

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 September 2013

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

Decision (including any steps ordered)

1. The complainant has requested information regarding the Ministry of Defence's ("MoD") policy regarding the handling of certain correspondence and whether further information regarding a case related to him was held. The MoD denied holding this information and upheld this position at internal review. During the course of the Commissioner's investigation, it disclosed information of interest to the complainant which was outside the scope of his requests.
2. However, the Commissioner has decided that the MoD should have refused to confirm or deny under section 40(5) whether it held the complainant's personal data as described in one of his requests. In failing to do so, the MoD contravened the requirements of section 1(1) and section 17(1) of the Freedom of Information Act.
3. No steps are required.

Request and response

4. On 3 January 2013, the complainant wrote to the MoD and requested information in the following terms [using the complainant's numbering]:

"3. Is it RAF policy past and present that when DGMS (RAF) examines medical negligence cases a written signed report/signal is expected from DGMS to pass on his conclusion to Ministers and to airman who have involved their Member of Parliament to begin a Parliamentary Enquiry on the subject? If not, how would DGMS (RAF) convey his opinion to Roger Freeman to sign on the 11/11/94."

4. In the light of the oversights I have outlined in paragraph two of page one, could there be any more evidence on record within the Ministry of Defence that MoD have failed to disclose to me about this case, especially from Air Marshall Sir John Baird DGMS (RAF) and his staff officers or any other evidence that is not contained in the file currently with Minister Andrew Robathan MP department?"
5. In paragraphs 2 and 3 of page 1 of the complainant's letter of 3 January 2013, he had said:

"I write further to your letter to the SCC, [named doctor] about the above case [the complainant's medical negligence complaint] when you told her that there were limited papers held by the MoD and a [named official] also wrote to me on 27 April 2007 in answering my FOI act request of 26 March 2007 and said that comprehensive records on this case are not available, yet with respect, there were indeed plenty of documents/records available within MoD about this case plus of course my medical records which must be retained by departments of the MoD as per regulations.

So therefore, to allay any future misunderstanding within the MOD, I wish to confirm that a comprehensive file about the above QR1625 complaint [complaint made under the Queen's Regulations] was delivered to the Veterans Minister Andrew Robathan MP office on 30 March 2011 by my then MP for Bradford West Mr Marsha Singh".
6. For ease of future reference, this notice will now refer to these as Request 3 and Request 4 respectively.
7. The MoD responded on 1 February 2013. It stated that it did not hold the requested information.
8. Following an internal review the MoD wrote to the complainant on 3 April 2013. Concerning Requests 3 and 4 generally, it said that FOIA gave a right of access to recorded information. It did not oblige public authorities to answer questions, to provide explanations or to give opinions.
9. Concerning Request 4 specifically, it said that the complainant had supplied all the information in question to the MoD in 2010 and that it was therefore reasonably accessible to him.¹

¹ Some confusion had arisen between the parties in related correspondence as to when the complainant had submitted the bundle referred to in paragraph 3 of the complainant's letter of 3 January 2013 (which also contained Requests 3 and 4). In a typographical error elsewhere, the complainant had said that the bundle was submitted in 2010, not 2011. The

10. The complainant wrote again on 8 April 2013 and asked it to re-examine its responses to both requests.
11. On 22 April 2013, the MoD sent him the outcome of its internal review. It apologised for not handling the complainant's letter of 7 February 2013 as a request for internal review. It upheld its original position. It said that it was satisfied that adequate searches were undertaken to find any records which would fall within the scope of his requests.

Scope of the case

12. The complainant, a former serviceman, contacted the Commissioner on 15 May 2013 to complain about the way his request for information had been handled. He provided information which, in his view, contradicted the MoD's position that it did not hold the requested information.
13. He also provided background detail which the Commissioner will not set out on the face of this Notice because it concerns medical matters relating to the complainant. These are connected to a medical negligence claim which was settled with the MoD. The matter was also raised in Parliament by his MP.
14. The Commissioner has considered whether, contrary to the MoD's assertion, it holds information within the scope of Requests 3 and 4.

Reasons for decision

15. Section 1 of FOIA states 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."

16. In determining whether information is held, the Commissioner applies the normal civil standard of proof – i.e. he will decide on the balance of probabilities whether the information is held.
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correct date of 2011 was given in the 3 January 2013 letter but this appeared to have been overlooked by the MoD when preparing its response.

17. The Commissioner asked the public authority a series of questions regarding what information it might hold, how it might hold it and what searches it had undertaken to establish whether it held further information within the scope of the requests.

Request 3 – is information held?

18. Regarding Request 3, the Commissioner observed that, while not as clearly worded as it might have been, this request seeks to know whether the MoD holds a record of the policy or procedure that was to be followed in 1994 when the Director General of Medical Services (“DGMS”) was required to provide a report about a medical negligence claim to a Minister.
19. In response, the MoD explained that the relevant guidelines for handling complaints about medical treatment were found in Queen’s Regulations 1624-1626, details of which the complainant was already aware because he, himself, had referred to them in correspondence with the MoD dated 3 January 2013. In any event, the MoD’s records showed that it had forwarded a copy of the relevant extracts of the Queen’s Regulations to the complainant in April 2007.
20. The MoD had also identified an internal MoD policy document derived from the Queen’s Regulations in question. It disputed that this was within the scope of the complainant’s request. It explained that the complainant had formed an incorrect opinion about the DGMS’ involvement in matters relating to him. The information in the document would only be within scope if the complainant’s opinion had been correct. It disclosed the document to the complainant outside the FOIA during the Commissioner’s investigation in an effort to achieve resolution of the complainant’s queries in this case.
21. Having seen the information, the Commissioner agrees that the document is outside the scope of the request. It would only be within scope if the complainant’s erroneous understanding of the DGMS’ involvement had been correct.
22. The MoD provided other detail about the extent and quality of its searches in response to each of the Commissioner’s detailed questions. It explained, for example, that when using the complainant’s surname as a search term when examining its electronic records, it used a common alternative spelling of his name to ensure no relevant records were missed. It also explained that it had searched records generated in 2011 as well as in 2010. The complainant submitted evidence which showed, in his view, that there was a policy in place and that it had been withheld from him. The Commissioner is satisfied, having considered the submissions of both parties, that no further information

is held within the scope of Request 3. He has reached this view using the civil standard of proof, namely, on the balance of probabilities.

23. Finally (regarding Request 3), during the course of the investigation, the complainant identified another document of interest to him which was mentioned in information he had already received. He had apparently not specifically requested it from the MoD at any stage. The Commissioner asked the MoD if it could track down the document and provide it to the complainant. It did so. It argued that the document was also outside the scope of his request because it related more generally to the handling of ministerial correspondence and not to the specifics of a medical negligence claim. Having read the information, the Commissioner agrees that the information is outside the scope of the request for this reason.

Request 4 – is information held?

24. With regard to Request 4, the Commissioner explained the typographical error referred to in Note 1 when seeking the MoD's arguments. He observed that the MoD may well have generated further records as a result of the information submitted by the complainant in 2011 (rather than 2010, the date it appeared to have been working from according to its letter of 3 April 2013). He commented that the MoD would need to check its records from 2011 and not 2010 in order to establish whether it still held material about the case. It did not appear to have done so. The Commissioner accepted that this may have been an omission made in good faith due to a typographical error in the complainant's own previous correspondence.
25. The Commissioner considered the wording of the complainant's request. He would summarise it as follows: "Does the MoD hold any other information related to my case beyond what I have already received?"
26. In the Commissioner's view, the vast majority of any further information related to the complainant's case, if held, would be his personal data. Personal data is information about an identifiable living individual which is biographically significant about them. The Freedom of Information Act does not give requesters a right of access to their own personal data.
27. The appropriate legal route for accessing one's own personal data is the Data Protection Act 1998 ("DPA"). It is called the right of subject access. An organisation is entitled to check an individual's identity upon receipt of a subject access request from them. It is also entitled to charge them £10 for processing the request. Furthermore, it is entitled to seek clarification from the complainant about what information they are seeking.

Would the information, if held, be the requester's own personal data?

28. In determining whether the information described in the complainant's Request 4 would, if held, be the requester's personal data, the Commissioner has referred to his own guidance and considered the nature of the request.²
29. The information in question would, if held, relate to concerns the complainant has raised about how he had been treated by medical professionals while in the armed services. The Commissioner is satisfied that the information would, if held, be about a matter which is biographically significant to the complainant, which consequently relates to him and from which he can be identified.
30. When a public authority receives a request for information which describes the requester's own personal data, the correct response under the Freedom of Information Act is to refuse to confirm or deny whether it holds the requester's personal data. Section 40(5) is the part of the Freedom of Information Act which covers this.
31. Section 40(5) states that –
"The duty to confirm or deny-

does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1),"
32. Section 40(1), referred to in section 40(5) as "subsection (1)" states 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."
33. Put another way, a public authority should not discuss the requester's personal data with the requester under the terms of the Freedom of Information Act. The Freedom of Information Act is "applicant blind" and any disclosure made to one requester should ordinarily be made to any other requester. The public authority should therefore refuse to confirm or deny whether it holds the requester's personal data under the Freedom of Information Act. However, as a practical next step, it should then engage its DPA subject access request procedure. As outlined

² http://www.ico.gov.uk/for_organisations/data_protection/the_guide/key_definitions.aspx

above, it should satisfy itself that the requester is who they say they are (and not somebody impersonating them), it should clarify what personal data is being sought and it can charge a £10 administrative fee. It is not obliged to take forward a subject access request until these points have been satisfied.

34. Strictly speaking, the MoD should have refused to confirm or deny whether it held any information within the scope of Request 4 which was the complainant's personal data and cited section 40(5) as its basis for doing so. In failing to do so, the MoD contravened the requirements of section 1(1), and section 17(1) of the Freedom of Information Act. These provisions require a public authority to refuse a request within 20 working days and to cite which exemption it is seeking to rely on as its basis for doing so.
35. The Commissioner recognises that the complainant's requests were not particularly clear. He has made further comment on this in the Other Matters section of this Notice.

Information within the scope of Request 4 which is not the complainant's personal data

36. The Commissioner acknowledges that information held on a file about a person's complaint may not all be his personal data. He has produced detailed guidance on this general point.³ As noted above, the MoD provided other detail about the extent and quality of its searches in response to each of the Commissioner's detailed questions. The Commissioner is satisfied, having considered the submissions of both parties, that the MoD does not hold any information which is not the complainant's personal data and which is within the scope of Request 4. He has reached this view using the civil standard of proof, namely, on the balance of probabilities.

Other matters

37. The Commissioner recognises that the complainant has genuinely felt concerns about how certain medical matters relating to him have been handled by the MoD. The Commissioner also recognises that the
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http://www.ico.org.uk/~media/documents/library/Data_Protection/Practical_application/access_to_information_held_in_complaint_files.ashx

complainant has sought to word his requests in a particular way so as to maximise what he can learn from his enquiries. However, the Commissioner thinks that this approach has been somewhat counterproductive in this case. The Commissioner has urged the complainant to reconsider the wording of any future requests for information that he might make. He forwarded a copy of his own guidance to the complainant (the MoD had already directed him to a previous version) which explains that clear and specific requests are more likely to be effective.⁴ He would reiterate this point here.

⁴ http://www.ico.org.uk/for_the_public/official_information

Right of appeal

38. 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

39. 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.
40. 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