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MSU 2/9N

7 July 2008

RENDITION

Thank you for your two letters of 21 April 2008 and your letters of 15 May 2008 and 2 June 2008. As requested in your letters, I have treated your questions as requests for information under the Freedom of Information Act 2000(FOIA). I would like to apologise if my previous response, dated 19 March 2008, caused confusion. While your requests were responded to in line with the general provisions of the Act, and every effort was made to ensure that the answer was as informative as possible, I hope you find this response clearly sets out the status of the information you have requested, under the terms of, and with direct reference to, the Freedom of Information Act 2000.

In your first letter of 21 April 2008 you request all information contained in the review of detention practices in Iraq and Afghanistan. As stated in my letter to you of the 19 March 2008 the review of detention practices was a review commissioned by me and carried out by a senior British General supported by several senior officials. In your second letter of 21 April 2008, you also asked to be provided with:

1. A list of all individuals who have been detained by UK forces in Iraq or Afghanistan. This list should provide all known names of those detained, and any other information that may help in their identification, including dates of birth where known.

Andrew Tyrie MP
Chairman, All-Party Parliamentary Group on Extraordinary Rendition
House of Commons

2. All information relating to the 'understanding' between UK, Iraqi, Afghan, and US authorities referred to in your letter of 31 January 2008, and set out in my letter of 6 February 2008.

For ease, I am treating each as a separate Freedom of Information request and will respond to each in turn below.

Turning to your first request for the review of detention practices in Iraq and Afghanistan referred to in my letter of 19 March 2008 I can confirm, as in my previous correspondence, that the MOD holds information relevant to your request. However as you are aware there are provisions within the Freedom of Information Act which allow for certain information to remain exempt from release. It has been judged that a large amount of the information requested falls within the scope of the following Sections of the Act: Section 23 (information relating to security agencies), Section 26 (defence), Section 27 (international relations), Section 38 (health and safety), Section 40 (personal information) and Section 42 (legal professional privilege) and may accordingly be exempt from release.

As you will also be aware some of these exemptions are qualified, and the decision to release or withhold the information depends on where the balance of public interest lies. In order to make this decision, an assessment of the public interest factors on both sides of the argument has been conducted.

With regard to the information which falls under the scope of section 27(1) (International relations), there are general arguments in favour of release, such as a better public understanding and insight into the UK's defence relations with its allies, and increased transparency and accountability in the conduct of those relations. However, weighed against these, is the real risk for damage to important bilateral and multi-lateral relationships with these allies.

Much of the information which falls under Section 27 (International Relations) would also fall under the scope of Section 26 (1) (defence). As you will be aware, much of our own defence interests are bound up with those of our allies, and disclosing information concerning or provided by them not only undermines trust in our relations, making co-operation between our forces more difficult and dangerous, but could also place our own troops and operations at risk, harming the capability of the UK Armed Forces. As above, factors for release of the information falling under the scope of this exemption centre on better public understanding of the conduct of our operations and greater accountability and transparency of the activities carried out by the Armed forces. Although these are weighty concerns, and ones which I am mindful of, I have judged, that the risks to relations with our international allies, to our defence concerns and to operations are too great in this instance. I have therefore decided to withhold the information in the review that falls under the scope of exemptions at Sections 26(1) and 27(1) of the FOIA.

Parts of the review also fall under the scope of section 38 (Health and Safety) and section 40 (personal data). These relate to names and titles of individuals cited in and contributing to the report. The names of individuals are exempt by virtue of the absolute exemption at Section 40(2) of the Act. However, this information also falls under section 38 (1) (Health and Safety) of the Act. Section 38 is a qualified exemption and is thus subject to an assessment of the balance of public interest. I realise there is public interest in knowing who investigates and drafts reports into issues of this nature, and receiving reassurance that they are capable and qualified to do so. However, when addressing a potentially emotive and sensitive subject such as this, the individual's right to security, privacy and freedom from harassment must also be taken into account; there is general public interest in such freedoms being afforded to individuals. I therefore judge these names and titles exempt from release, both on grounds of the exemption at section 38, and that they are personal information properly exempt from release under section 40(2) of the FOIA.

There are also parts of the review that include information which is exempt under section 23 (information relating to or supplied by bodies dealing with security matters). This is an absolute exemption and information falling within the scope of this section is automatically exempt from disclosure.

The legal annex to the review is subject to Section 42 of the Act, (legal professional privilege). Section 42(1) is a qualified exemption and in reaching the conclusion not to release the information we have taken into account the public interest in disclosing the information, which is set out below.

The information held is, or relates to, legal advice to government in respect of which a claim to legal professional privilege could be maintained in legal proceedings. There has been no waiver of that privilege. Arguments in support of release include those relating to openness and accountability and the demonstration that Government is staying within the boundaries of the law and legal guidance. However, in the case of section 42, there is a strong public interest in a person seeking access to legal advice being able to communicate freely with his legal advisers in confidence, and in being able to receive advice from his legal advisers in confidence. The House of Lords has said that legal professional privilege is “a fundamental condition on which the administration of justice as a whole rests”: *R v Derby Magistrates’ Court ex p B* [1996] AC 487. The importance of the public interest in maintaining the confidentiality of communications between lawyers and their clients was reaffirmed by the House of Lords in *Three Rivers DC v Bank of England (No. 6)* [2004] UKHL 48.

After due consideration of the issues and applying the principles referred to above, I am not satisfied that the balance of public interests favours the disclosure of the majority of the information contained in the review of detention practices in Iraq and Afghanistan. However, the information contained in the review that does not fall under any of the above exemptions may be released, and we have provided an extract of this at Attachment A.

I have also received a request, by Sir John Stanley, for a copy of the review of detention practices to be placed in the Library of the House. I have responded to him indicating that I will send him a copy of this letter as the information contained within addresses his questions and fully describes my position with regard to information releasable under the FOIA. I shall also place a copy of this letter in the Library of the House.

I am disappointed to note that you have declined my offer of a meeting on Privy Counsel terms. It is my belief that any meeting not on such terms would not provide you with anything further than what is contained in this response and in our previous correspondence. If you change your mind and decide you would like to attend the separate meeting on these terms to which I have invited Sir John Stanley and members of the Foreign Affairs Committee then please, as before, contact Edward Ferguson in my office, by e-mail at Edward.Ferguson956@mod.uk or by telephone on 020 7218 2112. I continue to believe that you would find a meeting on Privy Counsel terms helpful, enabling you to receive a briefing on issues of concern to you, and to gain a more rounded picture of our activities in Iraq.

In your second letter you reiterate your request for a list of all individuals who have been detained by UK forces in Iraq or Afghanistan. I would like to reiterate the Departments position as outlined in my letter to you of 19 March 2008 that the names of the individuals cannot be released. I hope that some additional explanation may help clarify the position.

The Ministry of Defence declines to disclose this information to you on the basis that it is exempt information by virtue of section 40 (2) (Personal Information) of the FOIA. Following a detailed analysis of the provisions of the FOIA and the Data Protection Act (DPA) by MOD legal experts it is the position of the MOD that the information you request constitutes "personal data" under the DPA. You argue that "even if the information you requested amounted to personal data subject to the provisions of the DPA it would appear to be exempt from the

non-disclosure provisions of the Data Protect Act in this case". You quote section 35 (2) and Schedule 2 paragraph 4 and Schedule 3 paragraph 3 (a). Taking these points in turn, with regard to section 35 (2), I am not aware of any legal proceedings or prospective legal proceedings which would require disclosure of these names. With regard to Schedules 2 and 3, I see no valid arguments as to why it is necessary to disclose the names of the individuals to protect their vital interests. The refusal to provide the names of the individuals is based on a rational assessment of the obligations of the Ministry of Defence under both the Freedom of Information act and the Data Protection Act. It is my assertion that to release the names of the individuals would place the Ministry of Defence in breach of its obligations under the Data Protection Act.

In your second letter you also request all information relating to the understandings between the UK, Iraq, Afghanistan and the US and make a series of points regarding the amount of information provided in relation to your initial request. Having re-considered the information in light of the exemption at Section 27(1), I must inform you that the information we have provided to date is as much as we judge we are required to release under the FOIA, and indeed as much as we can release without jeopardising our other obligations, which it is equally in the public interest that we meet. Sections 27(1) is qualified exemption and in reaching the conclusion not to release the information we have taken into account the public interest in disclosing the information, which is set out below.

With regard to the understanding with Iraq, the Iraqi authorities have requested that the written agreement is not put into the public domain. Whilst this in itself is not a valid reason to claim an exemption under the FOIA, I have concluded that the best interest of the UK and the UK Armed forces lays in a close and trusting relationship with our Iraqi counterparts. The publication of the understanding would undermine our bilateral relationship with Iraq and would put at risk ongoing operations. The exemption is being claimed regarding publication of the understanding and other information regarding our

understanding with Iraq as disclosure of this information would also undermine the relationship. Whilst I acknowledge that there is inevitably a public interest in this information, and that there are genuine arguments for the public interest being served by the promulgation of a better understanding of the UK's bilateral relations, as well as the concomitant benefits of promoting greater transparency and accountability, I have come to the conclusion that the balance of public interest lies in favour of withholding this information from the public domain.

With regard to the document sent to you detailing the agreement between the Governments of the UK and Afghanistan, you ask if this document contains all information relating to the understanding. In answer to that question I can confirm that there is other information held by the MOD relating to the relationship between the UK and Afghanistan. As per the case for Iraq I am claiming an exemption for this additional information under section 27 (1) (International Relations). The same arguments apply in this case and the same conclusion has been reached, namely that after consideration of the public interest the balance rests on the side of withholding this information from the public domain. You may be interested in an exchange of letters regarding access to detainees transferred to the government of Afghanistan. Details of this are available from the FCO website (www.fco.gov.uk/resources/en/pdf/pdf19/fco_afg_exchangeofletters3).

With regard to the situation regarding the relationship between the UK and the US, it goes without saying that the UK sees its bilateral relationship with the US as its most vital relationship. The US is a key ally of the UK and our national and defence interests are linked on a multitude of levels. The Ministry of Defence holds numerous documents relating to our relationship with the US but after consideration I feel that the arguments regarding the maintenance of our relationship with the US outweigh the public interest arguments for release of this type of information, as set out above with regard to the Iraq agreement. I therefore judge this information exempt under section 27 (1), of the Freedom of Information Act 2000. from the public domain.

I would like to reiterate that we have taken the allegations regarding prisoner transfer very seriously and having commissioned and considered the review of detainee transfer I am confident that the processes currently in place are in accordance with UK policy and legal obligations. No evidence has been uncovered that anyone captured by the UK forces and detained by the US forces has been either mistreated or unlawfully renditioned.

I have reconsidered your requests as part of preparing this answer to your letter and I maintain that the correct decision has been reached.

If you are unhappy with this response or you wish to complain about any aspect of the handling of your request, then you should contact me in the first instance.

If informal resolution is not possible and you are still dissatisfied then you may apply for an independent internal review by contacting the Director of Information Exploitation, 6th Floor, MOD Main Building, Whitehall, SW1A 2HB (e-mail Info-XD@mod.uk). Please note that any request for an internal review must be made within 40 working days of the date on which the attempt to reach informal resolution has come to an end.

If you remain unhappy following an internal review, you may take your complaint to the Information Commissioner under the provisions of Section 50 of the Freedom of Information Act. Please note that the Information Commissioner will not investigate the case until the internal review process has been completed. Further details of the role and powers of the Information Commissioner can be found on the Commissioner's website, <http://www.informationcommissioner.gov.uk>.



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Attachment A

Extract from the review of detention practices in Iraq and Afghanistan

14 Mar 08

DETENTION PRACTICES IN IRAQ AND AFGHANISTAN

ISSUE

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.

BACKGROUND

Extent of Review. As directed, conducted a short notice 48hr visit to Iraq (4-7 March), accompanied by to carry out a rapid audit of current practice relating to UK forces' detention operations in Iraq followed by a short period of policy and legal audit at PJHQ and Main Building.

IRAQ

March 2003 – June 2004. Warfighting and the Occupation. Detentions are covered by a UK/US/AUS MOU as well as obligations under international humanitarian law and the Geneva Conventions which cover treatment of prisoners of war and protected persons. The MOU included a provision that transferred detainees would not be removed from Iraq without consultation.

June 2004 – September 2004. Operations were conducted by MNF-I under the authority of the UN Security Council Resolutions which permitted security internment, and the 2003 MOU was treated as continuing by the signatories.

September 2004 – March 2006.

Mar 06 – Present.

AFGHANISTAN

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Campaign phases: In policy and legal terms the campaign in Afghanistan transited through four phases – international armed conflict, OEF, host nation invitation (for the Mazar-e-Sharif PRT and then ISAF.

November 2001 – March 2002:

March 2002 – May 2006:

September 2003 – March 2004:

May 2006 – Present:

Iraq

The research we have undertaken has revealed no concerns so far and it is worth noting that only two detainees remain in UK detention at the Temporary Detention Facility in Basrah.

Afghanistan

- a. **Op JACANA.** 3 CDO BDE operations in Paktia, Paktika and Khost early 2002. No detainees were taken.
- b. **Kabul Patrol Company.** Operating in Kabul since 2002 primarily tasked with security of Camp SOUTER. Occasionally involved in capture operations which have always utilised ANP or NDS officers as the detaining authority.
- c. **Mazar-e-Sharif PRT.** 2003 to 2005. Military elements of the PRT were focused on security of the compound and support and influence patrols. No detainees taken.

CONCLUSION

The picture is a positive one. The UK has met its obligations by a combination of assurances, operational judgement and record keeping.

The Department will always be open to baseless speculation that we have been complicit in rendition or ill treatment. To end all speculation would require us to prove a negative. We can say, however, that we have no evidence of unlawful rendition and we have looked.

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