

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 August 2014

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

Decision (including any steps ordered)

1. The complainant requested information relating to any list held by the Home Office of individuals who are considered to preach extremism or intolerance. The Home Office refused to confirm or deny whether it held this information and cited the exemptions provided by sections 23(5) (information relating to or supplied by security bodies) and 24(2) (national security) of the FOIA.
2. The Commissioner's decision is that the Home Office cited sections 23(5) and 24(2) correctly and so it was not obliged to confirm or deny whether it held information falling within the scope of the complainant's request.

Request and response

3. On 17 January 2014, the complainant wrote to the Home Office and requested information in the following terms:

"1. Could you please tell me if there is in existence a list of public speakers who are considered to preach extremism or intolerance?

2. If any such list exists, could you please give details of the individuals on the list(s)?

3. Could you give details of which individuals or organisations/departments gave input to form any such list?"
4. After sending an earlier holding response, the Home Office responded substantively on 13 March 2014. It refused to confirm or deny whether it held this information and cited the exemptions provided by sections

23(5) (information supplied by or relating to security bodies) and 24(2) (national security) of the FOIA.

5. The complainant responded on 18 March 2014 and requested an internal review. The Home Office responded with the outcome of the internal review on 7 April 2014, which was that the refusal to neither confirm nor deny under sections 23(5) and 24(2) was upheld.

Scope of the case

6. The complainant contacted the Commissioner on 9 May 2014 to complain about the refusal of his information request. The complainant indicated that he did not agree with the exemptions cited by the Home Office.

Reasons for decision

7. Section 23(5) provides an exemption from the duty imposed by section 1(1)(a) to confirm or deny whether information is held if to do so would involve the disclosure of information, whether or not recorded, that relates to or was supplied by any of the security bodies listed in section 23(3). This is a class-based exemption, which means that if the confirmation or denial would have the result described in section 23(5), this exemption is engaged.
8. The argument from the Home Office on this exemption was that if the list referred to in the request did exist, it is very likely that at least some of the names on this list would have been supplied to it by section 23(3) bodies. Were it the case that absolute certainty of the connection with a section 23(3) body was required, this might mean that the possibility, however slim, of the Home Office holding relevant information that was not related to, or supplied by, a section 23(3) body would undermine its reliance on section 23(5).
9. However, in the Tribunal case *The Commissioner of Police of the Metropolis vs Information Commissioner* (EA/2010/0008) the argument was advanced that it was *highly likely* that any information held by the public authority that fell within the scope of the request would have been supplied to it by a section 23(3) body and, therefore, section 23(5) was engaged. The counterargument was made that only certainty as to the source of the information would be sufficient. The Tribunal rejected this counterargument and stated:

*"[The evidence provided] clearly establishes the **probability** that the requested information, if held, came through a section 23 body." (paragraph 20)*

10. The approach of the Commissioner on this point is that he accepts the Tribunal view that the balance of probabilities is the correct test to apply. This means that for section 23(5) to be engaged, the evidence must suggest to a sufficient degree of likelihood (rather than certainty) that any information held that falls within the scope of the request would relate to, or have been supplied by, a body specified in section 23(3).
11. In this case, the Commissioner considers it clear that the subject matter of the request – extremist or intolerant preaching – is within the area of the work of bodies specified in section 23(3). He also accepts that it is likely that, if the list referred to in the request did exist, this would have been compiled with input from outside the Home Office, including from security bodies. Indeed, the third part of the request refers specifically to the possibility of other organisations having provided input for any such list.
12. The Commissioner accepts that, on the balance of probabilities, any information held by the Home Office falling within the scope of the complainant's requests would relate to, or have been supplied by, a body or bodies listed in section 23(3). His conclusion is therefore that section 23(5) is engaged.
13. As this conclusion has been reached on section 23(5), it is not strictly necessary to go on to also consider any other exemptions. However, as the Home Office also relied on section 24(2), he has gone on to consider that exemption.

Section 24

14. Section 24(2) provides an exemption from the duty to confirm or deny where this is required for the purpose of safeguarding national security. Consideration of this exemption is a two-stage process. First, the exemption must be engaged due to the requirement of national security; secondly, this exemption is qualified by the public interest, which means that the confirmation or denial must be provided if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.
15. The Commissioner has already accepted when finding that section 23(5) is engaged that revealing whether or not information is held within the scope of the request would reveal information relating to the role of the security bodies. The Commissioner also accepts that disclosure that touches on the work of the security bodies would consequentially

undermine national security. For that reason section 24(2) is also engaged as exemption from the duty to confirm or deny is required for the purposes of national security.

16. Turning to the balance of the public interest, 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. 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 will be necessary for there to be public interest factors in favour of this of at least equally significant weight.
17. 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 knowledge of the work that the Home Office is involved in to counter extremism and intolerance and of how serious and widespread the Home Office believes extremism and intolerance to be.
18. 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.
19. In view of this finding and that above on section 23(5), the Home Office was not required to confirm or deny whether it held the information requested by the complainant.

Other matters

20. Whilst the Commissioner has upheld the refusal of the request, he notes that the complainant was provided with little explanation by the Home Office for why it refused the request. Some explanation for the citing of section 24(2) was given, but none was given for section 23(5).
21. The Commissioner recognises that in cases where the information request is in the area of national security, it will often be possible to give only a limited explanation for the refusal of the request due to the need to maintain secrecy in that area. In this case, however, the Commissioner can see no reason why the complainant could not have been provided with the explanation the Home Office gave to his office for the citing of section 23(5) and that is referred to in the analysis above.

22. Had the complainant been provided with that explanation, his view might have been that a complaint to the Commissioner was not necessary. In future cases where section 23(5) applies the Home Office should ensure that it provides to the requester as full an explanation as possible for the citing of that exemption.

Right of appeal

23. 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

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

24. 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.
25. 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**