

The Defence Exemption

The Information Commissioner has a duty under s.50 of the FOI Act to consider complaints that public authorities have failed to deal properly with requests for information which they receive. The Commissioner also has a more general duty to promote the following of good practice by public authorities and to provide information about the Act to the public.

The most difficult aspect of the Act (and therefore potentially the most controversial) is the application of the exemptions from the *right to know*. These are contained in Part 2 of the Act. As the name suggests, *Casework Guidance*, has been prepared primarily for use by complaints resolution staff in the Information Commissioner's Office. The guidance attempts to provide an interpretation of the various exemptions, to give some indication of the Commissioner's general approach, and, where appropriate, to describe the kinds of issues that are likely to come to the fore when the exemptions and the public interest test are applied.

Although the primary audience is internal, the Commissioner recognises that public authorities and members of the public will have an interest in understanding his point of view. For that reason he has decided to publish this internal guidance.

It is important to note that this is living guidance. It will be revised and supplemented in the light of cases considered from January 2005. Moreover, although not intended to be a formal external consultation, the Commissioner welcomes comments and suggestions on the guidance as it currently stands.

The right under the Freedom of Information Act to request official information held by public bodies (known as the **right to know**) comes into force in January 2005. The Awareness Guidance series is published by the Information Commissioner to assist public authorities and, in particular, staff who may not have access to specialist advice in thinking about some of the issues. The aim is to introduce some of the key concepts in the Act and to suggest the approaches that may be taken in preparing for implementation. Here we look at the exemption relating to information whose disclosure might prejudice defence or the capability, effectiveness or security of the armed forces. The exemption is set out in section 26 of the Act. Although the guidance is not aimed at specialists, those with responsibility for FOI compliance in the armed forces, MoD etc may find it helpful to be aware of the general approach of the Commissioner which the guidance attempts to explain. Guidance on this exemption is also available from the Department for Constitutional Affairs (www.foi.gov.uk)

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What does the Act say?

Section 26 of the Act sets out an exemption from the **right to know** if the disclosure of information would or would be likely to prejudice:

- the defence of the British Islands (i.e. the UK, Channel Islands and the Isle of Man) or any colony;
- the capability, effectiveness or security of the armed forces or that of any forces cooperating with them.

The term “prejudice” is not defined in the Act. In simple terms, however, information will be covered by the exemption if its disclosure would assist or be likely to assist an enemy or a potential enemy. While the likelihood of prejudice may not be very high, it should not be negligible. (See “Assessing the likelihood of prejudice” below.)

The term “armed forces” is not defined. However, it may be important to remember that the Special Forces (i.e. the SAS and SBS) are not public authorities for the purpose of the Act and that, furthermore, information obtained from them or relating to them is subject to an absolute exemption under s.23 of the Act.)

The terms “capability,” “effectiveness” and “security” are also not defined. However, it seems clear that the information covered by the exemption is that whose disclosure might put the physical safety of troops at risk or which might impair their ability to carry out their duties. The term “any forces cooperating with them” includes not only the armed forces of countries with which the UK has a formal alliance or agreement (for instance NATO countries or members of the UN involved in joint peace keeping operations) but also other forces with which British troops may be operating in informal alliance, e.g. forces of the Northern Alliance before the fall of the former Taliban regime in Afghanistan.

The exemption is subject to the public interest test (see below). This means that even if it is considered that disclosure of information might assist an enemy, the public authority holding the information must consider whether there is a stronger public interest in its disclosure. To a large extent the assessment of the likelihood of prejudice will be bound up with the application of the public interest test. The greater the risk to the safety or effectiveness of the armed forces the less likely it is that the public interest would require disclosure.

What information is covered and who can rely on the exemption

The exemption is not for “defence information” but for information whose disclosure would or would be likely to prejudice defence matters. In addition to information about weaponry, troop deployments etc which might be expected to be covered by the exemption, there may be other information, for instance information as to fuel supplies, whose disclosure might assist an enemy in some circumstances.

By the same token, it should not be assumed that the information covered by the exemption will only be held by the MoD or the armed forces. For instance, there may be information held by fire authorities and others involved in emergency planning

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which may be covered. During a recent fire fighters' strike, troops were deployed to provide a basic fire service. Information about the deployment of those troops, including the numbers involved, may have been exempt under s.26 if to disclose it would have been to assist an enemy. It would have made no difference whether the information had been held by the MoD or other public authority.

The duty to confirm or deny

The right to request information from a public authority is set out in Section 1 of the Act. In fact there are two related rights. These are:

- the right to be informed whether or not the information requested is held by the authority, and, if so,
- the right to have that information communicated to him/her.

The first of these rights is referred to in the phrase, "the duty to confirm or deny" which is used elsewhere in the Act. Although it is unlikely that public authorities will generally wish to give this non-committal response to requests for information, clearly there will be occasions when even to confirm that information of a given description is held would entail a risk. For instance it would be reasonable for the MoD to decline to confirm or deny that it had a particular battle plan or that British troops did or did not carry particular weapons if disclosure of even such limited information would assist an enemy.

Assessing the likelihood of prejudice

In assessing the likelihood of prejudice that a disclosure of information might cause it will be necessary to identify the particular harm that may arise. For instance, the disclosure of information about the reliability of a piece of military equipment might be covered by the exemption if it would enable an enemy to sabotage that equipment but not if the weakness was impossible to exploit or if it were one that was impossible to conceal.

The timing of a disclosure is likely to be crucial. Information which might prejudice the effectiveness of a military operation that was either planned or underway might cause no harm once the operation had been concluded. Once again, this is not an absolute rule, and there will certainly be many cases where the disclosure of information about the tactics or weaponry involved in a successful operation might prejudice the chances of success in a similar operation in the future.

When assessing whether disclosure would prejudice the purpose of defence, consideration should also be given to what information is already in the public domain. Where the same information is available from other, reliable sources, it will rarely be possible to argue that repeated disclosure would cause prejudice. By contrast, where the information available from elsewhere is of a more speculative nature (even though, in fact, true), then it will be easier to argue prejudice. Similarly, a public authority may legitimately decide to withhold information which is in itself relatively innocuous if that information would cause prejudice in combination with another piece of information which has already been put in the public domain.

Applying the Public Interest Test

In essence the public interest test involves weighing the benefits of the disclosure of information against the purpose of the exemption. Where the public interest for and against disclosure is evenly balanced, information should be disclosed. The Commissioner has given general advice on the public interest in [Awareness Guidance No 3](#). He has also published [Balancing the Public Interest: Applying the public interest test to exemptions in the UK Freedom of Information Act 2000](#), a Constitution Unit study of how the public interest test has been applied under FOI legislation in other parts of the world.

In the context of defence, as noted in “What does the Act say?” (above), the matters which the exemption is designed to protect are national defence and the safety and effectiveness of the armed forces. There is a presumption, in other words, that these matters themselves are in the public interest.

Although the Act does not list the factors that would favour disclosure, the Commissioner has suggested that among the factors that would weigh in favour of disclosure are:

- **Furthering the understanding of and participation in the public debate of issues of the day.**

Decisions as to whether to deploy troops or to go to war are clearly among the most difficult and sensitive faced by governments and by parliament. There is a strong public interest in facilitating an informed debate about the merits of such decisions. A more informed debate should lead to improved decision making and, therefore, an increase in public confidence in and support for military operations. Before decisions have been taken there are, however, likely to be strong arguments against the disclosure of operational information and an emphasis upon information as to the wider arguments for and against troop deployments.

From time to time there are arguments about the behaviour of British troops or about that of the armed forces of other countries. The latter may be forces with whom British troops are engaged in joint operations or for whom British forces provide training. There is a legitimate public interest in having an informed debate about such matters, albeit one that must be balanced against the prejudice that might be caused to those operations.

- **Promoting accountability and transparency by public authorities for decisions taken by them.**

As noted earlier, the timing of disclosures is likely to be a critical issue. While there may be good arguments against the disclosure of some information about operations which have been concluded, for fear of prejudice to other, similar operations in the future, there may be stronger arguments in favour of disclosure. In principle, the public has the right to know that military operations have been conducted properly and effectively, that there has been an attempt to minimise any casualties and so forth. While it may occasionally be argued

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that disclosures may adversely affect morale, there is likely to be a stronger counter argument that members of the armed forces have even more right than the general public to reliable information.

- **Promoting accountability and transparency in the spending of public money.**

The public have a clear interest in knowing that the very large sums of money involved in defence have been wisely spent. Unless the disclosure of information about the reliability and effectiveness of military equipment would in fact prejudice the security of the armed forces or national defence then there will be strong argument in favour. (As is discussed below, there may be other arguments against, in particular, protection of the commercial interests of defence contractors.)

- **Bringing to light information affecting public health and public safety.**

Almost inevitably where military operations lead to loss of life, there is debate about the safety of equipment and the direction of those operations. Again, it will be necessary to weigh the possible benefits of disclosure against the prejudice. Factors in favour of disclosure might include enhanced accountability, improvements to equipment and planning, and allowing individuals to challenge the basis of decisions affecting them personally. These benefits must be weighed against the risk that disclosure might assist an enemy.

The above is simply an indication of the sorts of issues that are likely to arise and the areas where it will be necessary to carry out an assessment of where the greater public interest lies.

Relation to other exemptions

Quite often the defence exemption will overlap with others. When refusing a request for information, public authorities must provide their reasons for doing so, explaining the exemptions upon which they are relying. Where there are several strong grounds for refusal, it would be good practice to explain this. It is not, however, necessary to point to exemptions which, although conceivably relevant, do not provide such strong grounds for refusal.

For instance, a request might be received for information which would identify a weakness in a piece of military equipment. If to disclose the information would assist an enemy, it is likely to be more appropriate to point to the defence exemption than to argue that to provide the information would prejudice the commercial interests of the manufacturer of the equipment.

By contrast a request may be received for information supplied to the MoD by a US defence contractor. If it were judged that disclosure might damage relations with a key ally, undermine the competitive position of the contractor and result in a decision by the contractor not to undertake other work for the MoD (thus prejudicing the effectiveness and capability of the armed forces), it may be appropriate to cite not

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only the defence exemption but those relating to international relations and commercial interests.

The exemptions which are likely to overlap with the defence exemption are as follows:

- **National Security:** information is subject to an absolute exemption set out in s.23 of the Act (i.e. there is no public interest override) if it was obtained from or relates to a national security body. These are listed in Annex 1 but include the Security Service and the special forces (SAS & SBS).

The Defence Intelligence Service is not, however a national security body. The s.23 exemption is not available. However, there is a qualified exemption at s.24 for other information whose disclosure might prejudice national security. The term "national security" is not defined in the Act. However, it would certainly include information whose disclosure might assist terrorists.

Where there is a choice as to whether to rely upon the s.23 national security exemption and s.26, Defence, the Commissioner would strongly encourage public authorities to choose the Defence exemption. Principally this is because reliance upon the Defence Exemption rather than National Security is likely to be less emotive. (The Commissioner also advises against the use of national security certificates unless there are good reasons from preventing him from considering complaints under s.50 of the Act in the normal way.)

- **International Relations:** Like the defence exemption, this is also a qualified exemption (i.e. subject to the public interest test). It covers information whose disclosure would be likely to prejudice relations between the UK and any other state or international organisation or the interests of the UK abroad. It may be easier to explain how the disclosure of a particular piece of information would prejudice relations with an ally than it would be to explain how the disclosure would prejudice the security of British forces.
- **Commercial Interests:** Again this is a qualified exemption but may properly be used as a ground for not disclosing information which might prejudice the competitive position of a defence contractor. See also [Awareness Guidance No 5](#).

Key Issues for Implementation

Although the MoD and the armed forces may not be the only users of the defence exemption, they will obviously be the most likely users. In addition to the general advice given in this *Awareness Guidance*, and in the guidance prepared by the DCA, detailed internal guidance and procedures for responding to requests are being developed by the MoD.

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So far as other public authorities which may have occasion to rely upon the exemption are concerned, it may be useful to attempt to identify in advance the information which may be protected by the exemption. This should help to ensure that prompt responses are given to any requests.

Although the MoD/armed forces do not have a “veto” over the disclosure of information which they think may be covered by the exemption, it would also be helpful to establish lines of communication with relevant officials in the MoD who may be able to assist in judging whether it is appropriate to rely upon the exemption. The Commissioner would be surprised if a public authority attempted to rely upon the exemption if the MoD did not consider that this was appropriate.