

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 15 June 2010**

**Public Authority:** Ministry of Defence  
**Address:** Main Building  
Whitehall  
London  
SW1A 2HB

### Summary

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The complainant made a three part request for information relating to detention practices in Iraq and Afghanistan. The public authority disclosed some information falling within the scope of the first part of the request, but withheld the remainder under sections 23(1) (information supplied by, or relating to, bodies dealing with security matters), 26(1)(b) (defence), 27(1)(a) (international relations), 38(1)(a) and (b) (endangerment to health and safety) and 42(1) (legal professional privilege). The second part of the request was refused under section 40(2) (personal information) and the third part under section 12(1) (cost limit). The Commissioner finds that the public authority was correct to withhold the information referred to in each of the three parts of the request, apart from that to which it applied sections 38(1)(a) and (b), which the Commissioner finds are not engaged. The public authority is required to disclose the information previously withheld under sections 38(1)(a) and (b). The Commissioner also finds that the public authority failed to comply with the procedural requirements of sections 1(1)(a), 1(1)(b), 10(1), 17(1) and 17(5).

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

## The Request

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2. On 21 April 2008 the complainant made the following information requests:
  - (i) *"All information contained in the 'review of detention practices in Iraq and Afghanistan' mentioned in [MoD letter of 19/03/08]."*
  - (ii) *"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."*
  - (iii) *"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."*
3. The public authority responded to this initially on 20 May 2008. This letter cited sections 24 (national security), 26 (defence), 27 (international relations), 38 (health and safety), 40 (personal information) and 42 (legal professional privilege), but did not specify subsections of these exemptions or confirm that these exemptions were engaged.
4. The public authority responded to the request substantively on 7 July 2008. Request (i) was refused in part, with the exemptions provided by sections 23 (information relating to, or supplied by, bodies dealing with security matters), 26(1), 27(1), 40(2) and 42(1) cited. Some information falling within the scope of this request that was not believed to be exempt was disclosed, titled *"Extract from the review of detention practices in Iraq and Afghanistan"*. Request (ii) was refused under section 40(2) and request (iii) under section 27(1).
5. The complainant responded on 29 August 2008 and requested that the public authority carry out an internal review. After a lengthy delay, the public authority responded with the outcome of the review on 27 February 2009. In relation to request (i), the public authority upheld the refusals under sections 23(1), 26(1)(b), 27(1)(a) and 42(1). The public authority now withdrew section 40(2), but cited section 38(1) in connection with the information previously considered exempt by virtue of section 40(2).
6. In relation to request (ii) the public authority amended its stance and now stated that this information was not held. The reasoning for this

was that, as this information was not collated into list form, it was not, for the purposes of the Act, held.

7. The public authority now also amended its stance in relation to request (iii), withdrawing the earlier citing of section 27(1) and now citing section 12(1) as it believed that compliance with this request would exceed the appropriate limit. The public authority advised that if the request were to be refined it may be possible to comply with it without exceeding the appropriate limit and provided some advice as to how the request could be refined to achieve this, but also stated that it was likely that any information that could be supplied without exceeding the cost limit would be subject to exemptions from Part II of the Act.

## Background

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8. In request (iii) the complainant refers to the *“understanding’ between UK, Iraqi, Afghan and US authorities”*. The ‘understanding’ referred to relates to detainees passed from UK jurisdiction to the jurisdiction of either Iraq, Afghanistan or the USA.

## The Investigation

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### Scope of the case

9. The complainant contacted the Commissioner following the outcome of the internal review on 22 April 2009. The complainant referred initially to correspondence that preceded that referred to above. The complainant had first contacted the public authority on 6 February 2008 and had requested the information described in requests (ii) and (iii). The Defence Secretary had responded to this on 19 March 2008, disclosing some information concerning an agreement with the Afghan authorities and setting out why the remainder of the information requested would not be disclosed. No provision of the Act was referred to in this letter, including in explanation for the refusal to disclose information.
10. For the purposes of analysing whether the public authority complied with the procedural requirements of the Act, the Commissioner has treated as the start point the complainant’s requests made on 21 April 2008. However, the Commissioner comments on the initial handling of the February 2008 request in the “Other matters” section below.

11. In his letter to the Commissioner of 22 April 2009, the complainant specified the following grounds for his complaint:
- Section 12(1) had only been cited for the first time at internal review.
  - The claim that, as information falling within the scope of request (ii) was not collated into list form, it was not, for the purposes of the Act, held.
  - The citing of exemptions in response to request (i).
  - The failure to respond to the requests within twenty working days.

## Chronology

12. The Commissioner contacted the public authority on 7 October 2009 and asked that it respond with further explanations for the refusals of the complainant's requests. The public authority responded on 9 November 2009. In this letter the public authority confirmed its current stance in relation to each of the complainant's requests and explained its reasoning for this.
13. On 17 November 2009 a representative of the Commissioner's Office visited the public authority in connection with request (i). During this visit the Commissioner's representative viewed the information falling within the scope of request (i) that had been redacted from the document *"Review of detention practices in Iraq and Afghanistan"* and discussed further with representatives from the public authority the reasoning for the withholding of this information.
14. Following this correspondence, the position of the public authority in relation to requests (i) and (iii) remained unchanged in that it maintained that the exemptions cited in response to request (i) were engaged and that compliance with request (iii) would exceed the appropriate limit.
15. In connection with request (ii) the Commissioner informed the public authority that his approach was that recorded information was considered held for the purposes of the Act, regardless of the form in which it was held. It was not the case, therefore, that information falling within the scope of request (ii) would not be considered held for the purposes of the Act on the basis that it was not held in list form. In response to this the public authority confirmed that it did hold information falling within the scope of request (ii), but reinstated the original reasoning given for the refusal to disclose this information, which was that this information was believed to be exempt by virtue of section 40(2).

## Analysis

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### Substantive Procedural Matters

#### Section 12

16. Prior to considering whether section 12(1) does apply here, the Commissioner will address the complainant's point that the public authority should not have introduced section 12(1) for the first time at internal review and that, because of the delay in the citing of section 12(1), the Commissioner should focus on whether the exemption initially cited, section 27(1), was engaged. The Commissioner agrees with the complainant that it would have been preferable for the public authority to have cited section 12(1) in the refusal notice, its earliest opportunity to do so. However, in order to preserve internal reviews as a means for public authorities to genuinely reconsider the response to a request and, where appropriate, to amend its stance, the Commissioner takes the substantive stance of a public authority to be that expressed at internal review stage. In line with this approach, in this case the Commissioner considers the citing of section 27(1) to have been withdrawn by the public authority and its substantive stance to be that section 12(1) applies.
17. The public authority has cited section 12(1) in relation to request (iii). Section 12(1) provides that a public authority is not obliged to comply with an information request if the cost of doing so would exceed the appropriate limit. The limit for central government public authorities is set at £600 in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the "fees regulations"). The fees regulations also specify that the cost of compliance with a request must be calculated at the rate of £25 per hour, giving an effective time limit of 24 hours.
18. The fees regulations further specify the tasks that can be taken into account when forming a cost estimate as follows:
  - determining whether information is held;
  - locating information;
  - retrieving information;
  - extracting information.
19. Section 12 can be applied in relation both to the cost of establishing whether the information is held, and to the cost of locating, retrieving and extracting the information. The public authority in this case

acknowledges that it holds the information requested, so is citing section 12(1) in relation to the cost of locating, retrieving and extracting the information requested by the complainant.

20. The public authority has provided the following details of its estimate of the cost of compliance with the request:

- Length of time taken to determine if the requested information is held:

7 hours / £175

- Length of time to locate this information:

14 hours / £350

- Length of time to retrieve this information:

21 hours / £525

- Length of time to extract this information:

7 hours / £175

21. Section 12(1) requires that a public authority should make a reasonable estimate of the cost of compliance. The task for the Commissioner is, therefore, to consider whether this estimate is reasonable.

22. The Commissioner does not accept as part of a reasonable estimate the time that the public authority estimates would be taken to establish whether the requested information is held. As covered previously in this Notice, the public authority confirmed that it did hold information falling within the scope of this request. It is clear, therefore, that the public authority is citing section 12(1) in relation to section 1(1)(b), rather than section 1(1)(a).

23. The Commissioner has, therefore, taken into account only the estimate of time and cost for locating, retrieving and extracting the information requested. The public authority has specified seven areas (internal departments) in which it anticipates information falling within the scope of the request may be held. It has estimated that it would take two hours per area to locate relevant information. The public authority has provided a list of the areas in which it anticipates relevant information is held and the Commissioner accepts the representations from the public authority on this point. The public authority has also stated that

the information would be held in the form of paper records, electronic records and emails and the Commissioner accepts that two hours is a reasonable estimate of the period that would be taken to locate relevant information for each of the seven areas. This gives a total time estimate of 14 hours to locate information.

24. The public authority has also broken down its estimate of the time taken to retrieve information according to the seven areas in which it anticipates relevant information is held. On this point the public authority has estimated that it would take three hours per area to retrieve this information. The Commissioner accepts that this is a reasonable estimate of time that would be taken in retrieving information from the various formats in which the public authority anticipates it is held. This gives a total time estimate of 21 hours to retrieve information.
25. In relation to the time that would be taken in extracting information, the public authority has stated that it would be necessary to read through documents to extract information falling within the scope of the request. It has estimated that this would take 1 hour for each area in which information is held, giving a total of 7 hours. The Commissioner accepts that 1 hour is a reasonable estimate of the time that would be taken in reading through documents to identify and extract the information within the scope of the request.
26. The total time estimate for locating, retrieving and extracting information is 42 hours, giving a cost estimate of £1050, in excess of the appropriate limit of £600. Whilst, as covered above, the Commissioner does not accept the cost estimate in relation to establishing whether information falling within the scope of the request is held, he does accept as reasonable the estimate of £1050 in relation to locating, retrieving and extracting the relevant information. As he has accepted as reasonable the estimate of the public authority that it would exceed the appropriate limit to comply with the request, the Commissioner concludes that section 12(1) provided that the public authority was not required to comply with section 1(1)(b) in relation to request (iii).

## Exemptions

### Section 23

27. The public authority has cited section 23(1) in relation to some of the information redacted from the document *“Review of detention practices in Iraq and Afghanistan”* that fell within the scope of request (i). This provides an exemption for information that relates to, or was supplied

by, either directly or indirectly, any of the bodies specified in section 23(3). This exemption is not subject to the public interest, meaning that if the information in question conforms to the class specified in this exemption, it is exempt from disclosure.

28. As noted above, on 17 November 2009 a representative of the Commissioner visited the public authority and viewed the information in question. During this visit the Commissioner's representative was able to verify that the information in question does relate to one of the bodies specified in section 23(3). The exemption provided by section 23(1) is, therefore, engaged in relation to this information.

## **Section 26**

29. Section 26(1)(b) was cited in relation to information redacted from the response to request (i). This section provides an exemption for information the disclosure of which would, or would be likely to, prejudice the capability, effectiveness or security of the armed forces of the Crown and / or any forces operating with those forces.
30. Consideration of this exemption is a two stage process; first disclosure of the information must be at least likely to produce the prejudice described in the exemption. Secondly, this exemption is subject to the public interest. This means that the information in question should be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, despite the exemption being engaged.
31. The analysis of this exemption is included in a confidential annex due to what this reveals about the content of the information. The conclusion of the Commissioner is that this exemption is engaged and that the public interest favours the maintenance of this exemption.

## **Section 27**

32. The public authority has cited section 27(1)(a) in relation to information redacted from the response to request (i). This section provides an exemption for information the disclosure of which would, or would be likely to, prejudice relations between the UK and any other state. Similarly to section 26(1)(b), consideration of this exemption is a twofold process; first the exemption must be engaged and secondly the public interest in the maintenance of the exemption must outweigh the public interest in disclosure.
33. Covering first whether the exemption is engaged, the first step in considering whether this exemption is engaged is to consider whether



the arguments advanced by the public authority are relevant to this exemption. The reasoning of the public authority for citing this exemption is that disclosure would be likely to prejudice the relations between the UK and the USA and the Commissioner accepts that this argument is relevant to the prejudice identified in the exemption.

34. Turning to the likelihood of this prejudice, in order for the Commissioner to conclude that prejudice would be likely to result, the possibility of this must be real and significant and more than hypothetical or remote. This approach is in line with that taken by the Information Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) in which it stated:

*“the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk.”* (paragraph 15)

35. The public authority has referred to the content of the information including mention of the United States armed forces and its practices in relation to detention in Iraq and Afghanistan. The public authority states that the USA would regard this information as sensitive and that the reaction of the USA to disclosure of this information would be likely to prejudice the relationship between it and the UK.

36. The Commissioner’s representative has verified that the information in question does refer to the US armed forces and its detention practices in Iraq and Afghanistan. On the basis that the actions of the US armed forces in Iraq and Afghanistan and in particular its practices in relation to detention have been the subject of intense focus and considerable controversy, the Commissioner accepts the representations of the public authority that the USA would regard this information as sensitive and would object to the disclosure of this information. Therefore, the Commissioner accepts that disclosure of this information would be likely to prejudice the relationship between the UK and USA and finds that the exemption provided by section 27(1)(a) is engaged. The Commissioner considers this approach to section 27(1)(a) to be in line with that taken by the Information Tribunal in the case *Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence* (EA/2006/0040) in which it stated:

*“prejudice can be real and of substance if it makes relations more difficult or calls for a particular damage limitation response to contain or limit damage which would not have otherwise have been necessary”* (paragraph 81)

## The public interest

37. Having concluded that the exemption is engaged it is necessary to go on to consider the balance of the public interest. In reaching a conclusion on the public interest, the Commissioner has taken into account the arguments advanced by the public authority in favour of maintenance of the exemption, as well as what the subject and content of the information suggest about the public interest.
38. The public authority has argued that it is in the public interest for the UK to maintain a strong relationship with the USA given the importance to the UK of this relationship. The public authority has also argued that there is a strong public interest in maintenance of the military relationship between the UK and the USA and that the maintenance of this relationship relies on trust on the part of the USA that confidential information relating to its military operations will not be disclosed.
39. The Commissioner accepts that maintenance of the strong relationship between the UK and the USA is in the public interest and that this public interest applies particularly strongly to the military relationship. This is a factor of very considerable weight in favour of maintenance of the exemption.
40. Turning to what the subject matter and content of the information suggest about the balance of the public interest, the Commissioner considers it significant that this information relates to actions taken by the armed forces in Iraq and Afghanistan and, in particular, relates to detention practices in those countries. The Commissioner believes there to be a considerable public interest in any information recording the activities of the armed forces in Iraq and Afghanistan and believes that this public interest is heightened in relation to information recording detention practices, given the particular controversy surrounding this issue.
41. The conclusion of the Commissioner is that the public interest in the maintenance of the exemption provided by section 27(1)(a) outweighs the public interest in disclosure. Whilst the Commissioner has recognised a significant public interest factor in favour of disclosure on the basis of the content and subject of the information in question, he has concluded that this is outweighed by the public interest in the maintenance of the relationship, both in general and militarily, between the UK and the USA.

**Section 38**

42. The public authority has cited sections 38(1)(a) and (b) in relation to names and acronyms of job titles included within the information falling within the scope of request (i). Section 38(1)(a) provides an exemption for information the disclosure of which would, or would be likely to, endanger the physical or mental health of any individual and section 38(1)(b) provides the same for information the disclosure of which would, or would be likely to, endanger the safety of any individual. The threshold for concluding that endangerment would be likely is as set out above at paragraph 34.
43. The argument of the public authority is that the individuals identified either by name or by acronyms of job titles would be associated with the report that falls within the scope of request (i) and would be targeted for attack as a result. In making this argument the public authority has specified endangerment relevant to sections 38(1)(a) and (b) and has identified the individuals that it believes would be subject to this endangerment. However, no evidence has been adduced specifically in support of the assertion of endangerment.
44. The Commissioner accepts that there are those who might seek to target and endanger the health and safety of individuals associated with the public authority. The issue here is, however, whether endangerment would arise through disclosure of the information in question. On this point, the Commissioner is not satisfied that the threshold of real and significant risk is met.
45. As noted above, the Commissioner accepts that there are those who might seek to target individuals associated with the public authority. It does not appear to be the case, however, that the information in question is the only means by which the individuals referred to either by name or by job title could readily be associated with the public authority; indeed the public authority has argued that it is via information in the public domain that the job titles could be linked to individuals.
46. The Commissioner does not accept that being associated with the report falling within the scope of request (i) would mean that the individuals in question were at a significantly higher risk of endangerment than they were already through their public association with the public authority. Therefore there is no real and significant risk of endangerment to health and safety likely to result through disclosure of the information in question. The conclusion of the Commissioner is, therefore, that the exemptions provided by sections 38(1)(a) and (b) are not engaged. As this conclusion has been reached

it has not been necessary to go on to consider the balance of the public interest.

## Section 42

47. The public authority has cited section 42(1) in relation to what it considers to be legal advice included in the report falling within the scope of request (i). Section 42(1) provides an exemption for information that is subject to legal professional privilege. This exemption is also qualified by the public interest.
48. Covering first whether the exemption is engaged, the public authority has claimed advice privilege, rather than litigation privilege, in this case. For information to be subject to a claim of legal professional privilege, it must record advice provided in a professional capacity by a qualified legal practitioner to a client. There must also have been no waiver of the privilege.
49. The Commissioner's representative verified, when viewing the information, that its content was consistent with the claim of legal professional privilege. The public authority also confirmed the job title of the legal practitioner who had provided the advice and that it did not consider there to have been any waiver of privilege in this case.
50. The Commissioner accepts that the exemption provided by section 42(1) is engaged. The basis for this conclusion is that the information in question records the provision of advice to the public authority from a qualified legal practitioner and so is, therefore, subject to legal professional privilege.

## The public interest

51. In considering the balance of the public interest in connection with section 42(1) here, the Commissioner has taken into account the inbuilt public interest in the concept of legal professional privilege, as well as what the particular factors in this case suggest about the balance of the public interest. This includes what harm may result, and what benefit to the public interest would result, through disclosure of the information in question. The inbuilt public interest in legal professional privilege was noted by the Information Tribunal in the case *Bellamy and Secretary of State for Trade and Industry* (EA/2005/0023):

*"...there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt*

*interest....it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case..."* (paragraph 35)

52. Turning to those factors relevant to the specific information in question here, the Commissioner has taken into account that the legal advice in question remains live; at the time of the request the armed forces were operating in Iraq and Afghanistan. Given these factors the Commissioner believes that some harm may result through the disclosure of this legal advice through prejudicing the ability of the public authority to follow this legal advice and, in so doing, preserve the legal rights of detainees. It is also important and in the public interest to avoid a situation where the public authority is discouraged from seeking legal advice relating to the rights of individuals as it is concerned that this advice may later be disclosed. The Commissioner considers this a valid factor of some weight in favour of maintenance of the exemption.
53. As noted when considering the public interest in connection with section 27(1)(a), the Commissioner considers there to be a significant public interest in the detainee report given the subject matter and content of it. This public interest extends to the legal advice in question here and the Commissioner considers this to be a valid public interest factor in favour of disclosure of considerable weight.
54. Further to the point made in paragraph 52 that the legal advice in question here concerns the rights of individuals, this can also be cited as a factor in favour of disclosure on the grounds that there is a public interest in verifying that the public authority has followed this legal advice. The Commissioner considers this to be a valid factor in favour of disclosure of some weight.
55. The Commissioner concludes that the public interest in the maintenance of the exemption outweighs the public interest in disclosure. In *DBERR v Dermot O'Brien* (EWHC 164 (QB)) the High Court noted that the inbuilt public interest in legal professional privilege should not mean that section 42(1) is, in effect, elevated to an absolute exemption when stipulating that consideration of the balance of the public interest should:

*"...acknowledge and give effect to the significant weight to be afforded to the exemption in any event, ascertain whether there were particular or further factors which pointed to non-disclosure and then consider whether the features supporting disclosure*

*(including the underlying public interests which favoured disclosure) were of equal weight at the very least..." (para 53)*

56. However, in this case the Commissioner believes that this inbuilt public interest, combined with the harm that may result through disclosure given that this advice is live and relates to the rights of individuals, outweighs the public interest he has recognised in favour of disclosure of this information. For these reasons, the Commissioner has concluded that the exemption should be maintained.

## **Section 40**

57. The public authority has cited the exemption provided by section 40(2) in response to request (ii). Section 40(2) provides an exemption for any information that is the personal data of any individual other than the requester and if the disclosure of that personal data would breach any of the data protection principles. Consideration of this exemption is, therefore, a twofold process; the first step is to consider whether the information constitutes the personal data of any third parties. The second step is to consider whether the disclosure of that personal data would breach any of the data protection principles.

58. Section 1(1) of the Data Protection Act 1998 (the "DPA") provides the following definition of personal data:

*"'personal data' means data which relate to a living individual who can be identified-*

*(a) from those data, or*

*(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller"*

59. The Commissioner considers it clear from the wording of the request that the information falling within the scope of this request would, according to the definition of personal data given above, constitute the personal data of individuals other than the complainant; namely the detainees listed.
60. Turning to whether the disclosure of this personal data would breach any of the data protection principles, the Commissioner has focussed on the first data protection principle, which provides that personal data shall be processed fairly and lawfully. In order for disclosure of the detainee list to be compliant with the first data protection principle, this disclosure must be, in general, fair, lawful and meet at least one of the conditions in Schedule 2 of the DPA. For sensitive personal data, it is

necessary to also meet at least one of the conditions in Schedule 3 of the DPA.

61. The Commissioner has considered first whether disclosure of the detainee list would be, in general, fair to those identified on this list. On this point the public authority has argued that disclosing that those identified on this list had been detained by the armed forces would be damaging to the reputation of those individuals and thus unfair. The Commissioner accepts this argument from the public authority as, whilst it may be the case that many named on this list were released without charge, it is a reasonable assumption that association with having been detained would be injurious to the reputation of those individuals. Disclosure of this information would, therefore, be in breach of the first data protection principle.
62. Amongst the complainant's arguments against the citing of section 40(2) was that DPA section 35(2) provides an exemption from the non disclosure provisions, which includes the first principle, of the DPA for the information in question. DPA section 35(2) provides an exemption from the non disclosure provisions where disclosure is necessary for the purpose of establishing legal rights. The argument of the complainant was that disclosure here was necessary in order to establish the legal rights of the detainees. However, the approach of the Commissioner is that a disclosure under the Freedom of Information Act is made for no other purpose than in order to comply with the Act. This means that section 35(2) of the DPA, which provides an exemption from the non disclosure provisions where disclosure is necessary for a specific purpose, is not relevant to disclosure via the Freedom of Information Act. This approach is supported by that taken by the Information Tribunal in the case *The Rt Hon Frank Field MP v the Information Commissioner* (EA/2009/0055) in which it stated the following about paragraph (1) of Statutory Instrument 2000/471, which provides for the processing of sensitive personal data in certain circumstances:

*"That fact [the confirmation or denial] and the attendant disclosure cannot be said to be 'for the purposes of prevention or detection of any unlawful act', quite the contrary; any such confirmation or denial would be for the purpose of disclosure under FOIA and for no other purpose."* (paragraph 34)
63. The Commissioner has found that information falling within the scope of request (ii) would constitute the personal data of individuals other than the complainant and that disclosure of this personal data would be in breach of the first data protection principle. The exemption provided by section 40(2) is, therefore, engaged.

## **Procedural Requirements**

### **Section 1**

64. In incorrectly stating at internal review stage that information falling within the scope of request (ii) was not held the public authority failed to comply with section 1(1)(a).
65. In withholding the information in relation to which sections 38(1)(a) and (b) were cited the public authority failed to comply with section 1(1)(b).

### **Section 10**

66. In relation to the information that was disclosed, in failing to respond within 20 working days of receipt of the request, the public authority did not comply with the requirement of section 10(1).
67. In failing to disclose the information in relation to which sections 38(1)(a) and (b) were cited within 20 working days of receipt of the request, the public authority failed to comply with the requirement of section 10(1).

### **Section 17**

68. In relation to the exemptions cited, in failing to provide a valid refusal notice within 20 working days of receipt of the request the public authority did not comply with the requirement of section 17(1).
69. In failing to cite section 12(1) in relation to request (iii) until internal review stage the public authority did not comply with the requirement of section 17(5) that a Notice citing section 12(1) should be provided within 20 working days of receipt of the request.

## **The Decision**

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70. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act in that it stated correctly that the information withheld from the response to request (i) was exempt by virtue of sections 23(1), 26(1)(b), 27(1)(a) and 42(1). The public authority also applied section 40(2) correctly in relation to request (ii) and section 12(1) in relation to request (iii). However, the Commissioner also finds that the public authority did not comply with



the Act in that sections 38(1)(a) and (b) were cited incorrectly and that it failed to comply with the procedural requirements of sections 1(1)(a), 1(1)(b), 10(1), 17(1) and 17(5) in its handling of the request.

## **Steps Required**

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71. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
  - disclose to the complainant the information falling within the scope of request (i) in connection with which sections 38(1)(a) and (b) were cited.
72. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

## **Failure to comply**

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73. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## **Other matters**

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74. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

As noted above at paragraph 9, the complainant first requested the information described in requests (ii) and (iii) on 6 February 2008. Despite the complainant being specific that he was making an information request in accordance with the Act, the public authority appeared to handle this as an enquiry made by an MP outside the scope of the Act and the response provided by the Defence Secretary made no reference to the Act when refusing to disclose some of the information requested. The public authority should ensure that in future it recognises requests for information that require a response compliant with the Act, regardless of the identity of the requester, and respond to these accordingly.

75. The section 45 code of practice (the "code") contains recommendations for good practice, some of which are triggered by specific sections of the Act. So, for example, when refusing a request under section 12, paragraph 14 of the code states that authorities should:

*"....consider providing an indication of what, if any, information could be provided within the cost ceiling. The authority should also consider advising the applicant that by reforming or re-focusing their request, information may be able to be supplied for a lower, or no, fee."*

76. The Commissioner notes that the public authority did not provide the complainant with any breakdown of the estimated costs of complying with request (iii) in the internal review response. Although the Act does not require a public authority to provide a costs breakdown when refusing a request under section 12, the Commissioner considers that it is good practice to do so. He would advise the public authority that conformity to the code and the inclusion of a costs breakdown in a section 12 refusal notice is likely to make it easier to comply with the section 16 duty to advise and assist an applicant on what could be provided within the cost limit.
77. The Commissioner's published guidance on internal reviews states that a review should be conducted within 20 working days, unless there are exceptional circumstances, in which case the review period may be extended to 40 working days. The Commissioner is concerned that in this instance, despite his guidance, it took over 120 working days for an internal review to be completed. His concerns in this regard are echoed in the practice recommendation served to Ministry of Defence in August of 2009.

## Right of Appeal

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78. Either party has the right to appeal against this Decision Notice to the First-Tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals  
PO Box 9300  
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If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is sent.

**Dated the 15<sup>th</sup> day of June 2010**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## **Legal Annex**

### **Section 1**

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

### **Section 10**

Section 10(1) provides that –

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

### **Section 12**

Section 12(1) provides that –

"Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit."

### **Section 17**

Section 17(1) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies."

Section 17(5) provides that –

“A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.”

### **Section 23**

Section 23(1) provides that –

“Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).”

Section 23(3) provides that –

“The bodies referred to in subsections (1) and (2) are-

- (a) the Security Service,
- (b) the Secret Intelligence Service,
- (c) the Government Communications Headquarters,
- (d) the special forces,
- (e) the Tribunal established under section 65 of the Regulation of Investigatory Powers Act 2000,
- (f) the Tribunal established under section 7 of the Interception of Communications Act 1985,
- (g) the Tribunal established under section 5 of the Security Service Act 1989,
- (h) the Tribunal established under section 9 of the Intelligence Services Act 1994,
- (i) the Security Vetting Appeals Panel,
- (j) the Security Commission,
- (k) the National Criminal Intelligence Service, and
- (l) the Service Authority for the National Criminal Intelligence Service.”

### **Section 26**

Section 26(1) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) the defence of the British Islands or of any colony, or

(b) the capability, effectiveness or security of any relevant forces."

## **Section 27**

Section 27(1) provides that –

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) relations between the United Kingdom and any other State,
- (b) relations between the United Kingdom and any international organisation or international court,
- (c) the interests of the United Kingdom abroad, or
- (d) the promotion or protection by the United Kingdom of its interests abroad."

## **Section 38**

Section 38(1) provides that –

"Information is exempt information if its disclosure under this Act would, or would be likely to-

- (a) endanger the physical or mental health of any individual, or
- (b) endanger the safety of any individual."

## **Section 40**

Section 40(2) provides that –

"Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied."

Section 40(3) provides that –

"The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of

the information to a member of the public otherwise than under this Act would contravene-

- (i) any of the data protection principles, or
  - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded."

Section 40(4) provides that –

"The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data)."

## **Section 42**

Section 42(1) provides that –

"Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information."