

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

### **Decision notice**

**Date:** 19 August 2013

**Public Authority:** Ministry of Defence

**Address:** Whitehall, London  
SW1A 2HB

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

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1. The complainant requested information from a named data subject's employment records. The public authority withheld the information on the basis of the exemption at section 40(2) FOIA.
2. The Commissioner's decision is that the public authority was entitled to withhold the information on the basis of section 40(2).
3. The Commissioner does not require the public authority to take any steps.

#### **Request and response**

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4. On 19 August 2012, the complainant (a former employee of the public authority) wrote to the public authority and requested two sets of information. The request was in relation to a complaint he had made to the public authority concerning his treatment by a colleague while he was employed by the authority. The request was for;
  - i. The second date redacted from the Note of Action (NOA) dated 3 April 2007, and
  - ii. Copies of enclosures 92, 96 and 97 held in file reference WAD/8089656B/ROC – Redress of Complaint (ROC) Flt Lt [Named Person].
5. The public authority responded on 18 September 2012. It explained that the date redacted from the NOA was considered exempt from disclosure on the basis of section 40(2) FOIA. Item (ii) of the request was considered a Subject Access Request under the Data Protection Act 1998

(DPA). The public authority therefore informed the complainant that it would issue a separate response to item (ii) of the request under the terms of the DPA.

6. However, during the course of the investigation, the Commissioner discovered that the public authority had in fact issued a response to item (ii) to the complainant under the terms of the DPA on 22 June 2012 following a Subject Access Request from the complainant on 6 June 2012. It withheld the enclosures under Schedule 7, paragraph 10 of the DPA – legal professional privilege.
7. Following an internal review, the public authority wrote to the complainant on 7 November 2012. It upheld the decision to apply section 40(2) to item (i) of the request. It however also considered item (ii) of the request under the terms of the FOIA and withheld the information in scope on the basis of section 42(1) FOIA – legal professional privilege. The explanation provided for considering item (ii) under the FOIA was simply that, the request had been made under the terms of the FOIA and not the DPA as he had previously done in June 2012.
8. After reviewing the enclosures requested in item (ii), the Commissioner explained to the complainant that the information therein relates to him and is therefore his personal data as defined in the DPA. He therefore advised the complainant that he could re-submit a separate complaint to the Commissioner under the DPA if he was dissatisfied with the public authority's response of 22 June 2012.

## Scope of the case

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9. The complainant contacted the Commissioner sometime in March 2013<sup>1</sup> to complain about the way his request for information had been handled.
10. The scope of the investigation was restricted to item (i) of the request for the reasons previously mentioned above especially at paragraph 7. The Commissioner therefore considered whether the public authority was entitled to withhold the date redacted from the NOA<sup>2</sup> on the basis of section 40(2).

## Reasons for decision

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### Section 40(2)

11. Information is exempt from disclosure on the basis of section 40(2) if it constitutes third party personal data (i.e. the personal data of anyone other than the individual making the request) and either the first or second condition in section 40(3) is satisfied.
12. Personal data is defined in section 1 of the DPA as follows:

*'.....data which relate to a living individual who can be identified from those data or from those data and other information which is in the possession of, or likely to come into possession of, the data controller; and includes any expression of opinion about the individual and indication of the intentions of the data controller or any person in respect of the individual.'*

### Is the withheld information personal data?

13. The Commissioner understands that a redacted copy of the NOA had previously been disclosed to the complainant during the investigation of complaint(s) he had made to the public authority about his treatment by a colleague who is named in the NOA. The NOA was recorded on a *Minute Sheet* of the complaint file mentioned in item (ii) of the request –
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<sup>1</sup> The letter of complaint was not fully dated.

<sup>2</sup> Also referred to as 'the withheld information' or the 'final process date'.

i.e. the complainant's complaint file. As far as the Commissioner can see, there is no indication that the redacted copy of the NOA was disclosed under the terms of the FOIA. However, the public authority did disclose a publicly available date (described as the discharge date) from the NOA to the complainant following the internal review.<sup>3</sup>

14. The public authority explained that the redacted date relates to the named data subject's *final process date*. A final process date is applied to all personnel service records. When an individual is discharged, they should receive all their financial entitlements the day after their discharge. However, sometimes things do not go as planned, and having the final process date enables the public authority to undertake any remedial pay activity of the account if it is required. Once this date has passed, the account is locked down, and whilst it can be resurrected, it is not an easy option.
15. As the date relates directly to the processing of the pay of the data subject, it is his personal data within the meaning in section 1 of the DPA.
16. The Commissioner agrees that the NOA is about the named data subject therein. It is information which relates to him and is also biographically significant. He therefore finds that the redacted date is the named data subject's personal data within the meaning in section 1 of the DPA.

Would the disclosure of the withheld information contravene any of the data protection principles?

17. As mentioned, for section 40(2) to apply, either the first or second condition in section 40(3) must be satisfied. The first condition in section 40(3) states that disclosure of personal data would contravene any of the data protection principles or section 10 of the DPA.
18. The first data protection principle states:  
*'Personal data shall be processed fairly and lawfully and, in particular shall not be processed unless –*  
*At least one of the conditions in schedule 2 [DPA] is met....'*
19. In terms of the fairness element of the first data protection principle, the public authority submitted that the key question is whether the named data subject would have a reasonable expectation that the date will not

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<sup>3</sup> Additional commentary on this further below.

be disclosed. It explained that first date mentioned in the NOA which is the actual discharge date – i.e. as opposed to the final process date, is routinely published in the London Gazette and hence publicly available; the final process date is not. As the final process date relates to his personnel service records, specifically the processing of his pay and entitlements, it is unlikely that the named data subject would expect that it would be made public. There are no legitimate interests of the public (as opposed to private interests) that require the disclosure of the final process date.

20. The complainant's position is that the date published in the London Gazette was not in fact the accurate discharge date and that it was the *last day of duty*. The final process date was the *true discharge date*. The implication being that the final process date should have been published in the London Gazette anyway as the accurate discharge date. There was therefore no justification for withholding it from disclosure under the FOIA.
21. In considering the fairness element of the first data protection principle, the Commissioner takes into account a number of factors depending on the circumstances of each case. In this case, he has considered the reasonable expectations of the named data subject and the circumstances in which the withheld information was obtained or generated.
22. As mentioned, the final process date is part of the named data subject's personnel service records. It is information which was generated from, and is, part of his employment record with the public authority. The Commissioner accepts that he would have a reasonable expectation that information relating to his employment records would not be disclosed under the FOIA – i.e. to the public at large. He would quite clearly not have the same expectations in relation to his discharge date because the public authority routinely publishes that information. However, that expectation would understandably not extend to other parts of his employment record not already in the public domain, including the final process date redacted from the NOA.
23. It is outside the Commissioner's remit to consider whether the final process date was in fact the accurate discharge date as alleged by the complainant. Even if the complainant is right (and the Commissioner is not suggesting that he is), the question for the Commissioner still remains; whether in the circumstances, it would be fair to disclose the personal data of the named data subject under the FOIA. The Commissioner finds that it would not.

24. The Commissioner therefore finds that the public authority was entitled to withhold the final process date on the basis of the exemption at section 40(2).

### **Other matters**

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25. It is not clear to the Commissioner why the public authority decided to apply the legal professional privilege exemption at section FOIA to the information (i.e. the enclosures) it had previously decided was the complainant's personal data. The correct approach would have been to either apply the exemptions at sections 40(5)(a) or 40(1) FOIA given that the request was for the complainant's own personal data. It was incorrect to extend the legal professional privilege exemption under the DPA to the FOIA. An applicant's personal data is clearly automatically exempt from disclosure under the FOIA by virtue of the relevant provisions in section 40 regardless of whether or not it is also legally privileged.

## Right of appeal

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26. 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)

27. 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.
28. 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**  
**Group Manager – Complaints Resolution**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**