

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 August 2014

Public Authority: Foreign and Commonwealth Office

Address: King Charles Street
London
SW1A 2AH

Decision (including any steps ordered)

1. The complainant requested information relating to the Overseas Security and Justice Assistance Guidance specifically in connection with any decision by the United Kingdom to provide or to continue to provide counter-narcotics assistance to Pakistan law enforcement agencies from December 2011.
2. The Commissioner's decision is that;
 - The public authority was entitled to withhold information within the scope of Part 1 of the request on the basis of the exemption at section 23(1) FOIA, and
 - The public authority was entitled to neither confirm nor deny whether it held any information within the scope of Parts 2 and 3 of the request on the basis of the exemption at section 27(4)(a) FOIA.
3. No steps required.

Request and response

4. On 30 July 2013 the complainant wrote to the public authority and requested information relating to the Overseas Security and Justice Assistance Guidance dated 15 December 2011 (OSJA Guidance) in the following terms:

'.....I am requesting the following documents in relation to any decision to provide or to continue to provide counter-narcotics assistance to Pakistan law enforcement agencies in the period from December 2011 to the latest date for which the information is available:

- 1. The strategic assessment (Stage 1), risk identification assessment (Stage 2) and mitigation options (Stage 3) in relation to the human rights implications of providing assistance, financial or otherwise, to Pakistan law enforcement agencies, and the document which answers the question of whether there is "a serious risk that the assistance might directly or significantly contribute to a violation of human rights" (Stage 4), as required by the OSJA Guidance;*
 - 2. If Ministerial authorisation has been requested in relation to the proposed assistance, a copy of the relevant briefing paper given to the Minister; and*
 - 3. If Ministerial authorisation has been granted in relation to the proposed assistance, a copy of the authorisation.'*
5. The public authority responded on 20 August 2013. It neither confirmed nor denied whether it held any information within the scope of the request on the basis of the exemptions at sections 23(5) and 24(2) FOIA.
6. The complainant requested an internal review on 20 August 2013.
7. Following the internal review the public authority wrote to the complainant on 9 October 2013. It upheld the original decision.

Scope of the case

8. The complainant contacted the Commissioner on 10 January 2014¹ to complain about the way her request for information had been handled.
9. During the course of the Commissioner's investigation, the public authority revised its position as follows: it confirmed that it held information within the scope of Part 1 of the request. However, it considered the information in scope exempt from disclosure on the basis of section 23(1) FOIA (information from or relating to security bodies). In terms of Parts 2 and 3, the public authority neither confirmed nor denied whether it held any information in scope on the basis of section 27(4)(a) FOIA (interests of the UK abroad).
10. The scope of the Commissioner's investigation therefore was to consider whether the public authority was entitled to withhold information within the scope of Part 1 of the request on the basis of section 23(1) FOIA, and whether it was entitled to rely on section 27(4) in relation to Parts 2 and 3 of the request.
11. The complainant set out her grounds for appealing against the public authority's position. These are outlined in paragraphs 12 to 17 as follows.²
12. By way of background, the complainant explained that the OSJA Guidance sets out procedures to ensure the United Kingdom (UK) Government's overseas security and justice assistance work meets its human rights obligations and values. It expressly extends to assistance aimed at tackling "serious organised crime" and applies in the context of assistance to partners where there are "concerns about their adherence to and respect for human rights and democracy". The possibility that assistance may contribute to the use of the death penalty abroad is highlighted as a particular issue. The policy requires that UK Government officials involved in providing such assistance undertake a written assessment of the human rights risks involved and potential mitigation measures and sets out a multi-stage process for this. Where

¹ The complainant had been engaged in further correspondence with the public authority in the intervening period between the conclusion of the internal review and her complaint to the Commissioner.

² However, this was before the public authority had revised its position. Therefore, not all of the complainant's submissions are relevant to the authority's new position.

the assistance cannot be provided, even with mitigation measures, in a way that avoids a "serious risk" of contribution to a breach of human rights, the policy requires Ministerial authorisation for the assistance.

13. The complainant submitted that by refusing to either confirm or deny even whether it holds the information requested, the public authority had applied an excessively broad approach to the exemptions under the FOIA. It had also failed to engage properly with the strong public interest in ensuring that government decision making in matters relating to fundamental human rights is open to public scrutiny.
14. The existence of extensive UK law-enforcement assistance to Pakistan is a matter of public record. Disclosing the fact that such assistance exists cannot harm per se. Similarly, the public authority's own report, Human Rights and Democracy 2012, states that there remain "acute human rights challenges" in Pakistan. On this basis, an assessment under the OSJA policy ought to have been completed in relation to the assistance. There is no reason why the information whether such assessment exists and thus whether the public authority complied with its own policy should itself be exempt from disclosure.
15. Contrary to section 23(2) FOIA, no certificate by a government minister has been provided regarding the application of section 23(5). Public records suggest that at least significant parts of the relevant UK assistance are provided by bodies other than those specified in section 23(3).
16. It is a matter of public interest whether appropriate assessments have been conducted, whether the government accepts that it is providing assistance which may make it more likely that persons will be exposed to the death penalty despite the government's public stance of opposition to the death penalty in all circumstances, and if so, what consideration, if any, has been given to mitigation of those risks.
17. It is wholly unclear why the disclosure of UK counter-narcotics assistance to Pakistan for drug-related law enforcement operations in Pakistan would cause harm to the UK's national security. Taking such a broad approach in the context of international assistance would make it impossible for the public to monitor compliance with the OSJA policy in almost all relevant situations.

Reasons for decision

Section 23(1)

18. As mentioned, the public authority changed its position and has now confirmed it is withholding the information within the scope of Part 1 of the request on the basis of the exemption at section 23(1).

19. Sections 23 (1) and (2) state:

(1) *'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 subsection (3).'*

(2) *'A certificate signed by a Minister of the Crown certifying that the information to which it applies was directly or indirectly supplied by, or relates to, any of the bodies specified in subsection (3) shall, subject to section 60³, be conclusive evidence of that fact.'*

20. Section 23(3) contains a list of bodies dealing with national security matters. Needless to say, in cases where section 23(1) has been relied upon, the public authority considers the relevant information highly sensitive. The Commissioner has to be careful therefore that he does not inadvertently reveal information considered to be sensitive in a decision notice. He recognises that in such cases, the brevity of his reasoning might prove frustrating to complainants. That is however an unavoidable consequence of the required approach to section 23 cases.

21. To successfully engage the exemption at section 23(1), a public authority must be able to demonstrate that the relevant information was *directly or indirectly* supplied to it by, or *relates* to any of the bodies listed at section 23(3). There is no need for a public authority to carry out a public interest test because section 23(1) is an absolute exemption. Once the requirement above is satisfied, the exemption is engaged.

22. The Deputy Commissioner and Director of Freedom of Information has discussed the nature and content of the withheld information with representatives of the public authority at their premises. He was given a

³ By virtue of section 60, the Commissioner or an applicant (ie complainant) may appeal a certificate.

confidential briefing on the issues involved and a detailed explanation as to how the exemption applies to the withheld information.

23. The Commissioner is satisfied that the withheld information was supplied to the public authority by a body specified in section 23(3). He therefore finds that the public authority was entitled to withhold the information within the scope of Part 1 of the request on the basis of the exemption at section 23(1).
24. The Commissioner would like to point out that a Ministerial certificate (under section 23(2)) is not required by a public authority relying on either the provisions in sections 23(1) or 23(5). However, if such a certificate is provided by the public authority then that would automatically engage the exemption at section 23(1), without the need for any further consideration by the Commissioner.
25. The Commissioner's decision above in no way diminishes the strength of the complainant's arguments on the public interest in disclosure. However, as stated in paragraph 21, the exemption at section 23(1) is not qualified by a public interest test, so they are not relevant to the public authority's ability to rely on it.

Section 27(4)(a)

26. Section 27(1) states:

'Information is exempt information if its disclosure under this Act, would, or would be likely to, prejudice-

- (a) relations between the United Kingdom and any other State,*
- (b) relations between the United Kingdom and any international organisation or international court,*
- (c) the interests of the United Kingdom abroad, or*
- (d) the promotion or protection by the United Kingdom of its interests abroad.*

27. Section 27(4)(a) states:

'The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a)⁴-

would, or would be likely to, prejudice any of the matters mentioned in subsection (1).....'

28. The public authority neither confirmed nor denied (NCND) whether it held any information within the scope of Parts 2 and 3 of the request. It explained that it had adopted the NCND position based on section 27(1)(c). In other words, the public authority neither confirmed nor denied whether it held any information within the scope of Parts 2 and 3 on the basis that to do so would be likely to prejudice the interest of the UK abroad.
29. The representations from the public authority on the application of section 27(4) were provided in confidence and can be found in the confidential annex to this notice.
30. The Commissioner accepts those arguments and has taken them into account in reaching his conclusion on the application of NCND.
31. The Commissioner considers that revealing whether or not the public authority holds information within the scope of Parts 2 and 3 of the request would be likely to prejudice relations between the UK and Pakistan. That would in turn be likely to prejudice the UK's interests abroad. The Commissioner should emphasise that his conclusion cannot be taken as suggesting that the public authority holds or does not hold information within the scope of the requests. His finding is based on the sensitivity of the subject matter in question and the fact that, based on the wording of the request, confirmation or denial would be tantamount to revealing whether or not a ministerial authorisation had been sought or obtained. The requests relate to the UK Government's view on Pakistan's compliance or otherwise with its international human rights obligations. Any confirmation or denial provided by the public authority would be likely to generate discussion at senior diplomatic levels and that is likely to have an adverse effect on relations with Pakistan, other countries and/or on the UK's wider interests abroad.
32. The Commissioner therefore finds that the exemption at section 27(4)(a) was correctly engaged.

⁴ Section 1(1)(a) FOIA imposes on a public authority a duty to confirm or deny whether it holds information upon receiving a request.

Public interest test

33. Unlike section 23(1), the exemption at section 27(4)(a) is subject to a public interest test. Therefore, the Commissioner must consider whether in all the circumstances of the case, the public interest in neither confirming nor denying whether the public authority holds information within the scope of Parts 2 and 3 outweighs the public interest in confirming or denying whether it does.
34. The Commissioner accepts that there is a public interest in confirming or denying whether or not Ministerial authorisation was sought, a briefing paper created or Ministerial authorisation issued under the terms of the OSJA guidance in relation to the provision of counter-narcotics assistance to Pakistan law enforcement agencies. There is a public interest in knowing about how adherence by Pakistan to international human rights obligations and the exposure of individuals to the death penalty as a result of assistance provided by the UK Government to Pakistan law-enforcement agencies, may have been addressed by the UK Government when considering such assistance.
35. It follows that there is a public interest in ensuring that the terms of the OSJA guidance were followed by the UK Government in relation to the provision of any counter-narcotics assistance to the Pakistan Government.
36. However, the Commissioner considers that there is a strong public interest in not prejudicing relations between the UK and Pakistan. Relations with Pakistan extend to other areas which are vital to the UK's interests, such as, the economy, human trafficking and terrorism. The prejudicial effect of issuing a confirmation or denial in response to Parts 2 and 3 of the request could therefore extend to the UK's other interests with Pakistan.
37. Similarly, it is not in the public interest to prejudice the UK's wider interests abroad, especially in the region. The harm to relations between the UK and Pakistan that would be likely to follow from a confirmation or denial issued in relation to Parts 2 and 3 of the request is likely to extend to relations with other countries and organisations, given the range of views and sensitivity of the issues in the international arena.
38. The Commissioner therefore considers that there is a strong public interest in the public authority neither confirming nor denying whether it holds any information within the scope of Parts 2 and 3 of the request which clearly outweighs that in doing so.

39. Consequently, the Commissioner finds that the public authority was entitled to rely on the exemption at section 27(4)(a).

Right of appeal

40. 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@hmcts.gsi.gov.uk

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

41. 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.
42. 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
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Wilmslow
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SK9 5AF