

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 March 2013

Public Authority: Ministry of Defence

Address: Main Building (Level 1 Zone N)
Whitehall
London
SW1A 2HB

Decision (including any steps ordered)

1. The complainant has requested to see and possibly copy a specific file.
2. The Commissioner's decision is that:
 - The public authority was entitled to withhold the disputed information on the basis of the exemption at section 27(1)(a).
 - The public authority was entitled to rely on sections 23(5) and 24(2) FOIA to neither confirm nor deny it held information within the scope of the request exempt from disclosure on the basis of sections 23(1) and 24(1) FOIA.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 18 May 2012 the complainant wrote to the Ministry of Defence (the MoD) and requested information in the following terms:

'I would like to see, and possibly copy, the file that has been given the file number ADM 1/28956.'
5. The MoD responded on 11 June. It stated that it was withholding the file under sections 26(1) (Defence).

6. Following an internal review the MoD wrote to the complainant on 3 July. It stated that that it was withholding the information under section 26(1) and was also cited sections 27(1)(a) (international relations), 24(2) (National Security – neither confirm nor deny) and 23(5) (Information supplied by, or relating to, bodies dealing with security matters – neither confirm nor deny).

Scope of the case

7. On the 6 July the complainant contacted the Commissioner to complain about the way his request for information had been handled. He explained that the information he had requested was decades old. The complainant also explained that if there was any continuing sensitivity it could be dealt with through redaction, rather than retention.
8. The Commissioner has considered the application of the exemptions to the withheld information. Given the nature and sensitivity of the withheld information, the Deputy Commissioner and Director of FOI attended the offices of the MoD on 9 October 2012 to review the content and to be given a confidential briefing regarding the likely implications of disclosure.

Reasons for decision

9. The MoD has applied sections 26(1)(a) and (b), 27(1)(a), 24(2) and 23(5). The Commissioner considers that section 26(1) applies to the operational information and section 27(1)(a) applies to the rest of the information which the MoD has confirmed is held.

Section 26

10. Section 26 of FOIA states 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'

11. In order for a prejudice based exemption, such as sections 26(1)(a) and (b) 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. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority to discharge.
12. The MoD explained that it considered that disclosure '*would*' cause prejudice. It explained that the information described procedures, methods and techniques which are still in use in naval operations today. The MoD went on to explain that this information would aid any hostile forces wishing to counter them. This disclosure would therefore prejudice the effectiveness and safety of such operations.
 13. The Commissioner accepts that the alleged prejudicial effect i.e. damage to the effectiveness and safety to present naval operations, relates to the applicable interests within sections 26(1)(a) and (b).
 14. The Commissioner also accepts that there is a causal link between the disclosure of the information and the anticipated prejudice to naval operations. He is satisfied that the nature of the prejudice that could occur is real and of substance.
 15. Based on the nature and content of the information itself and the explanation which the MoD has given to the Commissioner as to the current operational relevance of the information, he is satisfied that disclosure would prejudice the effectiveness and safety of present day naval operations.

Public Interest Test

16. Sections 26(1) is a qualified exemption subject to the public interest test. The Commissioner has therefore considered whether in all the

circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.

17. The complainant argued that the information was decades old. He also explained that if there were any on-going concerns about sensitivity, they should be addressed by redaction, not retention.
18. The MoD acknowledged that the information was more than 50 years. It also accepted that disclosure of the information would add to the public's knowledge and understanding of the history of Royal Naval operations in the post-war period.
19. However, the MoD also argued that this had to be balanced against the potential harm to the safety and effectiveness of current Royal Naval operations that would arise if the information was made public.
20. The MoD explained that this was because the information described procedures methods and techniques which are still deployed in naval operations. Disclosure would assist any forces hostile to the UK wishing to counter its naval operations. This would prejudice the effectiveness and safety of such operations.
21. Disclosure would therefore be contrary to the public interest and the greater public interest lay in maintaining the UK's defence capability and effectiveness.

Balance of public interest

22. The Commissioner agrees with the public interest arguments in favour of disclosure. He considers that there is a public interest in knowing and understanding the history of the Royal Naval operations in the post-war period.
23. The Commissioner considers that there is general public interest in openness, accountability and transparency which supports the disclosure of information about the activities of public authorities using public money.
24. However, the Commissioner also considers that these arguments have to be balanced against the very strong public interest in avoiding prejudice to the safety and effectiveness of Royal Naval operations and that in maintaining the UK's defence capability.
25. Having accepted that disclosure of the withheld information would prejudice the UK's defence interests, applying the higher test of likelihood, the public interest in disclosure would need to be significant to balance out such prejudice. The Commissioner has not identified any

public interest factors here of such significance. Those factors which favour disclosure are general rather than specific.

26. For these reasons the Commissioner considers that the MoD has applied section 26(1) appropriately to the operational information and the public interest in maintaining the exemption outweighs that in disclosure.

Section 27

27. The MoD also applied section 27 to the remaining information.

28. Section 27(1) of FOIA states 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,'

29. As section 27(1) is also a prejudice based exemption, the three criteria referred to in paragraph 11 above apply to it.
30. The MoD explained that it considered that disclosure *'would'* cause prejudice. In this case it explained that it considered that disclosure *'would'* prejudice relations with certain foreign states as it would mean disclosing information about past naval activity in their region.
31. The Commissioner accepts that the alleged prejudicial effect, i.e. causing damage to the relationship between the UK and certain states of disclosing the withheld information relates to the applicable interest in section 27(1)(a).
32. The Commissioner also accepts that there is a causal link between disclosure of the withheld information and the anticipated prejudice to relations with the relevant foreign states. He is satisfied that the nature of the prejudice that could occur is real and of substance.
33. With regard to the third criterion, the Commissioner notes that the MoD has stated that disclosure *'would'* prejudice international relations. This places a stronger evidential burden on a public authority as the likelihood of the anticipated prejudice occurring as a result of disclosure must be at least more probable than not. Based on his assessment of the nature and content of the withheld information and his appreciation of the sensitivities, the Commissioner is satisfied that the higher likelihood threshold (*'would'* prejudice) is met in this case.

Public Interest Test

34. Section 27(1)(a) is a qualified exemption subject to a public interest test. The Commissioner must therefore consider whether in all the

circumstances if the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.

35. The complainant argued that the information was decades old. He also explained that if there were any on-going concerns about sensitivity, they should be addressed by redaction, not retention.
36. The MoD acknowledged that there was a genuine public interest in understanding how the British Government deployed its forces on naval operations in support of its foreign policy in the 1960s. However, it also explained that this had to be balanced against the potential harm which would be caused to present day relations with the relevant foreign states by disclosing the withheld information. This information is not in and has not been put into the public domain.

Balance of Public Interest

37. The Commissioner considers that significant weight must be given to the public interest in avoiding prejudice to the UK's relations with foreign states. This is particularly the case where, as in this case, he has accepted that disclosure would prejudice international relations, applying the higher threshold of likelihood. In the defence context in particular, when considering the public interest in maintaining the international relations exemption he is concerned not only about the impact on relations with the state or states in whose area the relevant operations have taken place, but also with that on relations with the UK's allies, who would inevitably be concerned if sensitive information about secret operations, including future operations, in which they might also play a part, were to be disclosed.
38. The Commissioner is also satisfied that the disclosure of some of the withheld information, with exempt information redacted, is not a feasible option in this case.
39. In all the circumstances of this case, the Commissioner is satisfied that the public interest in maintaining the section 27 exemption outweighs that in the disclosure of the information to which the exemption has been applied by the MoD.

Other matters

40. Section 17(7) of FOIA states that a public authority should provide details of its internal review procedures and the right to appeal to the Commissioner.
41. The MoD did not provide any of these details in its refusal notice. The Commissioner notes that the MoD rectified this in part in its internal review as it did provide details about the right to appeal to the Commissioner, including contact details.
42. However the Commissioner considers that the MoD breached section 17 (7) by not providing details of its internal review procedures to the applicant.

Right of appeal

43. 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

44. 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.
45. 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
Deputy Commissioner
Information Commissioner's Office
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Wilmslow
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SK9 5AF**