

From: Mrs S Gardiner



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FOI2019/09668

Dr Emma L Briant

Via email: request-598581-2dc5a11a@whatdotheyknow.com

23rd October 2019

Dear Dr Briant

FREEDOM OF INFORMATION ACT 2000 INTERNAL REVIEW

1. I am writing in response to your email of 25 September 2019, in which you asked for an internal review of MOD's handling of your request for information under the Freedom of Information Act 2000 ('the Act') which is available on the WhatDoTheyKnow (WDTK) website at https://www.whatdotheyknow.com/request/ukraine_project. In order to respond to your complaint, I have now completed a full independent review of the handling of your request and substance of the responses 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 5 of the Code of Practice¹ under section 45 of the Act.

Handling

2. In conducting my review of the handling of your request, I have focussed 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;

¹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/722165/FOI-Code-of-Practice-July-2018.pdf

- 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) that requires a public authority which is relying on an exemption(s) in the Act to state that fact, to specify the exemption(s) and to state, (if not otherwise apparent) why that exemption applies;
 - f. Section 17(2) which states that the notice under section 17(1) must, if applicable, state that a decision has not yet been made whether the public interest in maintaining an exemption outweighs the public interest in disclosing the information and give an estimate of the date that the authority expects such a decision will be made;
 - g. Section 17(3)(a) which states that, where 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; and
 - h. 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.
3. Your request of 21 August 2019, received on the same day, was worded as follows:
- 'Under the FOI Act I am writing please to request a copy of a final project report for a research and communication campaign in Ukraine to win back control of Donetsk undertaken by Strategic Communication Laboratories (SCL) - this may not be a UK campaign but the report was shared with the MoD. I would appreciate seeing the report as well as any associated communications and a list of any meetings about this specific project and related outcomes or proposals, as well as people involved please (period of interest - 2014-15). I am very grateful for your assistance and time spent on this public interest inquiry.'*
4. Section 10(1) of the Act requires that you receive a response within 20 working days and the response of 19 September was provided within the statutory timescales. MOD advised that it was necessary to extend the 20 working day time limit to consider the public interest of confirming or denying if information was held for the purposes of protecting the capability, effectiveness and security of the Armed Forces and to safeguard international relations. Therefore, the qualified exemptions at sections 26(3) and 27(4) were being considered and whether the public interest in maintaining the duty to confirm or deny outweighed the public interest in confirming whether or not the Department holds any information. MOD stated that the plan was to send you a response by 17 October 2019. You were correctly advised of your right to appeal.
5. The Act requires public authorities to comply with requests for information within 20 working days following receipt of the request. In cases where a public authority is considering the application of exemptions subject to a public interest test (PIT), the Act requires the authority to reach its decision "within such time as is reasonable in the circumstances". I am aware that the Information Commissioner's Office, in its good practice guidance, considers that in cases where the public interest considerations are exceptionally complex it may be reasonable to take longer but that, in their view, in no case should the total time exceed 40 working days (by 17 October in this case).
6. The substantive response of 24 September neither confirmed nor denied that it held information relevant to your request by virtue of sections 26(3) (defence) and 27(4) (international relations). You were provided with the balance of the PIT for the qualified exemptions, and correctly informed of the right to appeal.

7. In summary, the Department's substantive response was issued within the Information Commissioner's recommended 40 working days target for replying to requests where additional time is required to conduct a test of the public interest.

Substance

8. In conducting my review, I have considered your request again from first principles and my findings are below.

Use of section 27(4) (defence)

9. Section 27(4) states that: 'The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) – (a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1)'. In this case, I have considered again whether confirming or denying that the requested information is held would, or would be likely to, prejudice relations between the UK and any other state under the sub section 27(1)(a) (international relations). Section 27 is a qualified exemption and MOD must consider whether, 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 public authority holds information.

10. Irrespective of what information may or may not be held, confirmation would provide openness, transparency and public accountability. There is a strong public interest in the UK Government's dealings with the SCL Group and confirming if information is held would provide a greater understanding of the nature and extent of the UK's commercial dealings with the company.

11. However, there is a stronger public interest in not prejudicing relations between the UK and Ukraine, which would be undermined by confirming or denying whether the information in scope of your request is held. As advised, confirmation of information held would reveal whether or not there was an interest in the Donetsk region from the UK Government. The importance of building and maintaining good, effective and stable international relationships, cannot be underestimated. To confirm or deny whether the information is held would be likely to prejudice or undermine international relations between the countries involved.

12. The balance of public interest lies in neither confirming nor denying whether the MOD holds any information in scope of your request. This should not be used as an indication that such information is or is not held.

13. I am, therefore, satisfied that to confirm or deny whether the information is held would be likely to prejudice the matters identified at section 27(1)(a) of the Act.

Use of section 26(3) (defence)

14. Section 26(3) provides the public authority with an exemption from the duty to confirm or deny it holds the information but only where this would damage the defence of the British Islands, or the capability, effectiveness, or security of the armed forces. Section 26 is a qualified exemption and subject to a PIT.

15. Under section 26(3), MOD neither confirmed nor denied whether it held the information in scope of your request. A PIT has been conducted and the factors for disclosure are similar to those outlined at paragraph 10 above. As advised, section 26 is engaged because disclosing if information is held or not could reveal potential Armed Forces tactics, which would undermine the ability of the MOD to conduct effective operations. There is a stronger public interest in ensuring that the UK Armed Forces, and those they are working with, are able to conduct operations effectively, safely and securely.

16. Confirmation or denial of information held would reveal whether or not MOD worked with SCL on a particular campaign or was interested in a specific region. The balance of public interest lay in neither confirming nor denying whether the MOD held any information in scope of your request. This should not be used as an indication that such information is or is not held.

17. I therefore find that confirmation of whether or not the information is held would be likely to prejudice the capability and effectiveness of the UK's defence forces and that the balance of the public interest lies in favour of maintaining the use of the NCND limb of the exemption at section 26(3) in order that UK Armed Forces are not compromised in any way.

Conclusion

18. In summary, I find that:

- a. The Department's substantive response was issued within 20 working days of the initial response and met the Information Commissioner's recommended 40 working days target for replying to requests where a test of the public interest is required.
- b. The exemptions at sections 26(3) (defence) and 27(4) (international relations) are correctly engaged, as is the right to neither confirm nor deny whether information in scope of your request is held.
- c. For the avoidance of doubt, I should make it clear that this response should not be taken as an indication that information in scope of your request is or is not held by the Department.

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 the website at: <https://ico.org.uk>. The address is: Information Commissioner's Office, Wycliffe House, Water Lane, WILMSLOW, Cheshire, SK9 5AF.

Yours sincerely,



Sandra Gardiner