

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 16 March 2010

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

Summary

The complainant requested from the Ministry of Defence a copy of the movement order issued to the Ministry of Defence Special Escort Group, Fleet Protection Group Royal Marines, Defence Logistics Organisation Nuclear Movements Team and staff from AWE plc, in relation to the nuclear warhead which travelled from AWE Aldermaston / Burghfield to RNAD Coulport and back in January 2007. The Ministry of Defence relied on section 24 (National security) and section 26 (Defence) not to communicate the information to the complainant. The Commissioner found that the exemption was engaged and that the public interest test weighed in favour of the maintenance of the exemption. However, the Commissioner decided that the Ministry of Defence's public interest test determination was in breach of section 17(3) and there were further breaches of sections 17(1) and 17(1)(b). The Commissioner also expressed his concern at the public authority's lateness in completing the internal review.

The Commissioner's Role

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

2. On 1 May 2007 the complainant wrote to the Ministry of Defence ("MOD") and requested that it provide her with the following information:

"Copies of all movement orders issued to the Ministry of Defence Special Escort Group, Fleet Protection Group Royal Marines, and staff from the Defence Logistics Organisation Nuclear Movements Team and staff from AWE plc in relation to the nuclear warhead which travelled from AWE Aldermaston / Burghfield to RNAD Coulport and back in January 2007".
3. The MOD refused the request on the grounds that it was exempted from being communicated to the complainant as it was information relating to national security, defence or law enforcement (sections 24, 26 and 31 of the Act respectively). The letter went on to say that the MOD would require further time to consider the public interest test where applicable. This refusal was communicated to the complainant in a letter dated 17 May 2007. By way of a letter dated 24 July 2007 the MOD explained that it had now considered the public interest test and that it favoured the maintenance of the exemptions provided by sections 24, 26, 31 and 38 of the Act. The Commissioner notes that this is the first time the MOD had sought to rely on the exemption provided by section 38 not to disclose information to the complainant.
4. The complainant asked the MOD to review its decision in a letter dated 7 September 2007.
5. On 12 November 2007 the complainant agreed with the MOD (who had raised the issue with her) that her information request could be properly viewed as a request solely for the Movements Operation Order (which actually authorises and instructs the movements) rather than the Movement Order in its voluminous entirety. The Movements Operations Order itself is the authority, and provides the instructions for each movement.
6. The MOD conducted a review which concluded that the section 24 (national security) exemption was engaged and this absolved them from the duty to communicate the requested information to the complainant. The MOD next considered the applicability of section 26 of the Act. It concluded that the release of the information would, or would be likely to prejudice the United Kingdom's nuclear deterrent. This would, in turn, prejudice the defence of the British Islands. As section 24 and 26 are qualified exemptions the MOD next considered the public interest test. It acknowledged that disclosure would be an

aid to public accountability and thus a public interest factor favouring disclosure. Public interest factors against disclosure included safeguarding the UK's national security as represented by the nuclear deterrent and specifically maintaining the efficiency and effectiveness of the MOD's security arrangements for that deterrent. Balancing the competing public interest factors the MOD concluded that overridingly the public interest factors against disclosure outweigh those for disclosure and therefore the public interest lay with the maintenance of the exemption for sections 24 and 26. The MOD went on to say that, given that sections 24 and 26 exempted the information from disclosure, on the grounds of avoiding further expenditure of public money it declined to consider whether sections 31 and 38 could also exempt from disclosure some or all of the requested information. These review findings were given to the complainant in a letter dated 7 January 2008.

The Investigation

Scope of the case

7. By way of a letter dated 13 February 2008 the complainant contacted the Commissioner to complain about the way her request for information had been handled. In particular she asked the Commissioner to consider:
 - Whether the MOD has followed the law and relevant guidance and given sufficient consideration to the relevant factors in applying a public interest test to the disclosure of the information.
 - Whether the balance of the public interest lies in favour of disclosure of some or all parts of the movement order requested given that the order relates to a matter which is now over a year in the past and thus of reduced operational significance, yet touches upon a controversial matter of public debate.

Chronology

8. As part of his investigation the Commissioner wrote to the MOD (on 13 November 2009) asking them to lay out fully the public interest test considerations that were considered to reach the decision not to meet the complainant's information request. Under cover of a letter dated 3 December 2009 the MOD provided the Commissioner with a copy of a document that detailed its considerations of the public interest test and included an extended explanation of the requested information. It explained that the Movements Operations Order is fundamentally

operational in nature. It details the operational procedures followed for a particular movement of the nuclear convoy, including details of the protection afforded to the movement and the contingency plans that were in place to deal with any incident or accident. The requested information therefore consists of:

- Detailed timing and routing information, including rest breaks and crew change locations.
- Vehicles to be used for the movement, including registration numbers
- Names and roles of convoy personnel.
- Call signs and code words associated with the movement.
- Details of domestic arrangements including the accommodation to be used by convoy personnel.

Findings of fact

9. The staff magazine of the Ministry of Defence Police, 'Talkthrough', in 2004 published two articles featuring the work of the Ministry of Defence Police Special Escort Group. This group has responsibility for escorting Nuclear Weapons Convoys and Special Nuclear Material Convoys. The information within the articles, and thus in the public domain of course, is significantly less detailed than the requested information. The articles contained interviews with named Ministry of Defence Police Officers responsible for escorting convoys and included information on the level of protection afforded to the convoys. The articles gave some information as to the configuration of the convoys, the number and types of vehicles used together with the duties of individual members of the police escort. The articles were included in issues 117 and 118 both of which are publicly available on the Ministry of Defence website.

Analysis

Exemption

10. Section 24 (1) of the Act gives an exemption from disclosing information where the exemption is "required for the purpose of safeguarding national security". This exemption is subject to a public interest test.
11. "National security" is not defined in law but it is capable of a wide interpretation. The Commissioner's view is that interests of national security include the preventing of military and terrorist attacks on the United Kingdom. The exemption provided by section 24 (1) of the Act

can only be relied upon when it is required for the purposes of safeguarding national security. The Commissioner notes in particular that, as regards the application of section 24(1):

- It does not apply simply because the information relates to national security.
- The word "required" means "reasonably necessary". It may not be vital to apply the exemption but it must certainly be more than just useful or convenient.
- The exemption should not be applied in a blanket fashion. There must be evidence that disclosure of the information in question would pose a real and specific threat to national security.

12. The MOD averred that as stated in the Strategic Defence Review 'New Chapter' (2002) the United Kingdom's nuclear deterrent is its ultimate guarantor of the nation's security. Releasing the information would, the MOD went on to say, prejudice that security. The information if given public dissemination, even in part, would greatly assist an attack on future convoys.
13. The MOD acknowledged the apparent validity in the complainant's argument that the information requested related to a single past movement and may be of little use to accurately predict future convoy movements. However, the MOD went on to say that the Movement Operations Order requested contained highly detailed information which could result it in being of great assistance in planning an attack on a future convoy. The detail was concerned with time and route information, rest breaks, crew change locations, vehicles used, call signs, code words, and the exact nature of the load. The Movement Order also detailed the utilisation of security resources. All of which could provide useful inferences and extrapolations for other convoys.
14. The Commissioner is persuaded by the MOD arguments that releasing information regarding the movement of nuclear weaponry would put in jeopardy the national security of the country. It is clear to the Commissioner that providing information regarding the whereabouts of personnel, vehicles, communication usage and the route(s) would assist those who would wish to harm the United Kingdom and thereby jeopardising of safeguarding national security. In reaching this decision the Commissioner takes cognisance that the requested information relates to one past nuclear convoy. However the Commissioner accepts the validity of the MOD's arguments that releasing this information would reveal operational details and security resources that would be most likely common to future movements. The public release of this

information would be an asset acquisition for those who seek to jeopardise the United Kingdom's national security. That is, that detailed public knowledge of the type of security arrangements in place would undermine the effectiveness of those arrangements and make the nuclear weapons more vulnerable to planned attack or disruption in future. The Commissioner's decision therefore is that the exemption afforded by section 24 (1) is engaged.

Public interest test

15. Section 24 (1) is a qualified exemption and is therefore subject to the public interest test under section 2(2)(b) of the Act. Section 2(2)(b) provides that information to which a qualified exemption applies shall only not be disclosed where, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.

16. The Commissioner's view is that when considering the public interest test, only the factors relevant to and inherent in the exemption provided by section 24 should be taken into account. This view accord with the Information Tribunal decision in *Bellamy v the Information Commissioner and the DTI (EA/2005/0023)*, where it (at paragraph 5) clarified that only relevant public interest considerations could be taken into account, stating that:

"As section 2(2)(b) makes clear, the relevant exercise is to weigh the public interest in maintaining the exemption which is manifested by the relevant provisions against the public interest in disclosing the information. If the weighing process is in favour of the maintenance of the exemption, then any duty to communicate or disclose is disapplied. It necessarily follows that not all public interest considerations which might otherwise appear to be relevant to the subject matter should be taken into account. What has to be concentrated upon is the particular public interest necessarily inherent in the exemption or exemptions relied upon."

17. In considering the public interest test the Commissioner considered the following:

The Public Interest Factors for Disclosure

- It would enable the public to determine whether the MOD was complying with its legal obligations (by enabling a comparison between what is legally required and what is actually done) regarding the movement of nuclear weaponry.
- There is an assumption in the Act that openness is, in itself, to be regarded as something which is in the public interest.

- Aid public understanding more about the way in which these operations are planned and take place.
- It would assist in furthering public debate regarding the nuclear arms deterrent.

The Public Interest Factors for Maintenance of the Exemption

- Safeguarding national security
 - The maintenance, efficiency and effectiveness of the MOD's safety and security plans for nuclear convoys will be diminished if the information is released.
18. The Information Tribunal in *Guardian Newspapers Limited and Heather Brooke v the Information Commissioner and the BBC* (EA/2006/0011 and EA/2006/0013) stated that there is an assumption in favour of disclosure under the Act, even though not expressly stated. It said: "what it means is that there is always likely to be some public interest in favour of the disclosure of information under the Act. The strength of that interest, and the strength of the competing interest in maintaining any relevant exemption, must be assessed on a case by case basis".
19. The public interest factors that favour disclosure are, in the Commissioner's view, outweighed by the public interest factors that favour maintaining the exemption. Regarding the factors that favour openness the Commissioner considers that the public interest has to some extent been met by the disclosure of less sensitive information regarding the operation of nuclear weapon convoys. The public interest in safeguarding national security, particularly having regard to the likely consequences of the requested information being placed in the hands of those who would do harm to the United Kingdom, lies in the maintenance of the exemption. In reaching this decision the Commissioner took into consideration that the requested movement order was for a past event however the Commissioner noted that the routes used by the nuclear convoy are finite (given the load of the nuclear convoy there are a limited number of usable routes) and therefore the information retains a degree of future value. The Commissioner accepts that public disclosure of the information would clearly be advantageous for those who would wish to attack or interfere with the convoy. Additionally as the exemption at section 24 (1) only applies when it is necessary (and the Commissioner's decision is that it is, for the reasons given above) to safeguard national security these are strong (but not solely determinative) public interest factors, inherent in finding section 24 (1) is engaged, that favour its maintenance.
20. Having found that section 24 (1) was engaged (and that the public interest favoured the maintenance of the exemption) the Commissioner

need not consider whether the information could also be withheld under section 26.

Procedural requirements

21. The Commissioner finds the MOD in breach of section 17(1) by its failure to specify its reliance on section 38 within 20 working days of receiving the request for information. The MOD's refusal notice dated 17 May 2007 did not cite the subsections of section 26 and section 31, relied on by the MOD not to meet the information request, and this places them in breach of section 17(1)(b). The MOD's refusal notice also did not explain the relevant prejudice needed to be avoided which required its reliance on section 24. Whilst this deficiency was addressed by the MOD, in the internal review, it remains in breach of section 17(1) for not explaining the relevant prejudice within 20 working days.
22. The Commissioner next considered the time it took for the MOD to reach its conclusions on the public interest test. Section 17(3) (full wording in the legal annex) does allow the public authority to provide its public interest determination in a separate notice 'within such time that is reasonable in the circumstances'. The Commissioner has issued publicly available Good Practice guidance on this point. This can be found at: http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/foi_good_practice_guidance_4.pdf. It states the following:

"...our view is that public authorities should aim to respond fully to all requests within 20 working days. In cases where the public interest considerations are exceptionally complex it may be reasonable to take longer but, in our view, in no case should the total time exceed 40 working days." In this case, notification of the extension to the time limit was given on 17 May 2007 but the final refusal notice was not issued until 24 July 2007. Accordingly the Commissioner's decision is, given it took in excess of 40 working days for the MOD to reach its public interest test determination, that the MOD was in breach of section 17(3).

The Decision

23. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- The MOD was correct to refuse to disclose the redacted information on the basis that it is exempt from disclosure by virtue of section 24(1)

24. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- The MOD breached section 17(1) of the Act by failing to provide a refusal notice that cited the full subsections of the exemptions they relied upon, by failing to specify its reliance on section 38 within 20 working days of the information request and for not specifying the relevant prejudice.
- The MOD breached section 17(3) by not issuing a decision on the public interest test within a reasonable time.

Steps Required

25. The Commissioner requires no steps to be taken.

Other matters

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

27. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit time scale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner therefore expresses his concern that it took over 60 working days for an internal review to be completed.

Right of Appeal

28. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk

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

Dated the 16th day of March 2010

Signed

**Gerrard Tracey
Assistant Commissioner**

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

Legal Annex

General Right of Access

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."

Time for Compliance

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 10(2) provides that –

"Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt."

Section 10(3) provides that –

"If, and to the extent that –

- (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
- (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given."

Refusal of Request

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(3) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

National Security

Section 24(1) provides that –

"Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security."