

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 03 May 2012

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

Decision (including any steps ordered)

1. The complainant requested information concerning investigations by the Royal Military Police of incidents in Afghanistan in which Afghan civilians have been either killed or wounded by British personnel. The Ministry of Defence (MoD) refused to disclose this information under the exemptions provided by sections 30 (information held for the purposes of an investigation) and 40(2) (personal information of third parties). It also refused to confirm or deny whether any further information was held under sections 23(5) (information relating to, or supplied by, security bodies) and 24(2) (safeguarding national security). The Commissioner's decision is that the MoD has applied the exemptions provided by sections 30, 23(5) and 24(2) correctly. In relation to section 40(2), the Commissioner finds that this exemption was applied correctly in part, but that some of the information withheld under this section is not exempt.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - disclose the information described in paragraphs 36 to 38 below in relation to which the Commissioner has found that section 40(2) was not engaged.
3. The public authority must take these steps within 35 calendar days of the date of this Decision Notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. On 1 November 2010, the complainant wrote to the MoD and requested information in the following terms:

"I would like to know how many investigations have been started by the Royal Military Police arising out of incidents in which Afghan civilians have allegedly been either killed or wounded by British military personnel in Afghanistan since January 1 2005.

I would also like to know:

- *what are the dates of each of the incidents which have been investigated;*
 - *what was the location of each of the incidents which have been investigated;*
 - *what was the name of the unit which has been investigated in each of these incidents;*
 - *what was the allegation which was investigated relating to each of these incidents.*
 - *how many of these investigations are still current and how many have been closed."*
5. After a very lengthy delay, the MoD responded substantively on 22 August 2011. It disclosed the total number of investigations and how many of these investigations were completed or ongoing and the detail requested by the complainant in relation to some of the incidents within the specified time period. In relation to the remainder of the information held by the MoD falling within the scope of his requests, it cited the exemptions provided by the following sections of the FOIA:
- 27(1)(a) (prejudice to international relations)
 - 30 (information held for the purposes of an investigation)
 - 32(1) (court records)
 - 40(2) (personal information of third parties)

It also stated that it refused to confirm or deny if it held any further information to that disclosed and that covered by the above exemptions and cited the following exemptions from the duty to confirm or deny:

23(5) (information supplied by, or relating to, security bodies)

24(2) (national security)

6. Following an internal review the MoD wrote to the complainant on 21 November 2011. It stated that the refusal of the request under the exemptions cited previously was upheld.

Scope of the case

7. The complainant contacted the Commissioner on 24 November 2011 to complain about the way his request for information had been handled. The complainant stated at this stage that he believed that the information he had requested should be disclosed in its entirety and referred the Commissioner to the arguments that he had advanced when requesting an internal review.
8. During the investigation of this case the MoD advised the Commissioner's office that the information previously withheld under sections 27(1)(a) and 32(1) had been disclosed in response to further requests made by the complainant. Those exemptions are not, therefore, addressed in this notice.
9. When requesting an internal review the complainant had suggested that the information disclosed to him was not sufficiently detailed in relation to the nature of the allegations. However, the Commissioner notes that the wording of the request was not specific as to the level of detail requested and his view is that the information disclosed was of sufficient detail to satisfy the request for details of the allegations investigated. As the view of the Commissioner is that the request has been complied with in this respect, this is not covered further in this notice.

Reasons for decision

Section 30

10. At every stage in the handling of this request – refusal notice, internal review outcome and in correspondence with the Commissioner's office – the MoD cited section 30(2). This provides an exemption for information held for the purposes of a criminal investigation and that relates to the obtaining of information from confidential sources. The crucial part of

this exemption is the latter; for this exemption to be engaged the information must, as well as being held for the purposes of a criminal investigation, relate to the obtaining of information from confidential sources.

11. In correspondence with the MoD about this case the Commissioner's office asked the MoD to state how the information withheld under this exemption related to the obtaining of information from confidential sources. This point was not addressed in the response sent to the Commissioner's office by the MoD. Also notable is that in neither the refusal notice nor the internal review outcome did the MoD provide any explanation on this point to the complainant.
12. The Commissioner has taken the approach here of considering section 30(1). His view is that it is likely that the MoD intended to cite this subsection, rather than 30(2), as the only comments provided by the MoD about the citing of this exemption concern how the investigations that this information relates to were of the kind described in section 30(1). Had the Commissioner taken the approach of considering section 30(2), his only option would have been to conclude that this exemption was not engaged due to the absence of any explanation about this from the MoD.
13. Sections 30(1)(a)(i) and (ii) provide that information held at any time for the purposes of an investigation that the public authority has a duty to conduct with a view to it being ascertained whether a person should be charged with an offence, or whether a person charged is guilty of an offence, is exempt. Consideration of this exemption involves reaching a conclusion as to whether the information in question does fall within either of the classes described in these sections. Section 30 is also qualified by the public interest, which means that, if the exemption is engaged, the information should in any event be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.
14. Turning to whether the exemption provided by section 30(1) is engaged, the reasoning of the MoD is that the information withheld under this exemption was held for the purposes of an investigation carried out by the Royal Military Police (RMP). The questions to be addressed when considering if this information falls within the scope of sections 30(1)(a)(i) and / or (ii) are as follows.
 - Does the RMP have a duty to conduct investigations of the kind described in sections 30(1)(a)(i) and (ii)?
 - Was the information held at any time for the purposes of a relevant investigation, rather than investigations in general?

- Was this investigation carried out with a view to it being ascertained whether a person should be charged with an offence, or whether a person charged with an offence was guilty of it?
15. As to whether the RMP has a duty to conduct criminal investigations, it is clear that it does and no further analysis on this point is necessary. On the issue of whether the information was held at any time for the purposes of a relevant investigation, having reviewed the content of the information in question, the Commissioner is satisfied that each entry within the information in question was held for the purposes of a single and specific investigation into an alleged incident. The Commissioner also considers it clear that the purpose of these investigations would have been to establish the facts of each alleged incident and to ascertain responsibility for any offences that were found to have taken place.
 16. The Commissioner therefore finds that the information is held by the MoD for the purposes of an investigation of the kind described in sections 30(1)(a)(i) and (ii). The exemption provided by section 30 is, therefore, engaged in relation to this information.

Public Interest Test

17. Having found that this exemption is engaged, the next step is to consider the balance of the public interest. In reaching a conclusion on the balance of the public interest here, the Commissioner has taken into account the general public interest in improving the transparency and openness of the MoD, as well as those factors that apply in relation to this specific information, including any arguments advanced by the MoD and by the complainant.
18. Covering first those arguments that favour disclosure of the information, the Commissioner recognises that the primary factor here is the subject matter of the information, which was the focus of the arguments advanced in favour of disclosure by the complainant. This concerns allegations of wrongdoing by the armed forces in Afghanistan and the view of the Commissioner is that there is a strong and legitimate public interest in this information.
19. The grounds for this public interest are several. Broadly, there is a strong public interest in understanding more about the actions of the armed forces in any situation. In this particular case, the information requested concerns the actions of the armed forces in Afghanistan. The reasons for the continued commitment of the armed forces to operations in Afghanistan are the subject of debate and, whilst the information in question may not relate directly to that issue, the view of the Commissioner is that this information would nevertheless inform that

debate through increasing public understanding of the situation in Afghanistan and the actions of the armed forces there.

20. More specifically, that this information concerns allegations of wrongdoing on the part of the armed forces does, in the view of the Commissioner, further heighten the public interest in favour of disclosure. Whatever the substance of these allegations, there is a valid public interest in the disclosure of information that would increase public understanding about the conduct of the armed forces in Afghanistan.
21. In addition to a moral imperative for disclosure here, there is also a financial one. The commitment of the armed forces to operations in Afghanistan has and continues to levy a very considerable cost to the UK taxpayer. Whilst again this information does not relate directly to this issue, as previously mentioned disclosure would be informative as to the actions of the armed forces in Afghanistan. The view of the Commissioner is that the financial cost of this commitment is relevant here in that it adds to the weight of the public interest in full disclosure of information about the activities of the armed forces in Afghanistan. Overall the view of the Commissioner is that the public interest in disclosure of this information is of very significant weight, on account of its subject matter.
22. Turning to those factors that favour maintenance of the exemption, the arguments of the MoD concern harm to the investigative process resulting through disclosure. The view of the Commissioner is that this is a relevant factor here and he considers that in any case where the balance of the public interest in relation to section 30 is covered consideration should be given to what is inherent in the exemption; the effective investigation and prosecution of crime. In order to consider the weight that this should carry in this case, the following factors have been taken into account:
 - the stage or stages reached in any particular investigation or criminal proceedings;
 - whether and to what extent the information has already been released into the public domain;
 - the significance or sensitivity of the information;
 - the age of the information.
23. The stage reached in the investigations covered in the withheld information is a central issue here. At the time of the response to the request, some of the information was disclosed, with one of the reasons given by the MoD for the refusal to disclose the remainder of the

information being that this related to investigations that remained active.

24. Since making the request that was the subject of this case, the complainant has made a further request to the MoD for similar information, in response to which some of the information withheld from the response to this request under section 30 was disclosed, due to those investigations having been completed in the time since the earlier request. The effect of this is that it is only necessary to consider section 30 in this case in relation to that part of the information that continues to be withheld under this exemption.
25. The information that continues to be withheld under this exemption relates to investigations that are ongoing, as is confirmed within the content of the withheld information, which states that the incidents described are "*Under investigation*". The Commissioner recognises that the public interest in maintaining the exemption provided by section 30 in a case where the investigation is ongoing is considerable. As noted above, at the core of this exemption is the necessity to ensure effective criminal investigations. The Commissioner considers it clear that there is potential to harm an investigation through the disclosure of information whilst it remains ongoing and that such an outcome would be counter to the public interest.
26. As to the extent, if any, to which this information is in the public domain, the Commissioner is aware of no suggestion that the specific information in question here is in the public domain. As noted above, similar information has, however, been disclosed. This raises the question as to whether there has been harm to these investigations through the disclosure of that information. The key point here is that the MoD has taken the approach of differentiating information relating to completed investigations from that relating to ongoing investigations. The release of some of the information cannot therefore be taken as an indication that release of the remainder of the information would not harm the investigatory process due to the crucial difference that the information that continues to be withheld relates to ongoing investigations. The public interest in favour of maintenance of the exemption on the basis that investigations are ongoing is not therefore reduced as a result of there being similar information that is in the public domain.
27. One factor which would potentially be significant is what, if anything, the information reveals about the integrity and probity of the investigations to which it relates. If it were the case that these investigations had been lacking in some respect, possibly leading to incidents of wrongdoing going unpunished, this would support the argument that it would be in the public interest to disclose this information. However, the information

in question reveals nothing about the standard of the investigations to which it relates. No good argument in favour of disclosure can therefore be made on this basis.

28. The age of the information can be cited in favour of both disclosure and maintenance of the exemption. Where the information is several years old and relates to an investigation that has long since been closed, it can be argued that disclosure would be less likely to result in prejudice. However, it could also be argued that the public interest in disclosure would be reduced through the passage of time. In relation to recent information, it could be argued that the public interest in disclosure remains high, but so too does the potential for significant prejudice to investigations.
29. In this specific case the age of the information is, as the Information Rights Tribunal has previously described this factor, "*a double-edged argument*". The information was recorded recently and so the very significant public interest in disclosure covered above has not lessened through the passage of time. However, that the information relates to recent incidents means that the investigation of these incidents is ongoing and so there is potential for prejudice to ongoing investigations as a result of disclosure.
30. The Commissioner has recognised very significant public interest in favour of disclosure on the basis of the subject matter of this information. In addition to this is the general public interest in the transparency and openness of MoD activity.
31. However, the view of the Commissioner is ultimately that the factor that is most significant in this case is that the investigations are ongoing. Disclosure raises the possibility of prejudice to ongoing investigations, which would clearly be counter to the public interest. Whilst the public interest in favour of disclosure is weighty and valid, the view of the Commissioner is that this is not sufficient to equal or outweigh the public interest in avoiding prejudice to these ongoing investigations. The conclusion of the Commissioner is, therefore, that the public interest in the maintenance of the exemption outweighs the public interest in disclosure. The MoD is not, therefore, required to disclose the information withheld under section 30.

Section 40

32. The MoD has cited the exemption provided by section 40(2). This provides that information that is the personal data of an individual other than the requester is exempt if the disclosure of this personal data would be in breach of any of the data protection principles. There are two steps to considering this exemption; first, it must be established

whether the information is the personal data of any individual other than the requester and, secondly, it must be established whether the disclosure of that personal data would be in breach of any of the data protection principles. Although in explanation for the citing of this exemption the MoD stated only that this information is the personal data of individuals other than the requester and neglected to give any explanation as to why it would be in breach of any of the data protection principles to disclose this, the Commissioner has considered the relevant arguments.

33. Covering first whether this information is the personal data of any third party, section 1(1) of the Data Protection Act 1998 (DPA) defines personal data as follows:

"personal data' means data which relate to a living individual and 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".

34. The MoD has stated that this exemption is cited in relation to names of civilians and the names, ranks and service numbers of service personnel involved. In relation to the names of living individuals, clearly individuals can be identified from that information and so this is personal data.
35. In relation to ranks and service numbers, whilst this is less clearly personal data, the Commissioner accepts the rank of the service personnel in question is recorded with their name and so can be considered personal data in this context, albeit that this information would not be personal data if this was recorded without reference to named individuals. As for service numbers, whilst a member of the public would be unlikely to be able to identify any individual through this information, clearly the MoD could relate this information to individuals and so the Commissioner accepts that this is personal data.
36. The withheld information also includes the names of individuals who, as is recorded within this information, are deceased. As is clear from the definition given in the DPA, information constitutes personal data only if it relates to living individuals. The information that records the names of individuals who are deceased is not, therefore, personal data.
37. Furthermore, the withheld information supplied to the ICO by the MoD was marked to show where each exemption was cited. Content that does not record the names of individuals, but instead records that the individuals concerned were unknown or refers to groups of people without giving names or other identifiers, is marked as having been

withheld under section 40(2). However, as no individual is identified from this information, this is not personal data.

38. In relation to the information covered in the preceding two paragraphs, the exemption provided by section 40(2) is not engaged. At paragraph 2 above the MoD is required to disclose this information.
39. In relation to the information that does constitute personal data, it is necessary to go on to consider if disclosure would be in breach of any of the data protection principles. The Commissioner has focussed here on the first data protection principle, which requires that personal data be processed fairly and lawfully. The Commissioner has considered in particular whether disclosure would be, in general, fair to the subjects of this information.
40. Section 2 of the DPA sets out what is considered sensitive personal data, which includes personal data relating to health and to the alleged commission of an offence. In this case the view of the Commissioner is that the information in question is sensitive personal data according to the definition given in section 2 of the DPA. In relation to civilians this includes personal data on health and in relation to service personnel it includes personal data relating to alleged offences. It is also the case that some of the personal data relating to civilians comments on alleged offences and that on service personnel concerns health.
41. In relation to sensitive personal data, the expectation of privacy held by the subject will be particularly high. In this case the view of the Commissioner is that it is likely that the individuals identified within this information would regard this information as highly sensitive, commenting as it does on injuries they have received and / or on offences they are alleged to have been involved in.
42. By its very nature, information that falls within the sensitive personal data categories in section 2 of the DPA has been deemed to be information that individuals regard as the most private information about themselves. In this case the Commissioner believes that, owing to the strong expectation that this information would not be disclosed, disclosure would be likely to result in distress to the subjects of this information. As a result the Commissioner considers that it would be unfair to disclose the requested information and so the exemption provided by section 40(2) of the FOIA is engaged in relation to this information. The MoD is not, therefore, required to disclose the information that the Commissioner has found to be personal data.

Sections 23(5) and 24(2)

43. Section 23(5) of the FOIA provides that a public authority is not required to confirm or deny if information is held where the information falling within the scope of the request relates to, or was supplied by, any of a list of security bodies specified in section 23(3). Consideration of this exemption requires forming a conclusion as to whether, if the MoD does hold information falling within the scope of the request, this information would relate to, or have been supplied by, any of the security bodies listed in section 23(3).
44. Section 24(2) provides an exemption from the duty to confirm or deny where this is required for the purpose of safeguarding national security. Consideration of this exemption is a two stage process, first the exemption must be engaged as a result of the exclusion of the duty to confirm or deny being required for the purpose of national security and, secondly, this exemption is qualified by the public interest. This means that the confirmation or denial should be provided unless the public interest in the maintenance of the exemption outweighs the public interest in confirming or denying.
45. The MoD appeared to be citing sections 23(5) and 24(2) jointly. Unlike the related exemptions provided by sections 23(1) and 24(1), sections 23(5) and 24(2) are not mutually exclusive. This means that they can, where appropriate, both be cited in response to a request.
46. Owing to what is revealed through the analysis of these exemptions, this has been included within a confidential annex supplied with this decision notice to the MoD only. The conclusion of the Commissioner is that these exemptions were cited correctly and so the MoD is not required to confirm or deny if it holds any further information to that it has previously confirmed was held.

Right of appeal

47. 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: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

48. 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.
49. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Graham Smith
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