

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 February 2018

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

Decision (including any steps ordered)

1. The complainant submitted a request to the Ministry of Defence (MOD) asking it to confirm whether, as per press reports, SAS troops and other military personnel were deployed undercover on the UK's streets. The MOD refused to confirm or deny whether it held any information falling within the scope of the request on the basis of sections 23(5) (security bodies), 24(2) (national security) and 26(3) (defence) of FOIA. The Commissioner is satisfied that the MOD is entitled to rely on sections 23(5) and 24(2) to refuse to confirm or deny whether it holds any information falling within the scope of the request.

Request and response

2. The complainant submitted the following request to the MOD on 23 August 2017:

'In June this year, the Daily Express ran this headline: SAS troops "posing as homeless beggars across UK streets" to foil attacks.

Can I ask the Ministry to confirm or deny that this is actually occurring (and not just SAS troops – any military personnel).

If it is can you please supply me with details:

1. *How many SAS troops (or indeed any other military personnel on assignment) have been deployed undercover in UK's streets between 1 Jan 2017 and 1 July 2017?*
2. *What is the cost of this deployment to the Crown's purse?*

3. *Has such deployment led to any specific encounters with terrorists and, if so, what was the outcome of such encounters (i.e. firefight/arrest/death)?*
4. *What are these "homeless" undercover SAS soldiers (or indeed any military personnel on assignment) armed with?*

As this was a front page story of the Express, this is clearly in the public interest. As armed soldiers on the streets is also a step towards Martial law, this is also in the public interest. I do not think that letting me know the above details is a breach of national security, as clearly the Express was given the story by the MOD to run, and even if you did give me the above details, it no longer is a state secret.'

3. The MOD responded on 11 September 2017 and refused to confirm or deny whether it held the requested information on the basis of section 23(5) (security bodies) of FOIA.
4. The complainant contacted the MOD on 28 September 2017 and asked it to conduct an internal review of this response.
5. The MOD informed him of the outcome of the internal review on 16 October 2017. The review upheld the application of section 23(5) and also concluded that the exemptions contained at sections 24(2) (national security) and 26(3) (defence) were engaged and that in the circumstances of the case the public interest favoured maintaining the exclusion to confirm or deny whether the requested information was held.

Scope of the case

6. The complainant contacted the Commissioner on 19 October 2017 in order to complain about the MOD's handling of his request. The complainant disputes the MOD's application of the various exemptions and his submissions to support this position are set out in the analysis below.
7. In relation to this complaint it is important to note that the right of access provided by FOIA is set out in section 1(1) and is separated into two parts: Section 1(1)(a) gives an applicant the right to know whether a public authority holds the information that has been requested. Section 1(1)(b) gives an applicant the right to be provided with the requested information, if it is held. Both rights are subject to the application of exemptions.
8. As explained above, the MOD is seeking to rely on sections 23(5), 24(2) and 26(3) of FOIA to refuse to confirm or deny whether it holds information falling within the scope of the request. Therefore, this notice

only considers whether the MOD is entitled, on the basis of these exemptions, to refuse to confirm or deny whether it holds the requested information. The Commissioner has not considered whether the requested information – if held – should be disclosed.

Reasons for decision

Section 23 – security bodies

9. The MOD argued that the exemption contained at section 23(5) of FOIA applied to the part of the request which sought information about 'SAS troops'.
10. Section 23(5) excludes the duty of a public authority to confirm or deny whether it holds information which, if held, would be exempt under section 23(1) of FOIA. It is an absolute exemption and not subject to the public interest test.
11. Section 23(1) of FOIA states 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). A full list of the bodies listed at section 23(3) of FOIA is available online¹, but for the purposes of this complaint it is only necessary to note that the special forces, which include the SAS, are listed at section 23(3)(d) of FOIA.
12. The Commissioner is therefore satisfied that if the MOD held information about SAS troops being deployed on the UK's streets this information would be exempt from disclosure on the basis of section 23(1). Given the provisions of section 23(5) it therefore follows that the MOD is entitled to refuse to confirm or deny whether it holds any information falling within the scope of this request about SAS troops.

¹ <https://www.legislation.gov.uk/ukpga/2000/36/section/23>

Section 24 – national security

13. The MOD acknowledged that the complainant's request was not limited to information about 'SAS troops', but also sought information about 'any other military personnel on assignment'. The MOD accepted that section 23(5) did not apply to the part of the request concerning these other military personnel. It sought instead to refuse to confirm or deny whether it held information falling within that part of the request on the basis of sections 24(2) and 26(3) of FOIA.

14. Section 24(2) states that:

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

15. It is a qualified exemption and therefore it is subject to the public interest test.

16. In the Commissioner's view this exclusion should be interpreted so that it is only necessary for a public authority to show either a confirmation *or* denial of whether requested information is held would be likely to harm national security. The Commissioner interprets the phrase 'required' in the context of this exemption to mean 'reasonably necessary'. In effect this means that there has to be a risk of harm to national security for the exemption to be relied upon, but there is no need for a public authority to prove that there is a specific, direct or imminent threat.

17. In relation to the application of section 24(2) the Commissioner notes that the First Tier Tribunal has indicated that only a consistent use of a 'neither confirm nor deny' (NCND) response on matters of national security can secure its proper purpose. Therefore, in considering whether the exemption is engaged, and the balance of the public interest test, regard has to be given to the need to adopt a consistent NCND position and not simply to the consequences of confirming whether the specific requested information in this case is held or not.

The MOD's position

18. The MOD argued that to confirm or deny that information is held would give away the position on the question of military undercover work in the UK in recent times. This confirmation or denial could be used by terrorists to make assumptions about current counter-terrorist measures adopted as part of the government's strategy for safeguarding national security and any terrorists could act accordingly in light of this information. For example, if information is not held, confirming this position could be construed by the public as implying that no military personnel are deployed undercover. This would have the potential to

assist terrorists to better target their attacks thus damaging national security. Furthermore, terrorist elements might be reassured by a not held response that they are not at risk from undercover military intervention, or be encouraged by an apparent lack of coverage to commence planning attacks, again to the detriment of national security. Conversely, confirming that information was held could place undercover military personnel at greater risk and also jeopardise the effectiveness of these potential operations.

19. Finally, the MOD explained that the article referenced in the complainant's request was not presented to the press by an authorised MOD official and in its view should be regarded as speculative in nature. The MOD noted where the article does contain a statement from an official spokesperson, this states that the '*MOD does not comment on matters relating to Special Forces*'.

The Commissioner's position

20. In the Commissioner's opinion the MOD's arguments provide a compelling basis upon which to conclude that the exemption contained at section 24(2) is engaged. The Commissioner accepts that if the MOD either confirmed or denied that the requested information was held this would represent a genuine risk to national security as it would clearly provide an insight in the counter-measures adopted (or not adopted) by the government in order to prevent future terrorist attacks. In terms of whether reliance on the exemption is 'reasonably necessary', in the Commissioner's view given the specific ways that compliance with section 1(1)(a) could undermine national security, and given the number of recent terrorist attacks in the UK, and in light of the fact that the UK's terror threat remains at 'SEVERE', the Commissioner is satisfied that this threshold is met. Section 24(2) is therefore engaged.

Public interest test

21. However, as noted above, section 24 is a qualified exemption. Therefore, the Commissioner must consider the public interest test contained at section 2 of FOIA and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in confirming whether or not the requested information is held.
22. The complainant argued that the UK public should have a right to know if undercover soldiers are deployed on our streets. The complainant argued that if the information was held this might worry the public that the streets are being manned by soldiers who, unlike policeman, are trained to kill. The complainant noted that in some parts of the world there is such a thing as martial law and that this involves the use of armed forces on the streets to impose public order. However, the

complainant suggested in such countries at least there was transparency that martial law was in place. In contrast he argued that in the UK it would appear that we have covert martial law in operation and this is deemed acceptable and beyond the scrutiny of the public. Conversely, the complainant argued that if the information was not held, this might reassure the public that the government was taking sufficient measures to ensure that we were not sleepwalking into a state whereby military law was a hidden reality. The complainant explained that he did an online poll on this question and the majority of respondents thought that the public should be told if British troops are posing as homeless as part of an anti-terror campaign.

23. The MOD acknowledged that confirming that information was held, if indeed that was the case, would provide openness and transparency about the counter-measures adopted by the UK government in dealing with terrorist threats and possibly provide reassurance to the public by confirming that military personnel have participated in undercover operations. The MOD also acknowledged, that regardless as to whether information was held, complying with section 1(1)(a) of FOIA would dispel the rumour and satisfy public curiosity following media stories that allege that military personnel have been deployed undercover on the UK streets. However, the MOD argued that given that the likely effect of complying with section 1(1)(a) would be to undermine the effectiveness of counter-terrorist measures designed to contribute to maintaining national security, the public interest heavily favoured maintaining the exclusion to refuse to confirm or deny whether information was held. In reaching this conclusion, the MOD emphasised that its ability to adopt an NCND position in response to similar requests in the future would be undermined by complying with section 1(1)(a) in response to this request. This is because the MOD could not rely on a NCND position at a later stage because it would reveal that the position had changed and this would in itself provide with terrorists with an insight into the government's counter-terrorist measures.
24. The Commissioner recognises that complying with section 1(1)(a) would contribute to the general public interest in openness and transparency in relation to counter-terrorism measures adopted by the government. More specifically, it would, as the MOD suggests, dispel the rumour about the use of undercover military personnel on the UK streets and in the Commissioner's view there is a public interest in achieving this and providing greater transparency, and thus potentially greater scrutiny and accountability, around such possible counter-terrorism measures. Furthermore, the Commissioner agrees with the complainant that the potential use of undercover military personnel as part of counter-terrorism measures raises serious and genuine questions about the use of the military forces in civilian society. However, although these factors are important, in the Commissioner's opinion the public interest in maintaining the exemption contained at section 24(2) is very significant

given that knowing whether the requested information is held could be used by terrorists to undermine the government's arrangements for safeguarding national security. Consequently, the balance of the public interest swings towards the maintenance of the exclusion of the duty to neither confirm nor deny whether the requested information is held. The public interest therefore favours maintaining the exemption contained at section 24(2) of FOIA.

25. In light of this finding the Commissioner has not considered the MOD's reliance on section 26(3) of FOIA.

Right of appeal

26. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

27. 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.
28. 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

Jonathan Slee
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