

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 18 December 2012

**Public Authority:** MOD  
**Address:** Main Building  
Whitehall  
London  
SW1A 2HB

#### **Decision (including any steps ordered)**

---

1. The complainant requested multiple documents from the Ministry of Defence (MOD) on the subject matter of a procurement exercise for a Defence Training Review Package (number 1)<sup>1</sup>. The MOD disclosed some of the information but withheld the remainder under section 36(2)(b)(i) and 36(2)(b)(ii) and section 40(2).
2. The Commissioner's decision is that the MOD has correctly withheld the information.

#### **Request and response**

---

3. On 17 January 2011, the complainant wrote to the MOD and requested information contained in five questions which due to their complexity and for ease of reference are detailed at Annex A of this notice. The Information Commissioner will refer to those numbered questions throughout his decision notice. For ease of understanding the following will provide a simple guide to the reader:

---

<sup>1</sup> Following a study of education and training requirements for armed forces personnel and civilians several 'packages' were identified based on specialist areas of training. Package 1 included Electro-mechanical engineering, Aeronautical Engineering and Communications and Information systems.

**Question 1**

- 1(a)
- 1(b)
- 1(c)
- 1(d)
- 1(e)
- 1(f)

**Question 2**

No sub questions

**Question 3**

- 3(a)
- 3(b)
- 3(c)
- 3(d)
- 3(e)

**Question 4**

No sub questions

**Question 5**

No sub questions

4. The MOD responded on 19 April 2011 and disclosed and withheld the requested information as follows:

**Question 1**

- 1(a) - disclosed
- 1(b) - disclosed
- 1(c) - withheld under section 43
- 1(d) - answered
- 1(e) - answered
- 1(f) - disclosed

**Question 2**

Withheld subject to section 43.

**Question 3**

- 3(a) - answered at 3(e)
- 3(b) - answered at 3(e)
- 3(c) - disclosed
- 3(d) - disclosed

3(e) - disclosed

**Question 4**

Withheld under section 33 (audit).

**Question 5**

Answer 'no'.

5. There was a delay in the MOD completing an internal review. Following a complaint to the Information Commissioner an internal review was subsequently completed on 6 October 2011 in relation to all questions apart from question four, which the MOD later responded to on 22 November 2011.
6. In its internal review the MOD maintained its position as outlined in its response of 19 April 2011 with some changes as detailed below:

**Question 1**

1(a) - maintained

1(b) - maintained

1(c) – additional information disclosed.

1(d) – additional information disclosed.

1(e) – additional information disclosed.

1(f) – a correction to the information previously disclosed.

**Question 2**

Maintained its reliance on section 43 in withholding the information

**Question 3**

3(a) - maintained

3(b) – additional information was provided about the previously disclosed information.

3(c) - additional information was provided about the previously disclosed information.

3(d) – maintained

3(e) - maintained

#### **Question 4**

MOD disclosed some previously withheld information and changed its reliance from section 33 to section 36(2)(b)(i) and 36(2)(b)(ii). It also cited section 40(2).

#### **Question 5**

The MOD provided additional clarification that the information was not held.

7. The Information Commissioner notes the delay in the handling of the request which was made on 17 January 2011 but was not responded to until 19 April. He further notes that there was a delay in completing the internal review which did not occur until 6 October and latterly 22 November 2011.

#### **Scope of the case**

---

8. The complainant contacted the Information Commissioner to complain about the way his request for information had been handled.
9. The Information Commissioner contacted the MOD to ask for details of its handling of the request together with a copy of the withheld information. He also contacted the complainant in order to clarify the scope of the investigation. In light of the multiple parts of the request.
10. Following the receipt of information from the complainant and the MOD the Information Commissioner identified three outstanding parts of the request:

#### **Question 1(e)**

*(1) What contracts, or quasi-contractual arrangements such as extra contractual payments, ex-gratia payments, cost underwritings, pre-contract agreements and the like, have been made with entities who formed part of the preferred bidder consortium? Specifically for each instance where a contract or the like has been awarded or is still under negotiation:*

*(e) If the contract was not advertised in the OJEU, details of the reason it was not advertised, the rationale for any derogation from the Public Procurement Directives, the identity of the official (by the post title) who took the decision not to advertise the*

*contract opportunity in the OJEU, and the date on which it was decided not to advertise the contract arrangement in the OJEU;*

## **Question 2**

*What bid cost payment(s) did the Department make to each of the entities of the preferred bidder consortium in respect of costs, fees, expenses, compensation, any other costs following the decision to cancel the project? If payments are still to be made, what is the expected maximum value of payments to be made to each of the preferred bidder entities?*

## **Question 4**

*For each instance where the DTR P1 project was formally reviewed by the Department under its business case approvals process please provide a copy of the written outcome of each review. This request includes each review of the project that may have been carried out by other Departments such as HM Treasury, and each OGC Gateway Review.*

11. Following a review of the information and after clarification with the complainant it was initially agreed that the scope of the Information Commissioner's investigation would focus on the application of the following exemptions by the MOD to the withheld information.
  - Question 1(e), the application of section 40(2).
  - Question 2, the application of section 43.
  - Question 4, the application of sections 36(2)(b)(i), 36(2)(b)(ii) and 40(2).
12. However, during the later stages of the Information Commissioner's investigation the MOD disclosed the information requested at question 2 which had previously been withheld under section 43. The investigation therefore focussed solely on the handling of the requests at question 1(e) and 4.

## **Reasons for decision**

---

### **Question 1(e)**

13. The Information Commissioner has first considered the handling of the request outlined in question 1(e).
14. The complainant requested:

*'(1) What contracts, or quasi-contractual arrangements such as extra contractual payments, ex-gratia payments, cost underwritings, pre-contract agreements and the like, have been made with entities who formed part of the preferred bidder consortium? Specifically for each instance where a contract or the like has been awarded or is still under negotiation:*

*(e) If the contract was not advertised in the OJEU, details of the reason it was not advertised, the rationale for any derogation from the Public Procurement Directives, the identity of the official (by the post title) who took the decision not to advertise the contract opportunity in the OJEU, and the date on which it was decided not to advertise the contract arrangement in the OJEU.'*

15. The MOD disclosed the information requested at 1(e) subject to redactions being made under section 40(2). The Information Commissioner has inspected the withheld information.
16. Section 40(2) (personal data) of the Act states that personal data is exempt if its disclosure would breach any of the data protection principles contained within the Data Protection Act 1998.
17. For section 40(2) to be engaged the information being withheld has to constitute 'personal data', which is defined by the DPA 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.'*

18. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the data protection principles under the DPA. The first data protection principle states that:

*"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."*

19. The Information Commissioner notes that in this case MOD applied section 40(2) to the names of MOD staff appearing on the disclosed document. The Information Commissioner is therefore satisfied that the information in question is personal data in accordance with the Data Protection Act.
20. The MOD told the Information Commissioner that it had considered whether it would be fair to disclose the personal data. It argued that it was its policy that the names of staff below senior civil service grades or rank would not be disclosed unless in a public facing role. Therefore it concluded that it would be unfair to those members of staff to disclose their personal information.
21. The Information Commissioner understands that there is a reasonable expectation by the named junior staff members that the information would not be disclosed and that disclosure would cause unwarranted intrusion into their private lives. He also considered the seniority of those staff and accepts the MOD argument that as they are not of a senior level or have a public profile that this would not warrant disclosure.
22. The Information Commissioner has balanced the rights and freedoms of the data subjects and the legitimate interest of the MOD and he notes that whilst the MOD are accountable to the public, the disclosure of the staff names would be of no benefit to the public at large and would cause unwarranted intrusion into the private lives of the individuals in question.
23. The Information Commissioner having considered the reasons provided by the MOD accepts that it would be unfair to disclose the redacted information which is personal information and therefore that section 40(2) is engaged in respect of question 1(e) of the request.

#### **Question 4**

24. The complainant requested:

*'For each instance where the DTR P1 project was formally reviewed by the Department under its business case approvals process please provide a copy of the written outcome of each review. This request includes each review of the project that may have been carried out by other Departments such as HM Treasury, and each OGC Gateway Review'.*

25. The MOD refused to provide the information and cited section 36(2) (effective conduct of public affairs) and section 40(2) (personal data) to the withheld information.

**Section 36 – prejudice to the effective conduct of public affairs**

26. Section 36 is the only exemption in FOIA that requires a determination by a 'qualified person'. The exemption will apply if the opinion of a qualified person is that disclosure of the information would cause the harm stated. The exemption is also subject to a public interest test.

27. Section 36 states:

*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 Cabinet of the Welsh Assembly Government,*

- (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'.*

28. The term inhibit is not defined in FOIA but it is the Information Commissioner's view that in the context of section 36 the term means to decrease, restrain or suppress the freedom with which opinions or opinions are expressed.
29. The MOD has cited reliance on both section 36(2)(b)(i) (would or would be likely to inhibit the free and frank provision of advice) and section 36(2)(b)(ii) (would or would be likely to inhibit the free and frank exchange of views for the purposes of deliberation).
30. The MOD has provided the Information Commissioner with details of the qualified person together with a copy of the submission which was presented to the qualified person and on which the opinion was made.
31. The qualified person in this case was Nick Harvey MP, the Minister of State for the Armed Forces.



32. The Information Commissioner has inspected the submission and the details of the opinion given by the qualified person. He is satisfied that for the purposes of section 36(2) an opinion has been given by a qualified person. He has therefore gone on to establish whether that opinion is a reasonable one.

*Was the opinion reasonable?*

33. In order to engage section 36(2) the qualified person must give an opinion that the prejudice or harm stated in 36(2)(a) to (c) would or would be likely to occur. However, that in itself is not enough, and the opinion must also be reasonable. In deciding whether an opinion is reasonable the Information Commissioner will consider the plain meaning of the word. In his published guidance on this subject<sup>2</sup> the Information Commissioner gives his view that:

*'The most relevant definition of 'reasonable' in the Shorter Oxford English Dictionary is 'In accordance with reason; not irrational or absurd'. If the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable.*

*This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that no reasonable person in the qualified person's position could hold. The qualified person's opinion does not even have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.'*

34. The qualified person gave an opinion that disclosure of the information would be likely to inhibit the free and frank provision of advice and free and frank exchange of views for the purposes of deliberation. He considered that disclosure of the information would be likely to adversely affect the thinking space of officials who carry out Major Project Review Group Assessments (MPRGA). He stated that officials may not give as free and frank advice in the future for fear that their

---

2

[http://www.ico.gov.uk/for\\_organisations/guidance\\_index/~media/document\\_s/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/section\\_36\\_prejudice\\_to\\_effective\\_conduct\\_of\\_public\\_affairs.ashx](http://www.ico.gov.uk/for_organisations/guidance_index/~media/document_s/library/Freedom_of_Information/Detailed_specialist_guides/section_36_prejudice_to_effective_conduct_of_public_affairs.ashx)

opinions may be disclosed and that any such advice may not be accurately recorded in the future for the same reason.

35. The Information Commissioner has considered the information on which the qualified person made his opinion and has also inspected the withheld information. In the circumstances the Information Commissioner accepts that the opinion was reasonable.
36. The Information Commissioner having accepted that the opinion was reasonable accepts that the stated prejudice would be likely to occur if the information were to be disclosed and therefore that sections 36(2)(b)(i) and (ii) are engaged in relation to the withheld information.
37. Sections 36(2)(b)(i) and (ii) are subject to a public interest test. As such the information can only be withheld if the public interest in maintaining the exemptions outweighs the public interest in disclosure.

*Public interest test*

38. When considering the public interest test the Information Commissioner will consider the situation at the time of the request or within the time for compliance with the test. Arguments must be relevant to the specific exemption.
39. There is a public interest inherent in prejudice-based exemptions in avoiding the harm specified. In this case in section 36 it is the prejudice to the effective conduct of public affairs. If the exemption is engaged there is automatically some public interest in maintaining it.

*Public interest arguments against disclosure*

40. The MOD argued that, if the information were disclosed, expert views may not be provided as freely and frankly in the future, because of the reluctance to engage where there is a concern that any such advice given may be disclosed. It also argued that the documents form an integral component of the MPRG process and if released could set a precedent which would adversely affect the 'thinking space' currently available to officials involved in MPRGs.
41. The MOD also argued that any such disclosure would reveal free and frank advice that was given on the reviews of the DTR project and that this could affect other MPRGs.
42. It also argued that expert advice may not be recorded as accurately in the future as there would be concerns that the advice would be disclosed. It stated that it would not be in the public interest if the necessary space to provide free and frank advice was not available to officials who carry out major project reviews. It argued that officials

needed that space to express views without concern that those views would be subject to public scrutiny.

43. The MOD further argued that the provision of advice on the DTR project needed to be unrestrained, frank and candid if those officials offering advice are to be fully effective in their roles.
44. The Information Commissioner considers that there is a public interest in allowing senior officials to carry out discussions and reviews of matters of a serious and complex nature in a free and frank manner to make an informed decision. He considers that in such discussions officials should be able to exchange views and explore options without fear that those views will be made public. The weight to be given to these chilling effect arguments will vary, depending on the circumstances of the case, including the content of the information and what it reveals, and the timing of the request and whether it was made whilst a process was still live. The Information Commissioner is also aware of the relevant counter points against the chilling effect arguments – that it is reasonable, in general terms, to expect civil servants not to be easily deterred from providing free and frank advice.

*Public interest arguments for disclosure*

45. The MOD told the Information Commissioner that it had considered the factors in favour of disclosing the information. It accepted that open policy making would increase trust and confidence in government and enhance the understanding of the decision making process. It said that there was a public interest in informing public debate on important matters.
46. In respect of the DTR project the MOD argued that there was a public interest in being assured that major projects were managed effectively and to provide greater understanding, openness and transparency about the DTR project.
47. The Information Commissioner accepts that there is a general public interest in promoting transparency, accountability, public understanding and involvement in the democratic process. He also understands that the public have a genuine interest in the decision making process behind the DTR project that has an effect on the expenditure of public money as well as the plans for the long term training of service personnel. The Information Commissioner attributes some weight to this argument.

*Balance of public interest arguments*

48. The MOD told the Information Commissioner that on balance its view was that the public interest in maintaining the exemption outweighed the public interest in disclosing the information because any such

disclosure would reveal free and frank advice that was given on the reviews of the DTR project and this could affect other MPRGs.

49. As already stated in this notice section 36(2)(b)(i) and (ii) involves an inherent public interest which carries some weight if the exemption is found to be engaged, as in this case.
50. When considering the circumstances the Information Commissioner has considered whether the timing of the request and subsequent passage of time may have diminished or strengthened either the public interest arguments for or against disclosure. He notes that the DTR project was cancelled in October 2010 and that the request was made in January 2011. He also notes that at the time of the internal review there were ongoing discussions with the preferred contractor who had been working with the MOD on the project before it was cancelled. The matter was therefore still of some sensitivity at the time of the request and could have impacted on the on-going process related to the project. The Information Commissioner finds this factor is particularly significant.
51. The Information Commissioner also attributes weight to the general arguments for transparency and openness in government and the need for transparency related to this particular project, noting the fact that it was cancelled and the public interest in understanding the value of the public money spent on the project. However, in the circumstances of this case, he attributes more weight to the ability of officials to have free and frank exchanges and discussions particularly on such high-level project reviews.
52. The Information Commissioner has inspected the withheld information and has taken into account the arguments both for and against disclosure and on balance accepts that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

### **Section 40(2)**

53. Having found that section 36(2)(b)(i) and (ii) applies to all of the relevant information in Question 4 he has not gone on to consider section 40(2).

### **Other matters**

---

#### **Time for compliance**

54. The Information Commissioner notes that the request was made on 17 January 2011 but that a refusal notice was not forthcoming until 19 April

2011. This is outside of the statutory requirement of 20 working days and a breach of section 10(1) of FOIA.

55. The Information Commissioner notes the considerable delay in conducting the internal review of the request and reminds the MOD of its obligations in this regard.

## Right of appeal

---

56. 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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

57. 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.
58. 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 .....**

**Steve Wood**  
**Head of Policy Delivery**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**

Annex A

Request of 17 January 2011

'FOI Request – DTR P1

In respect of the former procurement for Defence Training Review (DTR) Package 1, please provide the following information:

(1) What contracts, or quasi-contractual arrangements such as extra contractual payments, ex-gratia payments, cost underwritings, pre-contract agreements and the like, have been made with entities who formed part of the preferred bidder consortium? Specifically for each instance where a contract or the like has been awarded or is still under negotiation:

(a) The identities of the contracting entities.

(b) The nature of the contract etc awarded ie details of whether the arrangements are for goods, supplies, services, works, utilities. Specific details of the nature of the contractual arrangement are requested so if (for example) it is for Works, then details are requested of what specific works are to be provided and where. Ditto for services, goods, supplies, utilities;

(c) The contract value including details of how much has been paid to date and how much is still to be paid;

(d) Whether the contract was advertised in the Official Journal of the European Union. Details of the OJEU notice reference number are requested;

(e) If the contract was not advertised in the OJEU, details of the reason it was not advertised, the rationale for any derogation from the Public Procurement Directives, the identity of the official (by the post title) who took the decision not to advertise the contract opportunity in the OJEU, and the date on which it was decided not to advertise the contract arrangement in the OJEU;

(f) The completion date(s) for any contract arrangements still being performed.

2. What bid cost payment(s) did the Department make to each of the entities of the preferred bidder consortium in respect of costs, fees, expenses, compensation, any other costs following the decision to cancel the project? If payments are still to be made, what is the expected maximum value of payments to be made to each of the preferred bidder entities?

3. For each of the external advisers the Department employed, or still employs, (directly or indirectly eg via other Govt agencies) on the DTR Package 1 project please provide details of:

(a) The identities of each of the external advisers / contractors (by company or trading name);

(b) The nature of the services they provided;

(c) If still engaged on DTR P1 related work details of the nature of the work and expected fee;

(d) Details of the OJEU notice advertising the contract opportunity, or if no OJEU notice was issued please provide details of the reason for not advertising;

(e) The sums paid (and to be paid) to each of the external advisers from the date of appointment including fees, costs, expenses, disbursements and the like

4. For each instance where the DTR P1 project was formally reviewed by the Department under its business case approvals process please provide a copy of the written outcome of each review. This request includes each review of the project that may have been carried out by other Departments such as HM Treasury, and each OGC Gateway Review.

5. Did the Department provide any compensation or transfer of funds to the Welsh Assembly following cancellation of the Project? If so, details of sums paid and dates paid are requested.