

## **Freedom of Information Act 2000 (Section 50)**

### **Decision Notice**

**Date: 29 June 2011**

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

### **Summary**

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The complainant submitted a request to the Ministry of Defence (MOD) for the Captain's patrol reports of a particular submarine, HMS Turpin, during the period 1955-57. The MOD confirmed that it held information falling within the scope of this request but considered it to be exempt from disclosure on the basis of sections 26(1)(a), 26(1)(b) and 27(1)(a) of the Act. Furthermore the MOD also relied on sections 23(5) and 24(2) to refuse to confirm or deny whether any of the information falling within the scope of the request was also exempt from disclosure on the basis of sections 23(1) and 24(1). The Commissioner concluded that the withheld information is exempt from disclosure on the basis sections 26(1)(a) and 26(1)(b). The Commissioner has also concluded that sections 23(5) and 24(2) have been correctly relied upon as a basis upon which to refuse to confirm or deny whether the requested information is also exempt from disclosure on the basis of sections 23(1) or 24(1).

### **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.

## The Request

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2. On 5 January 2009 the complainant submitted two requests to the Ministry of Defence (MOD). The MOD received these requests on 13 January 2009. The first request sought 'access to the Captain's patrol reports etc of HMS/s TURPIN during the time she was on operations during 1956/7 and/or possibly the end of 1955/56' and the second request stated 'TURPIN had several 'skirmishes' in which I played a major part. I would ask for a copy of all information concerning myself.'
3. The MOD responded on 8 April 2009 and informed the complainant that his first request would be dealt with under the Act and his second request under the Data Protection Act 1998 (DPA) as the latter request clearly sought his own personal data. The response explained that the MOD held information falling within the scope of the first request but it considered it to be exempt from disclosure on the basis of sections 26 and 27 of the Act. The response also stated 'I also neither confirm nor deny that the Ministry of Defence holds any other information on this subject by virtue of sections 23(5) – Information supplied by, or relating to, bodies dealing with security matters, and 24(2) – National Security'. In respect of the second request the response explained that there was no mention of the complainant in the relevant files.
4. The complainant contacted the MOD on 19 May 2009 and asked for an internal review to be conducted into the handling of his first request.
5. The MOD informed him of the outcome of the review on 8 July 2009. The review confirmed that the information that was held and fell within the scope of the first request was exempt from disclosure on the basis of sections 26(1)(a), 26(1)(b) and 27(1)(a). The response also noted that 'the Department neither confirmed nor denied that it held any other information on the subject covered by your requests by virtue of sections 23(5)...and 24(2)...The use of 23(5) and 24(2) do not relate specifically to the information you requested on 13 January, but the likely position the Department might take in response to any future requests for information on the same subject'.

## The Investigation

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### Scope of the case

6. On 1 September 2009 the complainant contacted the Commissioner in order to complain about the MOD's handling of his first request. In further submissions to support his complaint that the MOD had misapplied the exemptions it cited, the complainant highlighted the fact that an account of HMS Turpin's activities during the period covered by his request was contained in the book 'GCHQ' by Richard J. Aldrich.
7. The complainant also asked the Commissioner to consider the MOD's handling of his second request but this issue is not addressed in this Notice because a public authority's compliance with a subject access request is not a requirement of Part 1 of the Act. (The Commissioner informed the complainant of the outcome of his assessment under the DPA of the MOD's handling of his second request in July 2010).

### Chronology

8. Following the conclusion of his assessment of the second request, the Commissioner contacted the MOD on 14 July 2010 and asked to be provided with a copy of the information falling within the scope of the complainant's first request (from here on, simply referred to as 'the request') and detailed submissions to support the application of the exemptions cited in the refusal notice.
9. The MOD responded on 29 July 2010. In this response the MOD explained that it wished to clarify the comments in the internal review regarding the application of sections 23(5) and 24(2). The MOD explained that whilst it was unclear why the review suggested that the use of these exemptions did not specifically relate to the information requested by the complainant, it was in no doubt that its actual position was that both exemptions were applicable to all of the information falling within the scope of the present request. The MOD explained that in the circumstances of this case it did not accept that the Commissioner needed to see requested information. The MOD did, however, provide the Commissioner with an explanation as to why it considered the public interest tests for both section 26 and 27 to favour maintaining the exemptions.
10. The Commissioner contacted the MOD again on 22 December 2010 and explained that given the particular circumstances of this case he might be prepared to make a decision as to the applicability of the exemptions in this case without sight of the requested information.

However, in order to be in a position to do so he needed the MOD to provide him with further details as to why it considered the exemptions to apply. The Commissioner suggested that the Deputy Commissioner would be prepared to meet with the MOD in order to discuss the nature and content of the withheld information.

11. On 26 January 2011 the Deputy Commissioner met with representatives of the MOD in order to discuss this case and was provided with the MOD's reasons for treating the information as highly sensitive and exempt from disclosure under the Act.

## Analysis

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### Exemptions

#### Section 26 - defence

12. The MOD has argued that the information falling within the scope of the request is exempt from disclosure on the basis of sections 26(1)(a) and 26(1)(b). These sections state that:

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

- (a) the defence of the British Islands or of any colony, or
- (b) the capability, effectiveness or security of any relevant forces'

13. In order for a prejudice based exemption, such as section 26, to be engaged the Commissioner believes that three criteria must be met:

- Firstly, the actual harm which the public authority alleges would or would be likely to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption.
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance.
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e. disclosure would be likely to result in prejudice or disclosure would result in prejudice. If the likelihood of prejudice occurring

is one that is only hypothetical or remote the exemption will not be engaged.

*MOD's position*

14. In its responses to the complainant the MOD explained that although the requested information was over 50 years old its release could still harm both the defence of the UK and the capability of the armed forces. This was because the type of operation that HMS Turpin was undertaking is still sensitive and the file shows a high level of detail as to how it was carried out. Given that these techniques are broadly still used today they would be of great use to any hostile forces as they would enhance their understanding as to how this type of operation is undertaken and therefore increase the chance of countering it. It was clear that any such increased understanding would prejudice the capability of British forces in successfully completing their mission and the safety of those taking part in current or future operations.
15. In written submissions to the Commissioner the MOD confirmed that it believed that for both exemptions 26(1)(a) and 26(1)(b) the higher level of likelihood was met, i.e. prejudice would not simply be likely to occur following disclosure of the information, but would occur. However, given the circumstances of this case the Commissioner does not consider it appropriate to include any further details about the nature of submissions (both written and oral) provided by the MOD to the Commissioner to support the application of these exemptions as to do so risks revealing the content of the withheld information.

*The Commissioner's position*

16. Similarly, the Commissioner believes that the level of detail he can include in relation to his analysis of the MOD's position is also very limited. However, he can confirm that he is satisfied that both exemptions are engaged for the following reasons:
17. The Commissioner accepts that the actual harm which the MOD believes would occur if the information was disclosed is clearly relevant to the applicable interests which fall within the scope of sections 26(1)(a) and 26(1)(b). The first criterion set out at paragraph 13 is therefore met. In relation to the second criterion the Commissioner is satisfied that disclosure of the withheld information can be clearly linked to the prejudice at sections 26(1)(a) and 26(1)(b) and furthermore that prejudice will not be trivial or insignificant but real and of substance. In relation to the third criterion the Commissioner is satisfied that based upon the information and submissions provided to the Deputy Commissioner at the meeting of 26 January 2011 the higher threshold of prejudice is met.

### **Public interest arguments in favour of disclosing the requested information**

18. The MOD accepted that the public has an undeniable interest in defence matters and the activities of the armed forces, both currently and in the past.

### **Public interest arguments in favour of maintaining the exemption**

19. The MOD argued that there was a very clear public interest in the UK being able to undertake its military operations as successfully and safely as possible.

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

20. The Commissioner agrees that there is a clear and valid public interest in the disclosure of information concerning defence matters, especially where the information in question would improve the public's understanding of a particular matter or inform a particular public debate. In the particular circumstances of this case the Commissioner accepts that the complainant (and others) have a genuine interest in the matters which are at the heart of the request and furthermore that there is a legitimate public interest in disclosure of information in order to inform the public about historic events so that there is an accurate record of past military operations. However, the Commissioner believes that there is a very strong and powerful public interest in protecting British Armed forces, and in turn, the defence of the British Isles. Whilst disclosure of the information could prove informative about a small number of naval incidents over 50 years ago, disclosure risks prejudicing a much greater range and number of current and future military operations. In the particular circumstances of this case as the Commissioner has concluded that prejudice would occur, not simply be likely to occur, he accepts that this adds further weight to the arguments in favour of maintaining the exemption. For these reasons the Commissioner has concluded that the public interest in maintaining the exemptions contained at sections 26(1)(a) and 26(1)(b) outweighs the public interest in disclosing the information.
21. The Commissioner recognises that the brevity of his reasoning in relation to why he has reached this conclusion, both in terms of engaging the exemptions and the public interest test, may prove to be frustrating to the complainant, particularly in light of the specific arguments he has advanced in support of his complaint. However, as noted above the Commissioner believes that any more detailed explanation of his reasoning risks revealing the content of the requested information itself.

22. In light of this conclusion, the Commissioner has not considered whether the requested information, is also exempt from disclosure on the basis section 27(1)(a) of the Act.

### **Sections 23(5) and 24(2)**

23. However, in addition to relying on the exemptions discussed above to withhold the requested information, the MOD also relied on sections 23(5) and 24(2) to refuse to confirm or deny whether any of the information falling within the scope of the request was also exempt from disclosure on the basis of sections 23(1) and 24(1).

24. 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).'

25. 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.'

26. Sections 23 and 24 are obviously closely linked provisions. Sections 23(1) and 24(1) are mutually exclusive. That is to say if information is exempt from disclosure on the basis of the exemption contained at section 23, it cannot also be exempt under section 24. Indeed, in such circumstances the exemption is not needed for the purposes of safeguarding national security because it is already exempt by virtue of the provisions of the previous section.

27. However, in respect of the application of sections 23(5) and 24(2), i.e. when a public authority believes it is exempt from the duty under section 1(1)(a) to confirm or deny whether such information is held, it is accepted practice to rely on both provisions without specifically stating which of the two actually applies. Such an approach is calculated to avoid disclosure of the fact that a section 23 body is or



isn't involved in the scenario described in a particular request. This approach was approved by the Information Tribunal in *Baker v Information Commissioner and the Cabinet Office* (EA/2006/0045). Obviously for such an approach to be effective, public authorities have to consistently cite both exemptions when responding to any similar requests.

28. Furthermore, in terms of how the Act operates, the Commissioner accepts that it is technically permissible for a public authority to say that requested information is held – and provide it or withhold it under another exemption – but at the same time rely on sections 23(5) and 24(2).
29. At the meeting with the MOD on 26 January 2010 the Deputy Commissioner was provided with a detailed explanation to support its decision to cite both sections 23(5) and 24(2) as a basis to refuse to confirm or deny whether any of the requested information was also exempt from disclosure on the basis of sections 23(1) and 24(1). On the basis of this explanation the Commissioner is fully satisfied that the MOD is entitled to have relied upon sections 23(5) or 24(2).
30. In the Commissioner's opinion to include any further details in this Decision Notice explaining the basis upon which he has reached this conclusion risks revealing the exemption that has in fact been cited by the MOD. Once again, the Commissioner recognises that the brevity of his reasoning in respect of this part of his decision may prove to be frustrating to the complainant. However, in cases of this nature where sections 23(5) and 24(2) have been relied upon on the Commissioner believes that this is an inevitable consequence of the required approach.
31. Furthermore, in setting out his conclusion in this way, the Commissioner wishes to emphasise that it should not be inferred that one exemption is more likely to have been relied upon than another. Nor should any inference be made as to whether the MOD actually holds any information falling within the scope of the request which is in fact exempt from disclosure on the basis of sections 23(1) or 24(1).

### **Procedural Requirements**

33. Section 10(1) of the Act requires public authorities to respond to a request promptly and in any event not later than the twentieth working day following the date of receipt.
34. Section 17(1) requires that if a public authority wishes to rely on exemptions to refuse a request it must provide the applicant with a



valid refusal notice stating this fact within the time period required set out in section 10(1).

35. In this case the complainant's request was received by the MOD on 13 January 2009 but it did not issue its refusal notice until 8 April 2009. This represents a breach of section 17(1) of the FOI Act.

## **The Decision**

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36. 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 information requested by the complainant is exempt from disclosure on the basis of sections 26(1)(a) and 26(1)(b) and for both exemptions the public interest in maintaining the exemptions outweighs the public interest in disclosure of the information.
  - The MOD is entitled to rely on sections 23(5) and 24(2) as a basis to refuse to confirm or deny whether any of the information falling within the scope of the request was also exempt from disclosure on the basis of sections 23(1) and 24(1).
37. 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 issue its refusal notice within the time period required by section 10(1) of the Act.

## **Steps Required**

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38. The Commissioner requires no steps to be taken.

## Right of Appeal

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39. 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)

40. 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.
41. 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 29 day of June 2011**

**Signed .....**

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

## Legal Annex

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### 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."

#### Section 1(2) provides that -

"Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14."

#### Section 2(3) provides that –

"For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

- (a) section 21
- (b) section 23
- (c) section 32
- (d) section 34
- (e) section 36 so far as relating to information held by the House of Commons or the House of Lords
- (f) in section 40 –
  - (i) subsection (1), and
  - (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
  - (iii) section 41, and
  - (iv) section 44"

## **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.”

## **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 -

(g) states that fact,

(h) specifies the exemption in question, and

(i) 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)."

**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."

**Section 24(3) provides that –**

"A certificate signed by a Minister of the Crown certifying that exemption from section 1(1)(b), or from section 1(1)(a) and (b), is, or at any time was, required for the purpose of safeguarding national security shall, subject to section 60, be conclusive evidence of that fact."

**Section 24(4) provides that –**

"A certificate under subsection (3) may identify the information to which it applies by means of a general description and may be expressed to have prospective effect."

**Defence**

**Section 26(1) provides that –**

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

- (j) the defence of the British Islands or of any colony, or
- (k) the capability, effectiveness or security of any relevant forces."

**International Relations**

**Section 27(1) provides that –**

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

- (a) relations between the United Kingdom and any other State,
- (b) relations between the United Kingdom and any international organisation or international court,
- (l) the interests of the United Kingdom abroad, or
- (m) the promotion or protection by the United Kingdom of its interests abroad."