has not reproduced the content of the submissions in this notice (or explained why she agrees with them) as the submissions comprise information which is itself exempt from disclosure. However, she has commented on this in the confidential annex.

Public interest test

25. 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 deny outweighs the public interest in confirming whether the FCO holds the requested information.
26. The Commissioner acknowledges that allegations that the UK has been involved in rendition are serious ones and as a result there is a public interest in the disclosure of information which could allow the public to be better informed about such matters. However, in her opinion there is a significant, and ultimately compelling, public interest in protecting information required for the purposes of safeguarding national security. She has therefore concluded that the public interest in maintaining section 24(2) outweighs the public interest in the FCO confirming whether or not it holds information falling within the scope of this request.
27. In light of the Commissioner's findings in relation to section 23(5) and 24(2) she has not considered the FCO's reliance on section 27(4) of FOIA.

Right of appeal

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

29. 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.
30. 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

Jonathan Slee
Senior Case Officer
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