

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 September 2012

Public Authority: Ministry of Defence

Address: Main Building
Whitehall
London
SW1A 2HB

Decision (including any steps ordered)

1. The complainant has requested information relating to members of the Ministry of Defence (MOD) who may have been seconded to the Metropolitan Police Service Counter-Terrorism Command or other counter terrorism units in the UK. The MOD refused to confirm or deny that it held the information relying on sections 23(5), 24(2), 26(3) and 31(3) of FOIA.
2. The Information Commissioner's decision is that the MOD was correct to neither confirm nor deny that the requested information was held in accordance with sections 23(5) and 24(2).

Request and response

3. On 24 November 2011, the complainant wrote to the UK Counter Terrorist and Resilience Team (UKCT&R) at the MOD and requested information in the following terms:
 - 1) *The total number of individuals that have ever been seconded from the MoD to the 4 CTU's¹ in the UK and Counter-Terrorism Command that is part of the Metropolitan Police Service (known as CTC/SO15) since September 11 2001.*

¹ Counter Terrorism Unit

- 2) *The total number of MoD staff currently working within the 4 CTU's and CTC/SO15*
 - 3) *The ranks, regiments and service (ie, SAS, Navy, RAF etc) of the officers working within the 4 CTU's and SO15, and*
 - 4) *The purpose of having MoD personnel working with and within CTU's and SO15.*
4. The MOD responded on 22 December 2011. It stated that the duty to confirm or deny whether the requested information was held did not apply by virtue of section 23(5) (Security Bodies), section 24(2) (National Security), section 26(3) (Defence) and section 31(3) (Law Enforcement) of the Act, and that it therefore neither confirms nor denies whether it holds information relating to the request.
 5. The complainant asked the MOD to review its response in relation to parts 1, 2 and 4 of his request only.
 6. Following an internal review the MOD wrote to the complainant on 31 January 2012 and maintained its original position that it would neither confirm nor deny that the requested information was held.

Scope of the case

7. The complainant contacted the Information Commissioner to complain about the way his request for information had been handled. He told the Information Commissioner that he was dissatisfied with the MOD response and requested that the Information Commissioner conduct an investigation into the handling of the request.
8. The MOD has made a claim that it is not obliged to confirm or deny that the requested information is held by virtue of four separate exemptions, namely section 23(5) (Security Bodies), section 24(2) (National Security), section 26(3) (Defence) and section 31(3) (Law Enforcement).
9. The MOD told the Information Commissioner that it was applying section 23(5) jointly with section 24(2). It also told him that it was applying sections 26(3) and 31(3) to the requested information should section 23(5) and 24(2) not be engaged.
10. The scope of the Information Commissioner's investigation is to focus solely on whether the MOD was correct to neither confirm nor deny that the requested information is held by virtue of the exemptions cited.

11. The Information Commissioner notes that the complainant confirmed that he narrowed his request to parts 1, 2 and 4 only. Therefore the Information Commissioner has only included those aspects of the request in his investigation.

Reasons for decision

12. The Information Commissioner has published guidance on the duty to neither confirm nor deny²:

'Section 1(1)(a) of FOIA requires a public authority to inform a requester whether it holds the information specified in the request. This is known as 'the duty to confirm or deny'. In most cases, a public authority will be able to comply with its duty to confirm or deny under section 1(1)(a) – in other words, it will be able to respond to a request by at least informing the requester whether or not it holds the information. In most cases where information is held, a public authority will go on to consider whether information should be provided under section 1(1)(b), or whether it is subject to an exemption in Part II of the Act.

However, there may be occasions when complying with the duty to confirm or deny under section 1(1)(a) would in itself disclose sensitive or potentially damaging information that falls under an exemption. In these circumstances, the Act allows a public authority to respond by refusing to confirm or deny whether it holds the requested information. This is called a 'neither confirm nor deny' (NCND) response.

A public authority can only refuse to confirm or deny whether it holds the information, if this would in itself reveal information that falls under an exemption. Public authorities should take decisions to neither confirm nor deny whether information is held in a similar manner to decisions to refuse to disclose information. A public authority must be certain that an exemption in the Act applies in respect of the confirmation/denial, and where an exemption is qualified by the public interest test, that the public interest favours neither confirming nor denying that the information is held.'

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http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/when_to_refuse_to_confirm_or_deny_section_1_foia.ashx

13. Section 23(5) (Security Bodies), section 24(2) (National Security), section 26(3) (Defence) and section 31(3) (Law Enforcement) all provide grounds for excluding the duty to confirm or deny.
14. The MOD has confirmed a joint reliance of section 23(5) (Security Bodies) and section 24(2) (National Security) together, but that in the alternative it was relying on section 26(3) (Defence) and section 31(3) (Law Enforcement).
15. The Information Commissioner has therefore first considered the joint application of sections 23(5) and 24(2).

Section 23(5) Information relating to security bodies

Section 24(2) National Security

16. The MOD refused to confirm or deny whether it held any of the requested information claiming a reliance on sections 23(5) and 24(2) of FOIA.
17. Section 23(5) is an absolute exemption which means that there is no requirement for the public interest test to be carried out. Section 23(5) states 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).'
18. Section 24(2) states 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.-'
19. Unlike the related exemptions provided by sections 23(1) and 24(1), sections 23(5) and 24(2) are not mutually exclusive. In relation to requests touching on issues of national security they can be claimed jointly, that is, both can be applied separately to the same information request.
20. The Information Commissioner has considered the wording of the request:
 - 1) *The total number of individuals that have ever been seconded from the MoD to the 4 CTU's in the UK and Counter-Terrorism*

Command that is part of the Metropolitan Police Service (known as CTC/SO15) since September 11 2001.

- 2) *The total number of MoD staff currently working within the 4 CTU's and CTC/SO15*
 - 4) *The purpose of having MoD personnel working with and within CTU's and SO15.*
21. The MOD provided an explanation in its refusal notice of its application of section 23(5) and 24(2). In particular it argued that, if it were to confirm that it held information on the investigation of terrorist activities by military personnel, this would reveal the extent of interest and coverage by the authorities. It said that this would allow terrorists (or others) to establish which types of targets or areas might present a higher risk of detection, allowing them to avoid these. Denying any information is held would reveal a lack of interest in, and coordination with, counter terrorist investigations being conducted by CTU's (Counter Terrorism Units). If terrorist activities were taking place this could persuade the perpetrators to adapt their activities so as to avoid detection by military personnel and, if they were not, would allow them to identify that certain targets might be more vulnerable to their operations.
22. The MOD also argued that the only way to protect national security, the capability, effectiveness or security of the armed forces of the Crown, and to ensure effective law enforcement in these circumstances, is to maintain secrecy around what work is or is not undertaken by military personnel working on intelligence operations. Neither confirming nor denying that any relevant information is held provides the consistency required.
23. The Information Commissioner accepts that if MOD personnel were to be seconded to the four CTUs in the UK or to Counter-Terrorism Command (part of the Metropolitan Police Service) the arrangements would be likely to involve liaison with one or more of the security bodies listed in section 23(3). The information requested therefore relates to such section 23 bodies.
24. In addition the Information Commissioner notes that section 24(2) is engaged only if the refusal to confirm or deny is required for the purposes of safeguarding national security. "National security" is not defined in the FOIA, but in the Information Commissioner's view it would include the security of the United Kingdom or its people. Therefore the Information Commissioner accepts that the activity of seconding MOD staff to the UK and Counter-Terrorism Command would be highly relevant to safeguarding national security. Confirming or denying that

relevant information was held would inform the public (including terrorists) as to the level of interest taken by the security services, which itself would assist those working against them. The Commissioner finds that refusing to confirm or deny whether this information is held is indeed required for the purposes of safeguarding national security.

25. In light of the above the Information Commissioner is satisfied that the MOD was correct to neither confirm nor deny that the information requested was held. Accordingly the exemptions at 23(5) and 24(2) are engaged.
26. As section 24(2) is a qualified exemption this means that it is subject to a public interest test. The Information Commissioner has therefore gone on to consider the public interest arguments for and against excluding the duty to confirm or deny.

Public interest

27. The MOD argued that it had considered whether the public interest in maintaining the exclusion of the duty to confirm or deny outweighed the public interest in confirming whether or not the MOD holds any information. It argued that there is a general public interest in openness in government because this increases public trust in, and engagement with, the government. However, if it were to confirm that it held information on investigation of terrorist activities by military personnel, it would reveal the extent of interest and coverage by the authorities. It said that this would allow terrorists (or others) to establish which types of targets or areas might present a higher risk of detection, allowing them to avoid these. Denying any information is held would reveal a lack of interest in and coordination with counter terrorist investigations being conducted by CTUs. If terrorist activities were taking place this could persuade those involved to adapt their activities so as to avoid detection by military personnel and, if they were not, would allow them to identify that certain targets might be more vulnerable to their operations.
28. The Information Commissioner has considered and balanced the public interest arguments for and against neither confirming nor denying the information is held. In this case there are general public interest arguments in favour of confirming whether the information is held, such as openness and transparency in Government, and specifically as to whether personnel are or are not seconded from the MOD to the Police to work on counter-terrorism initiatives. Whilst these factors are important, the factors against confirming whether the information is held are significant in that there is a real risk that the information could be used by terrorists to make assumptions about the measures concerning the deployment of personnel which may or may not be in

place as part of government's arrangements for safeguarding national security. Accordingly, the balance of the public interest swings favourably toward the maintenance of the exclusion of the duty to neither confirm nor deny that the requested information is held.

29. In view of these findings, the Information Commissioner has not found it necessary to go on to consider section 26(3) and 31(3).

Right of appeal

30. 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,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

31. 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.
32. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Graham Smith
Deputy Commissioner
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SK9 5AF