

Freedom of Information Act 2000 (FOIA)

Decision Notice

Date: 27 October 2011

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

Decision (including any steps ordered)

1. The complainant has requested information regarding a specific report on the effects of Pyrexal on human beings and the results of an experiment involving Lipopolysaccharide ('LPS') conducted by a named doctor.
2. The Information Commissioner's ('the Commissioner') decision is that, in respect of its internal review, the Ministry of Defence ('the MoD') appropriately refused to provide information in the first point of the request in accordance with the Freedom of Information Act ('the FOIA'). This is because the cost of compliance would exceed the limit established by the Statutory Instrument¹ on fees regulation. The Commissioner also found that the information requested in the second point of the request is not, on the balance of probabilities, held by the MoD.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 16 September 2010 the complainant wrote to the MoD and requested information in the following terms:

¹ Statutory Instrument 2004 No. 3244 The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004

"This request relates to LPS exposures that took place at Porton Down. I refer you to Porton Technical Paper 841. 'Effects of Pyrexal in Man'.

(1) Of the 115 servicemen who were exposed to the bacterial endo toxin (Pyrexal) how many were provided with a copy of Porton Technical Paper 841?

(2) Do you have a copy of – or are you aware or have seen – the results of an experiment involving the IV injection of LPS conducted on 'five human test subjects – by one Dr (name redacted). Dr (name redacted)'s experiment was conducted some months prior to the Porton Down exposures. At the time he was with the MRC.

(3) A FOI request I submitted in July 2010 to Mr (name redacted) (MoD claims) was forwarded to you for answer. Why has this request for information not been responded to?"

5. The MoD responded on 18 October 2010. It provided information in answer to the questions in the request. However, the response was not a satisfactory response in accordance with section 1 of the FOIA.
6. Following an internal review the MoD wrote to the complainant on 10 November 2010. It acknowledged the inadequacies of the initial response and provided a full review of the response. The review added context to the initial request and explained that the MoD was unable to state whether the information requested in the first point of the request was held because the searches required to determine this would exceed the appropriate cost limit. The information requested in point two was determined to be not held by the MoD with the third point being answered outside of the FOIA.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant provided a detailed history of his contact with the MoD and other public authorities with respect to his legitimate concerns regarding chemical and biological research at the Porton Down military research facility in Wiltshire. The complainant raised many points and other issues not specifically in connection with his request of 16 September 2010 which are not addressed in this notice.
8. The Commissioner considers that the scope of this case is to determine whether the MoD appropriately refused to provide the information sought in the first and second points of the request.

Reasons for decision

9. The initial response provided by the MoD did not provide a clear statement of whether the requested information was held or not. The internal review addressed this point and clarified the MoD's refusal notice.
10. Section 12 (1) of FOIA states that

"Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit."
11. During his investigation the Commissioner asked the MoD to provide detailed information on the searches required to determine if the MoD held information relevant to the first two points of the request. The Commissioner also requested a detailed breakdown of the time needed to determine whether the requested information is held.
12. The MoD has explained to the complainant and the Commissioner that the identities of the group of 115 servicemen referred to are unknown. It is the usual protocol applied by the MoD to not register names in recording test results. It is common scientific practice to anonymise information to prevent the identification of individuals when producing Technical Papers. The MoD informed the Commissioner that the Defence Science and Technology Laboratory ('Dstl') Porton Down has approximately 100 hand written ledgers which form the historical experimental records held. The MoD stated that the detail included in the ledgers is variable with some of the experimental studies written up as formal internal technical papers.
13. The MoD explained that to identify the 115 servicemen involved with the pyrexal study a manual review of the entries in the handwritten ledgers (referred to as 'summary books') for a period of two to three years prior to the publication of the internal Porton Technical Paper 841 ('PTP 841') would be required. During the late 1950s and early 1960s the normal rate of participant attendance is estimated at between 750 and 1500 individuals per year resulting in a manual search of around 3000 handwritten records. Once identified the Dstl would need to compare the names of the individuals contacting the 'Helpline' regarding their participation in the pyrexal studies against the identified participants. The matched individuals would have been offered the opportunity to visit Dstl Porton Down. If a visit was made the individual would have been provided with a copy of the technical papers relevant to the studies in which they participated. The MoD considers that this procedure is more helpful than referring the participants to the National Archives although

a copy is held there. However the MoD is unable to confirm whether the provision of a technical paper would be recorded and has commented to both the complainant, in the internal review, and the Commissioner that it is "unlikely" that a record would have been noted.

14. The MoD provided the Commissioner with a comprehensive breakdown of the time necessary to determine whether the requested information is held. It provided an estimate of the time that would be required to locate, retrieve and extract the information in accordance with the requirements of the Statutory Instrument referred to at paragraph 2 above. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 provide that the appropriate limit is £600 for central government public authorities and that the cost of compliance with a request must be calculated at the rate of £25 per hour. This means that effectively there is a time limit of 24 hours.
15. The MoD's calculation totalled more than double the appropriate limit. On the basis of the explanations provided by the MoD the Commissioner accepts that it would be necessary to search the ledgers referred to above in order to retrieve and extract the names of participants which could then be matched with the Helpline contacts. The Commissioner accepts that the time and cost of searching for this information would exceed the appropriate limit (and the results of these searches would still not accurately answer the first point of the request). Therefore the conclusion of the Commissioner is that section 12(1) does apply and the public authority was not obliged to comply with section 1(b) of the FOIA with respect to this point of the request.
16. The MoD provided the Commissioner with details of the searches it had undertaken in order to determine that it did not hold a copy of the information requested in point two of the request.
17. Several relevant locations within Porton Down were searched, including the historical archive which contains the experimental record books, the Porton Down archive which contains technical papers and references, and scientists currently working on the relevant programme were consulted. The MoD advised the Commissioner that the majority of the technical papers and references are listed in an on line database which was searched, additionally one of the Dstl Knowledge Agents also searched all electronic and hard copy listings. No copy of a report of the named doctor's results was found and no evidence was identified to infer that a copy was held.
18. The MoD also explained that scientists would normally reference a report they had read but it is not normal practice to reference a report they have not read. The initial response to the complainant commented:

"If referenced in any Technical Paper we would have been aware at the time."

As no reference was found the MoD can only determine that no recorded information is held on whether Porton Down scientists were aware of the report by the named doctor.

19. The MoD referred the complainant to the Medical Research Council ('the MRC'); as the complainant had stated that the named doctor was working at the MRC at the time of producing the results of his experiments, it would seem likely that a copy would be held there. The MoD also informed the Commissioner that the complainant could ask the British Library if it holds a copy.
20. The Commissioner accepts that on the balance of probabilities the MoD does not hold a copy of the results of the named doctor's experiments.

Right of appeal

21. 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,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

22. 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.
23. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Alexander Ganotis
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