

From Andrew Tranham



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CIO-SPP-Information Rights Compliance

D/CIO/14-11-2012-155052-014; 10-
2012-141202-001; 14-11-2012-122732-
003; 19-11-2012-123523-006; 19-11-
2012-123903-007

Mr T. Deacon

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request-135489-47fe4c3b@whatdotheyknow.com
request-139598-f3a04047@whatdotheyknow.com
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request-140710-4f07f595@whatdotheyknow.com
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request-131200-54d712cb@whatdotheyknow.com
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10 January 2013

Dear *Mr Deacon*,

FREEDOM OF INFORMATION ACT 2000 - INTERNAL REVIEW

1. I am writing in response to your requests for internal reviews to the Deputy Chief Information Officer, dated 10 December 2012, 17 December 2012 and 18 December 2012. You asked for reviews of the MOD's inability to provide you with the information in scope of a number of requests you had previously made under the Freedom of Information Act 2000 (hereafter referred to as "the Act"). This review covers the following requests for information:

- i. *All correspondence, minutes, marginal, emails, memos and relevant documents pertaining to my allegation of RAF Police interview tape editing and the statutory basis of criminal proceedings at summary hearings prior the Armed Act 2008. (Ref: 18-10-2012-141202-001)*
- ii. *Any information or policy you may have on how this historical data that predates the Armed Forces Act 2006 can be recorded as a record of conviction despite criminal proceedings from summary hearings having no statute in law? (Ref: 14-11-2012-155052-014)*
- iii. *Can I please request any terms of reference, job description or policy for the Professional Standards Department at RAF Henlow. 2. Would handing a complaint of misconduct sent to OC PSD at RAF Henlow to a Wing Commander Provost Martial be considered within the*

guidelines of the above policy? Or a conflict of interest (the department investigating itself) - Can I also request any correspondence, emails, minutes of meetings etc as to why my complaint was not addressed by OC PSD? 3. I do not wish to waste any more time than required so I will not ask for the terms of reference/job description of secretariat 3a at HQ Air command, simple confirmation that she is unable to investigate RAF police misconduct allegations will suffice? 4. Would handing over a letter dated 28 August 2012 (of a misconduct allegation of the service police codes of practice) to a secretariat at HQ Air Command to respond be within the guidelines of question 1? 5. Can I request a copy of the response from HQ Air Command dated 12 September? 6. Can I request any correspondence, minutes of meetings, marginal notes and emails relating to the decision for the letter dated 12 September? 7. Since my allegation of misconduct is here on the Internet for the world to see and I have not had any form of response from the MoD in well over a month, does the MoD take allegations of misconduct seriously, can I request any policy you may have on responding to requests? 8. Since I have lost complete faith in the ability of the RAF police to investigate anything, and the lack of oversight by any external organisation, is there any department within the MoD that could investigate my allegation? 9. Should my allegation be proved, would it not be untenable to have a police force capable of investigating murder, but with no external oversight and completely complicit in covering up serious misconduct. I would like to request any minutes of meetings you may hold on the issue. **(Ref: 14-11-2012-122732-003)**

iv. 1) Of all the summary hearing convictions that are recorded what percentage of people that have one actually know that they have one, or realise the implications of one (since denied legal advice)? 2) Of all the summary hearing convictions that are recorded what percentage of Commanding Officers that convicted the individual, how many knew that they had done so? <http://www.channel4.com/news/fijian-born-soldier-given-leave-to-remain-in-uk> 3) How many ex or serving servicemen have found problems in gaining employment in security, aviation, working or with children upon leaving the armed forces because of a criminal record? 4) How many ex or serving servicemen have applied to join the police and been refused on the grounds they have a criminal record from a summary hearing? 5) How many ex servicemen have had applications to become a teacher rejected because a summary hearing conviction (such as assault occasioning actual bodily harm). 6) How many ex servicemen have had to change foreign career plans or emigration decisions due to a summary hearing conviction? 7) How many ex servicemen have had problems adopting or fostering children due to a summary hearing conviction? **(Ref: 19-11-2012-123523-006)**

v. How Many Foreign and Commonwealth soldiers have been or are facing deportation due to criminal records? 2) Of all the foreign and commonwealth soldiers deported or facing deportation in 1) How many have sustained injuries in the course of fighting for our country? 3) Of those in 1) how many received a trial that would be deemed article 6 of the ECoHR compliant? 4) Of those in 1) How many faced prank arrests or were ordered to decline their right to legal representation and the police interview tapes subsequently edited to hide that? 5) Of all the foreign and commonwealth soldiers now classed as illegal immigrants in the country that they fought for, (exempt of any NHS health care they may need, unable to pay income tax and therefore find employment). How much longer will they have to wait for the MoD to stop protecting its top officers and suppressing an enquiry to gain residency in the country they fought for? **(Ref: 19-11-2012-123903-007)**

2. The following requests have also been taken into consideration for the purposes of this review. Although you have not specifically sought an internal review for them, the MOD's position is the same as that outlined in this letter:

vi. Can you also provide definitions of both a service offence and criminal offence prior to the 2006 armed forces act. Prior to the armed forces act 2006, could a summary hearing conduct criminal proceedings for a civil offence? Prior to the armed forces act 2006, could a summary hearing conduct proceedings for service offence? When did a service offence and civil offence have the same meaning? **(Ref: 09-10-2012-105028-005)**

- vii. *Can I please request a copy of the response from the RAF Police Professional Standards Department that I am entitled to from the letter that was sent below 2. Any correspondence between RAF Police Professional Standards Department and HQ Air Command as to why HQ Air command sent the above letter rather than investigate my allegation? (Ref: 14-11-2012-150648-004)*
- viii. *Can you please provide the number of criminal convictions from Summary hearings broken down on year on year between 2004 to 2012? 2) With the data from 1) can you further break this down to those before the Armed Forces Act 2006 was introduced, and those After The Armed Forces Act 2006 was introduced? (Ref: 15-11-2012-163420-011)*
- ix. *Can you please confirm when the law was changed to allow Criminal proceedings [sic] from a Summary hearing that can be recorded as a criminal conviction? Can you please state what the text on 21 September 2007, would have read in the Police and Criminal Evidence Act 1984, in part VI (Codes of practice) relating to criminal proceedings [sic]? What would be the Statutory basis for criminal proceedings [sic] on 21 September 2007 for a court martial? What would be the Statutory basis for Criminal proceedings [sic] on 21 September 2007 for a summary hearing? A list of the offences capable of summary disposal under the Airforce Act 1955 on 21 September 2007? (Ref: 16-11-2012-141635-005)*
- x. *All correspondence between the SCC, MoD and RAF with regards to my Original complaint. 2) All correspondence between the SCC, MoD and RAF with regards to my new complaint. (Ref: 16-11-2012-160434-009)*
- xi. *What is MoD policy on responding to complaints or allegations of misconduct by our Armed forces? 2) How many complaints and allegations of misconduct have been received by the MoD that have simply not been acknowledged or responded to? 3) Does the MoD have any knowledge of RAF, RMP or navy police editing police interview tapes that have resulted in criminal convictions? 4) If yes to 3) on how many occasions, and who would authorise it? 5) Have any allegations of RAF, RMP or Navy police interview tapes being edited ever been made, if so how many? 6) How have these allegations been investigated, and what were the findings? Have the plaintiff been responded to in writing? (Ref: 17-10-2012-121246-003)*
- xii. *1) Any minutes of meetings resulting from the recommendation [sic] of human rights training? 2) Any Minutes of meetings resulting from the recommendation [sic] of independent [sic] oversight of RMP and Army Legal Services. (Ref: 23-11-2012-153322-010)*
- xiii. *Can you please confirm when the law was changed to allow Criminal proceedings [sic] from a Summary hearing that can be recorded as a criminal conviction? Can you please state what the text on 21 September 2007, would have read in the Police and Criminal Evidence Act 1984, in part VI (Codes of practice) relating to criminal proceedings? What would be the Statutory basis for criminal proceedings [sic] on 21 September 2007 for a court martial? What would be the Statutory basis for Criminal proceedings [sic] on 21 September 2007 for a summary hearing? A list of the offences capable of summary disposal under the Airforce Act 1955 on 21 September 2007? (Ref: 26-09-2012-155714-006)*
- xiv. *Can you please provide the number of criminal convictions from Summary hearings broken down on year on year between 2004 to 2012? 2) With the data from 1) can you further break this down to those before the Armed Forces Act 2006 was introduced, and those After The Armed Forces Act 2006 was introduced? (Ref: 26-09-2012-160038-007)*
- xv. *By breaking it down year on year, how many people during 2005, 2006, 2007, 2008 and 2009 (before 31 October), were given a criminal conviction from a summary hearing? By*

breaking it down year on year, how many people since 01 September 2009, and in 2010, 2011 and 2012 was given a criminal conviction from a summary hearing? (Ref: 29-08-2012-124804-002)

xvi. *1)How many serving (RAF, RMP and RN) police have criminal convictions (please list these in service, rank, offence, date and if the conviction came from a summary hearing or court martial.) 2)Any Policy pertaining to criminal convictions amongst serving HM Forces Police. (Ref: 29-10-2012-123956-006)*

xvii. *A copy of an e-mail to THOMPSONDM@parliament.uk (office of Andrew Robathan) dated 03 October 2012. 2)Any correspondence, minutes of meetings, marginal notes, emails etc within the MoD and to any external sources pertaining to the email of question 1 and the reasons for no acknowledgement or reply. (Ref: 29-10-2012-143948-011)*

xviii. *1a) All policy and guidelines given to the officer residing over a summary hearing that make it clear that his sentence will be a recordable criminal offence if found guilty. (I would like all versions of the guidelines/policy publication and the date they came into affect.) 1b) All policy and guidelines given to the accused before a summary hearing that make it clear that his sentence will be a recordable criminal offence if found guilty. (I would like all versions of the guidelines/policy publication and the date they came into affect.) This question was asked in parliament recently:
<http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm121019/text/121019w0004.htm#12101928004593>. Given that certain punishments would come under the rehabilitation of offenders act 1974 and others would not, this creates a situation where a £1 fine would be recorded as a criminal conviction but a demotion in rank would not be. 2) Can I request all policy, guidelines training notes and published material that highlight some punishments for the same crime result in criminal convictions and some do not. If none exist, does this indicate that certain punishments are already ruled out prior to the summary hearing? 3) Can I request any guidelines, policy, training notes or any published material for the service crime bureau that categorises "stoppage of pay" as either a fine or a compensation order? 4) In previous FOI's I have questioned the statutory basis for criminal proceedings before the armed forces act 2006. (Unfortunately it has not been answered yet.) Can I request a copy of any publication that relates to summary hearings that would be available to an airman (on 21 September 2007) Would an airman facing a summary hearing be entitled to an assisting officer or solicitor? Would this be in compliance with ECoHR? (Ref: 29-10-2012-155226-019)*

xix. *What is the policy of volunteering as a adult to help supervise Cadets if the adult has a criminal record? 2) Could I please request, if an ex HM forces soldier applied to become a civilian instructor at an air cadet squadron on leaving the forces. With which convictions from this list in the link bellow would he be allowed to supervise children? 3) If there are criminal convictions listed in 2) that would stop an adult working with children as a civilian instructor on leaving the forces, surely the same should be true for all military personnel who might supervise the cadets. Are CRB checks carried out on service personnel? Any policy you have would be appreciated. (Ref: 30-10-2012-120739-002)*

3. 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

4. In conducting my review of the handling of your requests, 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 12(1) which states that Section 1 (1) does not oblige a public authority to comply with a request for information where the cost of compliance exceeds the appropriate limit;
- e. Section 12(4) which states a public authority may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority-
 - a. by one person, or
 - b. by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign

the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.

- f. 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;
- g. 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.

5. You have asked for an internal review of four requests. You originally submitted these requests on 18 October 2012, 14 November 2012, 17 November 2012 and 19 November 2012. In accordance with section 10(1) of the Act, a substantive response was due for each of these not later than twenty working days after receipt by the Department. All of your requests were responded to within the timescale set out by the Act.

6. By virtue of section 17(1), when public authorities seek to withhold information they are required to set out precise details as to which exemption they seek to rely on and why they believe it is engaged. In accordance with this, you were informed that for two of your requests, referenced 14-11-2012-155052-014, 18-10-2012-141202-001 and 19-11-2012-123903-007, the information was being withheld from you under section 12 of the Act (cost). This was in line with the provisions in the Act.

7. In one request, reference 14-11-2012-122732-003, you submitted nine questions. These questions were considered to be requests for information and you were either supplied with the information deemed to be in scope or, in line with section 1(1)(a) of the Act, informed that it was not held by the Department.

8. For one request, reference 19-11-2012-123523-006, you were informed that the information you had requested was not held by the Department. This was in line with section 1(1)(a) of the Act.

9. Throughout its responses to your requests, the Department informed you of your rights to appeal. I find that the Department dealt with your requests in line with its obligations under the Act.

The Application of section 12 of the Act

10. I have looked again at the responses provided by the Department to your requests for information and I have concluded that all of the information you have requested is exempt from release under section 12 of the Act. Section 12 allows public authorities to withhold requested information when the cost of compliance exceeds an appropriate limit. It also allows a public authority to aggregate more than one request if these requests meet certain criteria. Following this, all four of your requests should have been aggregated with a further fifteen you had made within the previous sixty working days and the information (if held by the Department) withheld under section 12(4) of the Act. I have explained this below.

11. Section 12(4) allows that, 'in such circumstances as may be prescribed, where two or more requests for information are made to a public authority... the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.' In determining requests can be aggregated, the primary consideration is whether the criteria set out in the Fees Regulations apply. These regulations state that requests can be aggregated for the purposes of calculating costs if they are:

- Made by one person, or by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign;
- For the same or similar information; and
- The subsequent request is received by the public authority within 60 working days of the previous request.

12. I find that the fact that the first and third criteria as set out in the Fees regulations are met is beyond dispute. You submitted 19 requests between 29 August 2012 and 19 November 2012 (58 working days), four of which are in scope of this internal review. As such, these two criteria are both engaged. Any question remaining over the validity of section 12(4) therefore revolves around the second criterion, which states that the information requested must be the 'same or similar'.

13. In determining the outcome of *Fitzsimmons v the Information Commissioner & the Department for Culture, Media and Sport* (EA/2007/0124 dated 17 June 2008), the information tribunal recognised that the need for information to be 'the same or similar' was a very wide test. The Information Commissioner later decided (in Decision notice FS 50198530) that requests could be deemed 'similar' where there is an overarching theme or common thread running between them in terms of the nature of the information that is

requested. Within each of the four original requests in scope of this review it can clearly be seen that there is the same 'overarching theme'. Each of the requests is for information regarding military criminal proceedings and criminal convictions arising from summary hearings, either pertaining to your specific case or on a more general basis. As such, the Department's decision to aggregate these requests was appropriate. The ICO guidance states that aggregation can occur where information is linked between requests 'to any extent.' I therefore find that the Department was correct to aggregate these requests in accordance with the Fees Regulations.

14. For the exemption in section 12(4) to be legitimately applied, it is also necessary for section 12(1) to be engaged in respect of at least one of the aggregated requests. Section 12(1) states that a public authority is not obliged to comply with a request 'if the authority estimates that the cost of complying with the request would exceed the appropriate limit.' Regulation 5 of the Fees Regulations states that a public authority may refuse any aggregated requests for information where the appropriate limit would be exceeded in relation to any one of those requests. This limit is set for central government departments at £600. The Act deems this to be the equivalent of one person working for 24 hours at a rate of £25 an hour. The ICO has outlined that the cost of complying with a request includes the time taken to determine whether the information is held and then locate, retrieve and extract it. I have reviewed the estimated costs of complying with your requests and my findings are set out below.

15. I have established that the estimated cost of handling request xv would exceed the £600 limit for compliance by a significant margin. Request xv asked '*how many people during 2005, 2006, 2007, 2008 and 2009 (before 31 October), were given a criminal conviction from a summary hearing.*' Between 2005 and 2009 there were a total of 1458 cases for criminal damage investigated within the RAF alone. Not all of these cases were dealt with summarily and, as no central log is held, the Department would need to go through these cases to find out which ones were. Assuming that it would take 3 minutes to do this for one case, this process would take roughly 70 man-hours. The cost of locating the information at the proscribed cost of £25 per hour would total £1750, significantly in excess of the £600 appropriate cost limit applicable to Government Departments. The ICO guidance states that 'as soon as a public authority becomes aware that it intends to rely on section 12, it makes sense for it to stop searching for the requested information and inform the complainant. This avoids any further and unnecessary work for the public authority as it does not need to provide any information at all if section 12 is engaged.' However, I can inform you that, having identified the information in scope, the Department would also need to retrieve the information from the relevant cases. This would incur similar costs, validly attributable to the cost estimate under section 12 of the Act. The same processes would then need to be carried out for the information relating to 2010-2012, as requested in the second part of this request.

16. As request xv has exceeded the cost on its own and the Department was correct in its aggregation, the information in scope of your requests is exempt under the provisions laid down in the Act. However, I can also tell you that a significant number of your other requests would, if complied with, also go over the cost-limit proscribed.

17. Further Guidance

18. The Department did not engage section 12 for two of your responses (Refs: 14-11-2012-122732-003 and 19-11-2012-123523-006), rather opting to provide you with information or informing you that information was not held by the Department. I consider that these responses were attempts, under section 16 of the Act, to provide you with

guidance and information pertaining to some of your requests despite the fact that section 12 could have been also legitimately applied to these requests.

19. It should be noted that the Department is not obliged to confirm nor deny whether all of the information in scope of your other requests is held (except where this has previously been explicitly stated). Section 12(2) of the Act states that section 12(1) of the Act 'does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the cost limit.' However, due to the fact that your very first request went over the cost limit (request xv above), under the rules of aggregation the Department is not obliged to comply with section 1(1) for your other requests as the cost limit had already been exceeded. As such, despite the engagement of section 12 concerning your requests, it should not be assumed that all of the information is held by the Department.

20. In your series of requests you stated a number of questions that were not specific requests for information held. Section 1(1) of the Freedom of Information Act gives an applicant the right to access recorded information held by public authorities at the time the request is made and does not require public authorities to answer questions, provide explanations or give opinions, unless this is recorded information held. In a decision notice of 15 February 2011 (FS5027927) the Information Commissioner stated that "the Act does not provide a right to ask questions from public authorities. It provides the right to ask an authority for a copy of any recorded information that it holds... Although this is the case, the Information Tribunal has clarified that any written question to a public authority can be considered to be a freedom of information request. If a question can be answered by simply providing the applicant with copies of recorded information that it holds then it should do so. Otherwise it should simply state that it does not hold relevant information." Further to that, there is no requirement under FOI to create information to respond to hypothetical questions posed and submitted under the Act. FOI only covers information that is 'held' and interpretation of legislation in respect of scenarios posed would not represent a valid request for information under FOI. This should have been explained to you in your original response and I apologise for this oversight in this respect. You may find it helpful to know that The Information Commissioner's Office publishes guidance on how to make requests for information under the Freedom of Information Act in the ICO Charter for Responsible Freedom of Information Requests, available on the ICO website at the following address:

http://www.ico.gov.uk/upload/documents/library/freedom_of_information/practical_application/its_public_information_foi%20charter_final.pdf

21. In many of your requests you also stated that the Department has, under section 16 of the Act, an obligation to help you refine your request in order to bring it under the cost limit. Paragraph 14 of the section 45 Code of Practice states that where a public authority is not obliged to comply with a request because it would exceed the appropriate limit to do so, then it: "...should consider providing an indication of what, if any, information could be provided within the cost ceiling. The authority should also consider advising the applicant that by reforming or re-focussing their request, information may be able to be supplied for a lower, or no, fee." Where section 12 was invoked, the Department provided general advice on how to bring your requests under the cost limit (e.g. 'The MOD may be able to provide information requested if you reduce or refine your request to bring the cost of compliance under the limit, for example seek information on a single Service and refine your request to a 12 month period. Please contact us if you would like to refine your request or require advice on doing so.'). Due to the number of requests you had made, I do not believe that it would have been reasonable to expect the Department to have

offered more advice beyond what was given without further contact from you as the requestor.

22. In your request for an internal review for the request reference 19-11-2012-123903-007 you asked whether the reason your requests *were 'being refused [had] anything to do with the MoD's cavalier attitude to criminal convictions and the damage done to soldiers careers? Along with reports that the compensation bill running into millions as reported by this article in the times?'* As stated above, I can confirm that the reason your requests are being refused is that they are over the cost limit specified in section 12 of the Act.

Conclusion

23. In summary, I find that:

- The initial responses were handled in a timely manner and met the statutory requirements set out by the Act.
- The Department was correct in informing you that two of your requests fell under section 12 of the Act and hence the information requested was exempt. However you should have been informed that all of your requests fell under section 12 of the Act.
- The Department provided appropriate advice and assistance in compliance with the department's responsibilities under section 16 of the Act.

24. 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. His address is: Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF. Fax 01625 524 510.

Yours sincerely,

