

ANDREW TYRIE MP



HOUSE OF COMMONS

LONDON SW1A 0AA

Mr David Wray
Director of Information Exploitation
6th Floor
MOD Main Building
Whitehall
London
SW1A 2HB

29 August 2008

Dear Mr Wray,

Re: Freedom of Information Requests - Rendition

I am writing to you further to Rt Hon Des Browne's letter of 7 July 2008. This letter apparently constitutes a Refusal Notice to the Freedom of Information requests which I made on 6 February 2008 and 21 April 2008. Please find copies of these three letters enclosed.

In the light of Rt Hon Des Browne's letter of 7 July 2008, I am requesting an internal review of the decision to withhold the bulk of the requested information. I am also requesting that you review your procedures in the light of the length of time the Ministry of Defence ('MOD') has taken to respond to my requests and the fact that, contrary to the recommendation of the Information Commissioner in a letter dated 28 May 2008 (enclosed), an internal review of the requests I made on 6 February 2008 has still not been carried out. I am making this request for an internal review under the Freedom of Information Act ('the Act') Section 45 Code of Practice.

It is unclear from the Refusal Notice which information is being withheld from disclosure under which exemption. Your review into the decision not to release the information which I have requested should examine each exemption cited in the Refusal Notice in respect of all information withheld from disclosure.

1. Section 40 (Personal Information)

In refusing to provide the names and titles of the individuals cited in and contributing to the review of detention practices, the MOD has cited the section 40 (personal data) exemption. The focus of this exemption, however, is on "damage or distress to an individual acting in a personal or private capacity".¹ As the Information Commissioner has stated, "information which is about someone acting in an official or work capacity should normally be provided on request".² The MOD therefore appears to have misinterpreted this exemption.

The names of the senior British General who headed up the review and "the several senior officials" who supported him ought to be disclosed, unless to do so would put the safety of these officials at risk. This is considered below. To cite the ICO guidance: "the more senior a person is the less likely it will be that to disclose information about him or her acting in an official capacity would be unfair".³

The MOD has also cited the section 40 (personal data) exemption in refusing to release the names of all individuals detained by UK forces in Iraq and Afghanistan. It is not enough, however, merely to state that such information constitutes personal data, for this does not automatically exempt it from disclosure. This information is "necessary for the purposes of establishing, exercising, or defending legal rights" of those detained.⁴ These legal rights include the right not to be tortured, or to be treated in a cruel, inhuman, or degrading way. Section 35 (2) of the Data Protection Act ('DPA') does not require legal proceedings to have been issued or to be in prospect.⁵

2. Section 42 (Legal Professional Privilege)

The MOD has cited this as one of the exemptions which entitles it to refuse to disclose the requested information. In particular, it is claimed that this exemption applies to a "legal annex" to the review of detention practices. In order to be covered by the privilege, communication needs to be made for the

¹ Freedom of Information Act Awareness Guidance No. 1, p. 4,
http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance%201%20personal_information_v2.pdf

² *Ibid.*, p. 4.

³ *Ibid.*, p. 5.

⁴ Data Protection Act, section 35 (2)

⁵ Freedom of Information Act Awareness Guidance No. 1,
http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance%201%20personal_information_v2.pdf

principal or dominant purpose of seeking or giving legal advice. ICO guidance states:

*"Legal departments and professional legal advisers are becoming increasingly involved in policy development. The disclosure of such communications would allow individuals to understand the reasons for decisions made by the respective authority. Policy advice from professional legal advisers not about the substantive rights and obligations of an authority should not be considered privileged."*⁶

The stated purpose of the 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 in Iraq are treated in accordance with UK legal and policy requirements".⁷ As such, the review did not have as its dominant purpose the giving or seeking of legal advice and so ought to have been disclosed. Furthermore, Mr Browne's letter makes no attempt to explain the nature or content of the legal annex to the review. This is a case where the public interest in transparency and accountability is very strong.

3. Section 38 (Health and Safety)

The MOD has cited this exemption in its refusal to release the names and titles of the individuals cited in and contributing to the review of detention practices.

In order to rely on this exemption however, the MOD "must demonstrate that the disclosure of the information would or would be likely to endanger the physical or mental health or the safety of any individual".⁸ It is insufficient merely to state that this is a "potentially emotive and sensitive subject".⁹ If you were to determine that the release of names contained in the review would endanger the safety of those individuals, it would be possible to redact the names when disclosing the review. I hope that you will consider this.

⁶ Freedom of Information Act Awareness Guidance No. 4, 'Legal Professional Privilege', p. 7, http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance_4_-_legal_professional_privilege.pdf.

⁷ Extract from the review of detention practices in Iraq and Afghanistan, Attachment A to Secretary of State Mr Browne's letter of 7 July 2008.

⁸ Freedom of Information Act Awareness Guidance No. 19, 'Health and Safety', p. 5, http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance_19_-_health_and_safety.pdf.

⁹ Secretary of State Mr Browne's letter of 7 July 2008.

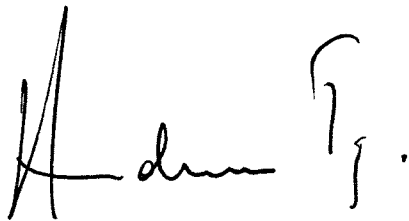
4. Sections 26 and 27 (Defence and International Relations)

It is not clear whether the MOD seeks to rely on these exemptions in respect of all of the information I have requested under the Act, or merely some of it.

In either case, please note that the ICO guidance states that "the public has the right to know that military operations have been conducted properly".¹⁰ There is clearly a strong public interest in the information I have requested: disclosure of the review would reassure the public that people captured by UK Forces in Iraq and Afghanistan are adequately protected. Moreover, it seems unlikely that disclosing such information could prejudice "the capability, effectiveness or security"¹¹ of the armed forces or that of any forces cooperating with them, particularly if names are redacted. The interest in promoting accountability and transparency in this instance is compelling.

I am placing a copy of this letter in the public domain. I am also copying it to the Information Commissioner and Mr Browne.

Yours sincerely,



ANDREW TYRIE

Chairman, All-Party Parliamentary Group on Extraordinary Rendition

Cc. Rt Hon Des Browne MP

Mr Richard Thomas, Information Commissioner

¹⁰ Freedom of Information Act Awareness Guidance No. 10, 'The Defence Exemption', p. 4, http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance_10_-_the_defence_exemption.pdf.

¹¹ The Freedom of Information Act 2000, section 26(1)(b).