

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 May 2024

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

Decision (including any steps ordered)

1. The complainant made a five-part request for information about microwave radiation devices, designed with through the wall sensors, and their utilisation. Ultimately, the Home Office refused to confirm or deny whether it held information in scope of the request, citing the 'neither confirm nor deny' provisions within section 24(2) (national security) and section 31(3) (law enforcement) of FOIA.
2. The Commissioner's decision is that the Home Office was entitled to rely on section 24(2) of FOIA for the reasons set out in this notice. As he has found section 24(2) to be engaged, the Commissioner has not deemed it necessary to consider the Home Office's reliance on section 31(3) of FOIA.
3. The Commissioner does not require the Home Office to take any steps as a result of this notice.

Request and response

4. On 5 September 2023, the complainant wrote to the Home Office and requested information in the following terms:

'In September 2003, Home Office employee, [name redacted] (of Covert Investigation Policy Team, Intelligence and Security Liaison Unit), confirmed in [sic] Home Office letter to Christians Against Mental Slavery, that the UK possessed microwave equipment which can be used as intrusive surveillance. In the Home Office letter, [name redacted] stated thus: "Much of the

technology used to undertake intrusive surveillance is classified to protect the capability of law enforcement to continue deploying that technology to prevent and detect crimes." In the view of several complaints of microwave radiation attacks in the UK; UK Police refusal to deny the use of microwave radiation in law enforcement; and in the light of Home Office decision to allow the UK Police and their civilian counter terrorism surveillance contract operatives to be using intrusive microwave radiation device (I.e. ACU CPR 4 and Akela Stand Off), in law enforcement. Confirm the following in your freedom of Information response:

1. Confirm when the Home Office allowed the Police and civilian counter terrorism surveillance contract operatives to be using microwave radiation designed with through the wall sensor devices in law enforcement?
 2. Confirm if the Home Office has any supervisory and oversight controls to ensure this equipment are [sic] only deployed during emergency?
 3. Confirm if the Home Office has issued any policy guidance to the UK Police Force regarding the use of microwave radiation device with through the wall sensor?
 4. Avail me with a copy of the policy?
 5. Confirm if all the Police Force [sic] in UK are equipped with microwave radiation device with through the wall sensor?'
5. The Home Office responded on 25 September 2023. It would neither confirm nor deny ('NCND') whether it held the requested information citing the following FOIA exemptions:
- Section 23(5) – information relating to bodies that deal with security matters.
 - Section 24(2) – national security.
 - Section 31(3) – law enforcement
6. The complainant requested an internal review on 1 October 2023. He argued that the existence of the letter from [name redacted] (as cited in his request above) must mean that the Home Office was permitting the UK Police, etcetera, to utilise microwave radiation devices "for nefarious activities".
7. Following its internal review, the Home Office wrote to the complainant, late, on 23 November 2023. It partly revised its position, explaining:

“At the time of responding to your FOI request the Department had interpreted the term “civilian counter-terrorism surveillance contract operative”, with reference to a security body listed in section 23 of the FOIA. However, in your request for an internal review you have subsequently confirmed that the term referred to relates to contractors the police are alleged to have recruited from your previous employer; [organisation name redacted]. In light of this confirmation, I am satisfied section 23 is not engaged.”

8. The Home Office maintained that sections 24(2) and 31(3) of FOIA applied to the complainant’s request.

Scope of the case

9. The complainant contacted the Commissioner on 23 December 2023 to complain about the way his request for information had been handled. He submitted extensive grounds of complaint and supporting information detailing his view that microwave radiation by use of through the wall sensors is taking place, including its negative health impacts on himself and various individuals.
10. Further grounds of complaint were submitted by the complainant on 27 March 2024. The Commissioner has reviewed and taken all the grounds of complaint into account in reaching his decision in this case.
11. Whilst the Commissioner acknowledges the importance of the request to the complainant, FOIA is both purpose and applicant blind. The Commissioner’s duty under FOIA is to assess whether the Home Office was entitled to NCND whether the requested information is held.
12. The Commissioner has therefore considered whether the Home Office was entitled to rely on the NCND provisions in sections 24(2) and 31(3) of FOIA to refuse this request.

Reasons for decision

Neither confirm nor deny (‘NCND’)

13. Section 1(1)(a) of FOIA requires a public authority to inform a requester whether it holds the information specified in the request. This is commonly known as “the duty to confirm or deny”. However, there are exceptions to this duty.
14. The Home Office has taken the position of neither confirming nor denying whether it holds the requested information by citing sections

24(2) and 31(3) of FOIA. The issue that the Commissioner has to consider here is not the disclosure of any requested information that may be held; rather, it is whether or not the Home Office is entitled to NCND whether it holds the information requested by the complainant.

15. The Commissioner has first considered the Home Office's reliance on section 24(2) of FOIA.
16. Put simply, in this case, the Commissioner must consider whether or not the Home Office is entitled to NCND, by virtue of section 24(2) of FOIA, whether it holds any information about the specified microwave radiation devices. Whether or not the requested information, if held, is suitable for disclosure is a different matter, and not one that is considered in this decision notice.
17. The Commissioner does not know whether, as a matter of fact, the Home Office does or does not hold information falling within scope of the request. He does not consider it necessary to know this in order to reach a decision in this NCND case.
18. In its submissions, the Home Office provided the Commissioner with copies of earlier relevant correspondence, the details of which it asked not to be reproduced in this notice. The Home Office has argued that these documents demonstrate that no previous confirmation or denial has taken place as to whether or not the requested information is held.
19. The Commissioner has respected the Home Office's position in not detailing the evidence it provided here, but has reviewed the supporting documentation it submitted. He concurs that no previous confirmation or denial has been made as to whether or not the requested information is held. The Commissioner does not wish to speculate as to why the complainant holds an opposing view on this matter; he must reach his determination based on the evidence put before him by both parties, which he has done in this case.

Section 24 – national security

20. Section 24(2) provides an exemption from the duty to confirm or deny where this is required for the purpose of safeguarding national security.
21. The Commissioner considers that section 24(2) of FOIA should be interpreted so that it is only necessary for a public authority to show that either a confirmation or a denial of whether requested information is held would be likely to harm national security. There is no need for a public authority to prove that there is a specific, direct or imminent threat.
22. The Home Office argued that a confirmation or denial would provide an insight into the effectiveness of national security which could be utilised

by Organised Criminal Groups ('OCGs'), and other disaffected individuals, in the UK and abroad, to identify the UK's national security capabilities. Specifically, it told the Commissioner:

"To confirm that information within scope is held would in effect be to confirm, among other things, that 'Police and civilian counter terrorism surveillance contract operatives' are equipped with and authorised to use 'microwave radiation designed with through the wall sensor devices in law enforcement'. Conversely, to deny that information within scope is held would be to confirm that such technology is not used in law enforcement.

In either case, the confirmation or denial would provide to the world at large information about the UK's law enforcement capabilities, including the capabilities of those involved in counter terrorism. As the original response to the request said, this would substantially prejudice the ability of relevant authorities to conduct investigations involving the protection of national security and the prevention and detection of crime:

'Criminals, terrorists and hostile states, constantly assess the covert investigative capabilities of the law enforcement and national security community. Consequently, any indication about whether or not a relevant authority uses specific covert capabilities has the potential to cause criminals, terrorists and hostile states to modify their behaviour to the detriment of future investigations or operations.

Information relating to covert law enforcement capabilities is sensitive by nature. Many criminals, terrorists and hostile states are determined to identify what capabilities are available to law enforcement and therefore seek to use fragmentary pieces of information to build a more complete picture. A confirmation or denial in this instance could therefore be detrimental to current and future investigations or operations by relevant authorities.'

The ICO's guidance on section 24¹ says that 'Required is taken to mean that the use of the exemption is reasonably necessary'. The guidance also says that:

'We also recognise that terrorists can be highly motivated and may go to great lengths to gather intelligence. This

¹ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-24-safeguarding-national-security/>

means there may be grounds for withholding seemingly harmless information on the basis that it may assist terrorists when pieced together with other information they may obtain.'

In this case, the information which would be revealed through confirmation or denial is substantive rather than 'seemingly harmless', but the principle applies. We consider that the exemption from the duty to confirm or deny meets the threshold, namely that it is reasonably necessary in order to avoid disclosing information which would undoubtedly be of use to those who are hostile to the security of the UK."

23. The Commissioner has considered the above arguments put forward by the Home Office and is satisfied it has evidenced real and specific threats that a confirmation or denial as to whether it holds the requested information would pose a risk to national security. He therefore finds that section 24(2) of FOIA is engaged.

Public interest test

24. Section 24 is a qualified exemption. This means that even where its provisions are engaged, the Commissioner must consider whether the public interest in maintaining the exemption outweighs the public interest in confirming or denying the information is held.
25. The Commissioner sent the complainant's grounds of complaint, which include his public interest arguments, to the Home Office for it to respond to. He has included the Home Office's key response points below (as applicable to his consideration of section 24 of FOIA).

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

26. The complainant submitted a large volume of arguments in favour of NCND whether the requested information is held by the Home Office. Examples range from the adverse health impacts (both physical and mental) to covert targeting and torture of certain individuals. However, the Commissioner notes that the complainant has attributed the majority of his arguments by reference to 'law enforcement', (ie section 31(3) of FOIA) and not national security as is being considered here.
27. The complainant argued that "the disclosure of the use of microwave radiation devices in law enforcement will enhance national security" but has not set out how and it is not obvious to the Commissioner why this would be the case.
28. The Home Office recognised the following in favour of a confirmation or denial:

"We recognise there is public interest in knowing what information is held by the Department [ie the Home Office] in relation to microwave radiation devices with through the wall sensors, as this knowledge would lead to greater transparency and public understanding of the subject."

Public interest arguments in favour of maintaining the exemption

29. The Home Office submitted the following arguments in favour of NCND whether it holds the requested information:

"...there is an overwhelming public interest in not directly or indirectly undermining ... national security. Confirming in this case whether or not information is held would be likely in itself to cause this prejudice. I consider that the balance of the public interest lies in neither confirming nor denying whether the specific information requested is held. This response should not be taken as confirmation that the information ... is or is not held by the Home Office".

30. Having also considered the complainant's public interest arguments submitted as part of his grounds of complaint, the Home Office told the Commissioner:

"In his grounds of complaint [the complainant] states that we should also consider 'The risk and level of harm to the public interest that would follow non-disclosure of that information.' While we recognise that providing the confirmation or denial would meet a public interest, and hence that refusing to provide the confirmation or denial arguably fails to provide some benefit to the public interest, we do not accept that refusing to provide the confirmation or denial would cause actual harm to the public interest. [The complainant] has not provided any evidence of what this harm would be or how it would occur."

Balance of the public interest

31. The question here is whether the public interest in safeguarding national security is outweighed by the public interest in disclosure of the confirmation or denial as to whether any related information is held. Clearly, the public interest in safeguarding national security carries very great weight. In order for the public interest to favour provision of the confirmation or denial, it is necessary for there to be public interest factors in favour of this of at least equally significant weight.

32. The Home Office stated:

"The complainant refers to ICO guidance on the public interest test which he maintains requires public bodies to disclose

required information 'if there is a plausible suspicion of wrongdoing, even if it is not actually proven' and to an alleged public lack of confidence in a system (he does not specify what system he has in mind). [The complainant] has not provided any evidence for what amount to claims that this technology is not only being used but has caused and is causing significant harm, or for any plausible suspicion of wrongdoing, or for a lack of public confidence in any system which is relevant in the present context. So far as we are aware, no such evidence exists. We do not consider that these are valid factors to be taken into account in assessing the balance of the public interest."

33. In his grounds of complaint the complainant argued that replies, to this and previous FOIA requests, indicate a general and inflexible policy of non-disclosure of information about the alleged use of microwave radiation in law enforcement and that this is contrary to ICO guidance on the public interest test, which says that '... the authority must always be willing to consider whether the circumstances of the case justify a departure from the policy'. The Home Office told the Commissioner:

"We would argue that these responses show consistency, not inflexibility. The FOIA requests to which [the complainant] refers, while they are from different requesters, are all virtually identical to the request under consideration and suggest a common source or at least collaboration. There is nothing in [the complainant's] request to distinguish it from earlier requests and there are no circumstances surrounding it which might justify a departure from the approach previously taken."

34. The view of the Commissioner is that there is some valid public interest in confirmation or denial in response to this request. This would increase public understanding of the issue and aid transparency.
35. The Commissioner considers it to be clearly the case, however, that this public interest does not match the weight of the public interest in safeguarding national security. This means that his conclusion is that the public interest in the maintenance of the exemption provided by section 24(2) outweighs the public interest in disclosure of the confirmation or denial.
36. In view of this finding, the Home Office was not required to confirm or deny whether it held the information requested by the complainant.
37. Given the Commissioner's decision, he has not found it necessary to further consider the Home Office's reliance on section 31(3) of FOIA.

Other matters

38. The Commissioner cannot consider the amount of time taken to complete an internal review in a decision notice because such matters are not a formal requirement of FOIA. Rather they are matters of good practice which are addressed in the code of practice issued under section 45 of FOIA.
39. Part 5 of the section 45 Code of Practice² (the Code) states that it is best practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information. The Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by FOIA, the Code states that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may take longer but in no case should the time taken exceed 40 working days; it is expected that this will only be required in complex and voluminous cases.
40. The Commissioner does not deem this case to be complex or voluminous and he is concerned that it took almost two months for an internal review to be completed.
41. The Commissioner will use intelligence gathered from individual cases to inform his insight and compliance function. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in his FOI and Transparency Regulatory Manual³.

²https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

³ https://ico.org.uk/media/about-the-ico/documents/4020912/foi-and-transparency-regulatory-manual-v1_0.pdf

Right of appeal

42. 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

43. 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.
44. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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