

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 August 2022

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

Decision (including any steps ordered)

1. The complainant submitted a request to the Ministry of Defence (MOD) seeking copies of operational directives concerning UK armed forces personnel embedded with other forces. After some delay, the MOD provided the complainant with copies of two versions of the directives which it held but redacted information on the basis of sections 23(1) (security bodies), 24(1) (national security), 26(1)(b) (defence), 27(1)(a) and (c) (international relations) and 40(2) (personal data) of FOIA. The MOD subsequently released some additional parts of the documents to the complainant.
2. The Commissioner's decision is that the MOD is entitled to withhold the remaining redacted information on the basis of the exemptions contained at sections 23(1), 26(1)(b) and 27(1)(a) and (c) of FOIA. However, the Commissioner has concluded that the MOD breached sections 10(1) and 17(1) of FOIA in its handling of this request.

Request and response

3. The complainant submitted the following request to the MOD on 5 November 2019:

 'Please provide a copy of

 (1) A copy of 'CDS Operational Directive 09/14 to Personnel Embedded within Other Nations Forces, dated Apr 14' as cited in JSP 900 Edition 2.
 (2) A dated list of any other versions of the above Directive.
 (3) Copies of all documents in above dated list.'
4. The MOD on responded on 6 February 2020 and refused to comply with the request on the basis of section 12(1) (cost limit) of FOIA.
5. The complainant contacted the MOD on the same day and asked it to conduct an internal review of this response.
6. The MOD informed him of the outcome of the review on 5 March 2020. The review concluded that section 12(1) did not apply and rather it had been the department's intention to refuse the request on the basis of section 14(1) (vexatious) because of the burdensome nature of the activities required to fully process the request. However, the MOD explained that it had now concluded that although burdensome to process, such a burden was not sufficient to meet the criteria for applying section 14(1) in such circumstances as set down by the Commissioner.¹ Therefore, the MOD explained that it would instead process the request.
7. Due to the impact of the Covid pandemic, the MOD did not provide the complainant with a response until 6 November 2020, disclosing some of the requested information.
8. The complainant contacted the MOD on 24 November 2020 and noted that the redactions did not appear to have been applied properly (as some of the purportedly exempt information was accessible) and he

¹ The criteria in question as set out here:

<https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/dealing-with-vexatious-requests-section-14/how-do-we-deal-with-a-single-burdensome-request/#section-12>

sought confirmation as to what information was actually exempt, as well as challenging the application of the exemptions.

9. The MOD issued the complainant with a revised response on 25 November 2020 (which replaced its response of 6 November 2020). The MOD provided him with redacted versions of two documents, namely copies of CDS Operational Directives to UK Personnel Embedded within Other Nations' Forces or Multi-National Organisations Engaged in Operations and UK Units in Receipt of Foreign National Embedded Personnel dated 09/14 & 02/16. The MOD explained that the redactions were applied on the basis of sections 26(1)(b) (defence), 27(1)(a) to (d) (international relations), and 23(1) (security bodies) and 24(1) (national security) which were applied in the alternative.
10. The MOD also contacted the complainant on 3 December 2020 and confirmed that it would undertake an internal review of these redactions in light of his email of 24 November.
11. The MOD informed the complainant of the outcome of the internal review on 7 May 2021. The review concluded that further information could be disclosed and the MOD provided him with revised versions of the two documents. However, the MOD explained that the remaining information was considered to be exempt from disclosure on the basis of sections 26(1)(b), 27(1)(a) and (c), and 40(2) (personal data). The MOD also explained that sections 23(1) and 24(1) still applied but it was no longer seeking to rely on these exemptions in the alternative.
12. During the course of the Commissioner's investigation of this complaint, the MOD disclosed a small amount of further information on 8 December 2021 which had previously been redacted and a further similar disclosure was made on 11 May 2022.

Scope of the case

13. The complainant contacted the Commissioner on 31 March 2021 in order to complain about the MOD's decision to redact information from the requested documents. He sought to challenge all such redactions with the exception of the MOD's reliance on section 40(2) of FOIA.
14. This position remained unchanged despite the MOD's internal review of May 2021 and its additional disclosures of information in December 2021 and May 2022. The focus of the Commissioner's investigation has therefore been on whether the remaining redacted information is exempt from disclosure.
15. The complainant was also dissatisfied with the time it took the MOD to process his request and this decision notice also addresses those delays.

Reasons for decision

Section 23 – Information supplied by, or relating to, bodies dealing with security matters

16. Section 23(1) of FOIA states:

'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 subsection (3)'

17. To successfully engage the exemption at section 23(1), a public authority needs only to demonstrate one of the following:

- That the information was supplied by any of the named security bodies, either directly or indirectly
- That the information relates to any of the named security bodies

18. The relevant security bodies are listed at section 23(3).²

19. If the requested information falls within either of the above classes, it is absolutely exempt from disclosure under FOIA. There is no requirement on the public authority to demonstrate that disclosure of the requested information would result in harm. The exemption is not subject to the public interest test.

20. The Commissioner has examined the information to which the MOD has applied section 23(1) and is satisfied that it clearly falls within the scope of that exemption. The Commissioner cannot elaborate on why he has reached this finding without revealing the content of the withheld information itself.

Section 26 – Defence

21. Section 26(1)(b) of FOIA 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.'

22. In order for a prejudice based exemption, such as section 26, to be engaged the Commissioner believes that three criteria must be met:

² <https://www.legislation.gov.uk/ukpga/2000/36/section/23>

- 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 – i.e., 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.

The MOD's position

23. The MOD argued that release of some of the information would be likely to assist hostile forces in building up a detailed picture of the techniques, tactics and procedures used by UK and Allied Forces personnel. In its view such insights would assist those with hostile intent to develop countermeasures and strategies, which would place British Forces and their Allies at more risk than they otherwise might be, as well as undermining the delivery of current and future missions and tasks, including peace keeping operations. The MOD explained that in its view the level of prejudice was set at the higher level of 'would' prejudice rather than 'would be likely'.

The complainant's position

24. The complainant argued that the MOD's use of exemptions in this case had been cavalier. In support of this position he emphasised that (as the chronology above demonstrated at paragraphs 8 and 9) in November 2020 the MOD had inadvertently disclosed information which it had intended, at that stage, to withhold. The complainant explained that the MOD has requested that he deleted all copies of this information. However, the complainant explained that when the MOD completed its internal review in May 2021 it decided to reinstate and openly disclose some (albeit not all) of the information which it previously redacted including information which it had demanded that the complainant delete.
25. The complainant argued that this demonstrated that information contained in the documents which the MOD had argued risked national security and other prejudicial consequences was clearly not as sensitive as initially claimed. Therefore, the complainant argued that the MOD's handling of this request called into serious question the MOD's use of the exemptions to withhold the remaining information.

The Commissioner's position

26. With regard to the first criterion of the test set out above, the Commissioner accepts that the type of harm that the MOD believes would occur if the information was disclosed is applicable to the interests protected by section 26(1)(b) of FOIA. Furthermore, having considered the nature of the specific information that is being withheld, the Commissioner is satisfied that this would, as the MOD argue, assist hostile forces in building up a detailed picture of the techniques, tactics and procedures used by British armed forces. The Commissioner is therefore satisfied that there is a causal link between the potential disclosure of the information and prejudice occurring to the capability, effectiveness or security of such forces. Furthermore, the Commissioner accepts that such a risk is one that relates both to current and future tasks. In view of this the Commissioner is satisfied that the likelihood of prejudice occurring is one that is more than a hypothetical risk; the second and third criteria are therefore met and the exemption is engaged. The Commissioner is also satisfied that the MOD were correct to argue that the risk of such prejudice occurring is set at the higher level of 'would'.
27. In reaching this conclusion the Commissioner wishes to emphasise that he recognises the complainant's concerns with regard to the MOD's application of the prejudice based exemptions. Although the Commissioner cannot elaborate on this rationale for reaching his conclusion in respect of section 26(1)(b) without referring to the content of the information itself, he wishes to reassure the complainant that he has given the application of such exemptions, and the content of the withheld information to which it has been applied, particularly close scrutiny. Following the disclosure of additional information during the course of the Commissioner's investigation, he is satisfied that the exemption contained at section 26(1)(b) has been correctly applied for the reasons set out above.

Public interest test

28. 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(1)(b) outweighs the public interest in disclosing the information.

Public interest in disclosure of the information

29. The MOD acknowledged that release of the information withheld on the basis of section 26(1)(b) would demonstrate the MOD's commitment to the general obligations of openness and transparency and provide the public with an insight into the extent and nature of the conduct of UK

armed forces and its interaction with Allied Forces, and overseas operations.

30. The complainant argued that there was an overwhelming public interest in disclosure of the remaining redacted information given the subject matter of the documents, and taking into account the unusual chronology of the request (ie the MOD disclosing some information in error, demanding that it be deleted, and then disclosing parts of it at the internal review stage).
31. More specifically, the complainant argued that there was a particular public interest in the disclosure of information which concerns the level of official authorisation cited in the redacted material which allows embedded personnel to assist other forces in the use of cluster munitions, despite the UK's obligations under the Convention on Cluster Munitions.

Public interest in withholding the information

32. The MOD argued that given the risk of prejudice to such forces, which it noted was set at the higher likelihood level, it was of view that the public interest favoured maintaining the exemption.

Balance of the public interest

33. The Commissioner recognises that there is a clear and legitimate public interest in the disclosure of information regarding the rules and legal position for UK armed forces when embedded with other nations' armed forces or multi-national organisations. In particular, the Commissioner notes the complainant's point that there is arguably a particular public interest in the disclosure of information regarding cluster munitions. The Commissioner accepts this point, albeit, subsequent to the complainant's submissions to him, the MOD's further disclosure of information on 11 May 2022 resulted in release of some parts of the document concerning cluster munitions.
34. Furthermore, in the Commissioner's view there is a very strong public interest in ensuring that the capability, effectiveness or security of UK armed forces is not undermined. In the particular circumstances of this case, the Commissioner considers that this public interest attracts additional weight given that the likelihood of prejudice occurring meets the higher threshold of would rather than simply being likely to. Moreover, in the Commissioner's view the public interest in maintaining the exemption also attracts further weight given the risk of prejudice is not simply to particular operations in the future, but potentially all operations, including peace keeping ones.
35. The Commissioner also recognises that the redactions which remain to the requested documents are minimal and therefore the information that

has been disclosed already provides a considerable insight into this issue. In view of this, and in particular given the weight that the Commissioner considers should be attributed to the public interest arguments in favour of maintaining the exemption, he has concluded that the public interest in favour of maintaining the exemption contained at section 26(1)(b) outweighs the public interest in disclosing the information.

Section 27 – International relations

36. The MOD also argued parts of the redacted information were also exempt from disclosure on the basis of sections 27(1)(a) and (c). The Commissioner has considered the application of this exemption to the parts of the redacted information which he has not already concluded are exempt from disclosure on the basis of sections 23(1) or 26(1)(b).

37. Sections 27(1)(a) and (c) of FOIA state that:

'(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

(a) relations between the United Kingdom and any other State...

...(c) the interests of the United Kingdom abroad.'

38. Section 27(1) is a prejudice based exemption and therefore the criteria at paragraph 22 above must be met in order for it to be engaged.

The MOD's position

39. The MOD argued that the effective conduct of international relations depends on the maintenance of trust and confidence between governments. It argued that if this trust was damaged, the UK would be less able to protect and promote UK interests through international relations. In the circumstances of this case it argued that disclosure of information which detailed the UK's engagement with coalition partners, and potentially revealing their Armed Forces' policies, could damage these relationships and would reduce the UK Government's ability to protect and promote UK interests abroad. The MOD's position was that the level of prejudice was set at the lower level prejudice of 'would be likely'.

The Commissioner's position

40. In relation to the criteria referred to above at paragraph 22, the Commissioner is satisfied that the first criterion is met as the prejudice envisaged by the MOD is clearly one that is protected by the exemptions contained at sections 27(1)(a) and (c). Given the nature of the information that has been withheld on the basis of these exemptions,

the Commissioner accepts that there is causal link between disclosure of the information withheld under these exemptions and prejudice occurring. The second criterion is therefore met. In relation to the third criterion the Commissioner is satisfied that given the content of the information, along with the need for trust and confidence between states to be maintained, especially in respect of operationally sensitive matters such as the armed forces, disclosure of this information would be likely to result in more than a hypothetical chance that the UK's relations with other states would be likely to be harmed. Furthermore, as a result the Commissioner accepts that there would be a harmful effect on the UK's ability to protect and promote its interests in if the information was disclosed.

41. Sections 27(1)(a) and (c) are engaged.
42. Again, in reaching this conclusion the Commissioner reiterates the points he made at paragraph 27 above, and would also note that the amount of redacted information which he has concluded is exempt from disclosure on the basis of these exemptions is very limited.

Public interest test

43. Section 27 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemptions contained at sections 27(1)(a) and (c) outweighs the public interest in disclosing the information.

Public interest in disclosure of the information

44. The MOD acknowledged that release of the information to which these exemptions applied would demonstrate the MOD's commitment to the Government's openness and transparency agenda, making the Government more accountable to the public, and to the international community. The MOD also accepted that there is a general interest in the deployment of British armed forces personnel and how they act in defence or support of other nations.
45. The complainant's arguments to support the disclosure of the information are referred to above.

Public interest in maintaining the exemption

46. The MOD argued that there was a clear public interest in ensuring that the UK's international relations with other states were not damaged and in ensuring that the UK Government could protect and promote its interests abroad.

Balance of the public interest arguments

47. For reasons set out above the Commissioner accepts that there is a public interest in the disclosure of information on this topic. However, this has to be seen in the context of the information which the MOD has already disclosed from the two documents falling within the scope of the request. Furthermore, the Commissioner agrees with the MOD that there is significant public interest in the UK being able to maintain effective relations with other states, particularly in respect of operational matters such as cooperation between armed forces. In view of this the Commissioner has concluded that the balance of the public interest favours maintaining the exemptions contained at sections 27(1)(a) and (c).

Section 24 – national security

48. The Commissioner has not considered the MOD's reliance on section 24(1) because he is satisfied that the information to which this exemption has been applied is exempt from disclosure on the basis of one of the exemptions already considered in this notice.

Delays in handling the request

49. Section 10(1) of FOIA requires a public authority to provide a requester with a response to their request within 20 working days. Section 17(1) of FOIA states that when a public authority refuses to disclose requested information on the basis that an exemption applies then it must issue the requester with a refusal notice within 20 working days.

50. In the circumstances of this case a substantive response to the request was due by 4 December 2019. However, as the chronology of the request above makes clear the MOD did not contact the requester until 6 February 2020 at which point it refused this request on the basis of 12(1). It later revised this position and issued a substantive response on 13 November 2020 in which it disclosed some information and sought to withhold further information on the basis of a number of exemptions. Further disclosures of information subsequently followed in May 2021, December 2021 and May 2022.

51. The MOD's failure to disclose information to the complainant in this case within 20 working days constitutes a breach of section 10(1) and its failure to issue a refusal notice within the same period constitutes a breach of section 17(1) of FOIA.

Right of appeal

52. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

53. 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.

54. 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
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