

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 July 2014

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

Decision (including any steps ordered)

1. The complainant has requested information about HMS Conqueror's Patrol Report/Report of proceedings and all supporting Annexes for Operation Barmaid in which she successfully participated in 1982. The Ministry of Defence (MOD) refused to provide this information citing Section 26(1)(b) (Defence exemption). At internal review the MOD restated reliance on Section 26 and introduced reliance on Section 27(1)(a) (International relations exemption).
2. The Commissioner's decision is that the MOD is entitled to rely upon Section 26(1)(b) as a basis for withholding all the requested information.

Background, request and response

3. HMS Conqueror was a Churchill-class nuclear powered fleet submarine which served in the Royal Navy between 1971 and 1990. HMS Conqueror was active during the Cold War and also participated in the Falklands War in 1982. 'Operation Barmaid' took place later that year and it is that (Cold War related) operation to which the complainant's request for information relates.
4. On 4 January 2013, the complainant requested information of the following description:
'HMS Conqueror's Patrol Report/Report of proceedings and all supporting Annexes for Operation Barmaid in which she successfully participated in 1982'.
5. On 6 February 2013, the MOD acknowledged the request and confirmed that they held the information requested. The complainant was

informed that additional time was necessary to conduct the public interest test in order to decide whether the information should be released and that a response would be provided by 27 February 2013. The MOD wrote to the complainant on 28 February 2013 and apologised for the delay in providing a substantive response to the request. The complainant was advised that he would receive a response by 2 April 2013.

6. On 2 April 2013 the MOD provided a substantive response to the request and informed the complainant that the information was withheld because it was exempt under Section 26(1)(b) of the Act. The response advised that the public interest test had found that *'although the file is over 30 years of age and release would add to the public's knowledge of the operations undertaken by HM submarines, the information within the file relates to intelligence collecting operations, release of which could inhibit the effectiveness of any such operations in the future'*.
7. On 4 April 2013 the complainant wrote to the MOD to ask that they reconsider their decision not to release the information requested.
8. On 1 May 2013 the MOD replied to the complainant and confirmed that having considered the withheld information and the arguments put forward for release by the complainant and having consulted subject matter experts, the decision to withhold the information in its entirety was upheld. The complainant was advised that he could apply for an independent internal review if he remained dissatisfied with the response provided. The complainant duly requested an internal review on 4 June 2013.
9. The MOD provided the complainant with their internal review on 9 July 2013. The review provided further explanation for the decision to withhold the information and concluded that Section 26(1)(b) applied to all of the information as its release would be likely to prejudice the capability, effectiveness and security of British forces. In addition the review found that some of the information within scope of the request was exempt under Section 27(1)(a) because its release would be likely to prejudice relations between the United Kingdom and any other state. The MOD advised that *'further information as to the reasons why this applies cannot be used without itself exposing the exempt information'*. The review confirmed that the public interest test had been conducted in respect of Section 27 and that the balance of the public interest was found against releasing the information.

Scope of the case

10. The complainant contacted the Commissioner on 7 August 2013 to complain about the MOD's decision to withhold the requested information.
11. The Commissioner has considered whether the MOD is entitled to rely on the exemptions it has cited as a basis for refusing to provide the requested information.
12. The MOD seeks to rely on two exemptions as a basis for refusing to provide the information, namely Section 26 (Defence) and Section 27 (International relations). In relation to all the information it relies on Section 26 and in relation to some of the information it also relies on Section 27.
13. Where the application of one exemption fails in relation to withheld information, the Commissioner will consider the application of the other exemption cited in relation to the same information. Where the Commissioner is satisfied that the information is exempt by virtue of one exemption, he will not go on to consider whether that same information is exempt by virtue of the other exemption cited in relation to it.
14. On 11 December 2013 the Deputy Commissioner met with representatives of the MOD in order to view the content of the withheld information. He was provided with confidential detail as to the MOD's reasons for treating the information as highly sensitive and exempt from disclosure under the Act.

Reasons for decision

Section 26 - Defence

15. Section 26(1)(b) provides that information is exempt from disclosure if it would, or would be likely to prejudice the capability, effectiveness or security of any relevant forces (in this case the armed forces of the Crown).
16. In order for a prejudice based exemption, such as Section 26, to be engaged the Commissioner considers 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 withheld information 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 would result in prejudice. If the likelihood of prejudice occurring is one that is only hypothetical or remote the exemption will not be engaged.

The Complainant's position

17. The complainant has contended that Section 26 does not apply to the withheld information for a number of reasons.
18. Primarily the complainant considers that the 'Operation Barmaid' information can be distinguished from other submarine related information because he believes that it concerns a unique operation which would not be repeated. In support for this contention the complainant provided submissions to the Commissioner in which he noted that much of the equipment which would have supported HMS Conqueror would be radically different to the equipment supporting more modern submarines. For this reason, the complainant contended that the manner in which HMS Conqueror would have been operated tactically at the time (1982) would be very different to the way in which modern submarines operate.
19. The complainant advised the Commissioner that he would accept the MOD's decision to withhold the information he had requested if 'Operation Barmaid' had been a usual or standard type of intelligence gathering operation. However, the complainant's experience led him to believe that 'Operation Barmaid' had been unique and quite unlike other intelligence gathering operations such as that of HMS Turpin¹.
20. The complainant noted that the Cold War (the context for 'Operation Barmaid') had long since ceased and the Soviet Union dissolved.
21. The complainant drew both the MOD and the Commissioner's attention to the fact that 'Operation Barmaid' had been the subject of an article in the Daily Telegraph as recently as 12 October 2012², itself based on a

¹ In FS50323113 the Commissioner found that information concerning the Captain's patrol reports of the submarine, HMS Turpin, from 1955-57 was exempt from disclosure by the MOD on the basis of Section 26.

² 'HMS Conqueror's Biggest Secret: A Raid on Russia' (Daily Telegraph 12 October 2012).

book published in the same month, 'Secrets of the Conqueror: The Untold Story of Britain's Most Famous Submarine'³. A full chapter of this book ('Operation Barmaid – Last Orders') covers the events with which the requested information is concerned.

22. In submissions to the Commissioner' the complainant also highlighted that as part of its Cold War Season of programmes in December 2013, the BBC had broadcast a programme ('The Silent War') about operations conducted by nuclear submarines during the Cold War. The complainant noted that the programme had covered in some detail the operation by HMS Swiftsure in 1977 to carry out covert surveillance against the Soviet Union aircraft carrier, the Kiev. The complainant stated, *'Obviously the Ministry of Defence did not attempt to block the detailed description of these activities and does not appear to have 'neither confirmed nor denied' the operation took place. Therefore, I would argue it is illogical to not stop the detail of this operation reaching the public domain and yet continue to deny the release of the information I seek'*.
23. Finally, the complainant made the point that information about 'Operation Barmaid' already available in the public domain was *'undoubtedly'* obtained from some of HMS Conqueror's crew and would therefore be considered true by the public.

The MOD's position

24. In its response of 2 April 2013, the MOD advised the complainant that, although the information requested was over 30 years of age and its disclosure would add to the public's knowledge of the operations undertaken by HM submarines, *'the information within the file relates to intelligence collecting operations, release of which could inhibit the effectiveness of any such operations in the future'*.
25. In its 1 May 2013 reconsideration of its response the MOD noted that, although the information was historic in nature, *'many of the principles in the conduct of submarine operations and the technologies used are constant'*.
26. In its internal review of 9 July 2013, the MOD provided expansion in support of their reliance on the exemption. It stated, *'the information describes the location, operating techniques and procedures of a RN submarine related to a specific operation'*. Although the operation in

³ Authored by Stuart Prebble.

question had been conducted almost 30 years ago, the MOD was satisfied, after consultation with the subject matter experts, that *'it is not possible to rule out the likelihood that a similar type of operation would be required in the future or that similar operating techniques and procedures described would need to be either wholly or partly repeated. Disclosure of the information would enable a potential enemy to determine the type and nature, of the operations conducted at the time, and allow it to develop effective countermeasures to current capabilities'*.

27. Addressing the argument that information about 'Operation Barmaid' was already in the public domain, the MOD stated that *'the existence of information in the public domain (including books/documentaries) does not in itself confirm or deny the accuracy of that information, and public records relating to such events must continue to be subject to applicable security requirements until they are judged by the Ministry of Defence to be releasable'*.
28. The MOD further noted that, *'Whilst official records remain closed to the public, this information cannot be known to be true (or untrue) by those not involved in the events themselves. Even if considered to be true (or untrue) by the general public, this remains the case. Those who do know – most obviously from their direct involvement in the activity – are of course bound by the Official Secrets Act. This, and the uncertainty derived from the MOD neither confirming nor denying whether the information is correct, means that those who would seek to draw operational or technical conclusions from such information cannot know if those conclusions are correct'*.

The Commissioner's position

29. Given the sensitivity of the requested information, the amount and level of detail which the Commissioner can include in his analysis of the MOD's position is limited. However, where he is able to do so, the Commissioner addresses the arguments put forward by both parties below.
30. The complainant has noted that prior to his request there was already a significant amount of information available in the public domain about the role and involvement of HMS Conqueror in 'Operation Barmaid', much of this information coming to light in 2012. Having considered the book extracts and newspaper articles previously cited, the Commissioner would agree with the complainant about this. 'Operation Barmaid' is described in considerable detail in the book and it is made explicitly clear that much of the information was sourced from (unnamed) former crew members of HMS Conqueror.

31. However, as the MOD explained in its responses to the request, although there might be a reasonable presumption by the public that information in a book or newspaper article is true and accurate (particularly where some of that information has originated from individuals present during a particular event or activity), such information cannot be *known* to be true or verified while official records remain closed from the public. Where sensitive information of the type requested by the complainant is concerned, silence or a failure on the part of the MOD to either confirm or deny the accuracy of such information, does not amount to agreement or acceptance of the same. Indeed, providing such official confirmation (or otherwise) would risk causing the very prejudice which Section 26(1)(b) is designed to prevent.
32. As noted above, it would appear in this case that individuals bound by the Official Secrets Act (unnamed former crew members of HMS Conqueror) have supplied information to at least one author for the purposes of a book. The Commissioner has also noted that these same individuals clearly recognise that some of the information surrounding 'Operation Barmaid' remains sensitive. For example, on page 237 of the book 'Secrets of the Conqueror' it is stated that, *'Even today, some thirty years after the event took place, the precise location of the action is felt by all those who know it to be too sensitive to talk about'*. The Commissioner considers this to be significant, given that the actual information requested by the complainant would clearly reveal the location of 'Operation Barmaid'.
33. The Commissioner can appreciate why the complainant considers it to be *'illogical'* that the MOD should not attempt to prevent the disclosure of information (via the BBC series) about the Cold War operation conducted by HMS Swiftsure against the Kiev, and yet should refuse to disclose the information he has requested about 'Operation Barmaid' as carried out by HMS Conqueror. Such a situation would seem to be inherently inconsistent. However, each operation will necessarily be different in respect of its own facts and circumstances and the sensitivities of both.
34. The Commissioner has addressed the application of the exemption to the withheld information in this case. Any apparent inconsistency of approach on the part of the MOD, while notable, is of limited relevance to his investigation. In any event, he notes that information contained in the BBC programme is not as detailed or precise as the withheld information in this case.
35. The Commissioner acknowledges and accepts that a considerable period of time has now elapsed since 'Operation Barmaid' took place.

Furthermore, the geopolitical situation of today is very much different to that which pertained then.

36. However, this is not to say that the information no longer carries a significant degree of sensitivity concerning the interests which Section 26(1)(b) is designed to protect. Whilst the Commissioner accepts that many elements of submarine operations and technology will have changed since 1982, he also recognises the reality of the MOD's position, supported by the confidential briefing given, that *'many of the principles in the conduct of submarine operations and the technologies used are constant'*.
37. RN submarines are the United Kingdom's ultimate defence and deterrent from hostile forces. Those forces may not be as clear or present a danger as they were during the Cold War, but a real threat remains. The withheld information in this case contains a high level of detail about 'Operation Barmaid'. The detailed nature of the information is such that it would provide information as to those operational aspects of submarine activity and technique which remain broadly constant today.
38. In his analysis of whether Section 26(1)(b) applies to the withheld information, the Commissioner has given due and appropriate weight to the advice of the MOD subject matter experts. Were a similar operation to that carried out in 'Operation Barmaid' be required in future (however unlikely), then it is clear, as the MOD has contended, that disclosure of the withheld information would be of valuable use to any hostile forces as it would aid and enhance their understanding as to how this type of operation can be carried out and consequently increase the chances of countering or thwarting it. That would clearly prejudice the capability, effectiveness or security of British forces.
39. The Commissioner considers that the actual harm which the MOD believes would occur if the withheld information was disclosed is clearly relevant to the interests which Section 26(1)(b) is designed to protect. The first criterion set out at paragraph 16 is therefore met. With regard to the second criterion the Commissioner is satisfied that disclosure of the withheld information can be causally linked to the prejudice at Section 26(1)(b) and that prejudice is not insignificant or trivial but real and of substance. Finally, based upon the responses provided to the request by the MOD, and confidential information provided to the Deputy Commissioner at the meeting with the MOD of 11 December 2013, the Commissioner is satisfied that the higher threshold of prejudice is met with regard to the third criterion for establishing the exemption. Consequently, the Commissioner is satisfied that Section 26(1)(b) is engaged with regard to the withheld information.

Public Interest Arguments in Favour of Disclosing the Requested Information

40. In his request correspondence with the MOD the complainant stated that information about 'Operation Barmaid' would help inform the public about the significance and success of the Royal Navy's contribution to Cold War submarine operations. He suggested that the information was *'important from a historical perspective'* as it would show how such operations contributed to *'neutralising the Soviet Navy's activities'*.
41. In light of the recent BBC television documentary about the involvement of HMS Swiftsure in the Cold War operation against the Kiev, the complainant stated to the Commissioner that *'it would be a great shame if the public were denied insight into HMS Conqueror's unique operation'*. The complainant also noted that in view of the unofficial information already in the public domain about 'Operation Barmaid', disclosure of the requested information was important from an historical perspective as it would correct any errors and, *'put the record straight'*.

Public Interest Arguments in Favour of Maintaining Section 26(1)(b)

42. The MOD acknowledged that disclosure of the withheld information *'would add to the public's knowledge of the operations undertaken by HM submarines'*. However, this public interest was outweighed by the public interest in preventing a potential enemy from obtaining information about a type of operation which would enable effective capabilities and countermeasures to be developed and therefore jeopardise the effectiveness and safety of RN submarine operations.

Balance of the Public Interest Arguments

43. The Commissioner would agree that there is a clear and valid public interest in the disclosure of information concerning RN submarine operations that took place during the Cold War. Any information which would shed light on the operational involvement and successes of RN submarines would carry significant and important public interest. That public interest is reflected by the inclusion in the BBC television series highlighted by the complainant of the operational success of HMS Swiftsure.
44. The Commissioner also accepts that any information which would clarify or correct assumptions or errors contained in information already in the public domain about particular RN submarine operations would be of public interest worth in maximising transparency and openness.
45. However, the Commissioner is mindful that in this case he is tasked with considering the public interest factors attached to very specific submarine information, namely the Patrol Report and Report of

Proceedings for 'Operation Barmaid' with which HMS Conqueror was involved in 1982.

46. The information in this specific case would clearly serve the public interest factors in disclosure noted above, in that it would provide further detail to that already present in the public domain about 'Operation Barmaid'. Constituting as it does, the contemporaneous record of a highly sensitive operation the information's public interest value is important and significant.
47. However, the Commissioner considers that that same sensitivity is what gives the public interest factors in favour of maintaining the Section 26(1)(b) exemption such considerable and compelling force. Whilst the Commissioner appreciates that the complainant does not believe, for the reasons previously detailed, that a similar venture to 'Operation Barmaid' would ever be attempted in future, the MOD (after consultation with contemporary subject matter experts) has confirmed that it cannot rule out such a possibility or that similar operating techniques and procedures to those described in the withheld information might need to be repeated at some point.
48. This being the case the Commissioner considers that the powerful public interest in protecting the capability and security of the British Armed Forces (specifically RN submarine activity) must take precedence over any legitimate public interest case for disclosure. In the particular circumstances of this case, as the Commissioner has concluded, that disclosure of the withheld information would (rather than would be likely to) result in the prejudice which the exemption is designed to protect, he considers that the weight which attaches to the arguments in favour of maintaining the exemption is all the greater. The Commissioner therefore finds that the public interest in maintaining the Section 26(1)(b) exemption outweighs the public interest in disclosing the information.
49. The nature of the requested information and the sensitivity surrounding it has inevitably constrained, to some extent, the Commissioner's ability to comment or expand upon his reasoning in reaching his conclusions with regard to both the application of the exemption and the public interest test. Whilst he appreciates that this may prove frustrating or disappointing for the complainant, the Commissioner has sought in this decision notice to address all the arguments presented where he has been able to do so without risking revealing the content of the withheld information. He has, however, fully considered all the points that have been put to him by both parties.
50. The Commissioner has concluded that the MOD were correct to rely on Section 26(1)(b) as its basis for refusing all the information requested.

He has therefore not gone on to consider the applicability of Section 27(1)(a) to some of the information requested.

Right of appeal

51. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

52. 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.
53. 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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