

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 25 July 2018

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

#### **Decision (including any steps ordered)**

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1. The complainant submitted a request to the Ministry of Defence for the terms of reference for Operation HELVETIC. The MOD identified two documents containing relevant information and disclosed a small portion of information. However, it argued that the remaining withheld information was exempt from disclosure on the basis of section 26(1)(b) (defence) of FOIA. In addition, the MOD argued that some of the withheld information was also exempt from disclosure on the basis of either section 23(1) (security bodies) or section 24(1) (national security). The Commissioner has concluded that part of the withheld information is exempt from disclosure on the basis of section 26(1)(b) and that in all the circumstances of this case the public interest favours maintaining this exemption. However, in relation to the remainder of the withheld information the Commissioner is not persuaded that this is exempt from disclosure on the basis of section 26(1)(b).
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Provide the complainant with a copy of the document 'CDS Directive for Operation HELVETIC' with the information identified in the confidential annex unredacted. (A copy of the confidential annex has been sent to the MOD only). The remaining information contained within that document is exempt under section 26(1)(b)

and that information can be redacted from the copy of the document disclosed.<sup>1</sup>

3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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4. The complainant submitted the following request to the MOD on 3 May 2017:

*'This is a Freedom of Information request by...[ ]in relation to Operation HELVETIC, which commenced in Northern Ireland in 2007 further to the ending of Operation BANNER.*

*We are seeking:*

*1: What information does the MoD hold that sets out the Terms of Reference (or similar document) of Operation HELVETIC;*

*2: Copies of any document captured by (1) above which sets out the terms of reference of Operation HELVETIC.'*

5. The MOD contacted the complainant at the end of May 2017 and explained that it held information falling within the scope of the request but it needed additional time to consider the balance of the public interest test.
6. The MOD provided the complainant with a substantive response to its request on 29 June 2017. The MOD explained that the terms of reference in question were set out in two documents, firstly the Chief of Defence Staff's (CDS) Directive for Operation HELVETIC and secondly the Operation Order for Operation HELVETIC. However, the MOD explained that the terms of reference themselves were considered to be exempt from disclosure on the basis of section 26(1)(b) (defence) of the Freedom of Information Act (FOIA).

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<sup>1</sup> The MOD has not applied section 23(1) or section 24(1) to any of the information which the Commissioner's decision notice orders to be disclosed. Therefore, this notice does not consider these two exemptions.

7. The complainant contacted the MOD on 24 July 2017 in order to ask for an internal review of this decision.
8. The MOD informed the complainant of the outcome of the internal review on 19 September 2017. The review explained that the MOD had identified the two documents named above as falling within the scope of the request but concluded that these were exempt from disclosure on the basis of section 26(1)(b) of FOIA with the exception of a small portion of information which was being disclosed. The MOD explained that some of the withheld information was also exempt from disclosure on the basis of section 23(1) (security bodies) or section 24(1) (national security) of FOIA.
9. During the course of the Commissioner's investigation, the MOD disclosed a further small part of the withheld information.

### **Scope of the case**

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10. The complainant contacted the Commissioner on 1 December 2017 in order to complain about the MOD's decision to withhold information falling within the scope of its request.
11. As noted above, at the internal review stage and during the Commissioner's investigation the MOD provided the complainant with small parts of the information falling within the scope of the request. Both pieces of information that have been disclosed were from the document 'CDS Directive for Operation HELVETIC'. The focus of the Commissioner's investigation has therefore been to determine whether the remaining parts of this document are exempt from disclosure and whether the information contained within the second document, ie the 'Operation Order for Operation HELVETIC' is exempt from disclosure.

### **Reasons for decision**

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#### **Scope of request**

12. The MOD explained that it did not hold a specific document which set out the terms of reference for Operation HELVETIC. However, the two documents it identified described in detail the specific procedures, methods and techniques and terms of reference for the Operation. The MOD explained that it considered the terms of reference for an operation as defining not only the purpose of that operation but also its scope and limitations. It was for that reason that the two documents were initially

identified as relevant to the request, albeit that the MOD noted it could be argued that information specifically about the tactics and operational techniques could be seen as out of scope of the request although it considered it very difficult to isolate such information as it was embedded into other parts of the documents.

13. In the Commissioner's opinion the MOD's interpretation as to the type of information that would form part of the terms of reference is a reasonable one. Furthermore, given that in the particular circumstances of this case no standalone document exists which sets out the terms of reference for Operation HELVETIC, she is of the view that the entire contents of both of the two documents fall within the scope of the request.

## **Section 26 - defence**

14. Section 26(1)(b) states that:

*'Information is exempt information if its disclosure under this Act would or would be likely to prejudice-...*

*... (b) the capability, effectiveness or security of any relevant forces.'*

### The MOD's position

15. The MOD explained that the withheld information described in detail the specific procedures, method and techniques for Operation HELVETIC in addition to specific details about the rules of engagement, capabilities or operational restraints and limitations placed on UK forces. It argued that disclosure of this information would allow those with hostile intent to adapt their tactics, techniques and procedures accordingly which could compromise current and future operations. As noted above, the MOD argued that it considered the information relating to tactics and operational techniques was embedded throughout the documents and it was difficult to isolate this.

### The complainant's position

16. The complainant argued that the MOD's decision and approach to this information is entirely at odds with both the practice of the Police Service of Northern Ireland (PSNI) and even MI5 in relation to their operations in Northern Ireland. It argued that significant information is in the public domain and regularly scrutinised at the NI Policing Board about the role and remit of the PSNI, their policies, rules, capabilities and constraints. The complainant argued that the availability of this information clearly does not cause the prejudice the MOD is citing in relation to analogous information regarding the terms of Operation HELVETIC. The complainant noted that in relation to MI5 there are

published provisions regarding its role in Annex E of the (UK-Ireland) St Andrews Agreement 2006 and a MI5-PSNI Memorandum of Understanding setting out arrangements between them was ultimately published in 2014.

17. The complainant also noted that PSNI published a policy paper, SI1917 Military Assistance to the Police Service of Northern Ireland, which summarises some of the provisions in Operation HELVETIC.<sup>2</sup> The complainant argued that the availability of this information in the public domain undermined the MOD's case for withholding the remaining information.
18. The complainant argued that the request related to the terms of reference (or similar document) of Operation HELVETIC. Its request did not seek information on, for example 'tactics' or operational 'techniques' per se, and therefore the MOD erred in withholding the whole document on this basis, rather than redacting out any information that is about matters such as operational methodologies that are not for the public domain (albeit that the complainant suggested that it appeared unlikely that the document in question would contain such information).

#### The Commissioner's position

19. In order for a prejudice based exemption, such as section 26(1) 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 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; and
  - 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. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a

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<sup>2</sup> <https://www.psni.police.uk/globalassets/inside-the-psni/our-policies-and-procedures/corporate-policy/military-assistance-120417.pdf>

hypothetical possibility; rather 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. The anticipated prejudice must be more likely than not.

20. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the MOD clearly relates to the interests which the exemption contained at section 26(1)(b) is designed to protect.
21. With regard to the second criterion, having examined the withheld information the Commissioner is satisfied that significant parts of it clearly contain information about procedures, operational techniques and capabilities associated with Operation HELVETIC. This is the case for the entirety of the second document, ie 'Operation Order for Operation HELVETIC' and for significant parts of the first document. Furthermore, the Commissioner is satisfied that if such information was disclosed then there is a clear potential for prejudice to occur and that such prejudice would be one that was real and of substance. However, the Commissioner is not persuaded that there is a causal link between disclosure of some parts of the first document and the prejudice envisaged by the MOD. The Commissioner has reached this finding for a combination of reasons: either because the information, in her view, does not actually contain information about tactics, techniques, procedures or capabilities about Operation HELVETIC; or whilst the information does touch on such matters it is relatively generic or top-level that it is difficult to see a causal link between disclosure of the information and the prejudice envisaged by the MOD; or, because the information is already effectively in the public domain.
22. Nevertheless, the Commissioner accepts that for the information which meets the second criterion, she also accepts that disclosure of this would be likely to result in the prejudice envisaged by the MOD. She has reached this conclusion given the ongoing threat level to Northern Ireland from Northern Ireland-related terrorism remains at SEVERE, meaning that an attack is highly likely and because in her view disclosure of such information would provide those intent on carrying out such attacks with a particular insight into Operation HELVETIC.
23. In summary then, the Commissioner is satisfied that *all* of the information contained within the document 'Operation Order for Operation HELVETIC' is exempt from disclosure on the basis of section 26(1)(b) and that *some* of the information contained within the document 'CDS Directive for Operation HELVETIC' is exempt from disclosure. The Commissioner has identified the relevant parts of this document which she does not accept are exempt from disclosure on the

basis of section 26(1)(b) in a confidential annex, a copy of which will be provided to the MOD only.

### **Public interest test**

24. However, section 26(1) is a qualified exemption and therefore subject to the public interest test set out in section 2(2)(b) of the FOIA. 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 disclosing the withheld information.

#### *Public interest in disclosing the withheld information*

25. The MOD acknowledged that FOIA contained a general presumption in favour of openness and that there was a clear public interest in allowing the public access to information about this issue. It also accepted that disclosure could increase public confidence in, and understanding of, the work of the military to reassure the public that the MOD is compliant with the Good Friday Agreement.

26. The complainant argued that the MOD's balancing of the public interest test had not given sufficient weight to a number of factors that favoured disclosure of some or all of the withheld information. These factors, the complainant suggested, were as follows:

- The public interest is not limited to increasing awareness and understanding of the UK Armed Forces. Rather there is a strong public interest in awareness as to whether the role of the Armed Forces in Northern Ireland complies with the terms of the Northern Ireland peace settlement and that the armed forces are restricted in operating within the terms of the applicable legal framework, and in particular that the scope of Operation HELVETIC is compliant with human rights standards.
- Operation HELVETIC is not a deployment to which the laws of armed conflict are applicable, rather the domestic legal framework is applicable – the armed forces must act compatibly with ECHR rights and the powers available to the armed forces are limited to those set out in legislation such as the Justice and Security NI Act 2007 and investigatory powers legislation, and the rules on use of force are also governed by the common law and other statutes. The rules of engagement and scope of operations must be compatible with this legal framework. If the armed forces operate under secret terms of reference it is not possible to determine if this is the case which can undermine public confidence in the rule of law;
- The Belfast/Good Friday Agreement-mandated Independent Commission on Policing for Northern Ireland (the Patten Commission)

reached quite specific conclusions regarding the role of the army. Patten stipulated that the role should be reduced to matters such as bomb disposal, and the only area different to the rest of the UK where the Army should maintain an additional role in Northern Ireland would be where required for substantial public order policing demands in Drumcree-type situations (which have not arisen). The British government committed, in a bilateral international agreement to the implementation of the Patten recommendations (UK-Ireland Weston Park Agreement 2001). There were also significant commitments to limit the role of the Army in the (UK-Ireland) 2003 Joint Declaration—including the commitment to reduce army support to the police to a residual level along with the role of army helicopters, garrison sizes and locations etc. It is within the public interest to be aware as to whether the Patten Commission framework and these Agreements which make up the peace settlement are being abided with;

- This includes whether the role of the Army continues to be as a Military Aid to the Civil Power (MACP) and hence essentially operates under PSNI primacy (where there is then accountability to the NI oversight bodies provided in accordance with the Patten settlement) or whether other arrangements are in force. It also includes whether the Army's role is restricted to those areas envisaged by Patten or goes beyond this. At one stage it was confirmed the Special Reconnaissance Regiment (SRR) had been operational in NI, this was controversial given the activities of the Force Research Unit (FRU, from which the SRR emerged) in the past. Only public scrutiny of the general terms of reference of the Army's remit can allay suspicions that the documents are being withheld to conceal a broader role beyond what was provided for under the terms of the peace settlement.

#### *Public interest in maintaining the exemption*

27. The MOD argued that there is a very strong public interest in withholding information which, if disclosed, would undermine the effectiveness of how the UK armed forces conduct operations and thus achieve their military objectives, and moreover, put military personnel at risk. The MOD emphasised that the withheld information concerned both current and future operations.

#### *Balance of the public interest arguments*

28. The Commissioner agrees that there is a clear and weighty public interest in disclosure of information which would provide the public with a greater understanding of the armed forces role in Northern Ireland under Operation HELVETIC. More specifically, the Commissioner recognises that the complainant has advanced a number of strong reasons why the public interest favours disclosure of more of the



withheld information, if not all of the withheld information. Moreover, having examined the withheld information the Commissioner accepts that it could, in part, be used to address some questions and issues that the complainant has raised. As a result, in the Commissioner's opinion the public interest in the disclosure of the withheld information should not be underestimated. However, despite the weight that these arguments attract, the Commissioner has concluded that they are outweighed by the public interest in maintaining the exemption contained at section 26(1)(b). She has reached this conclusion because she agrees with the MOD that there is a particularly compelling public interest in ensuring the capability, effectiveness or security of the UK's armed forces. In the circumstances of this case the Commissioner considers that this argument attracts notable further, and ultimately compelling, weight given that the information relates to an ongoing operation.

29. In light of this finding the Commissioner has not considered the MOD's reliance on sections 23(1) and 24(1) of FOIA to the parts of the information which she has concluded are exempt from disclosure on the basis of section 26(1)(b).

## Right of appeal

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30. 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: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

31. 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.
32. 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 .....**

**Gerrard Tracey**  
**Principal Adviser**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**