

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 20 January 2010

Public Authority: Ministry of Defence
Address: Main Building
Whitehall
London
SW1A 2HB

Summary

In March 2007 HMS Cornwall was deployed in the Northern Persian Gulf charged with maintaining the sovereignty and integrity of Iraqi territorial waters under UN Security Council Resolution 1723. Two of HMS Cornwall's seaboats, whilst conducting a routine search of a merchant vessel, were captured by the Iranian Islamic Revolutionary Guard. The Iranian government subsequently announced that the 15 personnel on the seaboats had been captured because they had been in Iranian territorial waters. The British government maintained that the two seaboats remained in Iraqi territorial waters. The complainant requested a copy of information that had been exchanged by a data link between one of the seaboats and HMS Cornwall on the day of the capture. The public authority refused to provide the information citing section 26(1)(b) of the Act. The Commissioner has concluded that the public authority was entitled to refuse to disclose the requested information on the basis of this exemption.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. In March 2007 HMS Cornwall was deployed – alongside the Iraqi navy - to the Northern Persian Gulf as part of the coalition force charged with maintaining the sovereignty and integrity of Iraqi territorial waters under UN Security Council Resolution 1723.

3. On 23 March 2007 a boarding team consisting of seven Royal Marines and eight sailors in two of HMS Cornwall's seaboats conducted a search of an Indian flagged merchant vessel. After searching the vessel the two seaboats were captured by Iranian Islamic Revolutionary Guard vessels and escorted into an Iranian seaport.
4. The Iranian government subsequently announced that the 15 personnel had been captured because they had been in Iranian territorial waters and argued that the GPS information on the two captured seaboats supported their position.
5. The British government disputed this and stated that the captured service personnel had remained in Iraqi waters and never entered Iranian territory. On 28 March 2007 the MOD held a press briefing at which it presented evidence which it argued demonstrated that the 15 personnel were operating in Iraqi waters when they were seized. At this briefing Vice Admiral Charles Style also explained that one of the seaboats was connected to HMS Cornwall via a data link during the boarding of the Indian merchant vessel. The position of the seaboat during its search of the merchant vessel, as communicated by the data link, was displayed on HMS Cornwall and this information confirmed that the seaboat remained within Iraqi territorial waters.
6. The 15 captured personnel were released by Iran on 5 April 2007.

The Request

7. On 10 April 2007 the complainant submitted a request to the MOD which sought information communicated to HMS Cornwall on 23 March 2007 from the 15 personnel who were captured by Iran.
8. The complainant received a response from the MOD on 11 May 2007 extending the time it needed to conduct the public interest test.
9. The MOD subsequently provided the complainant with a substantive response on 20 June 2007. As part of this response the MOD provided the complainant with a transcript detailing verbal communications between HMS Cornwall and the two seaboats although some information was redacted from the transcript. The MOD explained that this information has been withheld on the basis of section 26(1)(b) of the Act and the public interest test favoured maintaining the exemption.
10. The complainant subsequently contacted the MOD on 25 June 2007 and explained that in submitting his request he had been specifically seeking information communicated to HMS Cornwall concerning the location and position of the seaboats and it was not clear from the response of 20 June 2007 whether such information had been withheld on the basis of section 26(1)(b). The complainant asked the MOD to clarify this issue.
11. The MOD contacted the complainant on 19 July 2007 and explained that it had effectively treated his communication of 25 June 2007 as a new request for

information which it described as seeking 'a copy of the location information communicated by data link to HMS Cornwall from the boarding party of 15 Royal Naval personnel who were detained by Iran on 23 March 2007'. The MOD confirmed that although it held information falling within the scope of this request, it considered it to be exempt from disclosure on the basis of section 26(1)(b) and the public interest favoured maintaining the exemption.

12. On the same day, 19 July 2007, the complainant contacted the MOD and asked it to conduct an internal review of this decision.
13. The MOD informed the complainant of the outcome of the internal review, which upheld the refusal on the basis of section 26(1)(b), on 11 April 2008. The internal review noted that section 17(4) of the Act provides that a public authority is not obliged to provide a detailed explanation of why it considers an exemption to apply if such an explanation would involve the disclosure of exempt information. The MOD explained that it believed that this provision of the Act was relevant to this request and thus the details included in the refusal notice and internal review as to why the MOD believed section 26(1)(b) to apply were deliberately brief in nature.

The Investigation

Scope of the case

14. The complainant contacted the Commissioner on 15 April 2008 and asked him to consider the MOD's refusal of his request on the basis of section 26(1)(b) of the Act. The complainant advanced a number of reasons as to why he believed that this exemption did not provide a basis upon which to withhold the information he had requested.
15. Before commencing his investigation the Commissioner asked the complainant to confirm that the scope of his complaint was restricted to the MOD's failure to provide the location and position information communicated by data link to HMS Cornwall by the two seaboats on 23 March 2007. The complainant confirmed to the Commissioner that this was indeed the scope of his complaint.

Chronology

16. Due to a backlog of complaints about public authorities' compliance with the Act, the Commissioner was not able to begin his investigation of this complaint immediately. Therefore it was not until 17 March 2009 that the Commissioner was in a position to contact the complainant in order to confirm the nature of his complaint (as detailed in the preceding paragraph).
17. Following this clarification the Commissioner wrote to the MOD on 17 March 2009 (although due to the Commissioner's emails being sent to an out of date contact point, the MOD did not receive this correspondence until 29 May 2009) and asked to be provided with a copy of the withheld information and detailed submissions to

support its position that this information was exempt from disclosure on the basis of section 26(1)(b).

18. The MOD provided the Commissioner with a response dated 22 June 2009. In this response the MOD provided the Commissioner with submissions to support its position that the withheld information was exempt from disclosure on the basis of section 26(1)(b). The MOD also invited a representative of the Commissioner's office to view the withheld information at the MOD's offices.
19. A representative of the Commissioner's office subsequently visited the MOD's offices on 9 July 2009 in order to view the withheld information and to discuss the basis upon which this information had been withheld. At this meeting the MOD confirmed that it believed that the withheld information would also have been exempt from disclosure on the basis of section 27 of the Act at the time of the request. During this meeting the representative of the Commissioner's office was provided with a copy of the withheld information.
20. The Commissioner wrote to the MOD again on 17 July 2009 in order to clarify a number of outstanding issues and also to seek written submissions from the MOD to support its position that the withheld information was also exempt from disclosure on the basis of section 27 of the Act.
21. The Commissioner received a response from the MOD on 19 August 2009.

Analysis

Exemptions

22. The MOD has argued that the withheld information is exempt from disclosure on the basis of both section 26(1)(b) and section 27(1)(a) of the Act. The Commissioner has considered the application of section 26(1)(b) first.

Section 26 - defence

23. Section 26(1)(b) provides that information is exempt if its disclosure would, or would be likely to prejudice:

‘the capability, effectiveness or security of any relevant forces’.

24. In order for a prejudice based exemption, such as section 26, to be engaged the Commissioner believes that three criteria must be met:

- Firstly, the actual harm which the public authority alleges would or would be likely to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption.
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is

designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance.

- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e. disclosure would be likely to result in prejudice or disclosure would result in prejudice. If the likelihood of prejudice occurring is one that is only hypothetical or remote the exemption will not be engaged.
25. The MOD has provided the Commissioner with submissions to support its position that disclosure of the withheld information **would** result in prejudice occurring to the capability, effectiveness or security of the armed forces
26. However, given the circumstances of this case the level of detail which the Commissioner can include in this Notice about the MOD's submissions to support the application of this exemption, and the Commissioner's consideration of them, is very limited. This is because inclusion of any detailed analysis is likely to reveal the content of the withheld information itself. Instead the Commissioner has produced a confidential annex which sets out in details his findings in relation to the application of the exemption. This annex will be provided to the MOD but not, for obvious reasons, to the complainant.
27. Nevertheless, the Commissioner believes that he is able to confirm in the body of the Notice that he is satisfied that the three criteria set out above have been met and thus the exemption contained at section 26(1)(b) is engaged.
28. In relation to the first criterion the Commissioner is confident that the harm which the MOD has identified is one which is inherent in the exemption contained at section 26(1)(b). In relation to the second criterion the Commissioner is satisfied that disclosure of the withheld information can be clearly linked to the prejudice set out at section 26(1)(b) and furthermore that the prejudice will be not trivial or insignificant but real and of substance. However, in relation to the third criterion the Commissioner does not accept that the MOD has advanced sufficient evidence in order to support its position that disclosure of the withheld information **would** result in prejudice occurring. Nevertheless the Commissioner is prepared to accept that the lower threshold of likely to prejudice is met.
29. In reaching this conclusion the Commissioner wishes to emphasise that he has taken into account the complainant's argument that the exemption should not be engaged because the MOD has already placed into the public domain information about the location of the seaboats at the time of their capture by the Iranians. However, due to the nature of the withheld information, more details regarding the relevance of this factor can only be given in the confidential annex referred in paragraph 26.

Public interest test

30. Section 26 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the requested information

31. The MOD acknowledged that disclosure of the withheld information may demonstrate openness and transparency and thereby help build greater trust and confidence in the MOD.
32. More specifically the MOD noted that there was a public interest in ensuring that the operational circumstances and factors leading to the capture of the personnel are fully examined and that proof that the boarding party were in Iraqi waters is given to the public.
33. The complainant argued that the MOD had not sufficiently proved its case that the boarding party were in Iraqi waters when they were captured: he noted that to support its position the MOD had simply released a picture of a serviceman on an aircraft holding a compass in the air over a ship several days after the capture of the British personnel and claimed that the co-ordinates matched the exact position of the boarding party had been in when captured.
34. Moreover, the complainant noted that the British and Iranians had both argued with equal conviction that their respective positions – i.e. that the personnel were in Iraqi not Iranian waters and vice versa – were correct. The complainant argued that there was a clear public interest in disclosure of information that would clarify what actually happened in this incident.
35. The complainant also suggested that there was no evidence that the House of Commons' Defence Committee report cited by the MOD (see below) had seen the information which was being withheld in response to his request and thus this argument could not be used to support the position to withhold the information.

Public interest arguments in favour of maintaining the exemption

36. The MOD argued that there was a significant public interest in protecting the UK armed forces' operational capability, effectiveness and security.
37. Furthermore there was a clear public interest in ensuring that the UK's contribution, as part of Coalition Task Force 158, to Operation Iraqi Freedom was not undermined.
38. The MOD also argued that the public interest in examining the incident and informing the public about it had been largely met by the House of Commons' Defence Committee's detailed inquiry into the incident, and its subsequent report into the lessons learned, and by the disclosure by the MOD of the seaboats' positions at the time of their capture.¹

¹ [House of Commons Defence Committee, *The Iran hostages incident: the lessons learnt*. Fourth Report of Session 2007-08, 14 December 2007.](#)

Balance of the public interest arguments

39. As with the engagement of the exemption, the Commissioner cannot include all parts of his analysis of the public interest arguments in the main body of the Notice without compromising the content of the withheld information. He has therefore included additional comments in the confidential annex.
40. With regard to attributing weight to the factors in favour of disclosure, the Commissioner recognises that they are ones which are regularly relied upon in support of public interest in favour of disclosure, i.e. they focus on openness, transparency, accountability and building trust in public authorities. However, this does not diminish their importance as they are central to the operation of the Act and thus are likely to be employed every time the public interest test is discussed.
41. Moreover, in the Commissioner's opinion such factors attract particular weight given the circumstances of this case: the incident in question was one of international significance and as the House of Commons report notes weaknesses were identified in the Royal Navy's intelligence, communications and training in respect of the events that led up to the incident. Furthermore, the Commissioner accepts the point advanced by the complainant that despite the disclosures and comments already made by the MOD, given the opposing positions of the British and Iranian governments, there is still arguably some debate as to the actual events surrounding the incident. Therefore the Commissioner believes that the argument that disclosure would be in the public interest in order to further inform the public about this incident and to confirm the MOD's position that the personnel were in Iraqi waters when captured, would strongly be in the public interest.
42. With regard to attributing weight to the arguments in favour of maintaining the exemption, the Commissioner does not believe that the contribution to openness and transparency that the Committee's report made should be dismissed in the way suggested by the complainant. Rather in the Commissioner's opinion their inquiry and subsequent report, along with the previous disclosures by the MOD considered by the Committee have made a worthwhile contribution to the public's understanding of the incident. Although, as the Committee's report notes, given the classified nature of information surrounding the incident there is limit to the actual facts and findings of the report that can be that can be placed in the public domain, the Commissioner does not believe that this should be equated to there being no independent review of the incident. Furthermore the Commissioner believes that the argument that the capability, effectiveness and security of British armed forces should be protected is a compelling and powerful one; it is clearly in not the public interest that such forces are undermined within whatever arena they are operating.
43. In conclusion although the Commissioner recognises the weighty arguments in favour of disclosing the withheld information, he believes that when taking into account the powerful public interest in protecting the British armed forces and considering the content of the information itself, the public interest weighs in favour of maintaining the exemption.

Section 27 – international relations

44. In light of his findings in respect of section 26(1)(b), the Commissioner has not considered in detail the application of section 27(1)(a). However, in the Commissioner's view it is most likely that section 27(1)(a) would provide a basis upon which to withhold the requested information and in all the circumstances of the case the public interest would be likely to favour maintaining the exemption.

The Decision

45. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

46. The Commissioner requires no steps to be taken.

Other matters

47. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
48. The Commissioner has issued guidance on the time limits on carrying out internal reviews under the Act². This guidance explains that in the Commissioner's opinion 20 working days constitutes a reasonable amount of time to conduct an internal review. In exceptional circumstances it may be reasonable to take longer but in no circumstances should the total time taken exceed 40 working days. In this case, the MOD received correspondence from the complainant in July 2007 asking it to conduct an internal review its handling of his request. The MOD did not inform the complainant of the outcome of this review until 9 months later in April 2008.
49. In the future the Commissioner expects the MOD to ensure that when conducting internal reviews it adheres to the time guidelines set out in the guidance paper reference above.

² [Freedom of Information Good Practice Guidance No. 5](#)

Right of Appeal

50. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 20th day of January 2010

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

General Right of Access

Section 1(1) provides that -

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

Section 1(2) provides that -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

Refusal of Request

Section 17(1) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 17(4) provides that -

“A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

Defence

Section 26(1) provides that –

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

(a) the defence of the British Islands or of any colony, or

(b) the capability, effectiveness or security of any relevant forces.”

International Relations

Section 27(1) provides that –

“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.”