

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 12 July 2011

Public Authority: The Foreign and Commonwealth Office
Address: Old Admiralty Building
London
SW1A 2PA

Summary

The complainant asked the Foreign and Commonwealth Office (FCO) for information relating to the use of airbases in the UK and or UK-controlled airbases overseas for the purposes of rendition/extraordinary-rendition flights. Due to the lack of clarity as to the scope of the request, the Commissioner was unable to determine whether the handling of the request was in compliance with the Act. Accordingly, the Commissioner has required the FCO to reconsider the request.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. "Rendition", in law, is a transfer of persons from one jurisdiction to another and the act of handing over, both after legal proceedings and according to law. "Extraordinary rendition" is a rendition which is outside the law.
3. As rendition refers to *transfer*, other practices such as apprehension, detention and interrogation occurring before and after the movement and exchange of extrajudicial prisoners do not fall into the strict definition of *extraordinary rendition*. In practice, however, the term is widely used to describe such practices, particularly the initial apprehension. This latter usage extends to the alleged transfer of

suspected terrorists by the US to countries known to torture prisoners or to employ harsh interrogation techniques that may rise to the level of torture.

The Request

4. The complainant wrote to the Foreign and Commonwealth Office (FCO) on 18 May 2010 with the following request:

"Please note that I am only interested in information which relates to the period January 1 2002 to January 1 2005.

Please note that the term airbase can relate to a civilian airport and or a military airbase and or a landing strip, and or an heliport, and or a runway and or an aerodrome.

Please note that the term airbase in the UK should also include but not be limited to facilities owned and or managed by the United States Government and or its official agencies.

Please note that I am only interested in rendition and extra-ordinary rendition flights which are authorised and or carried out by and or on behalf of the United States Government and its official agencies.

Please note that the term UK controlled airbases should include British military airbases overseas as well as all airbases in British overseas territories and dependencies. The above definitions of an airbase should apply.

- 1. For the aforementioned period does the Foreign Office hold information which relates to the use of airbases in the UK and or UK controlled airbases overseas for the purposes of rendition / extra-ordinary rendition flights. If so, could the Foreign Office please supply a schedule and or a list of the documents which includes the relevant authors and or correspondents of the documents, a brief description of the document and the date when it was generated. I am interested in all information irrespective of the role played by the airbase.*
- 2. All communications (including emails) between the Foreign Secretary and the Permanent Secretary at the Foreign Office which in any way relates to the use of airbases in the UK and or UK controlled airbases overseas for rendition and extra-ordinary rendition flights.*

- 3. During the aforementioned period did a rendition/extra-ordinary rendition flight(s) make use of an airbase in the UK and or a UK controlled airbase overseas. If so, can you provide the date(s) when the airbase(s) was used, the name of the airbase(s), the role played by the airbase(s) in assisting the flight(s), the original departure date of the flight(s), its place of origin and its eventual destination. For each and every flight can you state the number of people being rendered and their nationality*
- 4. All correspondence (including emails) between the Foreign Office and the American Embassy in London which in any way relates to the use of airbases in the UK and or UK controlled airbases overseas for the purpose of rendition."*
5. The FCO sought clarification on 3 June 2010 as to whether the requester was seeking information **generated** during the timeframe specified in the request or information that **related** to this period. The Commissioner understands from subsequent correspondence that the requester was interested in both information generated during the specified timeframe and in that which makes reference to the period 1 January 2002 to 1 January 2005.
6. The FCO responded on 3 August 2010 confirming that it held information relevant to the complainant's request. In relation to part (1) of the request, the FCO explained how it had interpreted "rendition" when responding. It provided the complainant with some information but withheld the rest citing sections 27(2) (international relations), 35(1)(a) (formulation and development of government policy) and 42 (legal professional privilege) of the Act.
7. Also in relation to part (1) of the request, the FCO advised that it could neither confirm nor deny whether it held any additional information within the scope of the request, citing the exemptions in sections 23(5) (information supplied by, or relating to, bodies dealing with security matters) and 24(2) (national security).
8. In relation to part (3) of the request, it provided the complainant with some information. However, it also withheld some citing the exemption in section 27(2) of the Act.
9. In relation to parts (2) and (4) of the request, it told the complainant that it did not hold any relevant information.
10. The complainant requested an internal review on 3 August 2010. He told the FCO:

"I am unhappy with the FCO's failure to provide certain pieces of information and with the application of particular exemptions. I

would be grateful if you could re-examine all aspects of the FOI request again.

In particular, I think the FCO should have included information relating to the landing and or refuelling of planes even if those aircraft did not have detainees on board. Your answer gives the impression that the FCO in particular and the Government in general is aware that flights for the purpose of rendition are using UK airbases and or UK controlled airbases as defined in the request. For the purposes of my request it makes no difference whether a detainee is on board or not. Can the FCO please clarify this aspect of its response. If it is aware that flights (without detainees) have been stopping and or refuelling at the aforementioned bases can it please provide full details of these flights. This information should include dates, times, the name of the appropriate base, its location and the help offered the plane(s). It should also include the eventual destination of the flight and its point of origin".

11. As far as the schedule of documents, provided in response to part (1) of his request was concerned, he told the FCO:

"I am unhappy with the application of exemptions in relation to certain documents. If the UK Government was genuinely unaware until 2008 that rendition flights carrying detainees had used Diego Garcia why the need for exemptions on documents generated prior to that period? By their very nature they cannot contain information of a particularly sensitive nature."

12. The FCO provided its internal review response on 17 September 2010. In this correspondence, it acknowledged that the complainant had asked it to extend its search *"to information on rendition flights whether or not a detainee was on board"*. In addition it said:

"You also stated that you objected to the FCO not considering 'circuit flights' without a detainee on board rendition flights. You received an email on 6 August from [name redacted] of the FCO's Press Office which explained in detail why we do not agree that a flight without a detainee on board could be described as a 'rendition flight'. I am satisfied with the original definition used for this request for the reasons set out in that email".

13. The FCO varied its earlier decision, telling the complaint that some information within the scope of part (1) of his request, previously withheld under section 27(2), was in fact publicly available. The Foreign Office provided him with the relevant link and an updated version of the schedule.

The Investigation

Scope of the case

14. The complainant contacted the Commissioner on 21 September 2010 to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:

"I am particularly concerned about the failure to provide information relating to 'unmanned' rendition flights."

15. During the course of his investigation, as outlined in the 'Chronology' section below, the FCO told the Commissioner that it wished to rely on section 40(2) as well as section 27 in relation to some of the withheld information in the schedule. It also told him that, in addition to the exemptions claimed, it neither confirmed nor denied holding any additional information that would meet the terms of the request. In this respect it cited the exemptions in sections 23(5) (information supplied by, or relating to, bodies dealing with security matters), 24(2) (national security) and 32(3) (court records) of the Act.
16. The Commissioner therefore considers the scope of his investigation includes the FCO's application of these exemptions. However, as the complainant does not appear to accept the FCO's definition of the information it considers falls within the scope of his request, the Commissioner has first addressed this matter during his investigation.

Chronology

17. The Commissioner has set out the key correspondence between his office, the complainant and the FCO below.
18. The Commissioner wrote to the FCO on 8 November 2010 advising that he had received a complaint in this matter and asking the FCO for further information in support of the exemptions it was relying on.
19. The FCO provided its substantive response on 24 December 2010.
20. In its correspondence, the FCO told the Commissioner that, having conducted a thorough review of the case, some more information could be disclosed.
21. It also clarified that, in relation to question 1, it considered sections 27(2), 35(1) and 42(1) applied to some of the small amount of information it was continuing to withhold. It also confirmed that the remainder of the small amount of withheld information was being

withheld by virtue of both section 27 and 40(2). It also told the Commissioner that it neither confirmed nor denied whether it held any other information within the scope of the request, citing multiple exemptions under the Act.

22. The FCO contacted the complainant on 28 January 2011 with the findings of its further review in relation to parts (1) and (3) of his request. It also provided him with a revised copy of the schedule. That version included further information relating to part (1) of his request which the FCO had previously withheld. It also provided him with a link to publicly available material relevant to part (3) of his request.
23. The FCO told the Commissioner on 4 February 2011 that it had not kept a copy of the email of 6 August, referred to in correspondence between it and the complainant, which the Commissioner had asked to be provided with.
24. The complainant confirmed on 8 February 2011 that, despite the additional disclosure, he wished the Commissioner to continue with his investigation.

Analysis

Section 1 General right of access

25. Section 1(1) of the Act creates a general right of access to information held by public authorities. It provides for any person making a request for information to be informed in writing by the public authority whether it holds the information of the description specified in the request, and, if that is the case, to have that information communicated to him.
26. In its refusal notice, the FCO told the complainant, in relation to part (1) of his request:

"Please note that I have not included information relating to the refuelling of planes without a detainee on board on UK territory during this period. We do not consider that a flight transiting our territory or airspace on its way to or from a possible rendition operation, but without a detainee on board, constitutes rendition."

27. The complainant disagreed: he wrote to the FCO on 3 August 2010:

"I think the FCO should have included information relating to the landing and or refuelling of planes even if those aircraft did not have a detainee on board... For the purposes of my request it makes no difference whether a detainee is on board or not."

28. The Commissioner agrees that this was within the scope of the original request.
29. In its internal review correspondence of 17 September 2010, the FCO referred the complainant to its email of 6 August, "*which explained in detail why we do not agree that a flight without a detainee on board could be described as a rendition flight*".
30. During the course of his investigation, the Commissioner asked both the FCO and the complainant to provide him with a copy of that email. The complainant asked the Commissioner to approach the FCO for a copy. The FCO told the Commissioner:

"I can confirm that unfortunately the FCO did not keep a copy of the email you require. I think this is because it was dealt with outside of the FOI request."
31. The Commissioner notes that the FCO confirmed that it held information within what it considered to be the scope of the request and that it also neither confirmed nor denied whether it held any additional information that it considered would meet the terms of the request.
32. The Commissioner considers the request of 18 May 2010, as clarified on 3 August 2010, to have been very specific. In the Commissioner's view, the content of the FCO's missing email to the complainant would appear to have a significant bearing on its interpretation, and therefore scope, of the request.
33. In the absence of that email, or an explanation of the FCO's interpretation of the request, the Commissioner has found it extremely difficult to determine whether the public authority has complied with the provisions of the Act. The Commissioner considers it disingenuous for the FCO to rely on a definition of scope described in an email, the content of which it is unable to produce.
34. The Commissioner has therefore determined that the FCO should reconsider the request and provide a response to the complainant on the basis of the clarification he provided that complies with the Act. Specifically, it should provide a response as to whether it holds information of the type requested on 18 May 2010, and clarified on 3 August 2010, and either disclose it to the complainant or cite a relevant exemption.
35. The Commissioner acknowledges that this decision does not represent an ideal outcome for the parties concerned but he considers that he has little alternative in this case.

Other exemptions

36. As a result of the Commissioner's decision above, he has not considered the FCO's application of the other exemptions in this case.

The Decision

37. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act.

Steps Required

38. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- reconsider the request on the basis of the original request of 18 May 2010 and the clarification provided on 3 August 2010 and provide the complainant with a response which is compliant with the Act.
39. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

40. Failure to comply with the steps described above 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.

Other matters

41. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.
42. The Commissioner notes that the FCO said that it was unable to provide an explanation of its interpretation of "rendition flights" because of reasons such as staff leaving the organisation, but he is concerned that the difficulties it experienced in this regard might be indicative of record management problems. The Commissioner has no concrete evidence to support a view that there are record management problems within the FCO but, in order to ensure it is following good practice, he would advise it to refer to the code of practice issued under section 46 of the Act.

Right of Appeal

43. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

44. 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.
45. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 12th day of July 2011

Signed

**Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

General Right of Access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him."

Section 2(3) provides that –

"For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

- (a) section 21
- (b) section 23
- (c) section 32
- (d) section 34
- (e) section 36 so far as relating to information held by the House of Commons or the House of Lords
- (f) in section 40 –
 - (i) subsection (1), and
 - (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
 - (iii) section 41, and
 - (iv) section 44"