

From Andrew Tranham



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CIO-SPP-Information Rights Compliance

Ref: 10-01-2013-103402-002

Ms A. Kellay  
request-144973-8ab2df2f@whatdotheyknow.com

27 February 2013

Dear Ms Kellay,

### **FREEDOM OF INFORMATION ACT 2000 - INTERNAL REVIEW**

1. I am replying to your email of 30 January 2013 to the Deputy Head of Corporate Information, in which you requested an internal review of the MOD's failure to disclose information in scope of a request you had previously submitted under the Freedom of Information Act 2000 (hereafter referred to as 'the Act'). In your initial request you asked for information concerning the legal weapons review of CHARM3 depleted uranium ammunition:

*'The Article 36 API to Geneva Conventions, Legal review of the 120mm anti-tank round CHARM3 has recently been undertaken. I would like to see the section of this document that states the intended use of CHARM3, and any restrictions that might apply to its use.'*

2. I have now completed a full independent review of the handling of your request and substance of the response you received. The purpose of the internal review is to consider whether the requirements of the Act have been fulfilled. The scope of the review is defined by Part VI of the Code of Practice under section 45 of the Act, which can be found at <http://www.justice.gov.uk/downloads/information-access-rights/foi/foi-section45-code-of-practice.pdf>.

### **Handling**

3. In conducting my review of the handling of your request, I have focussed in particular on the following requirements of the Act:

- a. Section 1(1)(a) which, subject to certain exclusions, gives any person making a request for information to a public authority the entitlement to be informed in writing by the public authority whether it holds information of the description specified in the request;
- b. Section 1(1)(b) which, subject to certain exemptions, creates an entitlement to receive the information held by the public authority;

c. Section 10(1) which states that, subject to certain provisions allowing extensions of time, the public authority must comply with the requirements of section 1(1) promptly, and in any event not later than the twentieth working day following the date of receipt;

d. Section 16(1) where it is the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, request for information to it;

e. Section 17(1) which states that, where it claims information is exempt, the public authority must, within the time for complying with section 1(1), give the applicant a notice which states the fact, specifies the exemption(s) in question and states why the exemption applies;

f. Section 17(3)(b) which states that, where the public interest in maintaining the exemption outweighs the public interest in disclosing the information, the public authority must state the reasons for claiming this.

4. Your request for information was received on 9 January 2013. In line with section 10(1) of the Act, a substantive response was due not later than 6 February 2013. You received a response on 28 January 2013, within the timescale laid out in the Act.

5. You were not explicitly informed that the information was held by the Department, as required by section 1(1)(a) of the Act. However, this was implicit from the body of the response you received. This response informed you that the qualified exemption in section 42(1) of the Act (Information subject to Legal Professional Privilege) was engaged with regard to the information you had requested. You were informed that the public interest test favoured withholding the information, and also given the reasons as to why this was the case. The initial response, despite withholding the information in scope, provided you with a lot of additional information (in line with the obligation to provide advice and assistance under section 16 of the Act). You were also informed of your rights to appeal. In conclusion, the initial response was within the statutory requirements laid out in the Act.

### **Substance**

6. As part of this independent internal review I have looked afresh at your request to be provided with the information specified, namely the sections of the CHARM3 depleted uranium round legal review which relate to the intended use of CHARM3 and any restrictions on its use. I have concluded that all of the information in scope was appropriately withheld under the exemption in section 42(1) of the Act.

7. Section 42(1) of the Act provides that information is exempt if a claim for Legal Professional Privilege (LPP) could be made in respect of it. In your appeal to the MOD you enquired *'as to whether the Article 36 Legal Review of CHARM 3 is a policy document and thus whether information within it can even be considered privileged'*. I can confirm that the review is not policy advice. It is a legal review intended to inform policy and hence is subject to LPP.

8. Section 42 is a qualified exemption and therefore a balance of public interest test is needed. It is recognised that the concept of LPP reflects the strong public interest in protecting the confidentiality of communications between lawyers and their clients. This confidentiality promotes respect for the rule of law by encouraging clients to seek legal advice and allowing for full and frank exchanges between clients and their lawyers.

Lawyers must be free to present weaknesses in an argument to provide balance without the prospect of such being published. Safeguarding LPP is important as, according to the ICO, it is a 'fundamental principle of English law.' Previous tribunal rulings have stated that 'there is a strong element of public interest inbuilt into the privilege itself' (Bellamy v Information Commissioner & the Secretary of State for Trade and Industry (EA/2005/0023, 4 April 2006)) and that anybody looking to over-ride the ruling must provide 'clear, compelling and specific justification that at least equals the public interest in protecting the information in dispute' (Crawford v Information Commissioner & Lincolnshire County Council (EA/2011/0145)). In considering the public interest in disclosure, promoting openness and furthering understanding of government processes in decision making, it is necessary to weigh any factors favouring disclosure on a case by case basis against the strong public interest in protecting LPP.

9. One argument in favour of disclosure is that releasing the document would provide confidence to the public that the Department is fully informed in the formulation of its policy with regard to DU weapons. You also put forward several arguments for the balance of the public interest lying on the side of disclosure (aside from the general trends behind the Act of transparency and openness). You stated that release of this information would allow the public to know what legal advisers consider '*the intended use and restrictions on use*' of DU weapons, allowing for informed debate. However, the intended use of DU weapons, and the restrictions imposed on them, was covered in a Written Ministerial Statement of 12 July 2012 which stated that the review had concluded that:

*'CHARM 3 is capable of being used lawfully by UK Armed Forces in an international armed conflict. CHARM 3 is the only munition within the UK arsenal manufactured using DU. We judge this capability necessary in any land battle to defeat the armoured vehicles of an adversary state and no alternative tank round (using another metal or substance) has been shown to provide a comparable effect on target. It is self evident that use of CHARM 3 will be limited to a war fighting role, specifically in tank battles, and likely therefore to be employed only in exceptional and limited circumstances.'*

10. You stated that '*there is an issue of fundamental rights and access to justice from the point of view of innocent civilians who may come into contact with DU weapons and potentially suffer negative health impacts.*' You argued that this should also '*be taken into consideration in terms of the weighting of a public interest test*'. However, in ministerial correspondence to John Leech MP on 10 December 2012 (which was released to you) it was made clear that:

*Our own environmental monitoring and that carried out by the UN Environment Programme in areas where DU munitions have been used has confirmed the presence of DU at levels far too low to have any detectable health impact. This is consistent with the findings of many agencies and with the World Health Organisation statement, that, "for the general population, neither civilian nor military use of DU is likely to produce radiation doses significantly above normal background levels". The European Commission, through a group of independent scientific experts taking into account mechanisms, potential pathways and realistic scenarios of exposure, concluded that "exposure to depleted uranium could not result in a detectable effect on human health".*

*The International Atomic Energy Agency (IAEA) reports that DU does not pose a long-term radiological hazard to the general population. Potential annual radiation doses arising from exposure to DU residues are very low and of little*

*radiological concern. Annual potential radiation doses in the areas where residues do exist are of the order of a few microSieverts, well below the annual doses received from sources of natural radiation in the environment and far below the reference level recommended by the IAEA as a criterion to help establish whether remedial actions are necessary.*

11. You have stated that the public interest may favour release as the information may *'assist in the access to justice and other fundamental rights.'* I do not see how this is a relevant factor with regard to the information in scope, consistent as it is with the Government's stated positions.

12. In determining the outcome of this case, I have been mindful of a decision in relation to the use of section 42 in a previous MOD case: *Pugh v Information Commissioner and MOD* dating from 2007. Here the Tribunal found that the public interests in favour of disclosure need not be exceptional to result in disclosure where the LPP exemption is engaged. The Tribunal stated that the correct test to be applied was whether "in all the circumstances of the case" the public interest in maintaining the exemption outweighed the public interest in disclosing the information. At the same time, the Tribunal also held that that this approach does not amount to treating the exemption under section 42 as absolute (i.e. information falling into this category can be refused without consideration of the public interest) nor does it affect or reverse the normal situation under the public interest test whereby information should be disclosed unless the maintaining the exemption outweighs the public interest in disclosure.

13. In weighing up the factors 'for' and 'against' release, I have concluded that in all the circumstances of the case the balance of the public interest lies in favour of withholding the information. The principle of LPP is a considerably weighty factor and the desire to know the legal arguments behind the outcome of the review are relatively weak and made weaker by the fact that the CHARM3 legal review's conclusion and the rationale behind it have already been the subject of a Ministerial statement on 12 July 2012. I do not believe that the public interest is best served in overriding the important principle of LPP in this case simply to enable the public to understand better the legal arguments which have already been referred to in a statement to Parliament.

### **Further Guidance**

14. In your correspondence dated 30 January 2013 you mentioned a statement made by an employee of the MOD (in breach, I must add, of the Data Protection Act 1998 due to its appearance on the whatdotheyknow website). The quotation was:

*'We acknowledge some public anxiety. We are conscious many people are concerned there is a link between the use of DU ammunition and medical problems such as cancers and birth defects. This is an issue taken very seriously by the Government. The cases of illness reported in Iraq and elsewhere are extremely distressing especially when they affect children.'*

I believe it is important to note that the correspondence in question goes on to say that:

*'there is no reliable scientific or medical evidence to suggest DU is responsible for post conflict incidences of ill health in UK Armed Forces personnel or civilian populations. Environmental monitoring in areas where DU munitions have been used has confirmed the presence of DU at levels far too low to have any detectable health impact.'*

## **Conclusion**

15. In summary, I find that:

- The initial response was handled in a timely manner and largely in accordance with the statutory requirements set out in the Act.
- The information was correctly withheld under section 42(1) of the Act.
- The MOD provided appropriate efforts in compliance with the department's responsibilities under section 16 (advice and assistance) of the Act.

16. If any aspect of this review is unclear, I would be happy to explain it. If you are dissatisfied with the review, you may make a complaint to the Information Commissioner under the provisions of section 50 of the Act. Further details of the role and powers of the Commissioner can be found on his website at: [www.ico.gov.uk](http://www.ico.gov.uk). His address is: Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF. Fax: 01625 524 510.

*Yours sincerely,*  
*As Tranter*