

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

### **Decision notice**

**Date:** 25 March 2013

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

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

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1. The complainant requested information on comparisons between pension benefits for Gurkha personnel that opted to transfer between two pension schemes. The MOD confirmed that it held relevant information but said that it would exceed the cost limit to comply with the request.
2. The Commissioner's decision is that the MOD was entitled to rely on section 12. However he has determined that the MOD breached section 16 of the FOIA in handling the request.
3. The Commissioner requires the MOD to take the following steps to ensure compliance with the legislation:
  - provide advice and assistance to allow the complainant to refine his request to bring it within the cost limit.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

#### **Request and response**

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5. On 26 July 2012, the complainant requested information of the following description from the Headquarters British Gurkhas Nepal (HQ BGN):

- a. *"Please confirm that some of the Gurkhas, who served in the Army after 1 July 1997, and who opted to transfer from the GPS to AFPS 75 under GOTT, currently receive lower pensions under AFPS 75 compared to the GPS pensions of any Gurkha who retired before 1 July 1997 with the same rank and service?"*
  - b. *"Please provide the number of GOTT transferees whose AFPS 75 pension is currently lower compared to the GPS pension of any Gurkha who retired before 1 July 1997 with the same rank and service, broken down by rank?"*
6. (The terms GPS, AFPS 75 and GOTT refer to the Gurkha Pension Scheme, the Armed Forces Pension Scheme 75 and the Gurkha Offer to Transfer respectively).
  7. The MOD responded on 23 August 2012. It denied holding the requested information, telling the complainant:

*"To help you understand this response, you should know that the MOD does not maintain any information on comparisons between pension benefits for those personnel that opted to transfer between schemes, and those who did not, in either the main OTT or the GOTT".*
  8. The complainant repeated his request on 30 August 2012. That correspondence appears to have been treated as an attempt at informal resolution.
  9. Following further correspondence, the complainant requested an internal review on 24 September 2012.
  10. The MOD sent him the outcome of its internal review on 6 November 2012. In that correspondence, the MOD revised its position, confirming that although information is not held in the exact form requested, information within the scope of the request is held. However, with respect to the information requested at part (b) of the request, it cited section 12 (cost of compliance exceeds appropriate limit).

## **Scope of the case**

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11. The complainant contacted the Commissioner on 20 November 2012 to complain about the way his request for information had been handled. He told the Commissioner:

*"Whilst I understand the explanation given .... I consider that the MOD has exaggerated the complexity and difficulty of generating the information that I requested.... I believe that it should not take*

*the MOD more than 24 hours to make this comparison provided they use the right documents... ”.*

12. The Commissioner considers the scope of his investigation to be in relation to the MOD's application of section 12 to the information requested at part (b) of the request. He has also considered the advice and assistance offered to the complainant as required by section 16 of the FOIA.

## **Reasons for decision**

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### *Section 12 cost of compliance*

13. Section 12 of FOIA provides that a public authority is not obliged to comply with a request if the cost of doing so would exceed the appropriate cost limit. This limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the fees regulations) at £600 for central government bodies. The fees regulations also state that the cost of a request must be calculated at the rate of £25 per hour, meaning that section 12 effectively provides a time limit of 24 hours.
14. The tasks that can be taken into account when calculating a fees estimate are specified in the fees regulations as follows.
  - Determining whether the requested information is held
  - Locating that information
  - Retrieving the information
  - Extracting the information.
15. The four activities are sequential, covering the retrieval process of the information from the public authority's information store.
16. When requesting an internal review, the complainant told the MOD:

*"I explained the reason why I submitted my request for information under the FOIA 2000 to HQ BGN and not MOD LF Sec was because I know that the Army Pay Office Kathmandu/Pokhara hold personal records of all Gurkha pensioners in Nepal, from which this information could easily be derived and the APO is under the direct control of HQ BGN".*
17. The MOD told the complainant that, in order to respond to his request:

*"we would need to examine the records of all the individuals who transferred with immediate benefits. This pertains to the records of roughly 300 GOTT transferees".*

18. It went on to explain the steps that would need to be undertaken in order to locate and retrieve the relevant records from third party contractors and the subsequent manual review of each individual file.
19. It estimated that it would take approximately 200 hours to comply with the request.
20. During the course of the Commissioner's investigation, the MOD was asked to respond in relation to the complainant's view that the information at issue could easily be derived. It confirmed that the estimate was done on the basis of the quickest method of gathering the information.
21. Having considered all the evidence available to him, the Commissioner is satisfied that the MOD's estimate that it would take more than 24 hours work to answer the request is based on a reasonable assessment of the activities that are allowed by Regulation 4(3) of the Fees Regulations. He accepts the estimate in this case and therefore finds that the MOD applied section 12(1) correctly.

#### *Section 16 Duty to provide advice and assistance*

22. Section 16(1) imposes an obligation on a public authority to provide advice and assistance to a person making a request, so far as it would be reasonable to do so. Section 16(2) states that a public authority is to be taken to have complied with its section 16 duty in any particular case if it has conformed with the provisions in the Section 45 Code of Practice in relation to the provision of advice and assistance.
23. Whenever the cost limit has been applied correctly, the Commissioner will consider whether it would be possible for a public authority to provide advice and assistance to enable the complainant to obtain information without attracting the costs limit in accordance with paragraph 14 of the Code of Practice.
24. In this case, the Commissioner notes that the complainant was supplied with links to the current pension rates for both GPS and AFPS. In this respect, the MOD told the complainant:

*"these links would allow you to make your own comparisons regarding the two schemes. I regard this as being in fulfilment of Section 16(1) of the Act".*

25. However, the Commissioner has considered whether it would also have been reasonable for the MOD to have advised the complainant about reducing the scope of his request. During the course of his investigation, the MOD told the Commissioner:

*"we would be happy to provide [the complainant] with a representative sample of the information on the basis of our cost estimate .... However, we are unsure how [the complainant] would want this sample to be taken (eg randomly, by rank etc). I apologise that an offer of refinement was not included in the review".*

26. Accordingly, the Commissioner considers that the MOD breached section 16(1) - and did not comply with the section 45 code of practice - as it did not offer advice and assistance in order to narrow or refine the request.

## Right of appeal

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27. 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)

28. 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.
29. 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 .....**

**Jon Manners**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**