

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 April 2014

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

Decision (including any steps ordered)

1. The complainant requested information from the Ministry of Defence (MOD) about its use of contractors in Afghanistan, specifically information as to whether any MOD investigations had revealed links between any contractors to the Taliban or any other insurgent groups. The MOD refused to confirm or deny whether it held any information falling within the scope of the requests on the basis of the exemptions provided by the following sections of FOIA: 23(5) – security bodies; 26(3) – defence; 27(4) – international relations; and 43(3) – commercial interests.
2. The Commissioner's decision is that the MOD is entitled to refuse to confirm or deny whether it holds any information falling within the scope of the requests on the basis of section 23(5) of FOIA.

Request and response

3. The complainant submitted the following requests to the MOD on 2 September 2013:

'I am writing to make a request for information under the Freedom of Information Act 2000, regarding the MoD's use of prime contractors and sub-contractors in Afghanistan.

I would like to request the following information:

1. On how many occasions each year have MoD reviews or investigations revealed that contractors being paid by the MoD have links to the Taliban or other enemy insurgent groups?

2. For each of these contractor believed to be linked to the Taliban or other insurgent groups, what was:

a. The annual value of their contract/s?

b. The nature of the contract/s (ie What was the contractor being paid to do)?

c. Which Taliban/insurgent group were they believed to be linked to?

d. How much have they been paid by the MoD and other UK Government bodies in total (ie over the whole duration of their contract)?

e. In which area/s of Afghanistan was the contractor operating?

f. Had the contractor been vetted by the MoD before the contract was awarded?

g. What action was taken against the contractor?

i. Was any assessment made of the amount of MoD money that could have gone from this contractor to Taliban/insurgency groups? And if so, what was the amount?

I'd like to limit my request from 1 January 2008 to the present day.'

4. The MOD contacted the complainant on 30 September 2013 and explained that it needed further time to consider the balance of the public interest test.
5. The MOD contacted him again on 28 October 2013 and explained that it was refusing to confirm or deny whether it held the requested information on the basis of sections 26(3) (defence) and 27(4) (international relations) of FOIA. The MOD concluded that the public interest favoured maintaining both of these exemptions. The MOD also explained that under section 17(4) of FOIA it was not obliged to explain why an exemption applied if such an explanation would involve the disclosure of exempt information.
6. The complainant contacted the MOD on the same day and asked it to conduct an internal review of this decision.
7. The MOD informed the complainant of the outcome of the internal review on 21 November 2013. The internal review upheld the application

of sections 26(3) and 27(4) and also explained that the MOD was also relying on sections 23(5) (security bodies) and 43(3) (commercial interests) of FOIA to refuse to confirm or deny whether it held the requested information. Once again, the MOD noted that by virtue of section 17(4) of FOIA it was not in a position to explain why it considered these additional exemptions to apply.

Scope of the case

8. The complainant contacted the Commissioner on 27 November 2013 to complain about the way his requests for information had been handled. In his submissions the complainant set out detailed reasons why he believed that the MOD had misapplied sections 26 and 27 and moreover why he believed that there was a compelling public interest in the disclosure of the information he had requested.
9. Although the complainant's submissions focused on why he believed that the information he requested should be disclosed, it is important to remember that the right of access provided by section 1(1) of FOIA and is separated into two parts: Section 1(1)(a) gives an applicant the right to know whether a public authority holds the information that has been requested. Section 1(1)(b) gives an applicant the right to be provided with the requested information, if it is held. Both rights are subject to the application of exemptions. Some exemptions are qualified, requiring the application of a public interest test under section 2 to determine whether the information requested should nevertheless be disclosed. Others are absolute, which means public interest considerations are irrelevant for these purposes.
10. In this case the MOD has relied on sections 23(5), 26(3), 27(4) and 43(3) to refuse to confirm or deny whether it holds any information falling within the scope of the requests, ie it has relied on these exemptions in order not to fulfil the duty contained at section 1(1)(a) of FOIA. Therefore this notice only considers whether the MOD is entitled on the basis of any of these exemptions to refuse to confirm or deny whether it holds the requested information. The notice does not consider whether the requested information – if held – should be disclosed.

Reasons for decision

Section 23 – security bodies

11. The Commissioner has considered this exemption first because it is an absolute exemption, whereas others claimed by the MOD in this case are qualified. The MOD applied this exemption to the entire request.
12. Section 23(1) of FOIA states that:

'Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in sub-section (3).'
13. Section 23(5) of FOIA states that:

'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 subsection (3).'
14. In the Commissioner's opinion the exemption provided by section 23(5) 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 involve the disclosure of information relating to a security body. It is not necessary for a public authority to demonstrate that both responses would disclose such information. 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 different decisions.¹
15. Consequently, whether or not a security body is interested or involved in a particular issue is in itself information relating to a security body. Therefore section 23(5) can legitimately be used by a public authority to avoid issuing a response to a request which would reveal either that a security body was involved in an issue or that it was not involved in an issue.

¹ See for example [Dowling v Information Commissioner and The Police Service for Northern Ireland](#), EA/2011/0118, paras 17 to 22.

16. The test as to whether a confirmation or denial is itself information which 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 a confirmation or denial would relate to a security body then the exemption would be engaged.
17. Section 23(5) therefore has a very wide application. If the information requested could be described as within the ambit of security bodies' operations, section 23(5) is likely to apply. 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.
18. The MOD provided the Commissioner with submissions to support its application of section 23(5) in this case. Having considered these submissions the Commissioner is satisfied that by either confirming or denying whether it holds information falling within the scope of these requests the MOD would itself, on the balance of probabilities, reveal information relating to one or more of the security bodies. The Commissioner has therefore concluded that the MOD can rely on section 23(5) to refuse to confirm or deny whether it holds any information falling within the scope of the complainant's requests.
19. The Commissioner cannot elaborate on either the nature of the MOD's submissions to him, nor why he considers these submissions to demonstrate that section 23(5) is engaged, as to do so would risk revealing information that is in itself exempt information. This should not be taken as an indication that the requested information is or is not held. Similarly, the Commissioner confirms that, in the circumstances of this case, the MOD's reliance on section 17(4) in its response to these requests was justified.
20. In light of his finding in respect of section 23(5), the Commissioner has not considered the MOD's application of sections 26(3), 27(4) or 43(3).

Right of appeal

21. 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

22. 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.
23. 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