

ANDREW TYRIE MP



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 REQUESTS DATED 6 FEBRUARY 2008 AND 21 APRIL 2008

I am writing in my role as Chairman of the All Party Parliamentary Group on Extraordinary Rendition (the "APPG"), with reference to the above information requests (the "Requests") made by me on behalf of the APPG to the Ministry of Defence (the "MOD") on 6 February 2008 and 21 April 2008, pursuant to section 1 of the Freedom of Information Act 2000 ("FOIA"). I wrote to you about these requests on 22 April 2008 and 29 August 2008, and your office replied on 28 May 2008 and 4 September 2008 respectively.

I am concerned that the MOD may have acted in breach of its obligations under FOIA in respect of the Requests. 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.

THE REQUESTS

1. The Requests were made in the context of and for the purposes of clarifying the issue of whether individuals detained by UK Forces in Iraq or Afghanistan have subsequently been subject to rendition or mistreatment.
2. The Requests were set out in the following correspondence:

- (a) a letter dated 6 February 2008 (the "**6 February Request**", enclosed) from my office to the MOD, specifically requesting under FOIA:
 - (i) a list of all individuals who have been detained by UK Forces in Iraq or Afghanistan, providing names and other information that may help in their identification as well dates of birth where known (the "**Detainee List**"); and
 - (ii) a copy of all documents relating to the understandings between UK, Iraqi, Afghanistan, and US authorities (the "**Understandings**"), referred to by the Secretary of State in his letter dated 31 January 2008 (enclosed); and
- (b) a letter dated 21 April 2008 (the "**21 April Request**", enclosed) requesting all information contained in the "review of detention practices in Iraq and Afghanistan" (the "**Detention Review**"), referred to by the Secretary of State for Defence (the "**Secretary of State**") in his letter dated 19 March 2008 (enclosed).

THE MOD'S RESPONSE TO THE REQUESTS AND THE REFUSAL NOTICE

3. The MOD responded to the 6 February Request on 19 March 2008, disclosing only the agreement between the UK Government and the Government of Afghanistan. The MOD refused to disclose the Detainee List on the grounds that such disclosure would breach provisions of the Data Protection Act 1998. The MOD further refused to disclose information requested regarding the agreement between the UK Government and the Iraqi Government, stating that the Iraqi Government had requested that such documents were not put in the public domain. In relation to the agreement between the UK and the US, the MOD did not provide any documents or information but referred to an "MOU", a UN Security Council Resolution and various "assurances" by US Commanders. No FOIA exemptions were cited in this letter to support the refusals to disclose.
4. In view of the fact that the MOD's response dated 19 March 2008 made no reference to FOIA or to the grounds for exemption therein, I wrote to the MOD on 21 April 2008 (enclosed) asking it to either consider the 6 February Request under FOIA, or, if it had in fact done so, to initiate an internal review.
5. On 20 May 2008 the MOD responded to this renewed request (enclosed), setting out a number of exemptions under FOIA, which the MOD was apparently likely to rely on to refuse disclosure, and, despite having received the February Request some three and a half months earlier, indicated additional time was required to respond fully.

6. By letter dated 7 July 2008 (the "**Refusal Notice**", enclosed) the MOD refused to disclose any further information in relation to the Requests on the following bases:
- (a) relying on the absolute exemption under section 40(2) FOIA for personal data, the MOD refused to disclose the Detainee List;
 - (b) relying on the qualified exemption under section 27(1) FOIA in relation to international relations, the MOD refused to disclose any further information on the Understandings;
 - (c) relying on the exemptions under sections 23, 26, 27, 38, 40 and 42 FOIA, the MOD refused to disclose most of the information in relation to the Detention Review.

THE INTERNAL REVIEW

7. By way of letter dated 29 August 2008 to Mr David Wray of the MOD (enclosed), I requested an internal review of the Refusal Notice. 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). In essence, although the internal review found that the Requests were not handled fully in accordance with FOIA, Ms De Bourcier considered that the MOD had correctly reached its decision to withhold much of the information requested. However, in reaching this conclusion, it was admitted that in several instances, certain grounds had been incorrectly cited as the basis for refusing the disclosure and that other grounds should have been claimed.
8. Of relevance to this complaint, on the day prior to issuing the Internal Review Response, the Secretary of State issued a Ministerial Statement (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.

GROUND FOR COMPLAINT

9. 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 apparent failure properly to assess the likelihood of prejudice and to assess correctly the overriding public interest in refusing under section 27(1) the disclosure of the information requested in relation to the Undertakings;
- (c) the MOD's assertion in the Internal Review Response that the information requested relating to the Detainee List did not exist in the form required and that to put it into such a form would amount to the creation of new information;
- (d) the application of the section 40 exemption in relation to the Detainee List and the Detention Review;
- (e) the MOD's refusal to disclose the information requested in relation to the Detention Review, under various exemptions;
- (f) the apparent procedural breach of FOIA occasioned by the delay in responding to the Requests.

Each ground of complaint is addressed in more detail below.

GROUND (A): APPLICATION OF THE COSTS EXEMPTION (SECTION 12 FOIA)

10. Section 12 of 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, having not raised it their Refusal Notice, where the MOD relied instead on the qualified exemption under section 27(1) of FOIA. The use of this qualified exemption is dealt with under Ground (B) below.
11. 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.
12. Once the documentation containing the information has been located and retrieved, a public authority cannot take into account the time taken, or likely to

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

be taken, to consider whether any of the requested information is exempt. Nor can it take into account the time taken, or likely to be taken, to remove the exempt information in order to provide the information that is to be disclosed in response to the request.²

13. In this instance, in relation to the Understandings, the MOD had seemingly already taken steps to determine whether it held the information requested, to locate and retrieve such information, and then to extract it and review it for the purposes of (i) confirming that it held such information, and/or (ii) determining that the balance of public interests lay in not disclosing that information for the purposes of section 27(1) FOIA. Furthermore, even if such steps had not been taken prior to the 6 February Request, they appear likely to have subsequently been taken in relation to the MOD's review of detention records described in the 19 March Letter and the Ministerial Statement.
14. Accordingly, it appears contrary to the spirit of FOIA for the MOD to claim subsequently in the Refusal Notice that the cost of complying with the request would exceed the cost limit. 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.

GROUND (B): APPARENT FAILURE PROPERLY TO ASSESS THE PREJUDICE AND PUBLIC INTEREST IN RELATION TO THE UNDERSTANDINGS

15. In the Internal Review Response, Ms de Bourcier suggests that, in relation to the Understandings, it was unlikely that the MOD would be required to disclose this information even if the costs exemption did not apply.
16. As noted in my letter of 29 August to Mr Wray, I believe that the MOD's assessment, that all information other than that disclosed to date should be withheld on the grounds of the qualified exemption under section 27(1) of FOIA, may be incorrect. I put forward the following reasons:
 - (a) The likelihood of the disclosure of the information relating to the Understandings causing prejudice to the UK's international relations must be more than a hypothetical risk in order to justify the exemption from disclosure.³ The MOD has so far provided no evidence that the risk of prejudice is more than a mere possibility. Even if there had been sufficient risk of prejudice in the past, that may no longer be the case. In relation to the UK-US Understanding particularly, President Obama issued executive orders in January 2009 on detention, interrogation

² *Jenkins v Information Commissioner and Department for Environment, Food and Rural Affairs* (EA/2006/0067; 2 November 2007) and subsequently endorsed by the Tribunal in the case of *DBERR v Information Commissioner and Friends of the Earth* (EA/2007/0072; 29 April 2008)

³ *England v Information Commissioner and London Borough of Bexley* (EA/2006/0060 & EA/2006/0066; 10 May 2007); *ICO Freedom of Information Act Awareness Guidance No. 14*, October 2004, p.6

techniques and Guantanamo Bay. This suggests a possible change in relevant policy which the MOD does not appear to have taken into account in their reassessment of the likelihood of prejudice during the internal review. The ICO Guidance⁴ in relation to internal reviews makes it clear that if circumstances at the time of review are such that the authority can now release the information, it should do so.

(b) Even if the likelihood of prejudice were to be adequately demonstrated by the MOD, it is contended that the balance of the public interest may still lie in disclosing the remaining information relating to the Understandings. The topic of rendition and 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.⁵ 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 2003⁶, a coincidence of particular factors can generate a strong impetus in favour of disclosure. I would contend that the public interest in disclosure of the requested information is high, for the following reasons:

- (i) 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;
- (ii) 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 exemption under section 27(1) FOIA may have been improperly applied to information relating to the Understandings.

GROUND (C): FAILURE TO DISCLOSE THE DETAINEE LIST ON THE GROUNDS THAT IT "DOES NOT EXIST"

18. The Internal Review Response states that the MOD does not hold the Detainee Lists requested in the form requested (i.e. a list), but rather held details of detainees in various unconsolidated sources. Accordingly, the MOD's position was that it was not obliged to disclose the information requested as to put it into a consolidated form would constitute the creation of new information.

⁴ ICO Freedom of Information Act Awareness Guidance - Internal Reviews, February 2009, p.3

⁵ ICO Freedom of Information Act Awareness Guidance No.3, March 2007, p.3

⁶ Cabinet Office and Dr Christopher Lamb v Information Commissioner (EA/2008/0024 & 0029; 27 January 2009) at para.1

19. This appears to be an incorrect interpretation of the law. The ICO Guidance⁷, the Commissioner's position⁸ and the case law of the Information Tribunal⁹ on this subject are very clear: where the information already exists, albeit in unconsolidated form, the authority is not creating new information by presenting the existing information in a new form. It is therefore contended that to provide the information in relation to the Detainee List would have amounted to a compilation of existing information, rather than the creation of new information. The MOD does not therefore appear to be entitled to refuse to disclose the information requested in relation to the Detainee List on this basis.

GROUND (D): APPLICATION OF THE SECTION 40 EXEMPTION IN RELATION TO THE DETAINEE LIST

20. The Internal Review Response also states that if the information requested in connection with the Detainee List did "exist", it would be exempt from disclosure on the basis of section 40 of FOIA. As set out in my letter of 29 August 2008 to Mr Wray, I do not believe that this is a correct interpretation of the law. Under section 35(2) of the Data Protection Act 1999, 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 Detainee List was placed in the public domain. This section does not require legal proceedings to have been issued¹⁰. 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 FOIA exemption does not apply to the Detainee List.

GROUND (E): REFUSAL TO DISCLOSE THE INFORMATION REQUESTED IN THE 21 APRIL REQUEST UNDER VARIOUS FOIA EXEMPTIONS

21. The Internal Review Response confirms that a large amount of the information requested in connection with the Detention Review was exempt from disclosure under section 23 of FOIA. Whilst I accept that this is an absolute exemption, I am concerned that it may not have been correctly applied by the MOD. Furthermore, the MOD have so far failed to provide a certificate pursuant to section 23(2) of FOIA signed by a Minister of the Crown duly certifying that certain specific information withheld was indeed provided by or related to any of the bodies identified in section 23(3) FOIA.
22. The Internal Review Response also reasserts the applicability to the Detention Review of the exemptions under sections 26 and 27 of FOIA. In relation to

⁷ ICO Freedom of Information Act Awareness Guidance - Information held: retrieving and compiling information from original sources, February 2009, p.2

⁸ See ICO decision notice FS50070854

⁹ Mr M L Johnson v Information Commissioner and Ministry of Justice (EA 2006/0085; 13 July 2007)

¹⁰ ICO Freedom of Information Act Awareness Guidance No.1

both of these exemptions, the MOD appear to have failed to comply with their obligations under FOIA for the following reasons:

- (a) the likelihood of the disclosure of the information relating to the Detention Review causing prejudice to the UK's defence or international relations has not been shown by the MOD to be more than a hypothetical risk. I repeat my position set out above at 16(a), that the MOD must be able to provide some evidence as to the likelihood of harm.
- (b) Even if the likelihood of prejudice were to be adequately demonstrated by the MOD, it is contended that the public interest in disclosure of the Detention Review is high. In this respect I would reiterate my arguments at 16(b) above.

Accordingly, it is contended that the exemptions under sections 26 and 27 FOIA may have been improperly applied to the Detention Review by the MOD.

23. The Internal Review Response states that, in reviewing MOD's handling of the 21 April Request, the MOD has come to the conclusion that section 38 FOIA, rather than section 40 FOIA, is the appropriate exemption to rely on in refusing to disclose the names and positions of those involved in the drafting of the Detention Review. Section 38 FOIA is a prejudice-based exemption and is subject to a public interest test. As I stated in my letter of 29 August to Mr Wray it is not sufficient to show that the issue of rendition is "*a potentially emotive and sensitive subject*". Some evidence must be provided of the risk of prejudice, as confirmed in the ICO's Guidance on the "Health and Safety" exemption¹¹. It is not clear that the MOD has done this.
24. The MOD's position in respect of the legal annex to the Detention Review is that this is exempt from disclosure under section 42(1) of FOIA (Legal and Professional Privilege ("**LPP**")). As I stated in my letter to Mr Wray of 29 August 2008, the stated purpose of the Detention Review was "*to determine whether the UK had and continues to have appropriate accounting procedures to ensure that persons captured by UK forces and transferred to US detention Iraq are treated in accordance with UK legal and policy requirements*". This does not appear to be a document prepared in view of contemplated litigation, nor is it a document the dominant purpose of which is the obtaining of legal advice. It is contended that the legal annex does not concern the substantive rights and obligations of the MOD, but rather a review of the legal context in which all public authorities operate. On this basis, the legal annex to the Detention Review should not be exempt from disclosure.
25. However, even if it were covered by the section 42(1) FOIA exemption, the Detention Review could be disclosed on the ground that the public interest in disclosing it outweighs the public interest in not doing so. The arguments

¹¹ ICO Freedom of Information Act Awareness Guidance No.19, January 2006

which I have set out above at 16(b) apply equally to the Detention Review, because this document is central to the public's understanding of the UK's involvement in rendition. Despite the strong public interest in protecting LPP, this is not an absolute exemption and I contend that the substantial public interest in disclosure described above may outweigh the public interest in maintaining the exemption.

GROUND (F): PROCEDURAL BREACH OF FOIA

26. Ms de Bourcier set out in the Internal Review Response that the MOD's response to the Requests took 33 working days. However, given that the 6 February Request constituted a valid request under FOIA, and that the MOD's full substantive response in compliance with FOIA was not made until 7 July, the response to this request took far longer – in excess of 90 working days. This appears to breach section 10(1) of FOIA.
27. Furthermore, in conducting its internal review, the MOD appears to have acted in breach of the Section 45 Code of Practice, in particular paragraph 39 on the prompt determination of complaints. As to the meaning of prompt in this context, the Information Commissioner has stated that, in his view, a reasonable time for completing the internal review is 20 working days from the dated of the request¹². I would point out that the request for internal review was made in my letter of 29 August 2008, and the results of the internal review were not made known to me until Ms de Bourcier's letter of 27 February 2008.

PRIORITISATION OF THIS COMPLAINT

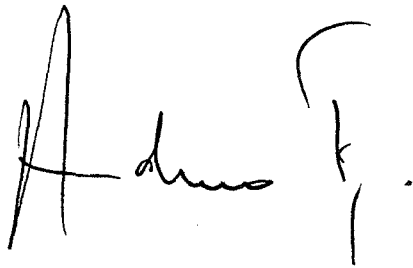
28. In accordance with the ICO's policy on designating priority cases previously provided to us (enclosed), I very much hope that you will agree with me that this complaint should be prioritised by the ICO. The reasons for prioritisation are strong:
 - (a) the Requests relate to high profile matters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

¹² ICO Freedom of Information Act Awareness Guidance No.5, February 2007, p.2

MOD in a full and prompt manner, information on these two renditions 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 the arrangements in place to prevent UK involvement in renditions are adequate, whether reviews into this issue have been properly conducted, and whether other detainees captured by UK Forces have been rendered, 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 be combined with the investigation of my complaint in relation to the MOD's handling of my request for information dated 20 June 2008, which accompanies this complaint.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Andrew Tyrie'. The signature is written in a cursive style with a large initial 'A' and a distinct 'T' at the end.

ANDREW TYRIE