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SECRETARY OF STATE

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Your ref: -

5 September 2008

Thank you for your letters of 20 June and 10 July. I will address the points raised in your letters in turn.

As requested in your first letter, I am treating three of your ten questions, namely, questions four, nine and ten, as requests for information under the Freedom of Information Act 2000 (FOIA). Your letter set out a range of questions relating to individuals apprehended by UK Armed Forces in Iraq and Afghanistan, the policy underpinning UK Special Forces operations in Afghanistan, the role of certain detention facilities and comments relating to the role of UK Special Forces. 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 letter of 20 June 2008, you also asked the following questions:

1. At any time since the invasion of Afghanistan in 2001, has there ever been a formal or informal policy (whether at governmental level, within the UK Forces or the UKSF) that UKSF operating within the joint task force referred to by Mr Griffin, would detain or capture individuals but not arrest them?

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2. If so what was the basis for this policy? In the government's view is there a difference between the legal obligations that a member of the UK Forces owes to those he or she arrests, and those he or she captures, or those he or she detains? If so what?

3. Is this policy still in place?

4. Please also supply a documentary record of the policy and any non- legally privileged information relating to the policy, its application and the purpose behind it. Please treat this question as a request under the Freedom of Information Act.

5. In the view of the government, at what point does an individual captured/detained/arrested by UK Forces come under and leave "UK jurisdiction" (as per your letter of 31 January 2008) and what precisely do you mean by that term?

6. With specific reference to the operation relating to the Qalai Janghi fortress, referred to by Mr Griffin, please state whether it is the case that, to the best of the Ministry of Defence's knowledge and belief, captured Taliban fighters were transferred to Guantanamo Bay or other detention facilities outside Afghanistan. If so, please state whether (and if so how many) of these individuals were captured or detained by British Forces or jointly by British Forces and all known information about their subsequent detention.

7. In the course of the review, have the commanding officer who allegedly referred to UKSF as "the secret police of Baghdad", and the three soldiers who allegedly witnessed the torture of detainees by US Forces, been located and questioned about these allegations? If not, have attempts been made to

contact these individuals? If so, have statements been taken from the individuals in question?

8. Does the 'understanding' between UK and US Forces, referred to in your letter dated 31 January 2008, extend to the operations of the joint US/UK unit of which UKSF was a part, that formed the basis of Mr Griffin's allegations?

9. I would like to request 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. I realise that this request may overlap with my request for "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", set out in my letter of 6 February 2008.

Please state how many of these individuals were subsequently transferred to Guantanamo Bay Detention Camp, Bagram Theatre Internment Facility, Balad Special Forces Base, Camp Nama BIAP or Abu Ghraib Prison or any other detention facility in third countries. Please state how many of these individuals following capture were taken to: (i) a detention facility under the authority and control of British Forces; (ii) a detention facility under the joint authority and control of British Forces; (iii) any other detention facility (please specify); (iv) more than one detention facility, or; (v) no detention facility.

In respect of each individual case please provide as much information as possible, 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 dates thereof.

Please explain what you have treated as detention and capture for the purposes of answering these questions. Please treat this question as a request under the Freedom of Information Act.

10. I would like to make a request on the same terms as Question 9, above, 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. This request may also overlap with the request set out in my letter of 6 February 2008. Please make clear in each case which other force was acting jointly with UK Forces. Please also treat this question as a request under the Freedom of Information Act.

For ease, and where appropriate, I will respond to each of your questions in turn below.

Turning to your first question, it is MOD policy that we do not normally comment on UK Special Forces matters. I see no reason to deviate from that policy in this instance. As such I am declining to answer question one on the basis that to do so would go against normal Departmental practice. I would like to point out that all elements of the UK Armed Forces operate within a strict operational policy and legal framework and are fully compliant with applicable UK domestic and international law.

With regard to your second question, it is obviously not possible for me to comment on the basis of UK Special Forces policy given that we do not normally comment on UK Special Forces matters. With regard to the Government's view of the difference in legal obligations on members of the UK Armed Forces should they arrest, capture or detain an individual, I can only comment on behalf of the Ministry of Defence, as the Department of State responsible for, and the strategic Headquarters, of the UK Armed Forces. The

Ministry of Defence's position regarding the legal obligations of our armed forces is that our obligations to those we arrest, capture or detain will vary depending on the circumstances – for example, in an international armed conflict, the Geneva Conventions will apply. However, in any situation, our policy is that such persons should always be treated humanely.

Moving onto your third question, I am declining to answer this question on the basis of Departmental policy regarding commenting on UK Special Forces matters.

As requested in your letter, I am treating your fourth question as a request for information under the FOIA. On the basis that you have asked for a documentary record of policies relating to UK Special Forces, I am declining to answer this question.

MOD can neither confirm nor deny that it holds information relevant to your request as the duty in Section 1(1)(a) of the FOIA does not apply by the following exemptions: Section 23(5) – Information supplied by, or relating to, bodies dealing with security matters (which include special forces) and Section 24(2) – National Security. This should not be taken as conclusive evidence that the information you requested exists or does not exist. As s23 is an absolute exemption an assessment of the public interest for and against disclosure is not required under the terms of the FOIA. To the extent that s24(2) applies, it has been determined that, in all the circumstances of the case, 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. To give a statement of the reasons why these exemptions apply would involve the disclosure of information which would in itself be exempt. Therefore, under section 17(4) of the Act, we are not obliged to give such a statement. If MOD

were to confirm whether or not the information is held, it may adversely affect the efficient and effective conduct of the Armed Forces.

With regard to your fifth question, again I can only provide the view of the Ministry of Defence. The concept of 'jurisdiction' is one which arises in human rights treaties, such as, the European Convention on Human Rights (ECHR). The courts have only exceptionally recognised the extra-territorial exercise of jurisdiction by a state in certain limited circumstances. You may like to refer to the judgment of the House of Lords in *Al Skeini* at [2007] UKHL June 2007, from which it follows that a person will only come under UK forces' jurisdiction for ECHR purposes in Iraq when held as a security internee in a UK-run detention facility.

Moving onto your sixth question, the information you ask for relates directly to UK Special Forces' activities and the relationship between the UK and the US. In line with Departmental policy I am unwilling to discuss information relating to UK Special Forces.

With regard to question 7, I am again unwilling to go into details given the Departmental policy on not normally discussing UK Special Forces Matters. Whilst Mr Griffin has never made any specific allegations, the Ministry of Defence initiated a general investigation and no evidence of wrongdoing has been found.

Moving onto question 8, with regard to the situation regarding the relationship between the UK and the US, 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. Whilst the Ministry of Defence holds documents relating to our relationships and understandings with the US, I consider, after careful consideration, that the arguments regarding the

maintenance of our relationship with the US outweigh the arguments for release of this type of information. As such, I therefore judge that details of the UK/US relationship and/or understanding should not be divulged.

I will treat questions nine and ten together as they are effectively asking for all details of all individuals detained or captured by the UK Armed Forces. I acknowledge that both questions nine and ten are to be treated as requests for information under the FOIA.

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 advisers, it is the position of the MOD that the information you request constitutes "personal data" under the DPA. In previous correspondence, you have argued 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 Protection Act in this case". You quoted section 35 (2) and Schedule 2 paragraph 4 and Schedule 3 paragraph 3 (a). Addressing these points in turn again, 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 FOIA and the DPA. 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 DPA.

Turning to your second letter of 10 July 2008, you also asked the following questions:

1. ...suggesting that you cross reference your records of people detained by UK Forces with US records of those detained at the detention facility on Guantanamo Bay... I therefore request again that this exercise be undertaken and its result be made publicly available, subject to any caveats.

2. ...Merely requiring the US to inform us of their intention to transfer such an individual out of the country, possibly to Guantanamo Bay or to secret detention, is likely to be insufficient to meet the UK's legal obligations. I would be grateful if you would let me know whether this is also the Government's assessment of the law.

3. ...I also note another change to the terms of the 'understanding', as you describe it in your letter of 31 January 2008. In your letter you refer to the 'understanding' relating to a situation where an individual is passed "from UK jurisdiction into the jurisdiction" of the Iraqi, Afghan or US authorities. In your Parliamentary answer to me of 5 December 2007, you referred to individuals who have been "captured" by UK Forces. This difference in language underscores the risk that the terms and scope of application of the understandings are ambiguous or that the US, Afghan or Iraqi authorities might take a different view from the Government as to when an assurance applies. This makes it even more important that the precise terms of the assurances are closely examined...

Does the 'understanding' apply equally to transfers of detainees or captured persons to detention facilities within the same country, as well as to facilities in a third country?

And make the following point regarding a meeting:

4. I would be happy to meet you or your officials to discuss these matters further. But I also ask for a written response to the matters raised in this letter.

Turning to your first question, you refer to my answer to your letter of 19 December 2007, sent to you on 31 January 2008 I stated in my response that 'You suggest in your letter that we might be able to compare the records we have of those we have detained next to the names of those in Guantanamo Bay. This would not produce an answer that could be verified to the degree necessary for me to put before Parliament. Many of those we have detained often go by several different names, not all of which we may have a record of, and even if a name matched between these sources, there would be no way to know whether it was the same person or simply someone with the same name.' It remains my position that a cross-referencing of records would not produce an answer I could have sufficient confidence in to put before Parliament. As such, I consider that the time of my officials would be better spent on other activities.

With regard to your second question, I can only comment on behalf of the Ministry of Defence. Legal advice is always taken on questions where MOD's legal obligations may be engaged, and our policy is always based on an assessment of those legal obligations by reference to applicable domestic and international law. What legal obligations may arise in any particular case very much depends on the circumstances.

Moving onto your third question, each 'understanding' we have regarding transfers of persons captured by UK forces to another state is tailored to meet the different circumstances in which transfers occur. Although we recognise that different language has been used, we do not believe there is any confusion so far as concerns our arrangements with other parties.

With regard to your comment on a meeting with me or my officials, I remain disappointed that you previously declined my offer of a meeting on Privy Counsel terms. I remain willing to offer you a meeting on a Privy Counsellor basis, as this will enable the most full and frank discussion, on the understanding that the information given is treated on a basis of strict confidentiality. If you change your mind and decide you would like to attend a meeting, please contact Edward Ferguson in my office, by e-mail at Edward.Ferguson956@mod.uk or by telephone on 020 7218 2112, who will find a mutually convenient opportunity and make the necessary arrangements for you to visit the Department. It is my belief that a meeting not on Privy Counsel terms would not provide you with anything further than what is contained in this response and our previous correspondence.

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.

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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