Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **10 October 2013**

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

Decision (including any steps ordered)

1. The complainant has requested information about Information Operations, Psychological Operations and Electromagnetic Operations in the UK. The public authority's position is to neither confirm nor deny holding any information by virtue of the exemptions in sections 23(5) (information held by, or relating to, security bodies) and 24(2) (national security) of the FOIA. The Commissioner accepts that it had no duty to confirm or deny holding information in this case and he does not require the public authority to take any steps.

Background

2. The request can be followed on the "*What do they know*" ("WDTK") website[1]. Including this case, the complainant has made six requests about 'Information Operations' which are being investigated at the same time - all of these are also on WDTK.

[1]https://www.whatdotheyknow.com/request/request_for_basic_stats_on_infor#incoming-360997

3. The complainant makes reference to 'Information Operations'. The publication Joint Warfare Publication 3-80 (JWP 3-80), which is available online[2], contains the following definition at paragraph 201:

> *"Information Operations (Info Ops) is defined as: 'Co-ordinated actions undertaken to influence an adversary or potential adversary in support of political and military objectives by undermining his will, cohesion and decision-making ability, through affecting his information, information based processes and systems while protecting one's own decision-makers and decision-making processes".*

The public authority has confirmed to the Commissioner that it is relying on this definition in responding to the request.

Request and response

4. On 4 August 2012, the complainant wrote to the public authority and requested information in the following terms:

> *"I would like to request answers to the following questions under Freedom of Information Act 2000:*
>
> *Can you tell me how many Information Operations (ics-www.leeds.ac.uk/papers/pmt/exhibits/2270/jwp3_80.pdf) the MOD is aware of in the UK for the years 2010, 2011 and at date of writing?*
>
> *Can you tell how many susbsidiary* [sic] *operations there are as part of or assistance to these information operations?*
>
> *Can you tell me how many Psychological Operations are going on in the UK that the MOD is aware of at present?*
>
> *Can you tell whether there are any Electromagnetic Spectrum Operations going on in the UK at present; and if so how many?"*

5. The public authority responded on 18 February 2013 . It neither confirmed nor denied holding any information by virtue of the exemptions in sections 23(5) and 24(2) of the FOIA.

[2] http://ics-www.leeds.ac.uk/papers/pmt/exhibits/2270/jwp3_80.pdf

6. It maintained this position following internal review.

Scope of the case

7. The complainant contacted the Commissioner on 3 April 2013 to complain about the way his request for information had been handled. He included lengthy arguments to support his position that the information in this request, along with that asked for in the other requests referred to above, should be released.

8. However, in view of the exemptions claimed by the public authority, the Commissioner clarified with the complainant that he was considering whether or not the public authority was entitled to neither confirm nor deny holding any information.

Reasons for decision

Section 23 – security bodies
Section 24 - national security

9. The public authority provided the Commissioner with its arguments in respect of these exemptions. They were provided in confidence and will not be repeated in this notice.

10. The Commissioner would also like to stress that he is not personally aware as to whether or not the public authority actually does hold any information in relation to this request. He does not consider this to be necessary in order for him to make a determination in respect of the NCND principles.

11. Information relating to security bodies specified in section 23(3) is exempt information by virtue of section 23(1). Information which does not fall under section 23(1) is exempt from disclosure under section 24(1), if such exemption is required for the purpose of safeguarding national security.

12. Sections 23(5) and 24(2) exclude the duty of a public authority to confirm or deny whether it holds information which, if held, would be exempt under sections 23(1) or 24(1) respectively.

13. By virtue of section 23(5) the duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which

was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in section 23(3).

14. By virtue of section 24(2) the duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security.

15. The use of sections 23(5) and 24(2) together had been endorsed by the Commissioner and the First-tier Tribunal. The Commissioner does not consider the exclusions at section 23(5) and 24(2) to be mutually exclusive and he accepts that they can be relied upon independently or jointly in order to conceal whether or not one or more of the security bodies has been involved in an issue which might impact on national security. However, each exemption must be applied independently on its own merits. In addition, the section 24 exemption is qualified and is therefore subject to the public interest test.

16. In the Commissioner's opinion the exemption contained at section 23(5) should be interpreted so that it is only necessary for a public authority to show that either confirmation or denial as to whether the requested information is held would involve the disclosure of information relating to a security body. Whether or not a security body is interested or involved in a particular issue is in itself information relating to a security body.

17. Furthermore, the Commissioner believes that the phrase 'relates to' should be interpreted broadly. Such an interpretation has been accepted by the First-Tier Tribunal (Information Rights) in a number of decisions.

18. The test as to whether a disclosure would relate to a security body is decided on the normal civil standard of proof, that is, the balance of probabilities. In other words, if it is more likely than not that the disclosure would relate to a security body then the exemption would be engaged.

19. From the above it can be seen that section 23(5) has a very wide application. If the information requested is within what could be described as the ambit of security bodies' operations, section 23(5) is likely to apply. This is consistent with the scheme of FOIA because the security bodies themselves are not subject to its provisions. Factors indicating whether a request is of this nature will include the functions of the public authority receiving the request, the subject area to which the request relates and the actual wording of the request

20. There is clearly a close relationship between the public authority and the security bodies. In respect of its role, and the subject matter being requested, the Commissioner is satisfied that, on the balance of

probabilities, any information, if held, could well be related to one or more of the bodies identified in section 23(3) of the FOIA.

21. With regard to section 24(2), the Commissioner again considers that this exemption should be interpreted so that it is only necessary for a public authority to show that either a confirmation or denial of whether requested information is held would be likely to harm national security. The Commissioner interprets the phrase 'required' in the context of this exemption to mean 'reasonably necessary'. In effect this means that there has to be a risk of harm to national security for the exemption to be relied upon, but there is no need for a public authority to prove that there is specific, direct or imminent threat.

22. In relation to the application of section 24(2) the Commissioner notes that the Tribunal has indicated that only a consistent use of a 'neither confirm nor deny' (NCND) response on matters of national security can secure its proper purpose. Therefore, in considering whether the exemption is engaged, and the balance of the public interest test, regard has to be given to the need to adopt a consistent NCND position and not simply to the consequences of confirming whether the specific requested information in this case is held or not.

23. In the context of section 24 the Commissioner notes that the threshold to engage the exemption is relatively low. Furthermore, as a general approach the Commissioner accepts that withholding information in order to ensure the protection of national security can extend, in some circumstances, to ensuring that matters which are of interest to the security bodies are not revealed.

24. On this occasion, the Commissioner is satisfied that confirmation or denial in response to the complainant's requests would be likely to disclose information relating to bodies specified in section 23(3). The need for a public authority to adopt a position on a consistent basis is of vital importance in considering the application of an NCND exemption.

25. The Commissioner is satisfied that the public authority is entitled to rely on sections 23(5) and 24(2) in the circumstances of this case. He accepts that revealing whether or not information within the scope of the request is held would reveal information relating to the role of the security bodies. Disclosing information about the work of the security bodies would also undermine national security and for that reason section 24(2) also applies.

26. The Commissioner is not able to add any further detail to support the public authority's position however, as mentioned above, further arguments have been provided by the public authority for his

consideration only and these have been taken into account in reaching this conclusion.

The public interest

27. Section 23 affords an absolute exemption and no public interest test is required once it is found to be engaged. However, this is not the case of section 24.

28. In its refusal notice the public authority provided the following public interest submission in respect of 24(2):

> *"The Ministry of Defence recognises that there is a general public interest in openness in government because this increases public trust in and engagement with the government. These public interests have to be weighed against a very strong public interest in safeguarding national security. This interest could only be overridden in exceptional circumstances. In this case there is a very strong public interest in protecting information about disclosure of information relating to information operations. I have determined that in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in confirming or denying that information is held beyond that covered by the above exemptions".*

29. It added nothing further at internal review but did provide further confidential arguments to the Commissioner to assist with his investigation.

30. Having viewed these further arguments, the Commissioner has considered and balanced the public interest arguments for and against neither confirming nor denying the information is held. In this case there are general public interest arguments in favour of confirming whether the information is held, such as openness and transparency in Government, and specifically as to whether any Information Operations have been undertaken or are on-going. However, he accepts that, in the circumstances of this case, the public interest in protecting information required for the purposes of safeguarding national security outweighs the public interest in favour of confirmation or denial. He therefore finds that, in all the circumstances of this case, the public interest in maintaining the exemption at section 24(2) outweighs the public interest in complying with the duty imposed by section 1(1)(a). The public authority was not, therefore, required to confirm or deny whether the requested information was held.

Right of appeal

31. 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

32. 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.

33. 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
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF