

## **Freedom of Information Act 2000 (Section 50)**

### **Decision Notice**

**Date: 23 March 2011**

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

### **Summary**

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The complainant submitted a request in May 2010 to the Ministry of Defence (MOD) for a copy of a study prepared by Lt Gen Chris Brown concerning the invasion of Iraq. The MOD responded to this request by citing section 36 of the Act, and then also sections 26 and 27, but explained that it needed further time to consider the balance of the public interest test for each exemption. At the point this Notice is being issued the MOD has failed to complete its consideration of the public interest tests, a delay which represents a breach of section 17(3) of the Act which requires any public interest consideration to be completed within a reasonable time period. In the Commissioner's opinion the time taken by the MOD in this case to complete its deliberations is clearly unreasonable. The MOD is required to issue a notice to the complainant explaining where it believes the balance of the public interest lies in respect of each of these exemptions. If the MOD determines that the public interest favours disclosure of any of the requested information this should be provided to the complainant.

### **The Commissioner's Role**

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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.

## The Request

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2. The complainant submitted the following request to the Ministry of Defence (MOD) on 27 May 2010:

‘I would like to request access to a study prepared by Lt Gen Chris Brown and commissioned by the Ministry of Defence concerning the invasion of Iraq.’
3. The MOD responded on 21 June 2010 and confirmed that it held the information requested but considered it to be exempt from disclosure on the basis of section 36 of the Act. This response explained to the complainant that he had the right to seek an internal review of this decision if he was dissatisfied with it.
4. The complainant contacted the MOD on the same day, 21 June, and asked for confirmation as to which sub-section(s) of section 36 it was seeking to rely on and confirmation as to which Minister provided the qualified person statement which necessary for the exemption to be engaged. The complainant explained that upon receipt of a response to these queries he would then decide whether or not to seek an internal review.
5. On 2 July 2010 the complainant then received an acknowledgment of his request from what would appear to be the MOD's central FOI email address. This confirmation stated that his request had been received and that a 'Subject Matter Expert will be in touch in due course'.
6. Having not received a response to his enquiry of 21 June 2010, the complainant contacted the MOD again on 13 July 2010 and asked for an internal review of the decision to withhold the requested information on the basis of section 36 to be conducted.
7. The MOD acknowledged this request for an internal review on 14 July 2010 and noted that it aimed to respond by 9 August 2010.
8. Having received no response, the complainant contacted the MOD on 13 August 2010. In its response of 16 August 2010 the MOD explained that completing the internal review was taking longer than anticipated.
9. On 9 September 2010 the MOD contacted the complainant again and explained that it could not in fact undertake 'a full internal review as the substantive response to your request for information has not yet been issued to you'. The response explained that the relevant department within the MOD had been asked to provide him with an

- update as to the status of this substantive response by 17 September 2010.
10. The complainant contacted the MOD on 13 September 2010 and explained that it was his understanding that the MOD's response of 21 June 2010 which refused his request on the basis of section 36 constituted a substantive response.
  11. The MOD replied, on the same day, and explained that the response issued on 21 June 2010 was confusing. It should have stated that the request was being considered under section 36 and that additional time was needed to consider the public interest test in order to determine where the balance of the public interest lay. The MOD explained that other qualified exemptions, namely sections 26 and 27, were also likely to apply to this information.
  12. The MOD contacted the complainant again on 17 September 2010 and confirmed that section 36(2)(b) applied to his request, along with sections 26 and 27, and that it hoped to be able to inform him of the outcome of the public interest considerations by 15 October 2010.
  13. The MOD contacted the complainant again on 15 October 2010, 12 November 2010, 10 December 2010 and 17 January 2011 and in each response explained that the deadline for reaching a decision about the balance of the public interest test had been extended by a further 20 working days.
  14. On 28 January 2011, having received no response, the complainant contacted the MOD once again, this time emailing the Permanent Secretary, in order to complain about the ongoing delays in its handling of his request.
  15. The MOD responded on 3 February 2011 and confirmed that the Permanent Secretary had asked officials to ensure that a substantive response was sent by 18 February 2011.
  16. The MOD contacted the complainant again on 17 February 2011 and explained that it was taking longer than anticipated to review the material he had requested which is, or could be sensitive to national security. As a result the MOD explained that it would not be in a position to issue its substantial response until 4 March 2011.
  17. On 11 March 2011 the MOD contacted the complainant once again and explained that it was still not in a position to issue its substantive response but hoped to be able to do so within a further seven days.

## The Investigation

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### Scope of the case

18. The complainant contacted the Commissioner on 21 December 2010 and argued that by failing to issue a substantive response to his request which he had submitted seven months ago the MOD was in clear breach of the Act.

### Chronology

19. The Commissioner contacted the MOD on 29 January 2011 in order to inform it that he had received a complaint regarding this request, specifically its failure to complete its public interest test considerations.
20. The MOD responded on 7 February 2011 and accepted that the 'MOD has failed to provide [the complainant] with a compliant section 17 refusal notice in response to his request and that the Department has exceeded the statutory timescale for providing this by a significant margin. Those responsible for handling the request have been made aware of these breaches of the Act and have been asked by Mrs Brennan [the Permanent Secretary] to reply by 18 February'.

## Analysis

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### Procedural Requirements

#### Section 17 – issuing of a refusal notice

21. Section 17(1) of the Act requires that, where a public authority believes that any exemption from Part II of the Act applies, it should issue a notice to the requestor stating why the exemption in question is engaged. (The wording of this section is included in the attached legal annex.) This notice must be issued within 20 working days of receipt of the request; there is no extension available to the time within which a notice identifying the exemption and stating why it is engaged must be provided.
22. Section 17(3) of the Act states that a public authority can issue its determination of the balance of the public interest test in a separate notice 'within such time as is reasonable in the circumstances'.
23. The Commissioner has issued guidance on what time period can be considered 'reasonable' for extending public interest considerations. This states that:

'[the Commissioner's] view is that public authorities should aim to respond fully to all requests within 20 working days [of the date of the request]. In cases where the public interest considerations are exceptionally complex it may be reasonable to take longer but, in our view, in no case should the total time exceed 40 working days.'<sup>1</sup>

24. In this case the MOD did issue what is now understood to be a refusal notice stating that it was relying on section 36 of the Act within 20 working days of this request. However, this notice failed to cite the specific exemption, or exemptions, within section 36 that it was seeking to rely on. The failure to cite a specific sub-section of a multi-limb exemption represents a breach of section 17(1)(b).
25. Furthermore, the MOD subsequently, and outside the 20 working day time period, informed the complainant that it was also seeking to rely on sections 26 and 27 of the Act to refuse his request. This failure to cite these exemptions within this time period represents a breach of section 17(1) and the failure once again to cite the specific sub-sections of these two further exemptions represent further breaches of section 17(1)(b).
26. With regard to the time period by which the MOD has extended its public interest test considerations for all three of the exemptions, the Commissioner notes that this very significantly exceeds the maximum period which his guidance notes suggests can be considered as reasonable. As noted above, the MOD has acknowledged to the Commissioner that it has clearly failed to comply with the requirements of the Act when handling this request.
27. The Commissioner therefore finds that the MOD has breached section 17(3) because it has not provided the complainant with its public interest determination within a time period that is reasonable.

## The Decision

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28. The Commissioner's decision is that:
  - The MOD breached section 17(1)(b) by failing to state in its refusal notice which sub-section of section 36 it was seeking to rely on.

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<sup>1</sup> [Freedom of Information Good Practice Guidance No. 4](#)

- The MOD committed a further breach of section 17(1)(b) by failing to state in its later correspondence with the complainant which subsections of sections 26 and 27 it was seeking to rely on.
- The MOD breached section 17(1) by failing to inform the complainant within 20 working days of his request that it was seeking to rely on exemptions contained within sections 26 and 27 as a basis to also withhold the information he requested.
- Finally, the MOD breached section 17(3) by failing to complete its determination of the public interest in relation to the exemptions contained within sections 26, 27 and 36 within a reasonable timescale.

## Steps Required

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29. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- Issue a notice to the complainant compliant with the requirements of section 17(3) which states the MOD's findings in relation to the balance of the public interest test in relation to the three qualified exemptions it has previously cited.
- Should the MOD decide that further qualified exemptions also provide a basis to withhold the requested information – the Commissioner notes the reference to national security considerations in the MOD's more recent correspondence with the complainant – it should ensure that the notice issued to the complainant also sets out its conclusions on the balance of the public interest test in relation to these further exemptions.
- If the MOD concludes that the public interest favours disclosure of any of the requested information this should be disclosed to the complainant.

30. The public authority must take all the steps required by this notice within 35 calendar days of the date of this notice.

## Failure to comply

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31. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Right of Appeal

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32. 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: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

33. 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.
34. 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 23<sup>rd</sup> day of March 2011**

**Signed .....**

**Alexander Ganotis  
Group Manager – Complaints Resolution  
Information Commissioner’s Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

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### 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"



## **Refusal of Request**

### **Section 17(1) provides that -**

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies."

### **Section 17(2) states –**

"Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
  - i. that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
  - ii. that the information is exempt information only by virtue of a provision not specified in section 2(3), and
  
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached."

### **Section 17(3) provides that -**

"A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a

separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

## **National Security**

### **Section 24(1) provides that –**

"Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security."

### **Section 24(2) provides that –**

"The duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security."

## **Defence**

### **Section 26(1) provides that –**

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) the defence of the British Islands or of any colony, or
- (b) the capability, effectiveness or security of any relevant forces."

### **Section 26(2) provides that –**

"In subsection (1)(b) "relevant forces" means-

- (a) the armed forces of the Crown, and
- (b) any forces co-operating with those forces, or any part of any of those forces."

## **International Relations**

### **Section 27(1) provides that –**

“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,
- (b) relations between the United Kingdom and any international organisation or international court,
- (c) the interests of the United Kingdom abroad, or
- (d) the promotion or protection by the United Kingdom of its interests abroad.”

### **Section 27(2) provides that –**

“Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.”

### **Section 27(3) provides that –**

“For the purposes of this section, any information obtained from a State, organisation or court is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.”

### **Section 36(1) provides that –**

“This section applies to-

- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

### **Section 36(2) provides that –**

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

- (a) would, or would be likely to, prejudice-

- (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
- (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
- (iii) the work of the executive committee of the National Assembly for Wales,

(b) would, or would be likely to, inhibit-

- (i) the free and frank provision of advice, or
- (i) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.