

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 15 June 2010

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

Summary

The complainant made three requests for information relating to detentions carried out by the armed forces operating jointly with the US armed forces, or with the armed forces of any other country. Following the internal review, the stance of the public authority was that the cost limit would be exceeded in relation to the first request, and that the information falling within the scope of the second and third requests was personal data and so was subject to the exemption provided by section 40(2) (personal information). The Commissioner finds that the public authority estimated correctly that it would exceed the cost limit to disclose the information falling within the scope of the first request, but that it would not have exceeded the cost limit for the public authority to confirm or deny whether it held this information. In relation to the second and third requests, the Commissioner finds that the public authority applied section 40(2) correctly in relation to some information falling within the scope of these requests, but that the remainder of this information would not constitute personal data and so was not subject to this exemption. The public authority is required to disclose this information. The Commissioner also finds that the public authority failed to comply with the procedural requirements of sections 1(1)(a), 1(1)(b), 10(1), 17(1) and 17(5) of the Act.

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.

The Request

2. The complainant made the following information requests on 20 June 2008:

- (i) *"A documentary record of the policy [that UK special forces operating jointly with United States special forces in Iraq would detain or capture individuals but not arrest them] and any non legally privileged information relating to the policy, its application and the purpose behind it."*
- (ii) *"All information relating to any individuals who were detained or captured by UK soldiers operating within the joint US/UK task force."*

Please state how many of these individuals were subsequently transferred to Guantanamo Bay Detention Camp, Bagram Theatre Internment Facility, Balad Special Forces Base, Camp Nama BIAP or Abu Ghraib Prison or any other detention facility in third countries.

Please state how many of these individuals following capture were taken to:

- 1. A detention facility under the authority and control of British Forces.*
- 2. A detention facility under the joint authority and control of British forces.*
- 3. Any other detention facility (please specify).*
- 4. More than one detention facility.*
- 5. No detention facility.*

In respect of each individual case please provide as much information as possible, including:

- a. The date of detention and / or capture.*
- b. The date of transfer to US authority and control.*
- c. The location of such transfer.*

d. Subsequent known places of detention and dates thereof.

Please explain what you have treated as detention and capture for the purposes of answering these questions."

(iii) *"I would like to make a request on the same terms as [request (ii)] in relation to all other individuals that have been detained or captured jointly by British forces and forces of another country in Iraq or Afghanistan. Please make clear in each case which other force was acting jointly with UK forces."*

3. The public authority responded to this on 5 September 2008, outside twenty working days from receipt of the request. In response to request (i) the public authority refused to either confirm or deny whether it held information falling within the scope of the request and cited the exemptions provided by sections 23(5) (information supplied by, or relating to, bodies dealing with security matters) and 24(2) (national security). In response to requests (ii) and (iii), the public authority confirmed that this information was held, but refused to disclose this, citing the exemption provided by section 40(2) (personal information).
4. The complainant responded to this on 21 October 2008 and requested an internal review of the refusal of his requests. The complainant questioned whether disclosure of information falling within the scope of request (i) would raise any security concerns. In connection with requests (ii) and (iii) the complainant requested the public authority to consider whether this information could be provided in an anonymised form and questioned whether the numerical and location information requested would constitute personal data.
5. The public authority responded with the outcome of the review on 27 February 2009. The public authority amended its stance in relation to request (i) and now cited section 12(1) as it believed that *"the costs that would be incurred in establishing whether the Department holds the information and determining whether the Department is capable of providing this information in accordance with the Act will exceed the appropriate limit"*. The public authority provided brief advice as to how the complainant could refine the request, but did not provide any breakdown of its cost estimate. In connection with requests (ii) and (iii), the public authority upheld its decision to refuse these requests under section 40(2).

The Investigation

Scope of the case

6. The complainant contacted the Commissioner following the internal review on 22 April 2009 and specified the following as his grounds for complaint:
 - The citing of section 12(1) as the basis for refusing request (i) for the first time at internal review stage.
 - The earlier refusal to confirm or deny in response to request (i) under the exemptions provided by sections 23(5) and 24(2) and the failure to provide an adequate explanation for the citing of these exemptions.
 - The refusal of requests (ii) and (iii) under section 40(2).
 - The delay in communicating the outcome of the internal review.
7. In relation to request (i), the complainant suggested that the public authority having cited exemptions when initially refusing this request indicated that it had, by the time of the refusal notice, undertaken the work necessary to comply with this request. The complainant believed that subsequently introducing section 12(1) as the basis for refusing this request went against the spirit of the Act.
8. In connection with requests (ii) and (iii), the complainant suggested, as he had when requesting an internal review, that not all of the information held by the public authority falling within the scope of that request would constitute personal data. The complainant believed that personal data could be redacted and the remainder of the information disclosed. The complainant also believed that the exemption at section 35(2) of the Data Protection Act 1998 applied and that this meant that the exemption provided by section 40(2) of the Freedom of Information Act was not engaged.

Chronology

9. The Commissioner contacted the public authority on 7 October 2009 and asked that it respond with further explanations for the refusals of the complainant's requests. The public authority responded on 9 November 2009.
10. In relation to request (i), the public authority provided a cost estimate that covered both time that would be taken in determining whether it held information falling within the scope of the request and time that would be taken to locate, retrieve and extract this information. This

indicated that the public authority was citing section 12(1) in relation to both sections 1(1)(a) and 1(1)(b).

11. In connection with requests (ii) and (iii), the public authority indicated that it believed that the information requested constituted sensitive personal data of the data subjects. The reasoning for this was that the public authority believed that the ethnicity and religion of these individuals could be inferred through this information.

Analysis

Substantive Procedural Matters

Section 12

12. Prior to considering whether section 12(1) does apply here, the Commissioner will address the complainant's point that the public authority should not have introduced section 12(1) for the first time at internal review and that, because of the delay in the citing of section 12(1), the Commissioner should focus on whether the exemptions initially cited, sections 23(5) and 24(2), were engaged. The Commissioner agrees with the complainant that it would have been preferable for the public authority to have cited section 12(1) in the refusal notice, its earliest opportunity to do so. However, in order to preserve internal reviews as a means for public authorities to genuinely reconsider the response to a request and, where appropriate, to amend their stance, the Commissioner takes the substantive stance of a public authority to be that expressed at internal review stage. In line with this approach, in this case the Commissioner considers the citing of sections 23(5) and 24(2) to have been withdrawn by the public authority and its substantive stance to be that section 12(1) applies.
13. The public authority has cited section 12(1) in relation to request (i). Section 12(1) provides that a public authority is not obliged to comply with an information request if the cost of doing so would exceed the appropriate limit. The limit for central government public authorities is set at £600 in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2005 (the "fees regulations"). The fees regulations also specify that the cost of compliance with a request must be calculated at the rate of £25 per hour, giving an effective time limit of 24 hours. Section 12(1) is set out in full in the attached legal annex, as are all other sections of the Act referred to in this Notice.

14. The fees regulations further specify the tasks that can be taken into account when forming a cost estimate as follows:
 - determining whether information is held;
 - locating information;
 - retrieving information;
 - extracting information.

15. Section 12 can be applied in relation both to the cost of establishing whether the information is held, and to the cost of providing a copy of the information to the requester. The public authority in this case has provided to the Commissioner an estimate that covers both the cost of establishing if the requested information was held and the cost of locating, retrieving and extracting this information. The Commissioner assumes that the stance of the public authority is that it would expect to hold information falling within the scope of the request, but that work would be necessary in order to establish this definitively. The public authority is, therefore, citing section both section 12(1) in relation to section 1(1)(b) (the duty to provide information, if held and not exempt) and section 12(2) in relation to section 1(1)(a) (the duty to confirm or deny whether information is held).

16. The public authority has provided the following details of its estimate of the cost of compliance with the request:
 - Length of time to determine if the requested information is held:
10 hours / £250

 - Length of time to locate this information:
15 hours / £375

 - Length of time to retrieve / extract this information:
50 hours / £1250

17. Section 12(1) requires that a public authority should make a reasonable estimate of the cost of compliance. The task for the Commissioner is, therefore, to consider whether this estimate is reasonable.

18. The public authority has specified five areas in which it believes information relevant to the request may be held and has stated that it anticipates that any relevant information will be held in the form of electronic records, paper records and e mails. The public authority has

provided an estimate that it would take two hours for each of these five areas to establish if information falling within the scope of the request is held.

19. The Commissioner would expect a public authority to cite section 12(2) in relation to section 1(1)(a) only in a case where it is genuinely unaware of whether it holds information falling within the scope of the request and it has concerns about the period of time that would be taken to establish this. In this case the Commissioner is not satisfied that the public authority is genuinely unable to confirm whether it holds information falling within the scope of the request. Instead, he believes that the public authority is aware that it does hold information falling within the scope of the request, but that it would take time to establish precisely what information is held. The test for establishing whether any information within the scope of the request is held is the balance of probabilities. Applying that test, the Commissioner considers that the public authority could have reached a decision. However, regardless of this, section 12(2) can be cited in connection with the duty to confirm or deny only where the cost of compliance with section 1(1)(a) alone would exceed the appropriate limit, as is made clear by the wording of this section. If the cost of compliance with section 1(1)(a) alone would not exceed the limit, section 12(2) is not relevant and the cost of compliance with section 1(1)(a) cannot, for the purposes of section 12, be added to the cost of compliance with section 1(1)(b). In this case, the cost estimate by the public authority for compliance with section 1(1)(a) is £250. As the public authority has estimated that the cost incurred through compliance with section 1(1)(a) would be less than £600, the Commissioner concludes that it would not exceed the cost limit for the public authority to comply with section 1(1)(a) in relation to request (i).
20. Turning to the time estimate in relation to the requirement of section 1(1)(b), the public authority has stated that it would take 15 hours to locate the information requested. It has not, however, provided any explanation of this part of its estimate. In the absence of any explanation from the public authority as to why it would take an estimated 15 hours to locate information falling within the scope of the request, the Commissioner does not accept that this part of the cost estimate is reasonable.
21. In relation to retrieving the information, the public authority has estimated that this would take three hours for each of the five areas in which it anticipates information will be held. The Commissioner accepts that 15 hours is a reasonable estimate of the time that would be taken to examine the content of the various sources for information falling

- within the scope of the request and so accepts this part of the cost estimate.
22. The public authority has also estimated that it would take a total of 10 hours to extract information from documents in which it is contained. The Commissioner accepts that it would be necessary for the public authority to spend time on this activity having identified and located the relevant information within the documents in which it is contained and that two hours for each of the areas in which relevant information is held is a realistic estimate of the time that would be taken in this activity. The Commissioner accepts as reasonable this part of the cost estimate made by the public authority. The Commissioner would also note at this point that the public authority provided brief advice to the complainant as to how his request could be refined to bring it within the cost limit, but that, so far as the Commissioner is aware, the complainant chose not to submit a refined request.
 23. The public authority referred to another retrieval / extraction task, stating that it would take a further 25 hours to carry out a complete read through of the retrieved information *"to identify what is specifically relevant"*. The Commissioner does not believe that it is reasonable to include the time that would be taken to read through the information in its entirety as part of a cost estimate. The public authority has previously stated that it would take three hours for each of the areas specified to retrieve the relevant information and a total of 10 hours to extract this information. The Commissioner is not clear as to why, in addition to those tasks, it would be necessary to spend a further 25 hours reading through this information. As the public authority is aware, time taken in considering whether any exemptions may apply and in redacting any information to be withheld cannot be included as part of a cost estimate. The Commissioner does not accept the estimate of 25 hours in order to carry out a complete read through of the information falling within the scope of the request as part of a reasonable estimate.
 24. The Commissioner has accepted as reasonable two parts of the cost estimate relating to time taken in retrieving and extracting the information. This gives a total time estimate of 25 hours, or a cost estimate of £625. As this exceeds the appropriate limit of £600, the Commissioner accepts that the public authority is not required to comply with section 1(1)(b) in relation to request (i).
 25. However, as the public authority has estimated the cost of confirmation or denial at less than £600, the Commissioner does not accept that section 12(2) applies in relation to section 1(1)(a). Also, owing to a lack of clarity and detail in the representations from the public

authority, the Commissioner has not accepted as a part of the reasonable estimate in relation to section 1(1)(b) the estimate relating to the time that would be taken in locating information falling within the scope of the request or in relation to the time that would be taken in reading through the information identified as relevant. The Commissioner has not included a remedial step in connection with his finding that section 12(2) does not apply in relation to section 1(1)(a) as the requirement to confirm or deny has been superseded by the content of this notice.

Exemptions

Section 40

26. The public authority has cited the exemption provided by section 40(2) in response to requests (ii) and (iii). Section 40(2) provides an exemption for any information that is the personal data of any individual other than the requester if the disclosure of that personal data would breach any of the data protection principles. Consideration of this exemption is, therefore, a twofold process; the first step is to consider whether the information constitutes the personal data of any third parties. The second step is to consider whether the disclosure of that personal data would breach any of the data protection principles.

27. Section 1(1) of the Data Protection Act 1998 (the "DPA") provides the following definition of personal data:

"personal data' means data which relate to a living individual who can be identified-

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller".

28. The complainant has requested all information relating to individuals detained by UK forces operating in the joint task force with US forces. Content within this information that would enable identification of any of these detainees is clearly personal data relating to the detainees on the basis that they would be identifiable from this and this would relate to them. The Commissioner would anticipate that this information will include the names of detainees and possibly other information of sufficient detail that this would enable identification of individuals, including information falling within the scope of those parts of request (ii) distinguished as a – d and, therefore, accepts that this part of the content of this information does constitute personal data. The following

analysis of the data protection principles relates only to that content of the information that records names of individuals, those subsidiary parts of the request distinguished as a – d and any other content that the public authority can clearly demonstrate identifies individuals. The remainder of the information requested is covered in a separate analysis below.

29. Turning to whether the disclosure of this personal data would breach any of the data protection principles, the Commissioner has focussed on the first data protection principle, which provides that personal data shall be processed fairly and lawfully. In order for disclosure to be compliant with the first data protection principle, this disclosure must be, in general, fair, lawful and meet at least one of the conditions in Schedule 2 of the DPA. For sensitive personal data, it is necessary to also meet at least one of the conditions in Schedule 3 of the DPA.
30. The Commissioner has considered first whether disclosure of information identifying detainees would be, in general, fair to those identified. On this point the public authority has argued that disclosing that those identified on this list had been detained by the armed forces would be damaging to the reputation of those individuals and thus unfair. The Commissioner accepts this argument from the public authority as, whilst it may be the case that many named on this list were released without charge, it is a reasonable assumption that association with having been detained would be injurious to the reputation of those individuals. Disclosure of this information would therefore be, in general, unfair. As the conclusion has been reached that disclosure would be, in general, unfair and, therefore, in breach of the first data protection principle, it has not been necessary to go on to consider whether any of the conditions for fair processing in DPA Schedule 2 are met, or whether this information constitutes sensitive personal data.
31. Amongst the complainant's arguments against the citing of section 40(2) was that DPA section 35(2) provides an exemption from the non disclosure provisions of the DPA, which include the first data protection principle, for the information in question. DPA section 35(2) provides an exemption from the non disclosure provisions where disclosure is necessary for the purpose of establishing legal rights. The argument of the complainant was that disclosure here was necessary in order to establish the legal rights of the detainees. However, the Commissioner is confident that the legal rights of those detained by the armed forces of the Crown are well established, even if there are those who would argue that those rights have not always been adhered to in relation to those detained in recent years in Iraq and Afghanistan. The Commissioner does not, therefore, accept that disclosure of the

information in question is necessary for the purpose of establishing the legal rights of the detainees and so the exemption provided by DPA section 35(2) does not apply.

32. Having found that part of the content of the information falling within the scope of this request would be the personal data of the detainees and that the disclosure of this personal data would breach the first data protection principle, the conclusion of the Commissioner is that the exemption provided by section 40(2) is engaged in relation to that part of the content. Below is a separate analysis relating to the location and numerical information specified by the complainant, as well as the request for a definition of detention and capture.
33. As well as requesting all information regarding those detained by the armed forces operating jointly with the US armed forces and with the armed forces of any other country, the complainant was specific about particular information he requested to be provided with. These parts of request (ii) are distinguished in the request quoted above as 1 – 5, as well as the parts of the request for the numbers of detainees transferred to various detention facilities primarily operated by the US armed forces and the request for an explanation of what had been treated as detention and capture for the purposes of the request. The Commissioner does not accept that the information requested in these subsidiary parts of the request would constitute the personal data of any individual.
34. Covering first the numerical and location information requested, the Commissioner considers it clear that this information would not identify any individual. This information would not, therefore, be personal data according to the definition given at section 1(1) of the DPA.
35. Turning secondly to the request for an explanation of what has been treated as detention and capture for the purposes of responding to requests (ii) and (iii), the Commissioner has taken the view that the public authority did not address this part of the request separately as no other information was disclosed in response to this request, rather than that this information would constitute personal data. The Commissioner's view is that a response to this part of the request should now be provided.
36. In relation to the request for the numbers of detainees transferred to various identified detention facilities, the parts of the request distinguished as 1 – 5 and the request for an explanation of what has been treated as detention and capture, the Commissioner concludes that the information falling within the scope of these parts of the request would not constitute the personal data of any individual. In

relation to these parts of the request the exemption provided by section 40(2) is not, therefore, engaged.

Procedural Requirements

Sections 1 and 10

37. In failing to disclose the information falling within the scope of requests (ii) and (iii) that the Commissioner now concludes should be disclosed within twenty working days of receipt of the request, the public authority failed to comply with the requirements of sections 1(1)(b) and 10(1).
38. In failing to confirm that information falling within the scope of request (i) was held on the basis of section 12(2) despite it appearing that it was aware that it held information falling within the scope of this request, the public authority failed to comply with the requirements of sections 1(1)(a) and 10(1).

Section 17

39. In failing to respond with the initial refusal notice within twenty working days of receipt of the request, the public authority failed to comply with the requirement of section 17(1). In failing to cite section 12(1) until internal review stage and so not within twenty working days of receipt of the request, the public authority did not comply with the requirement of section 17(5).

The Decision

40. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act in that it estimated reasonably that disclosing the information within the scope of request (i) would exceed the appropriate limit and that it applied section 40(2) correctly in relation to some of the information falling within the scope of requests (ii) and (iii). However, the Commissioner finds that it would not have exceeded the cost limit for the public authority to confirm that it held information falling within the scope of request (i) and that some of the information falling within the scope of requests (ii) and (iii) was not subject to the exemption provided by section 40(2). The Commissioner also finds that the public authority breached the procedural requirements of sections 1(1)(a), 1(1)(b), 10(1), 17(1) and 17(5).

Steps Required

41. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
 - disclose to the complainant the information falling within the scope of requests (ii) and (iii) that is not subject to section 40(2), which is set out above at paragraph 36.
42. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

43. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Other matters

44. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

The Commissioner's published guidance on internal reviews states that a review should be conducted within 20 working days, unless there are exceptional circumstances, in which case the review period may be extended to 40 working days. In this case the Commissioner notes that there appeared to be no exceptional circumstances, but that the public authority failed to provide the outcome to the review within 20 working days. Neither did the public authority respond with the outcome to the review within 40 working days. The public authority should ensure that internal reviews are carried out promptly in future.

45. When citing section 12, the public authority failed to provide any breakdown of the cost estimate. The public authority should be aware that the Commissioner considers it appropriate and in line with the obligation to provide advice and assistance imposed on public authorities by section 16(1) for a breakdown of how the cost limit would be breached to be provided where section 12 is cited. The

Information Tribunal confirmed that it would expect the same in *Gowers and the London Borough of Camden* (EA/2007/0114) when stating:

"...a public authority seeking to rely on section 12 should include in its refusal notice, its estimate of the cost of compliance and how that figure has been arrived at, so that at the very least, the applicant can consider how he might be able to refine or limit his request so as to come within the costs limit..." (paragraph 68)

46. The public authority should take note of this and provide a breakdown of its cost estimate in any future case where section 12 is cited.

Right of Appeal

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

First-tier Tribunal (Information Rights)
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 sent.

Dated the 15th day of June 2010

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

Freedom of Information Act 2000

Section 1

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 10

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Section 12

Section 12(1) provides that –

“Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.”

Section 12(2) provides that –

“Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.”

Section 17

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 40

Section 40(2) provides that –

"Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied."

Data Protection Act 1998

Section 35

Section 35(2) provides that –

"(2) Personal data are exempt from the non-disclosure provisions where the disclosure is necessary—

(a) for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings), or

(b) for the purpose of obtaining legal advice,

or is otherwise necessary for the purposes of establishing, exercising or defending legal rights."