

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 20 July 2011

**Public Authority:** Ministry of Defence  
**Address:** Main Building (Level 1 Zone N)  
Whitehall  
London  
SW1A 2HB

### Summary

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The complainant contacted the Ministry of Defence (the MOD) to request information concerning the McGurk's Bar Massacre of 4 December 1971. The MOD responded that determining whether relevant information was held would exceed the appropriate costs limit. The complainant refined his request but the MOD stated that compliance with the revised request would still exceed the costs limit. The internal review carried out by the MOD upheld this decision. The Commissioner has investigated and finds that compliance with either request would exceed the appropriate costs limit and, therefore, the MOD was correct to apply section 12(2). The Commissioner also finds that the MOD provided adequate advice and assistance to the complainant under section 16(1) of the Act but that it breached section 17(5) in issuing its refusal notice outside the statutory time frame. The Commissioner requires no further remedial steps to be taken.

### The Commissioner's Role

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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

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2. On 16 August 2010 the complainant contacted the MOD to request the following information:

*"If the EOP [End of Play] summaries are not to be found in MO4 then perhaps the replies to the documents from the MOD exist? Where Information Policy messages had EOP numbers, the replies from the MOD carried the letters 'IPR'. Perhaps these can be found in their stead?"*

*Furthermore, it is my understanding that classified documents and their destruction should be recorded in the 'Classified Documents register' at HQ Northern Ireland and/or MOD. Can you confirm that the EOPs for the dates requested are registered here along with their destruction?"*

*Finally, EOPs were daily summaries that were then gathered into a fortnightly Information Policy Working Party Report [IPWP reports]. Instead of the daily summaries which have disappeared may I have the fortnightly reports that cover the dates requested? If these cannot be found, please contact me directly as I can offer you further details of their existence."*

3. The MOD received the correspondence on the date it was sent and acknowledged the request on 25 August 2010.
4. On 17 September 2010 the MOD provided a response to the complainant. It refused to disclose the information relating to replies to the EOP summaries and IPWP reports on the grounds that compliance with the request would exceed the appropriate costs limit. The MOD stated that to conduct full searches to ascertain whether information was held in the first instance would exceed the costs limit and therefore the request engaged section 12(2).
5. With regard to the classified document registers (CDRs) the MOD stated that information pertaining to that part of the request could not be located. The MOD explained that this was due to the fact that the Defence Records Management Policy and Procedures stipulate that records should be retained for 30 years and can then be destroyed after that time period has expired. The MOD stated that the timescale given in the request fell outside the 30 year retention policy which increased the likelihood that the information had been destroyed.
6. The MOD offered advice and assistance to the complainant and suggested that he could locate certain information and files dating from

the period specified in the request at The National Archives; it provided the relevant series reference.

7. On 17 September 2010, in response to the MOD's costs refusal, the complainant refined his request stating that he wished to obtain the following information:

*"May I make a request for the Information Policy Working Party Reports (covering the relevant dates) on their own please in order to keep down costs."*

8. On 20 September 2010 the MOD responded, explaining that a search for this information had already been undertaken as part of the search criteria to locate information pertaining to the original request. The MOD stated that the costs limit still applied to this refined request.
9. On 22 September 2010 the complainant contacted the MOD dissatisfied with the handling of his requests. An informal review was provided by the MOD on 5 October 2010 in which it upheld its application of costs to all three parts of the original request; it repeated its advice concerning information held at The National Archives and provided the references for relevant files.
10. On 11 October 2010 the complainant requested an internal review of the MOD's decision. On 5 November 2010 the MOD wrote to the complainant with the details of the result of the internal review it had carried out. The internal review upheld the MOD's decision to apply section 12(2) to the requests. It provided further details regarding the initial searches it had undertaken to ascertain whether information was held, and an estimate of the costs it would incur were full compliance with the requests to be undertaken.
11. The MOD also upheld its decision that the CDRs for the period specified in the original request were not held and in all likelihood had been destroyed. The MOD confirmed that all the relevant business units where information could be held had been consulted and also provided further details of the information held at The National Archives including the specific file references.

## **The Investigation**

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### **Scope of the case**

12. On 10 November 2010 the complainant contacted the Commissioner to complain about the way his requests for information had been handled. The complainant specifically asked the Commissioner to consider the

fact that his original request had been refused on the grounds of cost and that refining it had failed to bring it under the costs limit. The complainant also remained dissatisfied that the MOD had stated no information was held in relation to his request for the CDRs.

13. The focus of the Commissioner's investigation, therefore, has been to determine whether the MOD's estimate of the costs it would incur in complying with the requests was reasonable and ultimately whether the application of section 12(2) to the requests was correct in accordance with the provisions of the Act. The Commissioner has also investigated whether CDRs for the period specified in the request were held by the MOD.

## **Chronology**

14. On 7 April 2011 the Commissioner wrote to the MOD asking for a detailed breakdown of the estimated time and cost it would take to locate, retrieve and extract the requested information. The Commissioner asked the MOD to include a description of the type of work that would be involved in complying with the requests, to clarify whether a sampling exercise had been undertaken and to confirm that the estimate had been based on the quickest method of gathering the information. He also made enquiries as to what advice and assistance the MOD had provided to the complainant.
15. With regard to the CDRs, the Commissioner made enquiries surrounding the MOD's position that no information was held. He put a number of questions to the MOD concerning what searches for the information had been carried out, how information would be held and the MOD's retention policy for information of the type requested.
16. On 6 May 2011 the MOD responded to the Commissioner and provided the required clarification.

## **Analysis**

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### **Substantive Procedural Matters**

#### **Section 1 – General right of access, information not held**

17. Section 1 of the Act states that any person making a request for information to a public authority is entitled to be informed in writing whether the public authority holds the information. Subject to any

exemptions, if a public authority holds the requested information the applicant is entitled to have it communicated to him or her.

18. With regard to the CDRs and their subsequent destruction, the MOD stated in the internal review that no information could be located and that there was a strong likelihood that no information was held. The MOD wrote:

*"...in accordance with Defence Records Management Policy and Procedures, CDRs are only retained for a period of at least 30 years and it is, therefore, likely that the registers may already have been destroyed..."*

19. Although the Commissioner's investigation has focussed on the application of section 12(2) to the requests, which is detailed later in this Notice, he did make enquiries surrounding whether information concerning the CDRs and their destruction was held by the MOD. He asked for clarification on what types of searches for the information had been carried out and how the information would be held, along with any records of its destruction.

20. The MOD confirmed to the Commissioner that searches would not have recovered any relevant information owing to its retention policy. The MOD explained that:

*"...the MOD operated a policy between Sept 1996 and March 2003 that CDRs, which were paper records, could be destroyed after five years after closure. Given the CDRs in question would probably have been closed in 1972 or 1973 then they would fall within the destruction criteria by 1996."*

21. The MOD went on to state that no electronic searches had been carried out as the CDRs were paper records and clarified that no central index of CDRs was held. In answer to whether any relevant information may have been held by the MOD but then destroyed, the MOD stated that it was not known whether the destroyed CDRs would have contained any relevant information. The MOD confirmed there was no record of the CDRs' destruction as they were restricted documents and there was no policy requirement to keep records of destroyed restricted documents.

22. For the sake of clarity, the Commissioner accepts that, on the balance of probabilities, no information pertaining to the relevant CDRs is held by the MOD. He also acknowledges the fact that, owing to the MOD's application of section 12(2) to the rest of the request, the request for the CDRs can also be covered by such a refusal. Section 12(4) permits a public authority to aggregate the cost of compliance with multiple requests for related information made within the same correspondence. Therefore, the MOD was not under an obligation to inform the

complainant whether information pertaining to the CDRs was held. It did so, which the Commissioner acknowledges, but he is of the view that the application of section 12(2) to the entire request overrides any further consideration of section 1. The Commissioner has gone on to consider the section 12 refusal.

## **Section 12 – the cost of compliance exceeds the appropriate limit**

23. Section 12(1) allows a public authority to refuse to comply with a request for information if the authority estimates that the cost of compliance would exceed the 'appropriate limit', as defined by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Regulations).
24. Section 12(2) allows a public authority to refuse to confirm or deny whether it holds information of the nature requested if simply to do so would in itself exceed the appropriate limit.
25. The Regulations allow a public authority to charge the following activities at a flat rate of £25 per hour of staff time:
  - determining whether the information is held;
  - locating the information, or a document which may contain the information;
  - retrieving the information, or a document which may contain the information; and
  - extracting the information from a document containing it.
26. The appropriate limit for central government departments, and therefore the MOD in this case, is £600 or 24 staff hours.
27. In investigating this case, the Commissioner has had to decide whether the estimate put forward by the MOD, regarding the costs it would incur in determining if information is held, is a reasonable one. He is aware that a number of Information Tribunals have made it clear that an estimate for the purposes of section 12 has to be 'reasonable', which means it is not sufficient for a public authority to simply assert that the appropriate costs limit has been met. In *Alasdair Roberts and the Information Commissioner* (EA/2008/0050) the Tribunal ruled that any estimate should be "*sensible, realistic and supported by cogent evidence*". This point echoed that previously made by the Tribunal in *Randall vs The Information Commissioner* (EA/2007/0004) and forms the basis of the Commissioner's investigation.
28. In its internal review the MOD stated that the costs to conduct a comprehensive search to determine whether information was held in relation to the MOD replies to EOP summaries and the IPWP reports would exceed the cost limit. The MOD based this estimate on the fact

that several searches had already been carried out for the requested information, under the costs limit, and had not located any relevant information.

29. With regard to the searches undertaken the MOD stated the following:

*"TNT UK Ltd was asked to search the MOD archives for files relating to EOP summaries and IPWP reports, CDRs and Destruction certificates from Oct 71 to Jan 72...22 files were located which related to Working Party Reviews but only 1 file came within the date range; 19 files related to document registers and 231 files related to destruction certificates. However, these files were not relevant to MO4, Headquarters Northern Ireland or the Information Policy Unit and were therefore discounted and not considered in the scope of your request.*

*[A department within the MOD] also conducted an internal search (using appropriate search criteria) within their offices...their electronic search cannot search for names of documents or individuals but can only search by using the date of incident. They also searched through their list of content codes and descriptions for any relevant information...the search resulted in a nil response...*

*MOD's Corporate Memory (CM) Staffs were also consulted and were tasked to locate information relating to MOD replies to EOPs, entries relating to EOP destruction in the CDRs and IPWP reports...three members of CM staff reviewed approximately 140 files currently held in MOD which may have held the information...the information was not located. Additionally there are a further 700 files that have been identified for the 1971/1972 period and whilst some of these can be discounted, CM estimate that it will be over 350 files from this batch requiring examination and it is, therefore, estimated that it will take one person a further 30 hours to complete the task. Taking in to account the effort that has already been expended in reviewing 140 files...the overall effort required exceeds the cost limit by some considerable margin...".*

30. The MOD acknowledged that it had not provided specific advice and assistance to the complainant regarding refining his request to bring it under the costs limit. However, the complainant did so, on his own accord, limiting his request on 17 September 2010 to just the IPWP reports for the relevant dates. The MOD stated in the internal review that searches for this information alone would still exceed the costs limit.
31. The Commissioner sought further clarification regarding the types of searches that could be carried out by the MOD for the requested

information and details concerning how the requested information was held and recorded.

32. The MOD confirmed to the Commissioner that the files needing to be searched for the requested information were both asbestos-contaminated files that had been digitally recreated as an image (but could not be text searched) and manual paper files. The MOD explained that both types of files would be identified through the use of an electronic database.
33. With regard to the tasks involved in locating, retrieving and extracting the information, and therefore where the cost of compliance would be incurred, the MOD explained the following to the Commissioner:

*"Those files that are paper files need to be read to see whether relevant information is available, as it is possible that the requested information is attached to other documents in the file (i.e. it is not clear from reading the title of an enclosure whether it is the requested information and each page needs to be examined). From this period MOD files are typically at least 80 enclosures in size each enclosure being on average of three pages. Allowing six minutes per file this means examining one enclosure every 4.5 seconds. For 350 files this equates to 35 hours work. The reconstituted electronic files either have to be printed (at a cost of around £24 per file) or examined on screen. The file size of each page results in slow rendering and examination times and would increase the average time to some 10-15 seconds per page."*

34. The MOD confirmed that the estimate had been based on the quickest method of gathering the information and that databases had been used where possible.
35. The Commissioner has considered the estimate put forward by the MOD. He understands that the MOD holds a vast amount of information in which the requested information may be held. The tasks involved in determining this and then locating, retrieving and extracting the information demonstrate that compliance would be a costly exercise. The Commissioner accepts the estimate provided by the MOD as reasonable and, therefore, holds that the MOD was correct to refuse both the original request and refined request under section 12(2) of the Act.

## **Section 16 – Duty to provide advice and assistance**

36. Section 16(1) of the Act places a duty on a public authority to provide advice and assistance, where possible, to those making or intending to make a request for information. In relation to requests which engage section 12, the Commissioner usually expects a public authority to offer



advice and assistance regarding refining the request to attempt to bring it under the costs limit.

37. The Commissioner therefore sought clarification regarding what, if any, advice and assistance the MOD had offered the complainant.
38. In the responses provided to the complainant of 17 September 2010, 5 October 2010 and the internal review of 5 November 2010, the MOD provided advice and assistance in the form of details of where the complainant could locate related information held at The National Archives. The MOD confirmed this to the Commissioner stating:

*"A refinement was not possible due to the large volume of information that it is held by MOD for the period specified and which may be in scope of the request. MOD directed the complainant to The National Archives (TNA) as it was clear that the UK Representative attended some of the meetings in relation to the Information Policy Working Party and it is possible that they may hold further information. The files identified date from 1969 – 1972 and the series reference is CJ 5. It was also considered that because the information in scope was over 30 years of age, there is always a possibility that it has been transferred to TNA as this is the requirement of the Public Records Act."*

39. The Commissioner understands that the MOD struggled to offer advice about refining the request due to the volume of relevant information which may be held. He acknowledges that in fact the complainant refined his request on his own initiative after the costs refusal; however, this refined request also engaged the costs limit. The Commissioner considers that the advice given by the MOD concerning additional information already in the public domain at The National Archives was adequate to fulfil its duties under section 16(1).

### **Procedural Requirements**

40. Section 17(5) of the Act states that where a public authority wishes to refuse to comply with a request on the grounds that section 12 applies, it should issue a notice stating that fact within 20 working days.
41. From the correspondence provided to the Commissioner it is evident that the MOD failed to respond to the complainant within the statutory time frame, issuing the refusal notice three days late. The MOD acknowledged and apologised for this in its internal review.

## **The Decision**

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42. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- the MOD correctly applied section 12(2) and refused to comply with the request on grounds of cost;
- the MOD provided adequate advice and assistance to the complainant under section 16(1) of the Act.

43. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- the MOD failed to issue the refusal notice within 20 working days and therefore breached section 17(5) of the Act.

## **Steps Required**

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44. The Commissioner requires no steps to be taken.

## Right of Appeal

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45. 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@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

46. 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.
47. 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 20<sup>th</sup> day of July 2011**

**Signed .....**

**Jon Manners  
Group Manager  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

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### 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."

### Exemption where cost of compliance exceeds appropriate limit

#### **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 12(3) provides that –**

"In subsections (1) and (2) "the appropriate limit" means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases."

#### **Section 12(4) provides that –**

"The secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority –

- (a) by one person, or
- (b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,

the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.”

## **Duty to provide Advice and Assistance**

### **Section 16(1) provides that -**

“It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.”

## **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(2) states –**

“Where–

- (d) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
  - 1. that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
  - 2. that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (e) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a

decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached."

**Section 17(3) provides that -**

"A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

(f) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(g) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

**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.

**Section 17(5) provides that –**

"A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact."