

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 27 April 2023

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

#### **Decision (including any steps ordered)**

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1. The complainant has requested to know the number of MPs who have been subject to telephone tapping or other intrusive surveillance, since 2000. The Home Office would neither confirm nor deny ('NCND') whether it held the requested information, citing sections 23(5) (Information supplied by, or relating to, bodies dealing with security matters), 24(2) (National security), 31(3) (Law enforcement) and 44(2) (Prohibitions on disclosure) of FOIA.
2. The Commissioner's decision is that the Home Office was entitled to apply section 44 of FOIA to NCND whether it holds the requested information.
3. The Commissioner requires no steps as a result of this decision.

#### **Request and response**

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4. On 21 October 2022, the complainant wrote to the Home Office and requested information in the following terms:  
  
"Since 1 January 2000, how many UK MPs have been subjected to telephone tapping or other intrusive surveillance?"

5. On 16 November 2022, in compliance with section 17(2) (Refusal of request) of FOIA, the Home Office informed the complainant that it was minded to apply sections 24 and 31 of FOIA and required more time to consider the balance of the public interest.
6. On 21 November 2022, the Home Office responded to the request. Stating that it had interpreted the request as "...pertaining to all Home Secretary-approved warrants for covert investigatory powers by relevant authorities", it cited sections 23(5), 24(2), 31(3) and 44(2) of FOIA, to NCND whether it held the requested information.
7. The complainant requested an internal review on 21 November 2022. He asked for an explanation of the application of sections 23(5), 24(2) and 44(2), and commented that he "...did not ask to see the warrants".
8. Following an internal review, the Home Office wrote to the complainant on 8 February 2023. It provided further details of the exemptions in question and confirmed its reliance on them.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 13 February 2023 to complain about the way his request for information had been handled. His complaint was specifically that:

"The response was not dealt with in accordance with the requirements [sic] Part 1 FOIA because it refers to warrants which was not part of the request...I am not interested in warrants."

10. Section 26 of the Investigatory Powers Act 2016 ('IPA')<sup>1</sup> sets out the warrant authorisation process for the lawful interception of MPs' communications. The approval of these warrants involves a 'triple lock' procedure whereby the Secretary of State may only issue a warrant if it is approved by the Prime Minister. The warrants are also subject to approval by the Judicial Commissioner.
11. The same safeguards also apply with relation to the use of equipment interference against members of relevant legislatures under section 111 of the IPA<sup>2</sup>.
12. Therefore, although the complainant suggests that the request has been misinterpreted, as he is "not interested" in warrants, the activities

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<sup>1</sup> <https://www.legislation.gov.uk/ukpga/2016/25/section/26/enacted>

<sup>2</sup> <https://www.legislation.gov.uk/ukpga/2016/25/section/111/enacted>

specified in the request, would, by necessity, involve the issuing of a warrant authorising them. They are therefore relevant to the consideration of the request.

13. Having regard to the above, the Commissioner has considered whether the Home Office was entitled to apply the cited exemptions to NCND whether it holds the requested information.

## **Reasons for decision**

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### **Neither confirm nor deny**

14. 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 exemptions to this duty, whereby a public authority may NCND whether it holds the requested information.
15. The decision to use an NCND response will not be affected by whether a public authority does, or does not, in fact, hold the requested information. The starting point, and main focus for NCND in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not a particular type of information is held.
16. The Home Office has taken the position of neither confirming nor denying whether it holds the requested information, citing sections 23(5), 24(2), 31(3) and 44(2) of FOIA. The issue that the Commissioner has to consider is not one of the disclosure of any requested information that may be held, it is solely the issue of whether or not the Home Office is entitled to NCND whether it holds any information of the type requested by the complainant.
17. Put simply, in this case the Commissioner must decide whether or not the Home Office is entitled to NCND whether it holds the number of MPs who have been subject to telephone tapping or other intrusive surveillance, since 2000.
18. The Commissioner has reached his decision based on the documentation provided by the complainant. He 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 case.

## Section 44 – Prohibitions on disclosure

19. Section 44(1)(a) provides an exemption from disclosure under FOIA for information which is prohibited from disclosure under any other law or enactment.
20. Section 44(2) provides that a public authority is not required to confirm or deny whether the requested information is held if confirmation or denial would, itself, reveal information that would fall within the scope of section 44(1)(a).
21. The Home Office told the complainant:

“...the matters you have raised - phone tapping - are governed by The Investigatory Powers Act 2016 (IPA)...The IPA imposes a duty not to make any unauthorised disclosures of warrants under sections 57 and 132 which prevents, among other things, disclosing the existence and contents of warrants issued under these parts of the IPA. So whilst I note that you did not request sight of any ‘warrants’ themselves, the legislation, also forbids us to confirm the ‘existence’ of any warrants.”
22. Sections 57(4)(a)<sup>3</sup> and 132(4)(a)<sup>4</sup> of the IPA establish duties which prohibit the Home Office from disclosing the existence of an interception warrant which has been issued under that legislation.
23. The Commissioner is satisfied that if the Home Office was to confirm that it held information falling within scope of the request, it would, in effect, be confirming the existence of one or more warrants to conduct surveillance on MPs. The giving of this confirmation would therefore contravene the statutory prohibitions at sections 57(4)(a) and 132(4)(a) of the IPA.
24. It is important to note that it is not necessary to demonstrate the consequences of both confirming **and** denying whether information is held, in order to engage the NCND provision. In this case, it is sufficient to show that confirmation alone would breach the duty under the IPA. The Commissioner’s guidance on NCND<sup>5</sup> makes this point clear.

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<sup>3</sup> <https://www.legislation.gov.uk/ukpga/2016/25/section/57>

<sup>4</sup> <https://www.legislation.gov.uk/ukpga/2016/25/section/132>

<sup>5</sup> <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/when-to-refuse-to-confirm-or-deny-holding-information/>

25. Section 44 is an absolute exemption, meaning that, if engaged, there is no need to go on to consider the public interest balancing test.
26. The Commissioner is therefore satisfied that the Home Office was entitled to NCND whether it held the requested information, under section 44(2) of FOIA, by virtue of section 44(1)(a).
27. The Commissioner has not found it necessary to consider the other exemptions cited by the Home Office.

## **Other matters**

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### **Internal review**

28. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in the main body of 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.
29. Where a public authority chooses to offer one, the code sets out, in general terms, the procedure that should be followed. The code states that reviews should be conducted promptly and within reasonable timescales.
30. The Commissioner has interpreted this to mean that internal reviews should take no longer than 20 working days in most cases, or 40 in exceptional circumstances.
31. In this case, the Home Office took 54 working days to complete the internal review. The Home Office's handling of the internal review therefore fell outside of the timescale the Commissioner considers acceptable.
32. The Commissioner has made a note of this delay for monitoring purposes.

## **Right of appeal**

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33. 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](mailto:grc@justice.gov.uk)

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

34. 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.
35. 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 .....**

**Samantha Bracegirdle**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**