

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 April 2023

Public Authority: Foreign, Commonwealth & Development Office
Address: King Charles Street
London
SW1A 2AH

Decision (including any steps ordered)

1. The complainant submitted a request to the Foreign, Commonwealth & Development Office (FCDO) seeking information about the use of Hikvision cameras. The FCDO refused to confirm or deny whether it held information falling within the scope of the request on the basis of section 24(2) (national security) of FOIA.
2. The Commissioner's decision is that the FCDO is entitled to rely on section 24(2) of FOIA to refuse to confirm or deny whether it holds the requested information and that in all the circumstances of the case the public interest favours maintaining this exemption.
3. No steps are required.

Request and response

4. The complainant submitted the following request to the FCDO on 29 June 2022:

'1. How many Hikvision cameras are in use in Department Foreign Commonwealth and Development Office buildings?

2. Copies of all correspondence and documentation regarding the plans to remove Hikvision products from the Department.

3. Copies of all correspondence and documentation that discuss or respond to the security recommendation by Professor Fraser Sampson, the Commissioner for the Retention and Use of Biometric Material and Surveillance Camera Commissioner outlined here.¹
5. Having received no response, the complainant contacted the FCDO on 22 November 2022 to chase this up. Again, having received no response to that email he contacted the Commissioner on 1 December 2022.
6. The Commissioner contacted the FCDO on the same day, and provided it with a copy of the request and asked it to ensure that a response was sent to the complainant. The FCDO responded to the Commissioner on 5 December 2022 and explained that it had not received the complainant's request of 29 June. Following a further exchange of correspondence between the Commissioner and FCDO it was established that the email address to which the request had been submitted was no longer in use (the FCDO was unsure whether at the time of the original request the address was still in use at that point).
7. As a result the FCDO agreed to process the complainant's request using 5 December 2022 as the date at which it was considered to have been received.
8. The FCDO contacted the complainant on 5 January 2023 and explained that it was considering the request under section 24(2) of FOIA and that it needed additional time to consider the balance of the public interest test.
9. The FCDO provided the complainant with a substantive response to his request on 19 January 2023. It explained that it had concluded that section 24(2) of FOIA applied and that the balance of the public interest favoured maintaining the exemption. However, it noted that section 17(4) of FOIA was considered to apply and therefore it could not provide a full explanation why it had reached this conclusion.²
10. The complainant contacted the FCDO on the same day and asked it to conduct an internal review of this decision.

¹ The link provided by the complainant in the request is this:

<https://www.gov.uk/government/publications/letters-from-the-biometrics-and-surveillance-camera-commissioner-april-2022/press-release-accessible>

² Section 17(4) of FOIA states that a public authority does not have to explain why an exemption applies in its refusal notice if to do so would involve the disclosure of exempt information.

11. The FCDO informed him of the outcome of the review on 16 March 2023. The review upheld the decision set out in the refusal notice.

Scope of the case

12. As noted above, the complainant initially contacted the Commissioner on 1 December 2022 to complain about the FCDO's failure to respond to his initial request. He also contacted the Commissioner on 22 February 2023 as he was dissatisfied with the length of time it was taking the FCDO to complete its internal review. Following the completion of the internal review the complainant confirmed that he wished to complain about the FCDO's refusal of his request. The complainant's grounds of complaint to support his position are set out below.
13. 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.
14. As explained above, the FCDO is seeking to rely on section 24(2) to refuse to confirm or deny whether it holds information falling within the scope of the request. Therefore, this notice only considers whether the FCDO is entitled, on the basis of this exemption, 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 24 – national security

15. Section 24(2) provides an exemption from the duty to confirm or deny where this is required for the purpose of safeguarding national security.
16. FOIA does not define the term national security. 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 follows:

- 'national security' means the security of the United Kingdom and its people;
 - the interests of national security are not limited to actions by an 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 co-operation between the UK and other states in combating international terrorism is capable of promoting the United Kingdom's national security.
17. 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.
18. 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. 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.

The FCDO's position

19. In support of its reliance on section 24(2), the FCDO explained that as has been the case under successive administrations, it is not government policy to comment on the security arrangements of government buildings. With regard to the complainant's grounds of complaint below in relation to how other government departments had responded to the same request, the FCDO noted that its buildings face a greater level of threat by comparison to some other parts of government and are used to manage high classification material. It therefore needed to maintain confidentiality over its security arrangements.

The complainant's position

20. In his submissions to the Commissioner the complainant explained that he had submitted the same request to a number of government departments, three of which had answered the request and did not rely on a neither confirm not deny (NCND) exemption. (The departments in question being The Department for Health and Social Care, The Department for Work and Pensions and Office of the Secretary of State

for Wales.)³ The complainant argued that as these departments have not cited national security concerns to refuse to answer the question this undermined the FCDO's reliance on section 24(2). He also noted the responses of other departments meant that it cannot be a blanket government policy not to comment on the security arrangements of government buildings.

The Commissioner's position

21. In this case the Commissioner appreciates that three government departments have complied with the same request which has been submitted to the FCDO. However, as noted above eight government departments, including the FCDO, also refused the request on the basis of section 24(2) of FOIA. In any event, when considering how a public authority has responded to a request, the Commissioner has to consider the individual circumstances of each request to determine if exemptions have been applied correctly. Therefore, whilst it can be relevant to consider how other public authorities have handled the same request, their responses do not necessarily provide a precedent which must be followed. In other words, the responses by the three authorities cited by the complainant do not necessarily undermine the FCDO's refusal of the request which is the focus of this complaint.
22. Furthermore, in considering the FCDO's application of section 24(2), the Commissioner has taken into account his guidance on the NCND provisions within FOIA. This guidance explains that public authorities need to have a consistent approach to NCND exemptions in order for such provisions to be effective.⁴ This does not mean applying the exemptions in a blanket fashion, but does mean identifying the type of information an authority might be asked about which might trigger the exclusion from the duty to confirm or deny, and taking a consistent approach to responding to requests for that type of information. Therefore, what may appear to a requester to be a 'blanket refusal' of a request could mean that a public authority is applying NCND exemptions in line with the approach advocated by the Commissioner's guidance.
23. Turning to the FCDO's basis for relying on section 24(2) of FOIA, the Commissioner notes that it is established government policy not to comment on the nature of security arrangements at government buildings. The Commissioner accepts the rationale behind such a policy,

³ The Commissioner understand that eight government departments, including the FCDO, adopted a NCND response to the requests.

⁴ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/when-to-refuse-to-confirm-or-deny-holding-information/#consistent>

namely because disclosure of information about details of such arrangements could assist those with malicious intent to attack such facilities. In the context of this request, if the FCDO confirmed whether or not it held information about the use of Hikvision cameras this would obviously provide an insight into whether such technology was used at FCDO buildings. The Commissioner accepts that such information would be likely to increase the risk of potential harm to such buildings as it would reveal whether or not a particular type of camera formed part of the FCDO's security infrastructure, and in turn to the UK's national security. The Commissioner acknowledges the FCDO's point that buildings across the FCDO's estate (ie including those based outside the UK) are likely to face a greater threat than some other government buildings.

24. Moreover, if the FCDO were to comply with section 1(1)(a) of FOIA in respect of this request and it subsequently received a request seeking information about whether a different type of camera or security system was in place, and it provided an NCND response to that request, inferences could be made from that response in comparison to the FCDO's compliance with the Hikvision request. That is to say a NCND response to such a future request could well be interpreted, possibly correctly, as a confirmation that information of the nature requested was held. This demonstrates the importance of the FCDO making consistent responses to similar requests it receives about security arrangements for its buildings in order to protect the effectiveness of the NCND provisions.
25. For these reasons the Commissioner is therefore satisfied that the FCDO is entitled to rely on section 24(2) of FOIA to refuse to confirm or deny whether it holds the requested information.

Public interest

26. Section 24 is subject to the public interest test, as set out in section 2 of FOIA. This means that although section 24 is engaged, confirmation or denial must still be provided unless, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in confirming or denying.
27. The complainant argued that it was clearly in the public interest to confirm whether or not a government department contains Hikvision cameras.
28. The FCDO argued that it firmly against the public interest for a response to an FOI request to result in harm the UK's national security.
29. The Commissioner recognises that there is a clear public interest in the FCDO complying with this request given the criticisms, including those made by Professor Sampson as referred to in the request, surrounding

the use of Hikvision cameras by government departments. If the FCDO did comply with section 1(1)(a) of FOIA in relation to the request this request would increase transparency in respect of this issue and what steps, (if relevant) the FCDO may be intending to take in respect of such technology. Therefore, the public interest in complying with section 1(1)(a) should not be underestimated.

30. However, in the Commissioner's view there is a very clear and weighty public interest in safeguarding national security. In the particular circumstances of this case the Commissioner accepts that it would be firmly against the public interest to compromise the security of FCDO buildings. Consequently, whilst the Commissioner appreciates the public interest in the possible use of Hikvision technology by government departments, in his view this is outweighed by the FCDO neither confirming or denying whether it holds any information falling within the scope of this request.
31. As noted above, the Commissioner has to consider each individual request on its own merits. Nevertheless, he would note that this decision is inline with his findings in relation to a similar request submitted to the House of Commons.⁵

Other matters

32. FOIA does not impose a statutory time within which internal reviews must be completed, albeit that the section 45 Code of Practice explains that such reviews should be completed within a reasonable timeframe.⁶ The Commissioner expects that most internal reviews should be completed within 20 working days, and even for more complicated requests, reviews should be completed within a total of 40 working days.⁷
33. In this case the complainant requested an internal review of the FCDO's initial response on 19 January 2023 and the FCDO informed him of the outcome of the review on 16 March 2022, ie a period of exactly 40 working days. The Commissioner is satisfied that given the nature of this request the FCDO was entitled to take up to 40 working days to consider the request.

⁵ <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022713/ic-171986-s7y1.pdf>

⁶ <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

⁷ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/request-handling-freedom-of-information/#internal>

Right of appeal

34. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

35. 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.

36. 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
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