

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 19 March 2014

**Public Authority:** Foreign and Commonwealth Office (FCO)  
**Address:** King Charles Street  
London  
SW1A 2AH

#### Decision (including any steps ordered)

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1. The complainant has requested information about the secondment of members of the Police Service of Northern Ireland (PSNI) to the FCO in Sri Lanka in 2009. The FCO provided some information and refused to confirm or deny whether it held more information which fell within scope of the request, citing the exemptions at section 23(5) and 24(2) of the FOIA. The Commissioner's decision is that the FCO was entitled to issue a 'neither confirm nor deny' response under the sections cited.

#### Request and response

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2. On 5 June 2013, in two emails, the complainant made the following request for information under the FOIA to the FCO:

*"Under the Freedom of Information Act 2000, I request a copy of your request\* to the Police Service of Northern Ireland (PSNI) for the international secondment of their officers to the FCO in Sri Lanka.*

*\*This request is referred to at point 15.1 in the minutes of the Northern Ireland Policing Board Human Resources Committee meeting that was held on 12/02/2009. A link to these minutes is available here:  
[www.nipolicingboard.org.uk/12\\_february\\_2009\\_hrc\\_minutes.pdf](http://www.nipolicingboard.org.uk/12_february_2009_hrc_minutes.pdf) <sup>1</sup>*

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<sup>1</sup> While the complainant describes point 15.1 of the minutes as referring to a request made by the FCO to PSNI for assistance, the Commissioner notes

And:

*"Under the Freedom of Information Act 2000, I request a copy of any documents related to the meeting\* between Catherine Weiss from the Foreign and Commonwealth Office, Sanjaya Colonne (then Strategic Affairs Advisor for the Sri Lankan Ministry of Public Security Law and Order) and the Chairman of the Northern Ireland Policing Board (then Barry Gilligan) that was held in Belfast on 18<sup>th</sup> June 2009.*

*\*This meeting is referred to at point 4.1 in the minutes of the Northern Ireland Policing Board meeting that was held on 2/07/2009. A link to these minutes is available here:*

*[http://www.nipolicingboard.org.uk/116297\\_northern\\_ireland\\_policing\\_board\\_-\\_minutes\\_-\\_2\\_july\\_-\\_private.pdf](http://www.nipolicingboard.org.uk/116297_northern_ireland_policing_board_-_minutes_-_2_july_-_private.pdf)*

3. The FCO responded on 5 August 2013. It provided the following information:

*"Digest – Security Sector Development Advisory Team Executive Summary 31 May 2009*

*British High Commission to approve Catherine Weiss' meeting with Police Service Northern Ireland in Belfast to agree their future assistance to Professional Development Programme."*

4. It would neither confirm nor deny (NCND) whether it held any further information relevant to the request, citing the exemptions at section 23(5) and section 24(2) of the FOIA.
5. The FCO provided an internal review on 5 September 2013 in which it maintained its original position.

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that point 15.1 in fact refers only to a request from PSNI to the Northern Ireland Policing Board, seeking approval for the international secondment of officers to the FCO in Sri Lanka.

## Scope of the case

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6. The complainant contacted the Commissioner on 14 September 2013 to complain about the way his request for information had been handled.
7. The Commissioner has considered whether the FCO was entitled to rely upon sections 23(5) and 24(2) to neither confirm nor deny whether it held any further information falling within scope of the request.

## Reasons for decision

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### Section 23 (security bodies) and Section 24 (national security)

8. Information relating to security bodies specified in section 23(3) is exempt information by virtue of section 23(1). Information which does not fall under section 23(1) is exempt from disclosure under section 24(1) if it is required for the purpose of safeguarding national security.
9. Sections 23(5) and 24(2) exclude the duty of a public authority to confirm or deny whether it holds information which, if held, would be exempt under section 23(1) or 24(1) respectively.
10. By virtue of section 23(5), the duty to confirm or deny does not arise if, or to 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 section 23(3).
11. By virtue of section 24(2), the duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security.
12. The FCO has stated that the exemptions at both section 23(5) and section 24(2) were engaged. The Commissioner does not consider the exemptions at sections 23(5) and 24(2) to be mutually exclusive and he accepts that they can be relied on independently or jointly in order to conceal whether or not one or more of the security bodies has been involved in an issue which might impact on national security. However, each exemption must be applied independently on its own merits. In addition, the section 24 exemption is qualified and is therefore subject to the public interest test.
13. The test as to 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 is engaged.

14. Thus 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. This is consistent with the scheme of the FOIA because the security bodies themselves are not subject to its provisions. 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.
15. There is clearly a close relationship between the FCO and the security bodies listed in section 23(3), particularly with the Secret Intelligence Service. The Commissioner also notes that in 2009, after 25 years of civil war (the repercussions of which had sometimes spilled across international borders) the security situation in Sri Lanka remained complex and highly sensitive.
16. In view of the FCO's role and the background to the information being requested, the Commissioner finds that, on the balance of probabilities, any information described in the request, if held, could be related to one or more bodies identified in section 23(3) of the FOIA. He therefore considers that the exemption at section 23(5) is engaged.
17. With regard to section 24(2), the Commissioner again considers that this exemption should be interpreted so that it is only necessary for a public authority to show that either a confirmation, or a denial, that requested information is held, would be likely to harm national security. The Commissioner interprets the phrase 'required' in the context of this exemption to mean '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. In relation to the application of section 24(2) the Commissioner notes that the First-tier Tribunal (Information Rights) has indicated that only a consistent use of an NCND response on matters of national security can secure its proper purpose.<sup>2</sup> Therefore, in considering whether the exemption is engaged, and the balance of the public interest test, regard has to be given to the need to adopt a consistent NCND position

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<sup>2</sup> See for example, *The All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner and the Foreign and Commonwealth Office* – EA/2011/0049-0051

and not simply to the consequences of confirming whether the specific requested information in this case is held or not.

19. The FCO explained that it considers the subject matter to relate to section 24 because the matters referred to in the complainant's request "*...could refer to reasons as to why such a secondment of PSNI officers to the FCO in Sri Lanka is required which could...involve reference to either national security or [counter terrorism] related activity.*"
20. In the context of section 24 the Commissioner notes that the threshold to engage the exemption is relatively low. Furthermore, as a general approach the Commissioner accepts that withholding information in order to ensure the protection of national security can extend, in some circumstances, 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 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 consequences of maintaining a consistent approach to the application of section 24(2).
21. On this occasion the Commissioner is satisfied that complying with the requirements of section 1(1)(a) would be likely to reveal whether or not the security bodies were interested in the subject matter which is the focus of these requests.
22. The Commissioner is therefore satisfied that the exemptions at both sections 23(5) and 24(2) were engaged in the circumstances of this case. He accepts that revealing whether or not information is held within the scope of the request which relates to security bodies would reveal information relating to the role of the security bodies (section 23(5)). It would also undermine national security (section 24(2)) and for that reason neither confirming nor denying if further information is held is required for the purpose of safeguarding national security.

#### *Public interest test*

23. Section 23 is an absolute exemption and no public interest test is required where it is found to be engaged. However, section 24(2) is a qualified exemption and it is necessary to consider whether the public interest nevertheless favours confirming or denying whether the information is held over maintaining the exclusion to that duty.

*Public interest considerations in favour of confirming or denying whether information is held*

24. The complainant pointed to the fact that he had submitted modified versions of the request to PSNI and the Northern Ireland Policing Board. Neither public authority had issued an NCND response or cited section 23 and section 24 when dealing with the requests.
25. He argued that requiring the FCO to provide any information it held that fell within scope of the request would ensure transparency and accountability, good decision-making by public bodies, uphold standards of integrity, ensure justice and fair treatment for all and secure the best use of public resources.
26. He said that the request, in essence, asked for information about the FCO's decision in late January 2009 to actively engage with the Sri Lankan Police, and why this liaison was not suspended in May/June 2009 when the civil war ended. He referred to extensive civilian deaths and human rights violations that took place during this period<sup>3</sup> and also to the UK Prime Minister's call for "*credible, transparent and independent investigations into alleged war crimes*" perpetrated by Sri Lankan government forces in 2009<sup>4</sup>. Against this background the complainant considered that there was a clear case for full transparency around any UK involvement in Sri Lankan security matters.

*Public interest considerations in favour of maintaining the exemption from the duty to either confirm or deny*

27. Maintenance of the exclusion of the duty to confirm or deny whether the public authority holds the information requested is required for the purpose of safeguarding national security.
28. It is important to protect the space within which government and its agencies discuss issues that might concern national security. The purpose of doing this is to enable the widest possible range of information and intelligence gathering and analysis. To reveal the extent of any interest the UK had in Sri Lanka in 2009 would be prejudicial to that process and would be likely to undermine intelligence gathering that might have occurred, or remain ongoing.

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<sup>3</sup> <http://www.un.org/en/rights/srilanka.shtml>

<sup>4</sup> <http://www.bbc.co.uk/news/world-asia-24967501>

29. As a consequence this could potentially benefit people who have threatened or are intending to threaten UK security and UK interests overseas.
30. Confirmation or denial of whether the FCO holds the requested information could also lead to a lack of trust and undermine national security co-operation not only in respect of this matter, should it be ongoing, but more generally with other states and governments in the future.

*Balance of the public interest*

31. The Commissioner understands that the request centres on the complainant's concerns about any UK involvement in Sri Lanka during a turbulent period, but the FCO's response considers matters from the perspective of national security. It is important for the complainant to recognise that a response to his request must be viewed as a response to the world at large, as is the case with all information requests made under the FOIA. Therefore, whilst on the surface (and particularly in view of the responses given by PSNI and the Northern Ireland Policing Board to modified versions of the request) the FCO's stance may seem to be overly cautious, it has to consider the effect of disclosure at large.
32. As noted above, knowledge as to whether or not the FCO holds more information than it has disclosed may be of significant interest to other parties, particularly those interested in harming the UK or its interests overseas, who might try to extrapolate from its response the extent of any UK involvement in Sri Lankan security, both in 2009 and currently. The Commissioner recognises that the security situation in Sri Lanka remains complex. While the request relates to the last months of the civil war in 2009, the Commissioner notes that in the last 12 months credible reports have emerged that Sri Lanka is facing a renewed threat to peace and stability<sup>5</sup>.
33. With regard to the concern expressed by the Prime Minister, the Commissioner notes that in the same speech, the Prime Minister made a commitment to press for a credible and independent investigation into war crimes that were alleged committed by Sri Lankan forces in the latter stages of the civil war. The Commissioner considers that the public interest in establishing the extent of any UK involvement in Sri Lankan

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<sup>5</sup> <http://www.aljazeera.com/news/asia/2013/09/201393143447630804.html>

security matters at that time will be served if such an enquiry takes place.

34. The Commissioner's considered view is that the public interest in safeguarding national security is of such weight that it can only be outweighed in exceptional circumstances. He also places significant weight on the requirement to maintain consistency when applying an NCND in these circumstances.
35. The Commissioner accepts that in the circumstances of this case, the public interest in protecting information required for the purposes of safeguarding national security outweighs the public interest in favour of confirmation or denial. He therefore finds that, in all the circumstances of this case, the public interest in maintaining the exemption at section 24(2) outweighs the public interest in complying with the duty imposed by section 1(1)(a).



## Right of appeal

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36. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

37. 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.
38. 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 .....**

**Graham Smith**  
**Deputy Commissioner**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**