

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 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 directed energy weapons. The public authority's position is to neither confirm nor deny holding any information by virtue of the exemption in section 26(3). The Commissioner accepts that the public authority had no duty to confirm or deny holding information in this case and he does not require it to take any steps.

Background

2. The request this decision relates to can be followed on the "What do they know" ("WDTK") website¹. It is a lengthy request to follow and contains several other information requests.
3. The complainant has made several further requests to this public authority, for similar subject matters, the responses to which are being investigated at the same time as this complaint. These can also be found on WDTK.

¹https://www.whatdotheyknow.com/request/use_of_directed_energy_device_s_i

Request and response

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

"I would also like to add another FOI request in regard to the following quote mentioned above in JWP 3-80:

'Emerging Technology includes the use of directed energy weapons such as Radio Frequency, Laser, and acoustic and other non lethal weapons.'

Please could you supply an inventory list of all of these assets which MOD has access to. I would define access as something which MOD has the ability to use or initiate the use of by others, either directly, through proxy, or in any other fashion.

If this exceeds the total amount of hours please prioritise in this order:

- 1.Space based payloads*
- 2.Land based payloads*
- 3.Air and Sea based payloads".*

5. The public authority responded on 1 May 2013. It provided some information but refused to neither confirm nor deny ("NCND") holding any further information by virtue of section 26(3) of the FOIA.
6. Following an internal review the public authority wrote to the complainant on 10 May 2013; it maintained its position.

Scope of the case

7. The complainant contacted the Commissioner on 27 May 2013 to complain about the way his request for information had been handled.
8. The Commissioner will consider whether the public authority is entitled to rely on the exemption at section 26(3).

Reasons for decision

Section 26 - defence

9. Section 26(1) of FOIA sets out an exemption from the right to know if the disclosure of information would or would be likely to prejudice:
 - (a) the defence of the British Islands (i.e. the UK, Channel Islands and the Isle of Man) or any colony;
 - (b) the capability, effectiveness or security of the armed forces or that of any forces cooperating with them.
10. With regard to section 26(3), the Commissioner 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 defence matters.
11. In the Commissioner's view, the exemption is not for defence information but for information whose disclosure would or would be likely to prejudice defence matters. In simple terms, information will be covered by the exemption if its disclosure would assist, or would be likely to assist, an enemy or a potential enemy.
12. In order for a prejudice based exemption, such as section 26, 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 – ie, disclosure would be likely to result in prejudice or disclosure would result in prejudice. If the likelihood of prejudice occurring is one that is only hypothetical or remote the exemption will not be engaged.
13. The public authority explained to the complainant that:

"Confirming or denying whether the MOD has, or has not, any access to directed energy weapons would provide hostile forces

with a clear indication of the capability of the Armed Forces. This information could be exploited by individuals or organisations to either take advantage of a perceived weakness or develop tactics and techniques to counter this capability. This response should not be taken as conclusive evidence that the information you have requested is or is not held by the Ministry of Defence”.

14. By way of clarification, the public authority explained to the Commissioner that this exemption was not being applied generally in relation to whether or not it holds information about directed energy weapons technology or research. It confirmed that this area has been under research for a number of years and that knowledge of this is already in the public domain. However, what it does seek to protect is the status of its research and whether or not it has led to any useable weapons. It believes that to do so would expose its capability, or lack of it, in this area. It advised:

“MOD’s position is that not only would it be harmful to confirm or deny whether it has access to specific types of DE weapons, it would be harmful us to disclose whether or not the Department has access to the use of any DE weapon since this would be avowing (or otherwise) a generic equipment capability which hitherto has not been the subject of public disclosure”.

15. With regard to the first criterion of the test set out above, the Commissioner accepts that the type of harm that the public authority believes would be likely to occur if it were to confirm or deny holding the requested information is applicable to section 26(1)(b).
16. With regard to the second criterion, having considered the explanation provided by the public authority, the Commissioner is satisfied that confirmation as to whether or not such weapons are available for use clearly has the potential to harm the effectiveness of British forces by informing enemies of their military capabilities. The Commissioner is therefore satisfied that there is a causal link between the confirmation as to whether or not any information is held and the interests which this exemption is designed to protect. Moreover, the Commissioner is satisfied that the resultant prejudice is one that can be correctly categorised as real and of substance. In other words, subject to meeting the likelihood test at the third criterion, confirmation as to whether such weaponry is available for use could result in prejudice to the capability, effectiveness or security of British armed forces.
17. In relation to the third criterion, the Commissioner has been guided on the interpretation of the phrase ‘would or would be likely to’ by a number of Tribunal decisions. He believes that for the lower level of likelihood (ie ‘likely’) to be met the chance of prejudice occurring should

be more than a hypothetical possibility; there must have been a real and significant risk. With regard to the alternative limb of 'would prejudice' the Commissioner believes that this places a stronger evidential burden on the public authority to discharge. The public authority has confirmed that it is relying on the higher likelihood, ie confirmation or denial 'would' be prejudicial.

18. Within his guidance on the application of this exemption², on the subject of the duty to confirm or deny holding information the Commissioner has specified, by way of example: "*... it would be reasonable for the MoD to decline to confirm or deny that it had a particular battle plan or that British troops did or did not carry particular weapons if disclosure of this information would assist an enemy*".
19. On this basis, the Commissioner is therefore satisfied that the public authority has sufficiently argued its position to satisfy the engagement of this exemption. He accepts that the requested information relates to defence and that confirmation as to whether or not any information is held would inform other parties about the capability of British armed forces.

Public interest test

20. Section 26 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption contained at section 26(3) outweighs the public interest in disclosing the information.

Public interest considerations in favour of confirming or denying whether information is held

21. The complainant argued to the public authority that:

"I have previously stated that I believe the use of radiation on people in such operations as Targeting and Information Operations in peacetime is a breach of Common Law, The Geneva Convention, the European Convention and the Human Rights Act.

Previously I have indicated pertinent areas in terms of the technology used. These have included the relevant departments of MOD such as Targeting and Information Operations, Electronic

²http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_10_-_THE_DEFENCE_EXEMPTION.ashx

Warfare Operational Support at RAF Waddington, and the DSTL Cyber and Influence Department. I believe that the information refused is likely to be directly relevant to these.

Although unlikely, I would say it is also possible that the devices which have been mentioned in your response may possess additional capabilities; though there is a disappointing lack of specificity which limits any conclusion.

In a similar request I pointed out that foreign powers are unlikely to benefit from such knowledge as this, since they have the capability to detect such devices as well as resources to protect themselves through Electronic Warfare counter measures. I believe this is the case here and that it is the British public this is being used on who deserve to know what is happening and the scale of such transgressions”.

22. The public authority provided the complainant with the following arguments:

“There is a legitimate public interest in releasing information about defence equipment capability to provide public reassurance that our forces are properly equipped to undertake their roles and deal effectively with current and potential threats from hostile forces. There is also a legitimate public interest in providing reassurance that the armed forces’ covert possession of particular weapon types does not unjustifiably restrict the public’s right to raise any ethical concerns (whether justified or not) about their use”.

Public interest considerations in favour of maintaining the exclusion of the duty to either confirm or deny

23. The public authority provided the complainant with the following arguments:

“On the other hand, there is a strong public interest in sustaining a well-equipped and effective armed forces [sic] and in not releasing information which could prejudice this interest. In considering the factors against release, the Department has taken into account the serious implications to the safety and effectiveness of our forces should hostile forces become aware of the nature and extent of the UK forces directed energy capability. It would have equally serious implications whether the information, if it were held, were to show a complete lack of capability (thereby indicating a potential capability weakness) or whether, if it were held, it provided a long list of assets showing extensive potential capability. In regard to the latter, I note that in [the complainant’s] email of 8 May [he

says] *"that foreign powers are unlikely to benefit from such knowledge as this, since they have the capability to detect such devices as well as resources to protect themselves though Electric Counter Measures". But MOD's argument is that if we did have any particular directed energy weapon capability (and we neither confirming or denying [sic] that we do) disclosing any information about specific assets would provide hostile foreign powers with more precise information about the nature of the threat they need to detect and countermine.*

In this case MOD applied that part of the section 26 exemption ((3)), to remove the obligation to confirm or deny whether the Department held any information in scope of your request other than that with which you were provided ie 6 Long Range Acoustic Devices. I find this was necessary since were MOD to confirm or deny whether we held other information in scope of your request, it would by default disclose information about the capability or lack of it for the Radio Frequency or Laser assets specified in your request. This would have the effect of producing the harm described above that the application of the section 26 exemption is aimed at avoiding in this case".

Balance of the public interest arguments

24. The complainant has submitted various arguments to support his position that the information he has requested should be disclosed. However, it should be borne in mind that the Commissioner is not actually considering the disclosure of any requested information, if indeed any such information is held, but only whether or not the public authority had a duty to confirm or deny holding the requested information.
25. The Commissioner recognises that the possible use of what could be viewed as 'controversial' weaponry is of a significant and legitimate public interest. He acknowledges that confirmation or denial that such weaponry is being used would be of public interest in that it would assist any forum for debate concerning whether or not the use of such weaponry is appropriate and the potential consequences of its use.
26. However, as argued above, the Commissioner recognises that confirmation or denial would provide hostile forces with a clear indication as to the capability of British armed forces. This would allow the potential exploitation of any shortfalls or opportunities that might be revealed.
27. In the Commissioner's opinion there is an exceptionally weighty and overriding public interest in ensuring the security and safety of British

forces. Therefore, despite the weight that the Commissioner accepts should be given to the public interest in confirming whether or not directed energy weaponry is available for use by our forces, he has reached the conclusion that the public interest firmly favours maintaining the exclusion of the duty to neither confirm nor deny.

Other matters

28. Although not referred to by the complainant, the Commissioner notes the considerable time delay of almost five months in responding to this request. He can confirm that, although this has not been formally considered in this decision notice, he has noted this delay for ongoing monitoring purposes.

Right of appeal

29. 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

30. 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.
31. 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
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