

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 25 June 2007

**Public Authority:** Ministry of Defence  
**Address:** Main Building  
Whitehall  
London SW1A 2HB

### Summary

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The complainant, an employee of the Ministry of Defence (MOD), sought information from MOD relating to an Assessment and Development Centre he had attended to help determine suitability for promotion. Although a substantial amount of information was released to the complainant, MOD withheld some information under section 36 of the Act on the grounds that release of it would, or would be likely to, prejudice the effective conduct of public affairs. The Commissioner took the view that the opinion of the qualified person that the information should be withheld was a reasonable one and that the public interest operated in favour of the maintenance of the exemption. He did, however, criticise MOD for some aspects of its handling of the request.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

### The Request

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2. The complainant was an unsuccessful candidate at the Ministry of Defence's (MOD) 2003 Assessment and Development Centre for promotion to Band B2, and subsequently appealed to an Independent Grievance Appeal Panel. Following earlier correspondence the complainant wrote on 11 March 2005 to request, in accordance with the Freedom of Information Act, a copy of: the 2003 Assessment and Development Centre – Assessor Guide (in particular the section dealing (sic) 'PAR/PDRs and the Promotion Recommendation'). The complainant said that it was essential for him to have this information in order to assist with the appeal he was currently making. On 21 March 2005 the complainant was told by

MOD that an exemption was being sought under section 36 (Prejudice to effective conduct of public affairs) as there were concerns that release of this information might jeopardise the Assessment and Development Centre process: a decision would be made in due course. Given the steer he thought this letter to contain the complainant, in a letter of 30 March 2005, sought a review. He also complained about the delay. The complainant was then told, in a letter dated 4 April 2005, that the letter of 21 March had only been intended to let him know, as a courtesy, what the probable outcome of his request would be. MOD remained of the view that section 36 applied to the information requested but needed additional time in order to consider the public interest aspect of what was a qualified exemption.

3. While awaiting the formal decision on this request the complainant was also pursuing this matter through other avenues within MOD. On 5 May 2005 the complainant was told, through a letter from the office of the 2<sup>nd</sup> Permanent Under Secretary, that the Minister had agreed that the information should be withheld under section 36 although it would be made available to the grievance panel when considering the complainant's appeal. However, on 11 May 2005, the complainant was told that the Minister had only agreed that section 36 should be applied **in principle** (the Commissioner's emphasis) to the material requested: a further decision was being sought from the Minister as to whether or not that principle should be applied in this particular case.
4. On 16 May 2005 the complainant received a substantive reply from MOD. In response to the complaint about delay MOD said that, as was allowed for under section 10(3) of the Act, it had extended the 20 day response time set out in the Act in order to consider the question of the balance of the public interest. On the substantive question of the release of the information MOD said that it was important, and in the public interest, to maintain the integrity of the process by ensuring a level playing field for all candidates. This meant making sure that no individual candidate could gain an advantage by having access to privileged knowledge or to guidance designed for the assessors. On that basis the Minister, exercising his reasonable opinion as a qualified person under the Act, took the view that the information should remain withheld under section 36 as release of it would prejudice the conduct of public affairs. MOD invited the complainant to seek an internal review if he remained dissatisfied.
5. On 17 May 2005 the complainant sought that internal review. He said that he thought that the exemption had been wrongly applied, that there had been an unacceptable delay in dealing with his request, and that the wrong information had been presented to the qualified person. The complainant said that release of the information he sought could not now provide advantage to anyone as it did not tell candidates how to tackle exercises or what competences particular exercises were testing: it simply provided a marking guide, and guidance as to how to proceed in borderline cases. The complainant was subsequently told that the review would be completed by 26 July 2005, in accordance with the 40 working day target MOD had set itself for the completion of internal reviews.
6. On 21 July 2005 MOD wrote to the complainant to inform him of the outcome of the internal review. In respect of procedural matters MOD accepted that its letter of 21 March 2005 had been incomplete in that it had failed to set out the

procedures for internal review and for subsequent appeal to the Information Commissioner, although these omissions had later been rectified. MOD also accepted that two errors, both of which had led to avoidable delay, had been made when seeking the view of the Minister as the qualified person. First, when the matter was initially submitted to the Minister, it was not made clear that the submission was in response to a specific request and that the timescales of the FOI Act therefore applied to his consideration. Second, the Minister was not provided at that time with the actual material sought by the complainant: he was provided only with a description of it. MOD accepted that this had been a mistake.

7. As far as the information that formed the subject of the request was concerned MOD noted that, following the end of the appeal period, the background information to the exercises and the exercises themselves were placed on the staff intranet. MOD was satisfied that section 36 had been correctly applied to the information contained in the marking guide. However, in respect of the information contained in the Assessor Booklet, MOD now took the view that much of the content need not have been withheld and that only one paragraph (5g – which deals with promotion markings) could now not be released. This was withheld because, in the view of MOD, information contained in that paragraph could be used by candidates to devise appropriate tactics to assist their appearance at the A&D Centre.

## The Investigation

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### Scope of the case

8. On 16 September 2005 the complainant contacted the Commissioner to complain about the way in which his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
  - a) that MOD had mishandled his request for information and misled him regarding the application of an exemption;
  - b) that MOD had not provided the information or processed his request in a timely way;
  - c) that MOD misrepresented his request to the qualified person with the result that a decision to exempt had subsequently had to be reversed
  - d) that MOD continued to withhold one element of information and had provided an incorrect explanation for doing so;

The complainant said that these failures had disadvantaged him in his preparation for the Grievance Appeal Panel. He also said that he did not accept the reasoning behind the refusal to release to him paragraph 5g of the booklet.

9. In the first submission to the Minister (see below) it was suggested that MOD should rely primarily on section 36 to justify withholding information relating to

A&D Centre process but that there would also be occasions when it might be correct to cite section 43. Other material would be protected under section 22 until such time as it was appropriate to release it. In this case, however, MOD has not cited any exemption other than section 36. On that basis, and in line with the decision in the Tribunal case of *Bowbrick v Information Commissioner & Nottingham City Council (EA/2005/0006)*, the Commissioner has not considered the possible application of any other exemptions.

## Findings of fact

10. Promotion to Band B in the MOD requires candidates to pass a two-day Assessment and Development Centre. Such assessments typically consist of a number of written and interactive exercises which are designed to test a range of competences and MOD uses material that is specifically tailored to its requirements. Those carrying out the assessments are provided with guidance material. In 2003, for the Band B2 Assessment and Development Centre, this consisted of two documents. The first was entitled: '*Band B2 Assessment and Development Centres Assessor Booklet 2003.*' The second was entitled '*MOD B2 Assessment and Development Centre 2003 Assessor Guide to the Exercises.*' For convenience, these are referred to subsequently as, respectively, the booklet and the exercise guide.
11. The Commissioner has noted that, following the end of the appeal period, information in the exercise guide covering background detail to the exercises, as well as the exercises themselves, were published on the MOD Intranet. Following the complainant's request, and the response to the internal review dated 21 July 2005, the booklet was also published on the intranet, minus the paragraph that had been redacted following the application of section 36. The information that remains withheld is therefore paragraph 5g from the booklet, and those pages from the exercise guide that advise on the interpretation of candidates' responses.
12. The Commissioner has also noted that, while pursuing his request for the complete texts of the two documents, the complainant was also pursuing a separate request to see the submission which resulted in the Minister's opinion as the qualified person under section 36, to which reference is made above. In a letter to the complainant dated 6 January 2006 MOD agreed to release both the submission itself (dated 14 April 2005) and a minute setting out the Minister's response to the submission (dated 3 May 2005). However, MOD made it clear that release in this case was outside the terms of the Act and therefore to the complainant only, not to the wider public. The Commissioner also notes that, in that response, the Minister agreed to the general proposition that specific elements of the A&DC process should be protected by section 36 and that some other elements would merit protection by section 43 (Commercial interests). In addition, because some information would in due course be released proactively, he accepted that information could be protected under section 22 (Information intended for future publication) until such time as publication took place.

## Analysis

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### Procedural matters

13. The complainant made his initial information request on 11 March 2005. The refusal notice in response to that request was sent out on 16 May 2005. This is clearly outside the timescale set out in section 10(1) of the Act. The Commissioner has noted that, in letters dated 30 March and 4 April 2005, MOD advised the complainant that it was thought likely that the material requested fell within section 36 of the Act and that, as this was a qualified exemption, consideration of the public interest test would be required. However it was only in the second of these letters (not the first, as was subsequently claimed in the refusal notice of 16 May 2005) that MOD indicated that, because of this, additional time would be needed and that a substantive reply would not therefore be provided until 20 May 2005. It was not, however, until the refusal notice of 16 May 2005 that MOD drew attention to the fact that this extension of time had been sought on the basis of the provisions in section 10(3) of the Act. Such clarification would have been helpful considerably earlier in the process, and the failure by MOD to provide it merits criticism.
14. In its review letter of 21 July 2005 MOD examined its handling of the request and correctly apologised for some minor errors in the initial responses to the complainant. More fundamental, however, was the delay caused by the MOD through the way in which the reference was made to the qualified person under section 36 of the Act. In its initial submission to the Minister (the submission of 14 April 2005) MOD had asked for a general endorsement of the proposition that certain sections of the guidance material should be withheld in order to protect the integrity of the promotion process. This endorsement was sought without the qualified person having the benefit of seeing the guidance material in full: what the Minister was given was a general summary of the contents of the guidance material, with specific reference to what MOD had identified as the areas that should be withheld. In the final paragraph of that submission, however, MOD noted that, even if this endorsement of the general approach were to be given, individual requests would still need to be decided on their particular merits.
15. Having received an endorsement of the recommended approach through the Minister's minute of 3 May 2005, a second submission was made on 10 May 2005. [It should be noted that MOD proved unwilling to provide the Commissioner with copies of either this or the third submission]. The second submission apparently made it clear that the Minister was now being asked to respond to a specific request under the Act rather than to support general principles. However, the Minister was still not provided with the information at issue in full and his decision to withhold it under section 36 (which he made on 16 May 2005) was therefore based upon a description of the information sought rather than on the actual information itself. It was only at the review stage, as part of the third submission, dated 30 June 2005, that the Minister was provided with the information in full.

16. As MOD has recognised, this approach was both flawed and contradictory. The Act recognises that all information requests should be judged on their merits and that it is not possible to withhold a class of information unless it is information which is covered by an absolute exemption (which was not the case here). It was therefore inappropriate to seek the Minister's agreement to the withholding of a class of information covered by a qualified exemption, a fact MOD seems to have recognised by noting that each request would still in any event have to be considered on its individual merits. What made matters worse was the fact that MOD sought the Minister's approval for this approach without providing him with the full text of the information concerned: his judgement was therefore based purely on the general description of it included in the submission. Only at the internal review stage did the Minister see the documentation in full and at that stage, it should be noted, it was agreed to release to the complainant some information which, had the agreement reached after the first submission been followed, the complainant would not have seen. The Commissioner is satisfied that MOD has now recognised that this approach was unsatisfactory but has noted that it caused some delay to the considerative process at a time when the complainant, for entirely understandable reasons, believed that he needed access to the material as a matter of urgency in order to assist in the planning of his appeal. This was unfortunate.
17. The outcome of this rather convoluted approach was that MOD did not send the complainant a proper refusal notice until 16 May 2005, well outside the requirements of the Act. For, while it is acceptable under the Act for the timescale to be extended in order to give further consideration to the public interest, there is no such right of extension in order for the qualified person to exercise his or her opinion. Given that the qualified person did not express that opinion until the same day as the refusal notice was issued, that constitutes a clear breach of section 17 of the Act. This merits criticism.

### **Exemption – Section 36**

18. The correspondence received by the complainant up to and including the refusal notice referred in general terms to section 36 without specifying which part of that section was considered relevant to the material sought. The refusal notice did, however, make a number of references to release of the information being likely to prejudice the effective conduct of public affairs so the Commissioner has taken the view that MOD was essentially applying section 36 (2) (c). The review decision of 21 July 2005, while releasing some additional information, was no more specific about which parts of section 36 were considered to apply to the withheld information.
19. The first necessity for the Commissioner in cases involving the citing of section 36 is to satisfy himself that, in accordance with the requirements of the Act, the reasonable opinion of a qualified person has been sought and given to the effect that release of the information concerned would (in this case) prejudice the effective conduct of public affairs. The Commissioner has seen both the initial submission and the initial response in this case, when what was being sought from the qualified person was agreement to the general proposition that material of this kind ought to be afforded some degree of protection. In that instance, the

information at issue was not provided to the qualified person, only described to him in general terms. Although (as said earlier) he requested them, the Commissioner was not provided with the two subsequent submissions, by which time the qualified person had been made aware that he was now being asked to deliberate on a specific request as opposed to a general principle, although the Commissioner has noted that only with the second of these submissions was the material itself provided in full to the qualified person. The Commissioner has commented adversely (see paragraph 16) on the decision not to provide the qualified person with the information in full until the third submission. Nevertheless, he is satisfied that the opinion of the qualified person was both sought and given.

20. The Commissioner's second task is to satisfy himself that the opinion of the qualified person was a reasonable one. In coming to a view on that the Commissioner needs to take account of the judgement given by the Tribunal in the case of *Guardian Newspapers and Heather Brooke v the Information Commissioner* (EA/2006/0011 and 0013). In that judgement the Tribunal said *'that in order to satisfy the sub-section the opinion must be both reasonable in substance and reasonably arrived at'* (Paragraph 64). In this case, in respect of the second part of that judgement, the process by which the reasonable opinion was arrived at in this instance involved three separate submissions to the qualified person. And, although the Commissioner has seen only one of these submissions, he is satisfied that an opinion reached after the consideration of three submissions (even allowing for the fact that the first was based on general principles rather than the specifics of the case) can be accepted as one that has been reasonably arrived at.
21. How then the reasonableness of the opinion itself? The initial submission to the Minister set out two reasons for withholding at least some of the information contained in the booklet and the exercise guide. The first was that releasing all of the information would enable candidates to gain an unfair advantage by giving them access to model answers. The second was that candidates who had already attended the A&D Centre might request information relating to their own attendance which they could then pass on to others, thereby giving individual candidates an unfair advantage. No evidence was adduced to show that this had actually happened: it was simply suggested that these were likely outcomes if none of the material was exempted. MOD therefore proposed to withhold certain information in order to prevent such situations arising. MOD took the view that sections 36 and 43 could be applied to justify that decision. However, in this case section 43 has not been relied on, but section 36 has.
22. The particular aspect of section 36 that is under consideration here is the effective conduct of public affairs. The Commissioner therefore has to decide the question: is the opinion that release of this information would prejudice the effective conduct of public affairs a reasonable one? The Commissioner has examined the arguments put forward by the MOD to justify the application of this section. In the early letters from MOD the complainant was told that release of the information might jeopardise the A&D Centre process and that an exemption under section 36 was therefore under consideration. The refusal notice of 16 May

2005 confirmed that position. And, while that letter did also refer to the public interest in that MOD took the view that this lay in its having a promotion process that was open and above board, the refusal notice did not set out why MOD thought section 36, as opposed to any other exemption, was the appropriate exemption to cite in order to protect this information.

23. In coming to a view on whether section 36 (2) (c) might be said to apply to the information at issue the Commissioner is aware that there is no definition in the legislation of 'public affairs'. He is however aware that, during the Parliamentary debates on the Bill, the Government expressed the view that the purpose of this section of the Act was to cover circumstances which could not be foreseen, which could not be covered by any other exemption, and where it would be necessary in the interests of good government to withhold the information. On the basis of that the Commissioner has concluded, in his own guidance, that this section would only be available in 'cases where the disclosure would prejudice the public authority's ability to offer an effective public service, or to meet its wider objectives or purpose (rather than simply to function) due to the disruption caused by the disclosure and the diversion of resources in managing the impact of disclosure.'
24. In the only one of the three submissions to the qualified person that the Commissioner has seen in relation to this matter the argument was put that disclosure of the information sought would, in effect, allow candidates to learn how to pass the tests. MOD explained, understandably, why it was anxious to prevent such a situation from occurring; that material needed to be withheld in order to prevent it from occurring, and went on to say that section 36 was the appropriate exemption to apply. What it did not do was explain **why** it thought section 36, in particular, was in fact the correct exemption to apply or why it felt that the information sought by the complainant fell within the definition of 'public affairs'.
25. Does this information, in fact, fall within the definition of 'public affairs'? The Commissioner is willing to accept that publication of the information concerned might have an adverse effect on the conduct of MOD's internal promotion processes: MOD clearly wishes to ensure that the correct people are promoted. But does that make internal promotion processes 'public affairs'? It is, at first, hard to see how it does. If, however, consideration is given to the interests of good government (the criterion of applicability set out by the Government itself) or to the argument that release of the information would prejudice the ability of the MOD to offer an effective public service or to meet its wider objectives (the criteria set out by the Commissioner in his own guidance) a connection can, in the Commissioner's view, be established. It is clearly the case that government will be carried out more effectively if the chosen promotion processes deliver the right people and, therefore, that the processes by which the right people are produced can be linked to the concept of public affairs. If, to continue the argument, MOD takes the view that releasing the withheld information might enable people to achieve promotion who were not the best candidates, then that clearly could have an adverse impact upon MOD's ability to conduct its business as effectively as it might. It therefore seems to the Commissioner that, while the link might perhaps not be immediately obvious, it is fair to argue that release of information relating



to internal promotion processes could inhibit the effective conduct of public affairs and that the opinion reached that it would do so is therefore a reasonable one. It would however have been helpful if MOD had provided rather more in the way of argument in support of its view on this matter than it did.

### **The Public Interest**

26. The Commissioner is therefore of the view that the exemption is engaged. On that basis he now needs to consider the application of the public interest test. There is little doubt that the complainant had a strong private interest in having access to the information at the time he sought it: the information was highly relevant to a promotion board at which he had been an unsuccessful candidate and against the decision of which he was then appealing. That, however, is not necessarily the same as the public interest. The Commissioner needs to be satisfied that releasing information that will be of interest and value to a small number of individuals will not adversely affect whatever broader public interest there may be in the information remaining withheld.
27. MOD accepts that there is a public interest in being as transparent as it can about the A&DC process. This is acknowledged by making as much information as possible available to all candidates before the process begins and by publishing other information as soon as possible after completion of the process. What MOD is anxious to avoid, however, is making information available which would enable some candidates, while the process is continuing, gain an insight into the assessors' thinking and thereby obtain an advantage as this would mean that not everyone was then being tested fairly. In MOD's view, the information sought by the complainant falls into that category as release of it would enable candidates to devise a 'game plan' for dealing with some of the exercises. That, in MOD's view, would not be in the public interest as the absence of a level playing-field might not then result in the best candidates succeeding.
28. The complainant has argued that the information which was not disclosed to him would not give any advantage to candidates as it did not indicate which competences were being tested by which exercises, nor did it tell candidates how to carry out particular exercises: it simply provided details of pass marks and how borderline cases might be approached by the assessors.
29. The Commissioner recognises the importance of the information sought by the candidate to him personally: he was appealing against a promotion decision and understandably wished to have access to as much information as he could to assist him in that appeal. However, the public interest, which MOD is required to consider under the Act, is broader than that. The Commissioner recognises that MOD puts into the public domain as much information as it feels it can as soon as it can in order to assist candidates as much as possible without compromising the integrity of the promotion process. The Commissioner takes the view that the public interest is best served by departments having in place a promotion process which ensures, as far as that is possible, that all candidates are competing for promotion on the same terms. On that basis he is of the view that, in this case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

## Other Matters

30. After the issuing of the refusal notice the complainant submitted a review request. He was subsequently informed by MOD that this would be completed within 40 working days. The Act lays down no specific timescale for the completion of internal reviews but the expectation is that they should be carried out promptly. The Commissioner has, in a recent Good Practice Guidance note, suggested that internal reviews should normally also be completed within 20 working days and that no review should take more than 40 working days. This review was carried out relatively early in the life of the Act and the Commissioner would not be critical of MOD for taking the best part of 40 working days to complete it (although the possible effect on the complainant in terms of his appearance before the Appeal Panel should not go unnoticed). However, in respect of future internal reviews, MOD might like to take note of the Commissioner's general recommendation.

## The Decision

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31. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with some of the procedural requirements of the Act.

## Steps Required

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32. There are no steps required to be taken by the public authority.

## Right of Appeal

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33. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@dca.gsi.gov.uk](mailto:informationtribunal@dca.gsi.gov.uk)

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 25<sup>th</sup> day of June 2007**

**Signed .....**

**Richard Thomas  
Information Commissioner**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

10. (1) Subject to subsections (2) and (3), a public authority must comply with sections (1) (1) promptly, and in any event not later than the twentieth working day following the date of receipt.

(3) If, and to the extent that-

(a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or

(b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.

17. (1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which-

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.

36.(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under the Act-

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.