

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 November 2013

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

Decision (including any steps ordered)

1. The complainant has requested information about drugs tests carried out on members of the Household Cavalry Regiment and the Household Cavalry Mounted Regiment. The Ministry of Defence ("MoD") made a partial disclosure but refused to provide the remainder citing section 40(2) (Unfair disclosure of personal data) as its basis for doing so. It upheld this position at internal review.
2. The Commissioner's decision is that the MoD is entitled to rely on section 40(2) in the circumstances of this case.
3. No steps are required.

Request and response

4. On 2 March 2013 the complainant requested information about drugs tests carried out on members of the armed forces. He had an exchange of correspondence with the MoD in order to clarify his request. On 10 June 2013, he clarified that he sought information of the following description:

"Please could you provide me with a list of drugs tests carried out for Household Cavalry, consisting of The Life Guards and The Blues and Royals (as defined on the British Army website) for the most recent two years available.

Please list whether any personnel were found to have used banned substances, the date of the test, what the substances were, the

Regiment/unit in question and the person's rank and any action taken as a result."

5. On 18 June 2013, the MoD responded. It explained that the names 'the Life Guards' and 'the Blues and Royals' were the names of the units pre-amalgamation. It further explained that these are now known as the Household Cavalry Regiment (HCR) and the Household Cavalry Mounted Regiment (HCMR). It provided some information in the form of a table but redacted figures which represented less than 5 individuals.
6. It said that these redacted figures constituted personal information and had been exempted from disclosure under section 40(2) of the FOIA (unfair disclosure of personal data). It also said that this accorded with Departmental policy and that some specific information requested (such as rank) had also been withheld. It confirmed that that no soldiers who returned a positive Compulsory Drug Test were above the rank of Corporal. It also explained that when an individual has tested positive at a Compulsory Drug Test they are administratively discharged from the Army and that this had occurred with those who tested positive in the cases mentioned in the table.
7. Following an internal review the MoD wrote to the complainant on 28 June 2013. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 31 July 2013 to complain about the way his request for information had been handled. The Commissioner and the complainant exchanged correspondence during which the complainant explained that he was now only seeking the number of individuals in the HCR and the HCMR who tested positive for banned substances in 2011 and 2012. He now no longer wished to know the date of the tests or the rank of those individuals who tested positive.
9. The Commissioner has therefore considered whether MoD is correct when it says that the number of individuals in the HCR and the HCMR who tested positive for banned substances in 2011 and 2012 is exempt from disclosure under the FOIA by virtue of section 40(2).

Reasons for decision

10. Section 40(2) of FOIA states that personal data (which is not the personal data of the requester) is exempt if its disclosure would breach

any of the data protection principles contained within the Data Protection Act ("DPA"). The term "personal data" is defined specifically in the DPA.¹

Does the requested information include third party personal data?

11. In determining whether information is the personal data of individuals other than the requester, that is, third party personal data, the Commissioner has referred to his own guidance and considered the information in question.² He has looked at whether the information relates to living individuals who can be identified from the requested information and whether that information is biographically significant about them.
12. The Commissioner recognises that in many cases, individuals cannot be identified even from small number statistics. However, he has had regard for the relatively small cohort from which the statistics in this case are derived, namely two regiments. He has also taken into account the nature of the cohort, that is, a group of people who live and work together within the inevitable confines of military service. The MoD explained that when an individual has tested positive at a Compulsory Drug Test they are administratively discharged from the Army and that this had occurred with those who tested positive in the cases mentioned in the table which it disclosed. The Commissioner is satisfied that where individuals are discharged from this particular cohort, the fact that they had been discharged would be widely known. Given the discipline with which service personnel are expected to conduct themselves, an administrative discharge is not likely to be a regular occurrence that would pass unnoticed by colleagues. The reason for the administrative discharge is more likely to be the subject of speculation among the small cohort. However, in this case, disclosure of the numbers of individuals in question and confirmation of the year in which the administrative discharge took place this would enable those in the small cohort to readily match the fact of the administrative discharge and the reason for it, to an identifiable former colleague or former colleagues. It would, in other words, be highly likely to validate the speculation.

¹ <http://www.legislation.gov.uk/ukpga/1998/29/contents>

²

http://www.ico.org.uk/for_organisations/data_protection/the_guide/~media/documents/library/Data_Protection/Detailed_specialist_guides/PERSONAL_DATA_FLOWCHART_V1_WITH_PREFACE001.ashx

13. The Commissioner is therefore satisfied that, in the circumstances of this case, living individuals could readily be identified from the disclosure of numbers in this context. An administrative discharge from the Army is an event which is self-evidently biographically significant for the individual in question.
14. Consequently, the Commissioner is satisfied that disclosure under FOIA of the number of individuals in the HCR and the HCMR who tested positive for banned substances in 2011 and 2012 would be disclosure of personal data: information relating to living, identifiable individuals which is biographically significant about them.
15. The Commissioner is also satisfied that the information is sensitive personal data for two reasons. The term "sensitive personal data" is defined in section 2 of the DPA (see Note 1). Firstly, being under the influence of drugs is against service law. The information is information as to the commission of an offence. Secondly, being under the influence of drugs is information about an individual's physical or mental health or condition.
16. The next question for the Commissioner to consider is whether disclosure of that information under FOIA would contravene any of the data protection principles of the DPA.

Would disclosure contravene any of the DPA data protection principles?

17. The data protection principle that is normally considered in relation to section 40 is the first data protection principle which states that:

'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 is met, and

in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.'

18. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:
 - The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
 - what the public authority may have told them about what would happen to their personal data;

- their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights;
 - the nature or content of the information itself;
 - the circumstances in which the personal data was obtained;
 - particular circumstances of the case, e.g. established custom or practice within the public authority; and
 - whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.
- The consequences of disclosing the information, i.e. what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor, the Commissioner may take into account:
 - whether information of the nature requested is already in the public domain;
 - if so, the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?
19. Furthermore, notwithstanding the individual in question's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure.
20. In considering 'legitimate interests', in order to establish if there is such a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests. In balancing these legitimate interests with the rights of the individual in question, it is also important to consider a proportionate approach, i.e. it may still be possible to meet the legitimate interest by only disclosing some of the requested information rather than viewing the disclosure as an all or nothing matter.
21. Administrative discharge from the Army is a significantly negative event in the life of any service person. It is not only a loss of livelihood but it is also a loss of prestige and self-confidence from which it would be difficult to recover. It would affect not only the individual in question but also their family – the financial, medical and domestic support that accompanies a military career would no longer be available to them. It is not a matter which any individual would reasonably expect to be made public in the circumstances of this case.

22. Events such as the ones referred in the disclosed information (where they occur in high profile regiments such as the HCR and HCMR) have already attracted press attention and speculation.³ Press coverage inevitably carries greater weight where an individual affected by or involved in a story can be identified. The Commissioner accepts the MoD's assertion that a determined person, such as a journalist, would be able to identify an individual or individuals to whom this information relates and to make their identity even more widely known.
23. The complainant has drawn attention to the high profile nature of the regiments in question and their connection to The Queen and other members of the Royal Family (both HRH Prince William and HRH Prince Harry served in the Household Cavalry⁴). Implicitly, if individuals serving in HCR and HMCR are using controlled substances then, arguably, this puts The Queen at personal risk either because they are not fit to or not disciplined enough to escort her safely, for example, on state occasions. HCR and HMCR form part of arrangements for The Queen's personal protection.⁵ Similarly, it could be argued that both Princes have been subject to service environments where controlled substances have been used by colleagues. Given the place of the Royal Family in the life of the UK, there is a clear and legitimate interest in learning about the risks to which members of the Royal Family (particularly the UK's Head of State) may be subject.
24. However, in the Commissioner's view, it would be unfair to the individuals in question to disclose their personal data in this case. Such disclosure would be wholly outside their reasonable expectations for the reasons set out above. In addition, the legitimate interest in knowing about positive drugs tests at the regiments in question has been served by disclosure that the MoD has already made. Disclosure of the identity of the individuals to whom this information relates is not necessary to serve that legitimate interest. Finally, the Commissioner can identify no condition in Schedule 3 of the DPA which can be satisfied in order to allow for the disclosure of this sensitive personal data. Disclosure would therefore be unfair and none of the conditions in either Schedule 2 or Schedule 3 could be satisfied.

Section 40(2)

³ <http://news.bbc.co.uk/1/hi/england/london/3605200.stm>

⁴ <http://news.bbc.co.uk/1/hi/uk/5367862.stm>

⁵ <http://www.army.mod.uk/armoured/regiments/26869.aspx>

25. The Commissioner has concluded that the requested information is personal data, the disclosure of which would be in contravention of the first data protection principle of the DPA. The information is therefore exempt from disclosure under section 40(2) of the Act.

Right of appeal

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

Website: 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