

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 21 July 2011

**Public Authority:** Ministry of Defence  
**Address:** Main Building (Level 1 Zone N)  
Whitehall  
London SW1A 2HB

### Summary

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The complainant requested information relating to a specified address during the 1970s. The MOD refused to confirm or deny whether it held any relevant information, citing the exemptions at sections 23(5), 24(2), 26(3) 31(3), 38(2) and 40(5) of the Act. The Commissioner finds that the MOD was entitled to refuse the request under sections 23 and 24, and does not require any further steps to be taken. However the Commissioner also recorded procedural breaches in relation to the refusal notice issued by the MOD.

### 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.

### Background

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2. The complainant in this case made similar requests to two public authorities. The Commissioner has already issued a Decision Notice in relation to a request made to the Police Service of Northern Ireland (the PSNI)<sup>1</sup>. In that case the Commissioner found that the PSNI was entitled to refuse to confirm or deny whether it held information relevant to the complainant's request.

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<sup>1</sup> Case reference FS50315818

## The Request

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3. On 4 January 2010 the complainant requested the following information from the Ministry of Defence (the MOD):

*"I am looking for information that you might have on myself or my family home at [address provided]. I lived at the above address from [date]. The house was used by the Provisional IRA for many years as a weapons dump bomb factory and a house to plan and plot murder. During that time it was searched by the British Army under the Prevention of Terrorism Act."*

4. The MOD responded to the complainant on 18 February 2010. The MOD explained that it was refusing to confirm or deny whether it held information relevant to the request under a number of exemptions:

- Section 23(5): information supplied by or relating to certain security bodies
- Section 24(2): national security
- Section 26(3): defence
- Section 31(3): law enforcement
- Section 38(2): health and safety
- Section 40(5): personal information

5. The complainant requested an internal review in an undated letter, which was received by the MOD on 17 March 2010.

6. The MOD responded to the complainant on 13 May 2010. The MOD advised that it had completed the internal review but upheld its refusal to confirm or deny whether it held information relevant to the request.

## The Investigation

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### Scope of the case

7. As noted above the complainant made complaints to the Commissioner about the same request made to two public authorities, the PSNI and the MOD, and provided the Commissioner with correspondence relating to both requests. The Commissioner considered the correspondence provided and wrote to the complainant on 2 September 2010 to clarify the status of his complaints. At this stage the Commissioner explained to the complainant that he would investigate the complaints relating to the PSNI and the MOD under separate case references.

## Chronology

8. Unfortunately the Commissioner's investigation was delayed owing to the volume of complaints received. The Commissioner also recognised that this case was closely linked with the other complaint made by the complainant about the PSNI. In these circumstances the Commissioner considered it appropriate to resolve the substantive issues in the PSNI complaint before progressing the MOD complaint.
9. On 8 June 2011 the Commissioner wrote to the MOD as he required some further information in order to complete his investigation. The MOD responded on 5 July 2011.
10. The Commissioner recognises that many of the arguments put forward by the MOD are similar to those submitted in the PSNI case. This is inevitable given the nature of the requests made to each public authority. In addition the Commissioner notes that he is unable to provide details of some of the MOD's arguments as they have been provided in confidence. Therefore the analysis below will necessarily replicate some of the analysis in the PSNI Decision Notice, although the Commissioner has considered the case thoroughly and on its own merits.

## Analysis

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### Exemptions

#### **Section 23: Information provided by or relating to security services Section 24: National security**

11. Under section 1(1)(a) of the Act, a public authority is obliged to advise the applicant whether or not it holds the requested information. This is known as the "duty to confirm or deny". However, the duty to confirm or deny does not always apply and authorities may refuse to confirm or deny in reliance on certain exemptions under the Act.
12. In this case the MOD refused to confirm or deny whether it held information relevant to the request in reliance on sections 23(5) and/or 24(2) of the Act. Section 23(1) and (5) state that:

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

*"...(5) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3)".*

13. Sections 24(1) and (2) state that:

*"(1) 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.*

*(2) The duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security".*

14. In terms of refusing to confirm or deny, the Commissioner recognises that in some circumstances it will be appropriate for a public authority to rely on both provisions without stating which of the two exemptions actually applies. This approach was supported in the Information Tribunal case *Baker v Information Commissioner and the Cabinet Office*<sup>2</sup>. In this case the Cabinet Office sought to rely on 23(5) and 24(2), explaining that relying on section 23(5) alone to neither confirm nor deny could itself reveal the fact that one of the security bodies listed in section 23(3) was or could have been involved. Therefore the Cabinet Office relied on both exclusions in order to avoid disclosing exempt information.
15. In this case the MOD explained to the Commissioner that exclusion from the duty to confirm or deny was required to protect whether or not the MOD and other security bodies had an interest in the property in question. The MOD drew the Commissioner's attention to similar arguments made in the PSNI case, where the Commissioner accepted that it was important to avoid any kind of indication of such an interest. The Commissioner considers this to be a strong argument in support of refusing to confirm or deny.
16. Where a public authority has relied on an exclusion to the duty to confirm or deny, the Commissioner must ensure that his Decision Notice does not give any indication as to whether or not information is in fact held by the authority, or, in this case, under which exemption any information held would be exempt. As a consequence, it is not always possible for the Commissioner to comment in great detail on the reliance by a public authority on the exemption concerned.

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<sup>2</sup> Appeal no EA/2006/0045

17. In light of the above, the Commissioner notes that, as with the PSNI case, the MOD provided to him a significantly more detailed explanation than can be referred to in this Decision Notice. The Commissioner can however confirm that he was provided with sufficient information to enable him to conclude that the exemptions at section 23(5) and 24(2) are engaged in relation to the complainant's request.
18. Section 23(5) provides an absolute exclusion, but section 24(2) is qualified. Therefore the Commissioner is required to consider whether, in all the circumstances of the case, the public interest in maintaining the exclusion from the duty to confirm or deny outweighs the public interest in disclosing whether the MOD holds information relevant to the complainant's request.

### **Public interest arguments in favour of confirming or denying whether information is held**

19. The MOD accepted that there was a public interest (albeit limited) in informing the public of its security related activities. Confirming or denying whether information was held would demonstrate openness and transparency, especially for those affected by events in Northern Ireland.
20. In this case confirming or denying whether information is held could assist the public in understanding how and why decisions were taken on operational matters.
21. The complainant expressed the view that, given that any information would be more than thirty years old, its ability to cause harm could be limited. In addition, the complainant drew the Commissioner's attention to the wording of his request, in which he recollected that searches had taken place at the property in question.
22. The Commissioner also notes that section 24(2) is not an absolute exemption. Therefore Parliament recognised that some circumstances might arise where the public interest would favour confirming or denying that information was held.

### **Public interest arguments in favour of maintaining the exclusion of the duty to confirm or deny**

23. Again, the Commissioner is limited in the extent to which he can include details of the MOD's arguments in this Decision Notice. However he can confirm that the MOD provided more detailed arguments than those summarised below.

24. As indicated above, the MOD argued that confirming or denying whether information was held would inform the public (including terrorists) as to the extent of military activities at the time. This would allow terrorists to ascertain what information the MOD is likely to hold.
25. The MOD maintained that there remained a "serious terrorist threat" in Northern Ireland, and that anything that assisted terrorists in understanding the level or nature of security bodies' interest or activity in the past could subsequently enable them to assess current interest or activity. This would be detrimental to national security and would not be in the public interest.
26. The MOD also argued that a refusal to confirm or deny must be applied consistently to avoid undermining future responses. Confirming or denying in this case would enable comparisons between other responses, past or future, which would undermine the use of the refusal to confirm or deny more generally.

### **Balance of the public interest**

27. The Commissioner appreciates that the complainant lived at the property in question during the specified time period, and has recollections of searches having taken place. However the fact that searches may have taken place does not necessarily mean that information about those activities was held at the time of the complainant's request. In addition, the Commissioner must decide whether it is appropriate for a public authority to confirm or deny to the public at large that information is held, regardless of the views of a particular individual.
28. The Commissioner also acknowledges the potential difficulty in assessing whether confirming or denying whether a public authority holds information relating to events more than thirty years ago could cause harm now. However, as indicated in the PSNI Decision Notice the Commissioner is mindful of the political situation in Northern Ireland. In this context the Commissioner agrees that the MOD must avoid disclosing any information (even confirming whether information is held) which could assist terrorists and adversely affect national security.
29. The Commissioner recognises that section 24(2) provides a qualified exemption, but considers that there are strong arguments in this particular case for maintaining the refusal to confirm or deny whether information is held. Therefore the Commissioner concludes that in this case the public interest in maintaining the exclusion from the duty to

confirm or deny outweighs the public interest in disclosing whether the MOD holds relevant information.

### **Section 40(5): Personal information**

30. The MOD also cited section 40(5) to refuse to confirm or deny whether it held information relevant to the complainant's request. This is because information relating to the complainant's "family home" (as indicated in his request) could potentially be personal data of the complainant or other individuals. Therefore, in refusing to confirm or deny (i.e. to the public at large) whether it held any information the MOD was required to refuse to confirm or deny whether it held information relating to the complainant.
31. The Commissioner is satisfied that the MOD is not required to confirm or deny whether it holds information which, if held, would be the personal data of the complainant, by virtue of the exemption at section 40(5) of the Act.

### **Other exemptions claimed**

32. As the Commissioner finds that the exemptions at section 23(5) and 24(2) apply to the entirety of the complainant's request he is not required to also make a decision in relation to the other exemptions claimed.

### **Procedural requirements**

#### **Section 17: refusal notice**

33. Section 17(1) of the Act states 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".*

34. Having considered the correspondence, the Commissioner is of the view that the MOD's refusal notice did not adequately explain to the

complainant why the various exemptions were being applied to his request. The Commissioner understands the need to avoid disclosing exempt information (or in this case to avoid confirming or denying whether information is held). However, in this case the refusal notice did not explain why any of the exemptions were engaged; it merely provided a very brief summary of the public interest considerations. The internal review did not provide any further explanation. Therefore the Commissioner finds that the MOD failed to comply with the requirements of section 17(1)(c) of the Act in relation to the complainant's request.

35. The Commissioner also notes that the refusal notice was issued well outside the statutory time for compliance (20 working days following the date of receipt of the request). The MOD took 34 working days to respond to the complainant's request, which is a clear breach of section 17(1) of the Act. The Commissioner understands that the MOD considered it necessary to liaise with the PSNI; however the Act does not provide for an extension of the time for compliance for consultation with third parties.

## The Decision

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36. The Commissioner's decision is that the MOD dealt with the following element of the request in accordance with the requirements of the Act:
- The MOD correctly applied the exclusion from section 1(1)(a) provided by sections 23(5), 24(2) and 40(5).
37. However, the Commissioner has also decided that the following element of the request was not dealt with in accordance with the Act:
- The MOD failed to provide an adequate or timely refusal notice in compliance with sections 17(1) and 17(1)(c) of the Act.



## Right of Appeal

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38. 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](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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 21<sup>st</sup> day of July 2011**

**Signed .....**

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

## **Legal Annex: Relevant statutory obligations**

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### **Freedom of Information Act 2000**

#### **General right of access**

Section 1(1) provides that -

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

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- (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.”

#### **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.”

#### **Information supplied by or relating to, bodies dealing with security matters**

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(2) provides that –

“A certificate signed by a Minister of the Crown certifying that the information to which it applies was directly or indirectly supplied by, or relates to, any of the bodies specified in subsection (3) shall, subject to section 60, be conclusive evidence of that fact.”

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 23(4) provides that –

“In subsection (3)(c) “the Government Communications Headquarters” includes any unit or part of a unit of the armed forces of the Crown which is for the time being required by the Secretary of State to assist the Government Communications Headquarters in carrying out its functions.”

Section 23(5) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).”

## **Defence**

Section 26(1) provides that –

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

- (m) the defence of the British Islands or of any colony, or
- (n) the capability, effectiveness or security of any relevant forces.”

Section 26(3) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).”

### **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.”

Section 24(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security.”

### **Law enforcement**

Section 31(1) provides that –

“Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,
- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls,
- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
- (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes

specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment."

Section 31(2) provides that –

"The purposes referred to in subsection (1)(g) to (i) are-

- (a) the purpose of ascertaining whether any person has failed to comply with the law,
- (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
- (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,
- (d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,
- (e) the purpose of ascertaining the cause of an accident,
- (f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,
- (g) the purpose of protecting the property of charities from loss or misapplication,
- (h) the purpose of recovering the property of charities,
- (i) the purpose of securing the health, safety and welfare of persons at work, and
- (j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work."

Section 31(3) provides that –

"The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1)."

## **Health and safety**

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 38(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, have either of the effects mentioned in subsection (1).”

### **Personal Information**

Section 40(5) provides that –

“The duty to confirm or deny-

(a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and

(b) does not arise in relation to other information if or to the extent that either-

(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of the Act were disregarded, or

(ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).”