

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 15 November 2012

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

#### Decision (including any steps)

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1. The complainant has requested information relating to any plans for securing the border between Scotland and England in the event of Scottish independence. The public authority has neither confirmed nor denied holding any information by virtue of the exemptions at sections 23(5), 24(2), 35(3) and 36(3) of the FOIA. The Information Commissioner has concluded that the public authority is entitled to rely on 23(5) and 24(2) as a basis upon which to refuse to confirm whether or not it holds the information requested. He does not require any steps to be taken.

#### Request and response

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2. On 3 March 2012, the complainant wrote to the public authority and requested information in the following terms:  
  
*"Please tell me what plans exist for securing the border between Scotland and England in the event of Scottish independence. What specific measures are proposed to secure the border? I am thinking here of major and minor highways, cross border rail links, and, of course, foot access. And I am interested in such measures as control points, fencing, watchtowers, patrols, blocking of existing highways ..."*
3. The public authority required an extension to its response time in order to consider the public interest. In its response of 25 April 2012 it refused to confirm whether or not any information relating to the

request was held, citing sections 23(5) (information supplied by or relating to bodies dealing with security matters), 24(2) (national security), 35(3) (formulation or development of government policy) and 36(3) (prejudice to the effective conduct of public affairs).

4. On the same date the complainant sought an internal review. He stated:

*"You have provided a steam-hammer response to a reasonable request. The response is also not reasonable. It is difficult to see how the location of border controls - which would be frequented by the public - could possibly be a matter of national security. The locations of Heathrow Airport or the Port of Dover are not official secrets".*

5. On 24 May 2012 the public authority sent out its internal review. It maintained the same position.

### **Scope of the case**

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6. On 25 May 2012 the complainant contacted the Information Commissioner to complain about the way his request for information had been handled. He said:

*"The Home Office has turned down a request I made under the Freedom of Information Act. Implausibly they say this is for reasons of 'national security'. All I wanted to know was where they are likely to locate border controls in the event of Scottish independence. This cannot be an official secret - since any such controls would be marked and signposted and, obviously, open to members of the public.*

*I wish to complain about the Home Office's failure to comply with my request. I believe they have applied sophisticated reasoning to avoid responding to my request, which is quite reasonable, but which might be embarrassing to the Home Office and/or the Government".*

7. The Information Commissioner will therefore consider whether or not the public authority was entitled to neither confirm nor deny holding any information under the exemptions cited.

## Reasons for decision

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### Section 23 – security bodies Section 24 - national security

8. Section 1(1) of FOIA provides requestors with the right of access to information held by public authorities. The right of access is in two parts with section 1(1)(a) providing the right to be told whether a public authority holds the requested information and section 1(1)(b) provided the right to be provided with the information if it is held. Both rights are subject to the application of exemptions. The parts of the exemption contained at section 23 of FOIA relevant to this case state that:

*“(1) Information held by a public authority is exempt information if it was directly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3)...*

*(5) The duty to confirm or deny does not arise if, or to the 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 subsection (3)<sup>1</sup>”.*

9. Section 23 provides a class-based exemption which means that a public authority does not need to demonstrate a likelihood that prejudice would occur if it complied with a request, simply whether the requested information (if held) would fall within the description set out in section 23(1). Furthermore, the exemption is absolute and thus not subject to the public interest test.

10. The parts of section 24 of FOIA relevant to this case state that:

*“(1) Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security.*

*(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.”*

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<sup>1</sup> The list of section 23(3) bodies can be viewed here:  
<http://www.legislation.gov.uk/ukpga/2000/36/section/23>

11. The section 24 exemption is qualified and is therefore subject to the public interest test.
12. Sections 23 and 24 are closely linked provisions. Sections 23(1) and 24(1) are mutually exclusive. However, sections 23(5) and sections 24(2) are not mutually exclusive and therefore a public authority can apply just one exemption or both in order to refuse to confirm or deny whether or not it holds requested information. However, each exemption must be applied independently on its own merits.
13. In the Information Commissioner's opinion the exemption contained at section 23(5) should be interpreted so that it is only necessary for a public authority to show that either confirmation or denial as to whether the requested information is held would involve the disclosure of information relating to a security body. It is not necessary for a public authority to demonstrate that both responses would disclose such information. Whether or not a security body is interested or involved in a particular issue is in itself information relating to a security body.
14. Furthermore, the Information Commissioner believes that the phrase 'relates to' should be interpreted broadly. Such an interpretation has been accepted by the First-Tier Tribunal (Information Rights) in a number of different decisions<sup>2</sup>. Therefore, in the Information Commissioner's opinion section 23(5) could be used by a public authority to avoid issuing a response to a request which revealed either that a security body was involved in an issue or that it was not involved in an issue.
15. 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 would be engaged.
16. From the above 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 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.

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<sup>2</sup> See for example *Dowling v Information Commissioner and The Police Service for Northern Ireland*, EA/2011/0118, paras 17 to 22.

17. With regard to section 24(2), the Information 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** denial of whether requested information is held would be likely to harm national security. It is not necessary for a public authority to demonstrate that both responses would have such an effect. The Information 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 specific, direct or imminent threat.
18. In relation to the application of section 24(2) the Information Commissioner notes that the Tribunal has indicated that only a consistent use of a 'neither confirm nor deny' (NCND) response on matters of national security can secure its proper purpose. 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 and not simply to the consequences of confirming whether the specific requested information in this case is held or not.
19. The public authority is responsible for: "*the office for security and counter-terrorism, which works with other departments and agencies to ensure an effective and coordinated response to the threat of terrorism*"<sup>3</sup>. In respect of its role, and the subject matter being requested, the Information Commissioner is satisfied that, on the balance of probabilities, any information, if held, could be related to one or more of the bodies identified in section 23(3) of the FOIA.
20. With regard to the application of section 24(2), the Information Commissioner notes that the Government produced the following publication in October 2010: "*A Strong Britain in an Age of Uncertainty: The National Security Strategy*"<sup>4</sup>. On page 27 of this it considers the following to be a 'Tier Three' risk: "*A significant increase in the level of terrorists, organised criminals, illegal immigrants and illicit goods trying to cross the UK border to enter the UK*". The publication goes on, in page 33, to identify the following "*National Security Task*": "*Protect the UK and our interests at home, at our border, and internationally, in order to address physical and electronic*

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<sup>3</sup> <http://www.homeoffice.gov.uk/about-us/our-organisation/>

<sup>4</sup> [http://www.direct.gov.uk/prod\\_consum\\_dg/groups/dg\\_digitalassets/@dg/@en/documents/digitalasset/dg\\_191639.pdf](http://www.direct.gov.uk/prod_consum_dg/groups/dg_digitalassets/@dg/@en/documents/digitalasset/dg_191639.pdf)

*threats from state and non-state sources*". This makes it clear to the Information Commissioner that the issue of border control is one which is considered to be of significant importance to national security. He therefore concludes that any information, if held, could relate to national security and withholding it might be reasonably necessary in order to safeguard national security in the future.

21. The Information Commissioner has considered the complainant's submissions that the public authority has: "*provided a steam-hammer response to a reasonable request*" and that "*... it is difficult to see how the location of border controls – which would be frequented by the public – could possibly be a matter of national security*". However, in the context of section 24 the Information Commissioner notes that the threshold to engage the exemption is not especially high. Furthermore, as a general approach the Information 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).
22. For the reasons set out above, the Information 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 focus of these requests. The need for a public authority to adopt a position on a consistent basis is of vital importance in considering the application of an NCND exemption.
23. The Information Commissioner is satisfied that the public authority is entitled to rely on sections 23(5) and 24(2) 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. It would also undermine national security and for that reason section 24(2) also applies because neither confirming nor denying if further information is held is required for the purpose of safeguarding national security.

#### *The public interest*

24. Section 23 affords an absolute exemption and no public interest test is required once it is found to be engaged. However, this is not the case of section 24.



25. In its refusal to the complainant the public authority provided the following public interest submissions in respect of 24(2):

*"There may be a general public interest in knowing whether the Government is making preparations in relation to the possibility of an independent Scotland. There may be specific public interest in knowing whether or not such plans include considerations around the security of the country in the light of the possibility of independence".*

And,

*"There is a strong public interest in the Government not revealing whether it is or is not been making [sic] preparations for an independent Scotland. There is an even stronger public interest in not revealing whether any such preparations relate to the security of the country".*

26. In correspondence with the Information Commissioner the public authority provided further arguments to support its position; however, it asked that these remain 'confidential'. The Information Commissioner has taken these into account and they are appended to this notice in a confidential annex (although he would stress his disappointment that the public authority has categorised them as being too sensitive to disclose as he is not of the same opinion).
27. The public authority has acknowledged the public interest in knowing whether or not the Government is considering an independent Scotland and how it will deal with any associated border control. The Information Commissioner also acknowledges the general public interest in openness and in promoting further public debate about issues such as how to manage an effective border control, if it becomes necessary.
28. However, the Information Commissioner notes the strong public interest in maintaining national security. Were Scotland indeed to become independent, then issues about border control are likely to be discussed and, ultimately, any such border control may well be visible to those wishing to travel between England and Scotland. However, at present it is only possible to speculate as to what, if anything, this might consist of. Whilst the information requested may appear to be relatively harmless in its nature, the Information Commissioner considers 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 exemption in these circumstances.

29. The Information 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).
30. In view of these findings, the Information Commissioner has not found it necessary to go on to consider section 35(3) and 36(3).



## Right of appeal

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31. 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,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

32. 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.
33. 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**