

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 June 2016

Public Authority: 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) for information concerning discussions with the US Department of Defence in relation to the use of RAF Croughton. The MOD provided some of the information requested but sought to hold the remainder on the basis of sections 27(1)(a) and 27(2) of FOIA. The Commissioner is satisfied that the withheld information is exempt from disclosure on the basis of section 27(1)(a).

Request and response

2. The complainant submitted the following request to the MOD on 24 March 2015:

'On behalf of [name redacted], please can you disclose the following information:

- (i) *The dates of consultations made with the Department of Defence [Defense] in connection with the European Infrastructure Consolidated Review and RAF Croughton taking place over the last year;*
- (ii) *The date of any Host Nation Notification sent by the US in connection with use of RAF Croughton in the last year;*

- (iii) *The date of any approval, permission or other response sent in connection with RAF Croughton in the last year;*
- (iv) *A copy of those Host Nation Notifications and responses requested in paragraphs (ii) and (iii).¹*

3. The MOD responded on 21 April 2015 and explained the nature of the consultations that had taken place but noted that the dates of these discussions were not maintained. However, the MOD did confirm that the US Defense Attaché briefed the Vice Chief of Defence Staff on 19 November 2014 and the Host Nation Notification (HNN) was provided in a letter dated 7 January 2015. The MOD's response went on to explain that it considered the copy of the HNN, and responses to it, exempt from disclosure under sections 27(1)(a) and 27(2) (international relations exemptions) of FOIA.
4. The complainant contacted the MOD on 3 July 2015 and asked for an internal review of this decision and in doing so set out a number of reasons as to why it considered the MOD's reliance on these exemptions to be flawed.
5. The MOD informed the complainant of the outcome of the internal review request on 28 August 2015. The MOD explained that the dates sought by request (i) were held and provided these to the complainant. The MOD also confirmed that the HNN was sent on 7 January 2015 with the approval of this being given on the same day. However, the MOD explained that it considered the information falling within the scope of request (iv) to be exempt from disclosure on the basis of section 27(1)(a). It also explained that the HNN was exempt from disclosure on the basis of 27(2) of FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 30 November 2015 in order to complain about the MOD's decision to withhold the information falling within the scope of request (iv).
 8. During the course of the Commissioner's investigation there was some discussion as to the nature of the information actually falling within the
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¹ In January 2015 the Department of Defense announced the consolidation of some US infrastructure in Europe including the transfer of personnel to RAF Croughton.

scope of request (iv). This decision notice therefore addresses that preliminary issue before considering whether the information the Commissioner has concluded is in the scope of that request is exempt from disclosure.

Reasons for decision

The scope of the request (iv)

9. There are two documents relevant to the scope of this request. The first is the HNN and the second is the UK's response to that HNN. The latter document consists of a record of a telephone conversation between the Secretary of State and his US counterpart concerning the HNN.
10. The MOD explained to the Commissioner that the HNN only contains a limited reference to RAF Croughton. The remainder of the HNN is not specific to RAF Croughton. Furthermore, the MOD explained that the memorandum of the telephone conversation only contains a limited reference to the HNN. Having examined both documents the Commissioner can confirm that this is an accurate summary of the documents.
11. During the course of this investigation, the MOD raised the possibility that request (iv) only covered the information contained in the two documents that related directly to RAF Croughton. This was on the basis that FOIA provides for the release of information rather than documents and request (iv) sought information about RAF Croughton.
12. The Commissioner acknowledges that FOIA only provides a right of access to documents rather than information. However, in the Commissioner's view a request for a copy of a document is a valid request for all of the recorded information in that document. In most cases the only practicable way to communicate all the recorded information in the document to the requester will be to provide a copy of the original. Furthermore, where some of the information in a requested document is exempt, any disclosable information in the document will have to be provided to a requester and the most practical way to do this is simply to provide them with a redacted version of the document rather than replicate the disclosable information into a digest.
13. With regard to the specific scope of the complainant's request in this case, the Commissioner acknowledges that the complainant would appear to simply be interested in information concerning RAF Croughton. However, in the Commissioner's view given the way that request (iv) is phrased he believes that it arguably covers the entirety of any HNN which discusses RAF Croughton and similarly covers the

entirety of any associated responses to it. Therefore, in the Commissioner's opinion the entirety of the HNN and the entirety of the memorandum of the telephone call are in the scope of the request.

Section 27 – international relations

14. The MOD argued that the information falling within the scope of this request was exempt from disclosure on the basis of section 27(1)(a) of FOIA.

15. This exemption 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'

The MOD's position

16. In its internal review response the MOD explained that it had concluded that disclosure of the withheld information would, rather than simply being likely to, prejudice the UK's relations with the US. It had reached this conclusion given that the HNN was provided by the US to formally notify the UK government of the impact of the European Infrastructure Consolidation Review *prior* to any of these changes being announced and thus the disclosure by the UK of such information would constitute a breach of US trust. Similarly, the MOD explained that the memorandum makes detailed reference to information provided by the US, information which again it would not expect to be disclosed.

17. During the course of the Commissioner's investigation, the MOD confirmed that it has liaised with the US Department of Defence (DOD) in respect of this request. The DOD confirmed that the HNN remains a classified document and the US government would not expect the UK government to ever release anything marked 'Secret' without the US first conducting a full inter-agency review. Even without such a review being undertaken DOD explained to the MOD why, based upon the content of this information, it was of the view that the content remained sensitive. The MOD has outlined to the Commissioner what these sensitivities were considered to be. With regard to the memorandum, the MOD also explained that the matters discussed between the Secretary of State and his counterpart remained issues of sensitivity for the US and thus it would not be content for them to be disclosed. In light of this discussion, the MOD argued that if it disclosed the withheld information then it would be ignoring the US' directly stated wishes that the information is withheld. As a result, the MOD argued that it was

clear that the UK would be directly and deliberately harming its relationship with the US.

The complainant's position

18. In its submissions to the Commissioner the complainant argued that the position adopted by the MOD relied on the fact that the HNN occurred prior to any of the changes being announced and therefore must be considered highly confidential. However, the complainant argued that this position did not allow for the confidentiality of documents to change over time. The complainant argued that as certain details are known about the proposal, as reported in the media and as recorded in a number of US Government documents available online which detail the proposed works at the site in substantial detail, it is likely that the confidentiality of the document has decreased significantly and the US may not in fact object. Furthermore, the complainant also noted that it appeared that in other circumstances and in other countries, governments have been willing to disclose HNNs that they have received from the US.²
19. The complainant also emphasised that the US government is very familiar with robust information access laws and it cannot expect to operate in the UK without a similar level of scrutiny.

The Commissioner's position

20. In order for a prejudice based exemption, such those contained with section 27(1), 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; and

² <http://www.mod.go.jp/e/pressconf/2012/06/120629a.html>

- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.
21. Furthermore, the Commissioner has been guided by the comments of the Information Tribunal which suggested that, in the context of section 27(1), prejudice can be real and of substance '*if it makes relations more difficult or calls for a particular damage limitation response to contain or limit damage which would not have otherwise have been necessary*'.³
 22. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the MOD clearly relates to the interests which the exemption contained at sections 27(1)(a) is designed to protect.
 23. With regard to the second criterion, the Commissioner is satisfied that disclosure of the information withheld on the basis of this exemption has the potential to harm the UK's relations with US. In relation to the HNN the Commissioner is satisfied that this is the case given the classified nature of the document, and in terms of the memorandum this is because it records a conversation between the Secretary of State and his counterpart, which contains reference to material which the US considers to be sensitive. Moreover, the Commissioner is satisfied that the resultant prejudice which the MOD believes would occur can be correctly categorised, in light of the Tribunal's comments above, as one of substance. In other words, subject to meeting the likelihood test at the third criterion, disclosure could result in making relations more difficult and/or demand a particular damage limitation exercise.
 24. With regard to the third criterion, in light of the MOD's discussions with the DOD, details of which are summarised above, the Commissioner is satisfied that disclosure of the withheld information would prejudice the UK's relations with the US. This is because the US has clearly stated that it does not wish this information to be disclosed and in the

³ [Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence \(EA/2006/0040\)](#), paragraph 81.

Commissioner's opinion it is logical to conclude that disclosure of the information in such circumstances would result in the prejudice envisaged by the MOD. In reaching this conclusion, the Commissioner acknowledges the point that the complainant has made about the confidentiality of information changing over time and moreover that as it correctly pointed out some information about changes to RAF Croughton as a result of the European Infrastructure Consolidation Review is indeed in the public domain. However, as noted above, the Commissioner is satisfied that despite this the US still considers the information in question to be sensitive and the UK's disclosure of it would harm international relations.

Public interest test

25. Section 27 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest in disclosure of the information

26. The complainant explained that it understood, through Parliamentary Questions and media reports, that RAF Croughton played a key role in surveillance operations conducted by the US security services and in the communications infrastructure supporting the US drone programme. However, the complainant argued that there had been very little transparency concerning this aspect of RAF Croughton. The complainant noted that in July 2015 it emerged that the US government was planning to spend nearly \$320m expanding its intelligence operations at RAF Croughton and it was reported that the base is to be used inter alia as a centre for US counter-terrorism activities.
27. The complainant argued that in light of the Snowden revelations and also increasing public concerns about the use of US armed drones and targeted killing outside the traditional battlefield, any expansion of US intelligence operations within the UK is bound to be controversial and furthermore give rise to considerable anxiety on the part of the public both in the UK and abroad.
28. The complainant argued that there had been very little transparency with respect of the UK-US discussions which led to the UK agreeing to the US expansion of RAF Croughton. Furthermore, the complainant argued that the UK government had failed to conduct any due diligence in respect of the expansion and had failed to permit any meaningful Parliamentary debate to the issue. Moreover the complainant suggested that the UK government may have bowed to US pressure in connection

with the consolidation and expansion of US intelligence operations within the UK.

29. For these reasons the complainant was of the view that the public interest favoured disclosure of the withheld information.

Public interest in favour of maintaining the exemption

30. The MOD argued that the public interest favoured withholding the information in order to ensure the maintenance of strong, trusting relations with the US. This would ensure that future working relations between the two governments are not strained which would not only benefit both states mutual defence interests but also ensure effective bilateral cooperation on a wide range of other interests.

Balance of the public interest

31. The Commissioner agrees with the complainant that there is a public interest in the disclosure of information which would reveal further details of the expansion of RAF Croughton, and in particular the nature of the consultation with the UK government about this expansion. Moreover, the Commissioner accepts that given the broader context of the ongoing debate surrounding the use of surveillance and intelligence data, such issues should not be dismissed lightly. However, in the Commissioner's opinion the degree to which the withheld information would meet these interests is actually quite limited.
32. With regard to the public interest in maintaining the exemption, the Commissioner accepts that there is a very significant and inherent public interest in ensuring that the UK enjoys a strong and effective relationship with the US given the significant ties between the two nations. In the particular circumstances of this case, the fact that disclosure of the information would prejudice these relations (rather than being likely to) adds, in the Commissioner's view, further weight to the public interest in maintaining the exemption.
33. Consequently, the Commissioner has concluded that the public interest favours maintaining the exemption. In reaching this conclusion the Commissioner is not seeking to dismiss the strong public interest in disclosing information which would reveal more about the expansion of RAF Croughton and the UK government's consideration of this. However, on balance he believes that this is outweighed by the significant public interest in maintaining the exemption given the importance of the UK-US bilateral relationship.
34. In light of his decision in relation section 27(1)(a), the Commissioner has not gone on to consider the MOD's reliance on section 27(2) to also withhold the HNN.

Right of appeal

35. 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

36. 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.
37. 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

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