

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 30 March 2009

Public Authority: Ministry of Defence
Address: Level 6, Zone E
Main Building
Whitehall
London
SW1A 2HB

Summary

The complainant requested the names of the officials involved in the discussions concerning the commissioning of an Unidentified Aerial Phenomena (UAP) Report and the name of the author of this report. The public authority refused to disclose the information relying on the exemption in section 40(2) of the Act (personal information). The Commissioner investigated the complaint and has found that the requested information constitutes personal data and its disclosure would breach the first data protection principle which requires that personal data be processed fairly and lawfully. The Commissioner has decided that the public authority dealt with the complainant's request in accordance with the Act and requires no steps to be taken.

The Commissioner's Role

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

2. On 23 November 2006 the complainant wrote to the public authority to request the following:

"...documents relating to the following categories of information from the file (taken from the list supplied by Linda Unwin on 21 August 2006, Annex A 03-08-2006- 114552-004):
 - 1) General MoD correspondence relating to UFO policy and procedures (all pre 1979)

- 2) Correspondence relating to the 'UAP' report/study "
3. The public authority responded to the complainant on 20 December 2006. It confirmed that it held the requested information and released much of it to the complainant. The public authority redacted certain portions of the information requested stating: "The exemptions used are: Absolute exemption 40(2) (Personal Information) and Qualified exemptions 26(1) (Defence), 27(1)(a) and 27(3) (International Relations), and 43(2) (Commercial Interests)".
 4. The complainant wrote to the public authority on 29 January 2007 asking for an internal review. The request was for a review of the justification used for the redactions made and the judgements employed on public interest tests applied to the qualified exemptions engaged under the Act. With regards to the qualified exemptions used the complainant countered that much of the information requested was already within the public domain. With regards to the absolute exemption 40(2) (Personal Information) the complainant argued that this exemption had been applied in a 'wholesale' manner and must be reconsidered.
 5. The complainant stated that the individuals concerned were 'Crown Servants' and that "the DPA (Data Protection Act) does not prohibit the release of third party data where this relates to the names of Crown Employees". In defence of this argument the complainant quoted from the Information Commissioner's guidance, Freedom of Information Act Awareness Guidance No 1 – Personal Information, where it states:

"It is often believed that the Data Protection Act prevents the disclosure of any personal data without the consent of the person concerned. This is not true. The purpose of the Data Protection Act is to protect the private lives of individuals. Where an information request is about people acting in a work or official capacity then it will normally be right to disclose."
 6. The complainant also referred to the Decision Notice FS50074589 issued by the Commissioner on 4 January 2006 where it was stated that "a distinction can be drawn between information relating to someone's private life and information relating to their professional or working life".
 7. The Ministry of Defence ('MOD') responded on 8 November 2007. With regards to the information withheld under section 26 and section 27 it accepted that the information was indeed in the public domain and therefore no further action was necessary as the complainant was already in possession of the information. Where section 43 was used the MOD conceded that it was incorrectly applied to some of information withheld but the MOD continued to withhold the name of the company concerned.
 8. However, the MOD also stated the exemption at section 40(2) was correctly used to withhold the names of the Defence Intelligence Staff (DIS) staff and the author of the report, and gave an explanation as to why it felt the exemption applied. The MOD went on to suggest that the individuals' right to a private life was protected by Article 8 of the European Convention on Human Rights which in turn engages section 44 of the Act (prohibitions on disclosure).

9. The MOD stated that another exemption that could “potentially apply to the release of the names associated with the individuals’ employment in Defence Intelligence and on work connected with UFO’s,” was section 24 (National Security). However, it was felt that the strength of the section 40(2) argument meant that at present that the section 24 argument need not be advanced.

The Investigation

Scope of the case

10. On 7 January 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the portion of the Internal Review under the heading ‘Removal of Names from Documents Disclosed under FOI’ in which the MOD explained that it had removed these names on the basis of section 40(2) of the Act.

Chronology

11. The Commissioner wrote to the MOD on 29 September 2008 advising that a complaint had been made against it which focused on its redaction of the following names from the information that had been provided to the complainant:
 - i. The name of the author of the Defence Intelligence Staff report on ‘Unidentified Aerial Phenomena’ (UAP) completed in 2000.
 - ii. The name of the official responsible for briefing MoD/DIS on the need for a UAP study.
 - iii. The names of the officials identified as (Head/Assistant Director) DI55 in the documents released on 20 December 2006.
 - iv. The name of the person who held the post of DI (ST) Director of Intelligence (Scientific and Technical) during 1996.
12. The internal review made reference to various exemptions that the MOD felt could be applied to withhold the names of the individuals concerned, namely section 24 (national security) section 26 (defence) and in the case of the company employed section 43(2). The Commissioner also sought clarification from the MOD as to which exemptions it was relying on to withhold these names and why it considered these exemptions to apply.
13. On 5 November 2008 the MOD responded setting out its reasons for applying the exemptions at section 40 and section 43. The MOD also advised that it did not feel that the application of the exemptions at sections 24 and 26 was necessary at that time.

Findings of Fact

14. The report that is fundamental to this information request is described as the UAP Report or Unidentified Aerial Phenomena report and was commissioned by the

MOD. It was a detailed study of the database, and any other information that was available within the MOD, to determine whether UAPs have any defence significance. The study was undertaken by the Defence Intelligence Staff (DIS). The mission of the Defence Intelligence Staff (DIS) is to provide timely intelligence products, assessments and advice to the Ministry of Defence (MOD) to guide decisions on policy and the commitment and employment of UK's armed forces; to inform defence procurement decisions; and to support military operations. The report was commissioned in 1993 and completed in 1995.

Analysis

Exemption - Section 40

15. Section 40(2) of the Act provides an exemption for information which is the personal data of any third party where disclosure would breach any of the data protection principles contained in the Data Protection Act 1998 (DPA).

Is the information personal data?

16. In order to rely on the exemption provided by section 40(2), the requested information must constitute personal data as defined by the DPA. Section 1 of the DPA defines personal data as:

*'...data which relate to a living individual who can be identified
a) from those data, or
b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,*

and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.'

17. In this case the withheld information consists of the following names of four individuals which have been redacted from the documents the complainant has already been provided with:
- i. The name of the author of the Defence Intelligence Staff report on 'Unidentified Aerial Phenomena' (UAP) completed in 2000.
 - ii. The name of the official responsible for briefing MoD/DIS on the need for a UAP study.
 - iii. The names of the officials identified as (Head/Assistant Director) DI55 in the documents released on 20 December 2006.
 - iv. The name of the person who held the post of DI (ST) Director of Intelligence (Scientific and Technical) during 1996.
18. The Commissioner believes that each redaction constitutes the name of an identifiable individual, and therefore it is personal data as defined by the DPA.

Would disclosure breach any of the data protection principles?

19. The MOD has argued that disclosure of any of the four names that have been redacted would breach the first data protection principle as disclosure would be unfair and no condition contained in Schedule 2 of the DPA could be met. The first data protection principle states that:
1. Personal data must be processed fairly and lawfully; and
 2. Personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met.
20. The Commissioner's guidance on section 40 suggests that the following criteria can be used when assessing whether it would be fair to disclose an individual's personal data:
- The individual's reasonable expectations as to what will happen to their personal data;
 - Whether the information relates to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life);
 - If the information relates to their public life, the seniority of the official and whether they have a public facing role – as a general rule, the more senior an official is the less likely it is that disclosing information about their public duties would be unfair or unwarranted;
 - The potential harm or distress that may be caused by disclosure;
 - Whether the individual has objected to disclosure.¹
21. With reference to these criteria, the Commissioner concluded that the names of the individuals concerned fulfil the requirement within the DPA and therefore must be considered as personal data. The Commissioner has considered in turn whether disclosure of each of the four individuals' names would be fair.

i. The Author of the Report

22. The MOD advised the complainant that the author of the report (i) under consideration was not an existing civil servant; rather he was a contractor employed by the DIS between 1996 and 2000 to produce the report as part of a wider defence contract. However, the MOD did note that the author's 'notional grade' was not at the Senior Civil Service level and therefore in its opinion given his relatively junior rank he would not have the expectation of his name being in the public domain. The Commissioner notes this comment and finds that if the MOD were relying solely on the fact that the author was not at senior level then this would have to be considered further; however the MOD have presented further arguments. Firstly, the Commissioner understands that the report was commissioned and produced by the author with strict security guidelines; at the time the report was drafted it was a classified project with those involved being

¹ Awareness Guidance 1 – Personal Information :
http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/personal_information.pdf

subject to the Official Secrets Act. Secondly, the MOD has explained that civil servants and contractors are given the clear instruction that 'any association with intelligence, security or counter-terrorism work must not be disclosed'. Therefore in the Commissioner's opinion given that the author, acting on instructions from the MOD would not have discussed his work on the draft report with those outside the DIS, it is reasonable to suppose that the author would not have expected his name, and moreover his authorship of the report, to be placed in the public domain. The Commissioner considers that, in the circumstance this expectation is reasonable.

ii. Official responsible for briefing the MoD/DIS

23. With regards to the official responsible for briefing the MOD/DIS on the need for a UAP study (ii), the MOD advised that he was at the rank of Wing Commander and as such was not a 'senior rank'. It should be noted that the Commissioner's consideration of seniority is not directly bound by civil service grades and the context and nature of the public authority must be considered together with the extent to which the body is public facing. In this case the RAF is very obviously not public facing in the area in question and therefore comparison with civil service grades is relevant. The Commissioner has investigated the claim and can confirm that the grade of Wing Commander is equivalent to a grade within the Civil Service below the level of the Senior Civil Service and as such the individual would not ordinarily have the expectation of their name being within the public domain. The Commissioner considers that in the circumstance this expectation of anonymity is reasonable. Furthermore, as with the comments made at the end of the preceding paragraph, given the sector within which this individual worked, i.e. defence intelligence, the Commissioner believes that it is reasonable to suppose that the individual would not expect his name to be placed in the public domain.

iii & iv. Head/Assistant Director and Director of Intelligence

24. With regards to the more senior individuals concerned with the report (iii) & (iv), the MOD has stated that their rank within a modern civil service would possibly give them an expectation that their names would be in the public domain and indeed the persons now holding these ranks are declared in the Civil Service Year Book. However, the report in question was commissioned and completed some years prior to the passing of the Act. Although information created prior to the passing of the Act is still subject to its provisions it is appropriate to consider the fact that all of the individuals concerned were working in a classified field many years prior to the Act and would therefore, as with the other individuals discussed above, not have expected that their names would be released to the public. Furthermore, the Commissioner understands that one, or possibly both of the individuals concerned have retired and the same points stated at paragraph 24 above are therefore relevant.
25. In summary then based upon the nature of the work the four individuals were involved in, and the guidance given to them by the MOD about not discussing their work, they would have had a reasonable expectation that their names would not be placed in the public domain by the MOD, either by virtue of disclosure under the Act or other means.

26. Furthermore, the Commissioner must take into account the impact disclosure could have on the personal life of the individuals concerned. The Commissioner recognises that this area of work attracts a significant level of media interest and accepts the suggestion by the MOD that disclosure of these names is likely to lead to attempts to contact them and question them about their work for the DIS. In addition, the Commissioner has also given consideration to the fact that at least two of these individuals have retired. The Commissioner is mindful that retirement cannot be used to circumvent disclosure where necessary but when the individual has retired, possibly many years before the request was made it must be considered whether disclosure would have a detrimental impact on the personal life of the individual concerned. The Commissioner considers that given the passage of time and the retired status of the individuals any attempt to contact and interview the individuals concerned could be deemed as having a detrimental impact on their private life. In other words, retired civil servants and a contractor could be subject to questioning, and potential criticism of decisions they took when employed by the MOD a number of years ago.
27. The Commissioner believes that the likely intrusion is not justified by any pressing public interest in identifying the individuals concerned given their seniority, status and extent of involvement in the report.
28. As a result of the reasoning set out above, the Commissioner is satisfied that disclosure of the names of the four individuals would be unfair and therefore breach the first data protection principle. Consequently disclosure of this information is exempt from disclosure by virtue of section 40(2) of the Act. The Commissioner notes that the MOD attempted to contact the individuals concerned in an attempt to gain their consent but was unable to locate them.
29. The Commissioner considers that as the information is exempt under section 40(2) of the Act there is therefore no need to consider whether the information would also be exempt under section 44.

The Decision

30. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

31. The Commissioner requires no steps to be taken.

Other matters

32. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
33. The complainant asked the MOD to undertake an internal review on 29 January 2007. The MOD did not complete this internal review until 8 November 2007.
34. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it took over 190 working days for an internal review to be completed, despite the publication of his guidance on the matter.
35. Information was originally withheld under section 26 and section 27 of the FoI Act. At the internal review stage the public authority acknowledged that this information was already in the public domain and stated "since you already have the information concerned, no further action is necessary". The public authority should more correctly have either provided the information to the complainant or cited section 21 of the Act (Information accessible to the complainant by other means).

Right of Appeal

36. 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@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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 30th day of March 2009

Signed

**David Smith
Deputy Commissioner**

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

Legal Annex

Personal information

Section 40(1) provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

Section 40(2) provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

Section 40(3) provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

Section 40(4) provides that –

“The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).”

Section 40(5) provides that –

“The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
- (b) does not arise in relation to other information if or to the extent that either-
 - (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section

- 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
- (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed)."

Section 40(6) provides that –

“In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.”

Section 40(7) provides that –

In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act.

Commercial interests.

Section 43(1) provides that –

“Information is exempt information if it constitutes a trade secret.”

Section 43(2) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

Section 43(3) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).”

National Security

Section 24(1) provides that –

“Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security.”

Section 24(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security.”

Section 24(3) provides that –

“A certificate signed by a Minister of the Crown certifying that exemption from section 1(1)(b), or from section 1(1)(a) and (b), is, or at any time was, required for the purpose of safeguarding national security shall, subject to section 60, be conclusive evidence of that fact.”

Section 24(4) provides that –

“A certificate under subsection (3) may identify the information to which it applies by means of a general description and may be expressed to have prospective effect.”