

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 July 2020

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

Decision (including any steps ordered)

1. The complainant submitted a request to the Ministry of Defence (MOD) seeking information about the number of times Ministers had consulted or approved intelligence sharing in particular circumstances. The MOD explained that it held some information falling within the scope of the request but it considered this to be exempt from disclosure on the basis of sections 24(1) (national security), 26(1)(b) (defence) and 27(1)(a) (international relations) of FOIA. It also refused to confirm or deny whether it held any further information falling within the scope of the request on the basis of section 23(5) (security bodies) of FOIA.
2. The Commissioner's decision is that the MOD is entitled to rely on section 27(1)(a) to withhold the information and that in all of the circumstances of the request the public interest favours maintaining the exemption. She has also concluded that the MOD is entitled to refuse to confirm or deny whether it holds any further information falling within the scope of the request on the basis of section 23(5) of FOIA.

Request and response

3. The complainant submitted the following request to the MOD on 1 April 2019:

'The request relates to actions taken pursuant to MOD Policy on the Passing or Receipt of Intelligence Relating to Detained or Captured Persons, the latest version of which was released to me on 13 March 2019 (F012019/01980). It also relates to all earlier versions of this policy document (e.g. the May 2013 version, released to me on 8 December 2014 (F012014/05808)).

Please provide me with overall figures, broken down by year, for the following:

- 1. Number of times that Ministers have been consulted in cases where MOD officials considered there to be a serious risk of torture and/or CIDT which cannot be mitigated (pare 15 (viii) and (ix));*
- 2. Number of times where Ministers have been consulted as above, and have subsequently approved intelligence sharing;*
- 3. Number of times that prior approval has been sought from Ministers (pare 22)*
- 4. Number of times where Ministers have provided prior approval as above.*

Similar figures were released to me on 8 December 2014, for the two years 2013 and 2014 (F012014/05808). The information I am seeking here is identical in nature to this.¹

4. The MOD responded on 12 June 2019 and confirmed that it held some information falling within the scope of the request but it considered this to be exempt from disclosure on the basis of sections 26(1)(b) (defence) and 27(1)(a) (international relations) of FOIA. The MOD also refused to confirm or deny whether it held any further information falling within the scope of the request on the basis of section 23(5) (security bodies).
5. The complainant contacted the MOD on 14 June 2019 and asked it to conduct an internal review of this response.

¹ A copy of the policy in question dating from November 2018 is available here <https://www.documentcloud.org/documents/6015916-MOD-Torture-Policy-Nov-2018.html>

6. The MOD informed him of the outcome of the review on 17 July 2019. The review upheld the application of the various exemptions cited in the refusal notice but also argued that section 24(1) (national security) applied.

Scope of the case

7. The complainant contacted the Commissioner on 26 November 2019 in order to complain about the MOD's handling of his request. He questioned whether the various exemptions applied and even if they were, then he argued that there was compelling public interest in disclosure of the requested information.

Reasons for decision

Section 27 – international relations

8. Section 27(1)(a) of FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the relations between the UK and any other State.

The MOD's position

9. In support of its reliance on this exemption the MOD explained to the Commissioner that intelligence sharing agreements, and information relating to any exchanges made under that theme, are based on mutual trust and considered confidential between the relevant parties. The MOD argued that whilst it is public knowledge that there is a UK and MOD policy which outlines the guidelines that have to be followed when passing or receiving intelligence relating to detained or captured persons, the expectation is that information relating to any exchanges considered under that policy is not revealed publicly by the parties involved. Therefore, the release of such information would be considered a breach of trust that would likely to prejudice the UK's relationships with the foreign authorities that shared the intelligence for which Ministerial advice was sought. However, the MOD noted that any perceived UK breach of trust relating to the sharing of intelligence could have wider implications for the UK's relations with other states which involve the sharing of sensitive or classified material.
10. As explained below, the complainant questioned why the MOD had sought to withhold this information when it had disclosed substantively the same information in response to a previous request five years

earlier. The complainant argued that the MOD had failed to explain what circumstances had changed over the period.

11. In response to this point the MOD explained to the Commissioner that during 2013 and 2014 (the period covered by the complainant's previous request) the UK Armed Forces were actively engaged in ground operations in Afghanistan under Operation HERRICK. The MOD explained that during this operation, UK forces had been conducting detention operations that involved the transfer of captured persons to Afghan authorities, including Afghan police forces where criminal acts falling under their jurisdiction were believed to have been committed. The MOD explained that the NATO International Security Assistance Force (ISAF) set a deadline of December 2014 to end combat operations in Afghanistan, and in line with this the UK's role gradually shifted from one of combat to training and assistance over that period, with the formal withdrawal of UK combat forces in late 2014. During this transition, responsibility for security passed from ISAF to Afghan National Security Forces (ANSF). The MOD explained that this is a material change to the UK Armed Forces operating environment between 2013-2014 and the present time.
12. However, the MOD explained that it was now of the view that the information released in response to the complainant's previous request should not have been disclosed. It explained that the publication of information that provides the public and adversaries with an insight into the MOD's intelligence sharing with partner forces and highly sensitive UK operational data was an error, and one that should not be repeated.
13. The MOD explained that the approach taken in this request was supported the position outlined in the written statement by the Minister for the Armed Forces given on 11 June 2019:

*'We do not comment on the details of our intelligence sharing arrangements relating to detainees or captured persons as to do so would, or would be likely to, prejudice the capability, effectiveness or security of the Armed Forces. However, I would like to reassure the hon. Member that this Government stands firmly against torture and does not participate in, solicit, encourage or condone the use of torture or cruel, inhumane or degrading treatment or punishment for any released purpose. Our policy and activities in this area are entirely in accordance with both domestic and international law.'*²

² <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2019-06-03/258881>

The complainant's position

14. As noted above, the complainant explained that he had requested substantively the same information as released in a previous request (FOI2014/05808), but the MOD had not explained what had changed in the intervening five years which meant the such information was now considered to be exempt from disclosure. The complainant suggested that it seemed possible that the only change is the greater public scrutiny on intelligence sharing following the release of the MOD's policy issue on this as a request of a separate request he had made for it.
15. The complainant noted that the MOD had argued that the information is 'operationally sensitive' and would 'prejudice the capability or effectiveness of our armed forces'. He also noted that the MOD had argued that it would also 'be likely to adversely affect relations with our allies if revealed.' However, the complainant argued that it was very unclear how the information requested would produce this harm. He emphasised that he had requested aggregate figures, which the MOD had released to him before; he also emphasised that he did not ask for details of the nature of intelligence to be shared, nor the identity of the ally. Furthermore, he noted that the refusal notice argued that prejudice would be likely to occur in combination with 'other information that could be revealed under the FOIA', but it is unclear what that information would be and how it would combine to generate harm. He suggested for this argument to hold the likelihood of that harm occurring would need to be realistic not purely hypothetical and the harm genuine.

The Commissioner's position

16. In order for a prejudice based exemption, such as section 27(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 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.

17. Furthermore, the Commissioner has been guided by the comments of the Information Tribunal which suggested that, in the context of section 27(1), prejudice can be real and of substance 'if it makes relations more difficult or calls for a particular damage limitation response to contain or limit damage which would *not have otherwise have been necessary*'.³
18. 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 27(1)(a) is designed to protect.
19. With regard to the second criterion the Commissioner acknowledges that there is an expectation that information shared between states on the basis of intelligence sharing agreements will be treated confidentially. In light of this she accepts that it is plausible to argue that disclosure of the withheld information which relates directly to information provided to the UK under such an agreement would be against the expectations of the states that provided it. In turn, she accepts that disclosure of the information would therefore have a negative impact on the UK's relations with those states, or as described by the Tribunal above, would require a damage limitation response that would otherwise have not been necessary.
20. With regard to the third criterion, the Commissioner is persuaded that the risk of prejudice occurring is one that is more than hypothetical. In reaching this conclusion she appreciates that the information requested is simply aggregate data and does not identify which states provided the data. However, given the clear expectation of the states in terms of how information shared with the UK would be treated, and the inherent sensitivity of such information, the Commissioner is satisfied that even disclosure of the such aggregate data still poses a real and significant risk to the UK's relations with the states who provided it with the intelligence.
21. Section 27(1)(a) is therefore engaged.

³ 4 Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence (EA/2006/0040), paragraph 81

22. In reaching this conclusion the Commissioner accepts that the MOD had previously disclosed very similar information to that which it is now seeking to withhold. However, in the Commissioner's view the MOD has adequately explained the different circumstances between the period covered by the previous request and that covered by this request. Moreover, as the MOD has acknowledged the previous disclosure was in error and should not have been made.

Public interest test

23. However, section 27(1) is a qualified exemption and therefore subject to the public interest test set out in section 2(2)(b) of 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 arguments in favour of disclosing the information

24. The complainant argued that the public interest in releasing information pertaining to Ministerial approval for intelligence sharing where there is a known, serious risk of torture could not be higher. He argued that this is clear from the parliamentary concern expressed as a result of the release in March 2019 of the MOD policy covering such intelligence following an earlier request of he had submitted. He argued that the MOD could not balance this very real, serious public interest in disclosure against a vague (indeed, hypothetical) harm.

Public interest arguments in favour of maintaining the exemption

25. The MOD argued that there was a significant public interest in withholding information which would be likely to undermine the UK's position and compromise its ability to work with other states on matters of intelligence sharing relating to detainees or captured persons.

Balance of public interest arguments

26. The Commissioner accepts that there is a significant public interest in the disclosure of the information sought by the complainant. As he noted, following the MOD's disclosure of its policy regarding such intelligence there were Parliamentary debates and media articles about this matter, including questions being raised as to whether the policy was compliant with the Cabinet Office's consolidated guidance on torture. Disclosure of the withheld information would provide the public with a clear insight into the number of occasions Ministers were consulted and prior approval had been sought for a five year period. The Commissioner accepts that disclosure of the information could further inform ongoing debate the operation of the policy in question.

27. However, the Commissioner considers there to be a very significant public interest in protecting the UK's relationships with other states, not least to ensure that intelligence sharing arrangements are not compromised. In attributing weight to the public interest in favour of maintaining the exemption the Commissioner accepts that the disclosure risks not only directly harming the UK's relations with the states that provided the intelligence in question but also risks undermining the UK's intelligence sharing relations with other states. In the Commissioner's view this adds further weight to the public interest in maintaining the exemption.
28. Taking the above into account the Commissioner has concluded, by a relatively narrow margin, that the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.
29. In light of this decision the Commissioner has not considered the MOD's reliance on sections 24(1) and section 26(1)(b) of FOIA.

Section 23 – security bodies

30. The MOD also sought to rely on section 23(5) to refuse to confirm or deny whether it held any further information falling within the scope this request.
31. Section 23(5) 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 section 23(3).
32. The test as to whether a disclosure would relate to a security body is decided on the normal 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.
33. 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.
34. In support of its reliance on section 23(5), the MOD explained that it had cited the substantive exemption at section 23(1) in response to a

similar request raised by complainant (FOI2014/05808) in which he asked for the guidance, policy and procedures held by MOD in relation to this topic. The MOD explained that as it had therefore already confirmed that its guidance, policy and procedures related to one or more security body, it is not unreasonable that information recorded when taking actions in accordance with this policy could potentially involve, or relate to, a listed body.

35. The MOD argued that confirmation or denial of when such bodies are, or are not, involved could be exploited by hostile individuals or organisations with consequent damage to national security. It also emphasised that there is a requirement to adopt a consistent approach to requests of this kind. Any future decision to provide an NCND response to requests relating to the sharing of intelligence could be weakened by supplying either a held or a not held response in this case.
36. The Commissioner is satisfied that on the balance of probabilities confirming whether or not the MOD holds any further information falling within the scope of the request could reveal information related to one or more bodies identified in section 23(3). The MOD was therefore entitled to rely on section 23(5) to refuse to confirm or deny whether it held any further information falling within the scope of the request.

Right of appeal

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

38. 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.
39. 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

**Jonathan Slee
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**