



HOUSE OF COMMONS

LONDON SW1A 0AA

Mr Richard Thomas
Information Commissioner
FOI/EIR Case Reception
The Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

22 April 2009

Dear Mr Thomas,

COMPLAINT REGARDING RESPONSE BY THE MINISTRY OF DEFENCE TO FREEDOM OF INFORMATION REQUEST DATED 20 JUNE 2008

I am writing in my role as Chairman of the All Party Parliamentary Group on Extraordinary Rendition (the "**APPG**"), with reference to the information request (the "**Request**", enclosed) made by me on behalf of the APPG to the Ministry of Defence (the "**MOD**") on 20 June 2008, pursuant to section 1 of the Freedom of Information Act 2000 ("**FOIA**").

I am concerned that the MOD may have acted in breach of its obligations under FOIA in respect of the Request. I would be grateful if you would consider ordering the disclosure of any requested information that was wrongly withheld in accordance with your powers under section 50 of FOIA. I enclose relevant correspondence and a duly completed ICO Complaint Form.

BACKGROUND TO THE REQUEST

1. The information sought by the Request relates principally to allegations made by a former member of the UK Armed Forces, Ben Griffin. As set out in more detail in the Request (enclosed), Mr Griffin alleged (*inter alia*) that some individuals detained by British soldiers within joint task forces in Iraq had been subsequently rendered or mistreated.
2. The serious nature of this allegation was acknowledged by the Secretary of State for Defence (the "**Secretary of State**") in his letter dated 19 March 2008

(the "**19 March Letter**"), which also addressed a previous freedom of information request that is subject to a parallel complaint. The Secretary of State confirmed in this letter that the MOD had commenced a review of detention practices and detention records in Iraq and Afghanistan, and that, at that stage, there was *"no evidence that anyone captured by UK forces and detained by the US forces has been either mistreated or unlawfully renditioned."*

3. As described more fully below, the Request sought information in relation to Mr Griffin's allegations, some of which may have fallen within the scope of the review initiated by the Secretary of State. Subsequently, the Secretary of State issued a Ministerial Statement on 26 February 2009 (the "**Ministerial Statement**") confirming that two individuals captured by UK forces had been transferred to US forces and subsequently rendered from Iraq to Afghanistan in 2004, where they remain. The Secretary of State has acknowledged that this contradicts several statements the Government had previously made on this subject.

THE REQUEST

4. In response to the 19 March Letter, I submitted the Request to the MOD. The Request included ten questions regarding Ben Griffin's allegations. Only three involved requests for information pursuant to FOIA, namely:
 - (a) *"a documentary record of the policy [in relation to UK special forces operating within the joint task force referred to by Mr Griffin, detaining or capturing individuals but not formally arresting them before handing them over to non-UK forces] and any non-legally privileged information relating to the policy, its application and the purpose behind it"* (the "**Policy Information**");
 - (b) *"all information relating to any individuals who were detained or captured by UK soldiers operating within the joint US/UK task force, referred to by Ben Griffin" including "(a) the date of detention and/or capture; (b) the date of transfer to US authority and control; (c) the location of such transfer; (d) subsequent known places of detention";* and
 - (c) *"a request on the same terms as [(b)], in relation to all other individuals that have been detained or captured jointly by British Forces and forces of another country in Iraq or Afghanistan. ... Please make it clear in each case which other force was acting jointly with UK Forces"* (together with (b), the "**UK Detainee Transfer Information**").

THE REFUSAL NOTICE

5. The MOD responded to the Request on 5 September 2008 (the "**Refusal Notice**", enclosed). In this response the MOD refused to disclose all of the information requested for the following reasons:

- (a) in relation to the Policy Information, the MOD refused to confirm or deny whether the information was held on the basis that it fell within the scope of the exemptions in "*Section 23(5) - Information supplied by, or relating to, bodies dealing with security matters (which include special forces) and Section 24(2) - National Security*". Further to the extent that section 24(2) applied to the Policy Information, the MOD considered that "*the public interest in maintaining the exclusion of the duty neither to confirm nor deny outweighs the public interest in confirming whether or not the information is held.*" The MOD refused to provide a statement of reasons as to why these exemptions applied as to do so would have disclosed information that was exempt.
- (b) In relation to the UK Detainee Transfer Information, disclosure was refused on the basis that it was "*personal data*" under the Data Protection Act and therefore fell within the absolute exemption provided by "*section 40(2) (Personal Information).*"

THE INTERNAL REVIEW

6. By way of letter dated 21 October 2008 to Mr David Wray of the MOD (the "**Internal Review Request**", enclosed), I requested an internal review of the Refusal Notice.
7. The result of the MOD's internal review (the "**Internal Review Response**") was provided on 27 February 2009 in a letter from Ms de Bourcier of the MOD (enclosed). Ms de Bourcier apologised for the delay in responding to the Request and acknowledged that the MOD had failed to comply with the requirements of sections 10 and 17 of FOIA. However, Ms de Bourcier upheld the decision to refuse to disclose the information requested on the following grounds:
 - (a) in relation to the Policy Information Ms de Bourcier found that reliance on sections 23 and 24 of FOIA was "*not the correct response*" but the request should, in fact, have been refused under section 12 of FOIA on the basis that "*the costs which would be incurred in establishing whether the Department holds the information and determining whether the Department is capable of providing this information in accordance with the Act will exceed the appropriate limit*"; and
 - (b) In relation to the UK Detainee Transfer Information, Ms de Bourcier upheld the refusal to disclose on the basis of section 40(2) of the Act.

GROUND FOR COMPLAINT

8. I am concerned that the MOD may have erred in reaching the conclusions set out in the Internal Review Response, and may be in breach of its obligations under FOIA. The principal grounds for complaint are as follows:

- (a) the MOD's claiming (for the first time) in its Internal Review Response of the costs exemption under section 12 of FOIA, when a substantive response had been provided in the Refusal Notice;
- (b) the MOD's reliance on sections 23 and 24 of FOIA to justify non-disclosure of the Policy Information in the Refusal Notice and failure to provide reasons in relation thereto;
- (c) the further and continued application of the s.40 exemption in relation to the UK Detainee Transfer Information;
- (d) the apparent procedural breach of FOIA occasioned by the delay in providing the Internal Review Response.

Each ground of complaint is addressed in more detail below.

GROUND (A): DELAYED CLAIMING OF THE COSTS EXEMPTION (S.12 FOIA)

9. Section 12 FOIA gives public authorities discretion to refuse disclosure on the ground that the cost of compliance would exceed the £600 cost limit. The MOD raised this exemption in their Internal Review Response (enclosed), having not raised it in the Refusal Notice, where the MOD relied instead on the exemptions under sections 23 and 24 FOIA. The use of these exemptions is dealt with under Ground (B) below.
10. With respect to the claim under section 12 of FOIA, as confirmed in the ICO Guidance on the application of that exemption¹, in estimating whether complying with a request would exceed the appropriate limit, Regulation 4(3) of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 states that an authority can only take into account the costs it reasonably expects to incur in:
 - (a) determining whether it holds the information;
 - (b) locating the information, or a document containing it;
 - (c) retrieving the information, or a document containing it; and
 - (d) extracting the information from a document containing it.
11. Ms de Bourcier has suggested that the costs exemption could have been claimed by the MOD partially on the basis of the costs involved in "*determining whether the Department is capable of providing this information in accordance with the Act*". However, this appears to be contrary to the ICO Guidance. Once the documentation containing the information has been located and retrieved, a public authority cannot take into account the time taken, or likely to be taken, to consider whether any of the requested information is exempt.

¹ ICO Freedom of Information Act Awareness Guidance - Using the Fees Regulations, October 2008, p.2

12. It also appears contrary to the spirit of FOIA for the MOD to claim in the Internal Review Response that the cost of complying with the request would exceed the cost limit. In relation to the Policy Information, by referring to the exemptions under sections 23 and 24 of FOIA in the refusal Notice, the MOD had seemingly already taken steps to determine whether it held the information requested and review it. Furthermore, such steps are also likely to have been taken in relation to the MOD's review of detention practices described in the 19 March Letter.
13. As such, the MOD had already exercised its discretion not to claim the costs exemption at the time of issuing the Refusal Notice. The MOD should not now be permitted retrospectively to claim the costs exemption, particularly in light of the delay in providing both the Refusal Notice and the Internal Review Response.

GROUND (B): THE INITIAL REFUSAL TO DISCLOSE THE POLICY INFORMATION

14. As explained above, Ms de Bourcier did not review the MOD's reliance on sections 23 and 24 of FOIA in the Refusal Notice. It would seem to me that the reliance on these exemptions is potentially inappropriate.
15. The MOD appears to have initially refused to confirm or deny the existence of at least part of the Policy Information on the basis that it "*relates to*" the Special Forces and is therefore exempt under section 23 of FOIA. As set out in the Internal Review Request, I am concerned that the MOD may have wrongly determined that a refusal to confirm or deny the existence of the Policy Information is required to safeguard national security. The Secretary of State confirmed in the Ministerial Statement that the capture of individuals by UK Forces and the transfer of those individuals to US detention (the subject of the Policy Information) was "*normal practice*". He provided information in the Ministerial Statement that would seemingly fall within the scope of the Policy Information. The MOD's blanket refusal to disclose any information therefore appears inconsistent with the Ministerial Statement. It would also appear to cast doubt on the MOD's refusal to explain their reliance on sections 23 and 24.
16. However, even if section 24 did apply to the Policy Information, section 24 is a qualified exemption. There is clear public interest in disclosing the Policy Information. The topic of rendition and the treatment of persons detained by the UK and subsequently transferred to foreign authorities is of great interest to the public and is generating a large amount of debate, as emphasised by the Ministerial Statement and the surrounding media coverage.² As decided by the Information Tribunal in its recent decision to order disclosure of certain Cabinet Minutes relating to the decision to invade Iraq in 2003³, a coincidence of particular factors can generate a strong impetus in favour of disclosure. I would

² See *ICO Freedom of Information Act Awareness Guidance No.3*, March 2007, p.3

³ *Cabinet Office and Dr Christopher Lamb v Information Commissioner (EA/2008/0024 & 0029; 27 January 2009)* at para.1

contend that the public interest in disclosure of the requested information is high, for the following reasons:

- (a) the serious nature of the allegations being made about the UK's possible involvement in practices, which may amount to violations of national and international law, including, specifically, the rendition of two detainees captured by UK Forces as acknowledged by the Ministerial Statement;
 - (b) the need to place sufficient information in the public domain for the public to be able satisfy itself through access to the relevant information, that the UK is not involved in any agreements with foreign powers which may be improper or provide inadequate protections to those the UK captures or detains.
17. It is contended therefore that the exemptions under sections 23 and 24 of FOIA may have been improperly applied to the Policy Information and that this information should now be disclosed.

GROUND (C): APPLICATION OF THE SECTION 40 DATA PROTECTION EXEMPTION

18. The Refusal Notice and the Internal Review Response both allege that the UK Detainee Transfer Information is exempt from disclosure under section 40 of FOIA on the basis that it constitutes 'personal data' under the Data Protection Act.
19. I am concerned that this is not a correct interpretation of the law. Under section 35(2) of the Data Protection Act 1998, personal data is exempt from the non-disclosure provisions where the disclosure is necessary for the purposes of establishing, exercising or defending legal rights. It would clearly be of benefit in establishing the legal rights of those detained, including the right not to be subjected to torture, if the information requested in relation to the UK Detainee Transfer Information was placed in the public domain. This section does not require legal proceedings to have been issued or even to be being considered.⁴ Accordingly, it is contended that to disclose this information would not place the MOD in breach of the Data Protection Act and that the section 40 exemption does not apply to the UK Detainee Transfer Information.
20. Furthermore, I would suggest that the section 40 exemption, to the extent that it does apply, does not apply to the entirety of the UK Detainee Transfer Information. Not all of this information constitutes personal information. UK Detainee Transfer Information other than the names of the individuals could potentially be provided. Personal information could be redacted from any disclosure if necessary. The MOD has not relied on any further exemptions to justify non-disclosure of this information.

⁴ ICO Freedom of Information Act Awareness Guidance No.1

GROUND (D): APPARENT PROCEDURAL BREACH OF FOIA

21. While Ms de Bourcier acknowledged and apologised for the delay in providing the Refusal Notice, she failed to explain the significant delay in providing the Internal Review Response. The Internal Review Request was made on 21 October 2008, but the internal Review Request was not sent until 27 February 2009, some 107 days later. The section 45 Code of Practice, in particular paragraph 39 on the prompt determination of complaints, suggests that an appropriate length of time for completing the internal review is 20 working days from the date of the request⁵.

PRIORITISATION OF THIS COMPLAINT

22. In accordance with the ICO's policy on designating priority cases previously provided to us (enclosed), I very much hope that you will agree with me that this complaint should be prioritised by the ICO. The reasons for prioritisation are strong:

- (a) the Request relates to high profile matters that have received substantial coverage in both the media and the political sphere. Further to the significant delay on the part of the MOD in responding to my Request and in carrying out the Internal Review, full and proper disclosure regarding the UK's involvement in rendition is needed as a matter of urgency, particularly as such involvement raises serious human rights and international law issues, about which it is clearly in the public interest for members of the public and Parliament to be informed.
- (b) The Ministerial Statement confirmed that two individuals captured by the UK and transferred to the US had subsequently been rendered from Iraq to Afghanistan, despite Government assertions to the contrary. It is conceivable that had the information I requested been provided by the MOD in a full and prompt manner, information on these two renditions and any specific policy concerning such transfers would have come to light considerably sooner than it ultimately did. There remains a possibility that similar renditions have occurred in the past. Determining whether a UK policy of capturing individuals and subsequently handing them over to US forces exists on the lines of that alleged by Ben Griffin, and the subsequent locations of people captured or detained by UK Forces, is a matter of urgency. The requested information goes to the heart of these issues.

I look forward to hearing from you regarding the above shortly. I should note that, in the interests of expediency and given the common questions that are raised, I would be happy for investigation of this complaint to combined with the investigation of my complaint in relation to the MOD's handling of my requests for information dated 6 February 2008 and 21 April 2008, which accompanies this complaint.

⁵ *ICO Freedom of Information Act Awareness Guidance No.5, February 2007, p.2*



Yours sincerely,

ANDREW TYRIE