

Freedom of Information Act 2000

Decision notice

Date: 25 January 2016

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

Decision (including any steps ordered)

1. The complainant requested information relating to Operation Herrick from the Ministry of Defence (MOD).¹ The Commissioner's decision is that the MOD has breached sections 10(1), 17(1) and 17(3) of the Freedom of Information Act 2000 (the Act) because its response was late. As the response has been issued no steps are required.

Request and response

2. On 24 January 2014, the complainant wrote to the MOD and requested information in the following terms:

"Please can you send me by email all completed editions of the lessons for land component campaign study of Operation Herrick undertaken by the army's Land Warfare Centre."
3. The MOD responded on 18 February 2015. It stated that information was held but that it falls within the scope of the following exemptions:
 - section 26 – defence

¹ Operation Herrick is the name for the United Kingdom's operations in the war in Afghanistan from 2002 – 2014.

- section 27 – international relations
- section 38 – health and safety

The MOD stated that it required further time to consider the balance of the public interest for these exemptions.

4. The MOD sent a further letter on 31 March 2015 stating that more time was required to consider the balance of the public interest. It estimated that a response would be issued by 29 May 2015.
5. The complainant sent letters on 9 June 2015 and 27 July 2015 trying to hasten a response. The complainant appealed to the Commissioner to intervene, and following the Commissioner's investigation the MOD issued a response to the complainant on 11 January 2016. The MOD disclosed some of the requested information but also withheld some under the following exemptions:
 - section 23 – security matters
 - section 26 – defence
 - section 27 – international relations
 - section 40 – personal data

Scope of the case

6. The complainant contacted the Commissioner on 28 August 2015 to complain about the MOD's delay in responding to his request for information.
7. The Commissioner considers the scope of the case to be whether the MOD met its obligations at sections 10(1), 17(1) and 17(3) of the Act.

Reasons for decision

Section 10 – time for response

8. Section 10 of the Act states:

(1) 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.

...

(3) 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.

9. Section 10(1) requires a public authority to respond to an information request within 20 working days of receipt, and this response must confirm whether information is held and communicate it to the requester. However, public authorities are permitted to withhold information if it is exempt, and section 10(3) provides public authorities with additional time to consider the public interest for exemptions. This time must be "reasonable in the circumstances". In order to determine whether there has been a breach of section 10(1) the Commissioner must also decide whether the length of time the MOD took to respond to the request (in respect of the information disclosed) was reasonable within the circumstances of the case.
10. During the course of the Commissioner's investigation the MOD stated that the delay was due to the size of the document – which ran into hundreds of pages – and the severity of the exemptions. Information relating to Operation Herrick contains the details of the United Kingdom's military operations conducted in Afghanistan since 2002, so the MOD argued that consideration of the exemptions was not an insignificant task.
11. The Commissioner accepts that the document is sizeable, and that the exemptions cited in the refusal notice can be seen as relevant given the nature of the information. However, the Commissioner wishes to point out that two of the exemptions ultimately cited are absolute so would not require any public interest considerations from the MOD. This limits the amount of information that would need to be considered within the public interest test, as a proportion of it was withheld under absolute exemptions.
12. The Commissioner notes the size of the task the MOD had to complete. However his view is that there has to be a limit to what can be seen as reasonable for an extension to consider the balance of the public interest. Whilst the Commissioner has not seen the withheld information, or the volume of information disclosed to the complainant,

he notes that the MOD took 243 working days to substantively respond to the request.

13. The Commissioner recognises that the MOD is trying to ensure that information is provided to the complainant rather than the document being withheld in full – such as a section 14 refusal as the burden of the work involved might make the request vexatious. However, he cannot accept that a public authority is permitted nearly a year in order to handle a single request.
14. The Commissioner's decision is that the time taken by the MOD to consider the public interest test was not reasonable under the circumstances. As it took the MOD an unreasonable amount of time to communicate disclosable information to the complainant, it has breached section 10(1) of the Act.

Section 17 – refusal of request

15. Section 17(1) of the Act states that:

(1) 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.

16. Section 17(3) of the Act states that:

(3) 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.

17. Section 17(1) requires that a response refusing a request should also be sent within 20 working days of receipt, and that this response must confirm which exemptions are being applied.
18. The MOD received the request on 24 January 2015. Its response of 18 February 2015 confirmed that it was considering the public interest test for three different exemptions (section 26, 27 & 38). However, the MOD's response of 11 January 2016 confirmed that four different exemptions applied (section 23, 26, 27 & 40), two of which were not cited by the MOD in its response of 18 February 2015. As the MOD did not confirm it would be refusing part of the complainant's request under section 23 and 40 until over 11 months after it received the request it has breached section 17(1) of the Act.
19. Section 17(3) allows a public authority to extend its consideration of the public interest for a reasonable period of time if necessary. For the reasons provided earlier in respect of section 10, the Commissioner's decision is that the time taken by the MOD to consider the balance of the public interest test was not reasonable in the circumstances. Therefore, the MOD has breached section 17(3) of the Act.
20. As the substantive response has now been issued there are no further steps required in order for the MOD to comply with the Act, given the scope of this case. However, the Commissioner asks that the MOD consider its handling of this request in order to improve its performance for future requests.

Right of appeal

21. 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 123 4504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

22. 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.
23. 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

Alexander Ganotis
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