

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 10 June 2010

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

Summary

The complainant requested the sight of the MOD's internal correspondence regarding discussions that may have taken place within the department concerning the publication of a book by an employee of the MOD. The public authority refused to disclose the information relying on section 36(2)(b) (prejudice to effective conduct of public affairs) and section 40(2) (personal information) of the Act. The Commissioner has found that the requested information constitutes personal data and its disclosure would breach the first data protection principle. The Commissioner has therefore decided that the public authority was correct to refuse the request. However, the Commissioner finds that the MOD breached section 17(1)(b) of the Act by not stating precisely in its first refusal notice what exemption was being used.

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.

Background

2. The request concerns an individual named Nicholas Pope who was at one time a serving member of the MOD. Between 1991 and 1994 he

worked for a department within the MOD called Sec(AS)2a (Secretariat of the Air Staff). Part of the duties of the Sec(AS)2a was documenting UFO phenomena reported to the MOD. Using this experience he has made television and radio appearances and published several books, the first of these being 'Open Skies, Closed Minds' in 1996. He resigned from the MOD in November 2006.

The Request

3. On 11 April 2007 the complainant made the following request:

"My request, (therefore), is for copies of MoD papers, records or other information relating to any or all internal discussions, policy and/or briefings in response to 1) public statement made to the media and 2) via the release of *Open Skies Closed Minds* by Mr Nicholas Pope during the period 1995-96. I wish you to include specific public interest material within the coverage of this request as follows:

- a) Any internal discussions relating to Mr Pope's public statements in the *Mail on Sunday* 2 July 1995, *The Independent* 3 June 1996 and other press articles during 1995/96.
 - b) Any specific discussions relating to Mr Pope's published statements that contradicted the department's officially stated policy on the subject of UFO's and their supposed defence threat.
 - c) Any papers, generated by MOD or its PCB branch, that relate to Mr Pope's public allegation that "there was a faction [in the MOD] that certainly didn't want the book to appear". Specifically I request a copy of "the short letter" referred to in Mr Pope's interview with IUR which allegedly said his manuscript was "completely unacceptable to MoD and quite beyond any suitable amendment" and any related discussion which resolved this issue. As Mr Pope has spoken of this matter openly and in public it cannot be seriously argued that this material falls within the auspices of the DPA."
4. The MOD acknowledged the request on 9 May 2007 and replied in full on 30 May 2007 stating that it felt that all the information held, falling within the scope of the request, was exempt for release under section 40 (personal information) and/or section 36(2)(b) (prejudice to the effective conduct of public affairs) of the Act.

5. The complainant asked for this decision to be reviewed on 30 May 2007.
6. On 11 June 2007 the MOD wrote to the complainant giving him the result of its internal review of the original decision. This review confirmed the position of the MOD as originally stated.
7. The complainant was dissatisfied with this review and therefore wrote to the MOD on 19 June 2007 requesting "an independent internal review".
8. This request for a second review was acknowledged on 19 June 2007 and on the 10 August 2007 the MOD advised that this review would be delayed. The MOD again contacted the complainant in January 2008 and advised that it was still not in a position to undertake the review.
9. After a series of holding letters and reminders from the complainant the MOD communicated the results of its internal review on 10 November 2008 confirming its use of section 36(2)(b) and section 40(2).

The Investigation

Scope of the case

10. On 1 December 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 MOD's application of exemptions to the information.

Chronology

11. Unfortunately, due to a backlog of complaints concerning public authorities' compliance with the Act, it was not until 1 December 2009 that the Commissioner wrote to the MOD. With regards to the section 40(2) exemption cited he asked the MOD which of the data protection principles it believed would be breached if the information was disclosed. With regards to section 36, the Commissioner asked the MOD to forward a copy of the submission to, and response from, the relevant 'qualified person' together with an explanation of the public interest arguments considered.
12. The MOD responded on 6 January 2010 outlining its reasons for citing the exemptions at section 36(2)(b) and section 40(2). This letter

included a copy of the submission to, and reply from, the relevant qualified person.

13. The Commissioner wrote to the complainant on 21 April 2010 in an attempt to resolve the case informally.
14. The complainant replied to the Commissioner on 4 May 2010 with further representations.

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. The requested information obviously centres on one individual, i.e. Mr Pope. He is identifiable from each of the withheld documents and all of the documents are of biographical significance. Several of the documents also contain expressions of opinion about the individual. It is therefore correct to state that all of the information is personal data as defined by the DPA.

Would disclosure breach any of the data protection principles?

18. The MOD has argued that disclosure of the documents withheld 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.

19. In considering whether a disclosure under the Act would be fair the Commissioner must balance the consequences for the data subject of any disclosure and the reasonable expectations of the data subject against any legitimate interests in disclosing the information. For example, the general principles of accountability and transparency enshrined within the Act.

Consequences of disclosure

20. The potential harm or distress that disclosure of this information may cause to the individual has also been considered by the Commissioner. The complainant has suggested that the individual concerned has courted media interest and has placed himself very much in the public eye. Whether this is true or not does not detract from the fact that the individual has the right to some privacy in respect of this information. Although the individual has spoken publically about his time at the MOD the individual has not spoken publically about the contents of the information the MOD is seeking to withhold. The Commissioner believes that if the information were to be released it has the potential to cause some element of harm or distress to the individual concerned.

Reasonable expectations

21. The complainant has suggested that as the individual concerned was at the time a public employee then the information should be made public. The complainant has stated that the purpose of the DPA is to protect the private lives of individuals. Where information requested is about people acting in a work or official capacity then it should be released.

22. The Commissioner notes this assertion but it should be noted that although an individual is employed as a civil servant this does not mean that all information relating to their role is public. For example a civil servant may have an individual end of year review which details how well or how badly they are doing in their role. This is private in

nature even though it is not about their private life outside of their employment. Having reviewed the information the Commissioner believes that the information withheld is of a private nature even though it relates to aspects of the how the individual was undertaking his public role.

23. In the case in question, when considering whether the individual concerned has a 'reasonable expectation' that the information would not be disclosed the Commissioner is mindful of the comments made by the complainant. The complainant stated "I ask you to consider whether Mr Pope has any reasonable expectation of privacy in regard to his statements to the media, given his career as a media pundit and self-declared 'former head of the MoD's UFO Project'".
24. The Commissioner has examined the withheld information and has considered whether, in the context of this particular case, the individual will have had a 'reasonable expectation' of the information being placed in the public domain. The Commissioner notes that although the interviews given and articles written by the individual are very obviously in the public domain this does not in itself mean that the individual will have an expectation that all correspondence and comments made about these public statements will be made public.
25. The information withheld appears to be of a private nature and this is not altered by the fact that its creation came about because of a number of public acts. The Commissioner therefore accepts that the individual concerned would not have an expectation that the information withheld would be made publically available.
26. Furthermore, the MOD advised in its letter to the Commissioner dated 6 January 2010 that the individual concerned has written to the MOD and asked for the information not to be released into the public domain. The Commissioner notes this and accepts that this is also a contributing factor to support the withholding of the information.

Legitimate interests in disclosure

27. Notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest.
28. The Commissioner must consider the seniority of the civil servant in question. It is generally accepted that the more senior the civil servant then the more likely it is that withheld information will be released. The individual in question was not at any time a senior civil servant.

However, the complainant has suggested that the individual's claim that he was the man 'who used to run the British Government's UFO Project' implies seniority, 'real or imagined'. The complainant argues that were the documents to be released they would "set the record straight", providing another strong argument for the release of the information in the public interest.

29. This position is noted but the Commissioner contends that the role of the individual and his substantive grade is public knowledge. Were the withheld information to be released it would not improve the public understanding of the situation. It would not clarify the individual's grade or position within the MOD. It would therefore not further this public interest.
30. The complainant has suggested that even if the withheld information falls within the scope of the exemption at section 40(2) of the Act then the public interest in releasing the information outweighs any prejudice to the rights and interests of the data subject. The Commissioner notes this but must clarify that if section 40(2) applies then the relevant information is exempt and there is no additional public interest balance.
31. The complainant argues that as the individual was employed as a public servant, paid for by taxpayers, who made public comments that dispute his own department's publicly stated policy on a matter then this is of public interest. The complainant states that because of the individual's experience as 'head of the MOD's UFO desk' he continues to use this as his primary qualification to comment on current MOD policy, this again makes the withheld information of public interest.
32. When considering section 40(2) of the Act the Commissioner must consider whether disclosure is necessary for legitimate public interests, with no unwarranted harm to the individual's interests.
33. The complainant has suggested that the MOD could release part of the information by simply redacting appropriate portions of the documents. To support this argument the complainant refers to an internal memo from the Defence Intelligence Staff (DIS) that has been released by the MOD. The MOD has redacted the names of both the author and the individual that is the subject matter but has left the text of the document complete. The complainant suggests that the name redacted is very obviously the same individual that is the centre of his current request and therefore the MOD has set a precedent in releasing redacted documents concerning this individual's conduct whilst with the MOD.

34. The Commissioner has examined this released document and compared it with the withheld information relevant to this current request. The Commissioner feels that the information being withheld is sufficiently different from the released information in that the withheld information is of a more personal and sensitive nature.
35. With regards to the suggestion by the complainant that the documents could be released in a redacted format, the Commissioner has considered this and believes that the documents would either make no sense to the reader or the subject matter and tone of the documents would be so obvious that the redactions would serve little purpose.
36. In this current case the Commissioner has considered the information being withheld and noted the comments made by the Complainant. The Commissioner accepts that there is always a legitimate public interest in promoting the transparency of public bodies thus ensuring greater accountability. The Commissioner feels that this is a finely balanced case and that the complainant has provided well reasoned arguments to support his case. However, in this particular case the Commissioner does not believe that release of the information concerned would further the legitimate public interest in any significant way. The individual's public life is well known and although for a period of time this coincided with his role as a public employee it does not mean that all information relating to this employment should be made public. Nor does he believe that disclosure is necessary for the public interest.
37. The Commissioner considers that the MOD correctly used the exemption at section 40(2) of the Act to withhold all of the information he has therefore not considered it necessary to examine its use of section 36(2)(b).

Procedural Requirements

38. The Commissioner finds that by not issuing the initial refusal notice within the required 20 working day period the MOD is in breach of section 17(1) of the Act.
39. The Commissioner also finds that by not stating the specific subsection of the exemption used in its original refusal and at the first internal review stage that the MOD is in breach of section 17(1)(b) of the Act.

The Decision

40. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- Refusal to release the requested information using the exemption at section 40(2) of the Act

41. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- By failing to issue a refusal notice within 20 working days the MOD breached section 17(1) and for failing to cite the precise section and subsection of the Act in order to withhold the information the MOD also breached section 17(1)(b) of the Act

Steps Required

42. The Commissioner requires no steps to be taken.

Right of Appeal

43. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

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 sent.

Dated the 10th day of June 2010

Signed

**Gerrard Tracey
Principal Policy Adviser**

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

Legal Annex

General Right of Access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

Section 1(2) provides that -

"Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14."

Section 1(3) provides that –

"Where a public authority –

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information."

Section 1(4) provides that –

"The information –

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request."

Section 1(5) provides that –

“A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).”

Section 1(6) provides that –

“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.”

Refusal of Request

Section 17(1) provides that -

“A public authority which ... 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.”

Section 17(3) provides that -

“A public authority which ... is to any extent relying:

- on a claim that 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 the information, or
- on a claim that in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information

must either in the notice under section 17(1) or in a separate notice within such

time as is reasonable in the circumstances, state the reasons for claiming -

(a) that, on a claim that 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 the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

Prejudice to effective conduct of public affairs

Section 36(2) provides that –

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

- (a) would, or would be likely to, prejudice-
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
 - (iii) the work of the executive committee of the National Assembly for Wales,
- (b) would, or would be likely to, inhibit-
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

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.”

Data Protection Act 1998

PART I PRELIMINARY

1 Basic interpretative provisions

(1) In this Act, unless the context otherwise requires—

“data” means information which—

- (a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,
- (b) is recorded with the intention that it should be processed by means of such equipment,
- (c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, or
- (d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68;

“data controller” means, subject to subsection (4), a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed;

“data processor”, in relation to personal data, means any person (other than an employee of the data controller) who processes the data on behalf of the data controller;

“data subject” means an individual who is the subject of personal data;

“personal data” means 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 intentions of the data controller or any other person in respect of the individual;

“processing”, in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including—

- (a) organisation, adaptation or alteration of the information or data,
- (b) retrieval, consultation or use of the information or data,
- (c) disclosure of the information or data by transmission, dissemination or otherwise making available, or
- (d) alignment, combination, blocking, erasure or destruction of the information or data;

“relevant filing system” means any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible.

SCHEDULES

Section 4(1) and (2).

SCHEDULE 1 THE DATA PROTECTION PRINCIPLES

PART I THE PRINCIPLES

1 Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—

- (a) at least one of the conditions in Schedule 2 is met, and
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

SCHEDULE 2 CONDITIONS RELEVANT FOR PURPOSES OF THE FIRST PRINCIPLE: PROCESSING OF ANY PERSONAL DATA

1 The data subject has given his consent to the processing.

2 The processing is necessary—

- (a) for the performance of a contract to which the data subject is a party, or
- (b) for the taking of steps at the request of the data subject with a view to entering into a contract.

3 The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.

4 The processing is necessary in order to protect the vital interests of the data subject.

5 The processing is necessary—

- (a) for the administration of justice,
- (b) for the exercise of any functions conferred on any person by or under any enactment,
- (c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or
- (d) for the exercise of any other functions of a public nature exercised in the public interest by any person.

6 (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

(2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.