

Freedom of Information Act 2000

Decision notice

Date: 13 February 2014

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

Decision (including any steps ordered)

1. The complainant requested information relating to members of an SAS regiment who served during World War II. The Commissioner's decision is that the Ministry of Defence (MOD) does not hold the requested information. While he notes that the information is held by the SAS Regimental Association (the RA), he is satisfied that it does not hold the information on behalf of the MOD. No further action is required.

Request and response

2. On 11 June 2013, the complainant wrote to the MOD and requested information in the following terms:

"I have for some little time, with limited success, been trying to ascertain the identity, by name(s), rank, service number and parent regiment or corps, of those who served in 2 SAS Regiment between 5 June, 1944 and 8 May, 1945.

I have it on good authority that the requested information exists in one or other of two documents held by the MOD, but deposited for safe keeping with the Archivist to the Special Service Regimental Association at its offices in London NW1 4WF. The two documents are firstly a nominal roll compiled in August/September, 1944 and secondly an alphabetical Regimental Next of Kin Register/Book. Both were created by those then serving in the regiment or attached personnel. I am advised that that being so and notwithstanding they are presently in

the possession of the Association the information is nevertheless deemed still to be held by the MOD."

3. The MOD responded on 8 July 2013 stating that the information was held by the RA and not held by the MOD.
4. Following an internal review the MOD wrote to the complainant on 12 August 2013. It upheld the original position.

Scope of the case

5. The complainant wrote to the Commissioner on 19 August 2013 to appeal against the MOD's decision as he considered that the information is held by the MOD.
6. The Commissioner considers the scope of the case to be whether the MOD holds the requested information under the terms of the Freedom of Information Act 2000 (the Act).

Background

7. The complainant had originally asked for the information directly from the RA, which is a registered charity and not subject to the provisions of the Act. This proved unsuccessful. He was later informed – although the Commissioner does not know by whom – that the MOD held the information.
8. Some of the references to the "MOD" in this decision actually refer to the War Office, which was the MOD's predecessor. However, in the interests of consistency the Commissioner has chosen to only refer to the MOD throughout this notice.

Scope of the case

9. The Commissioner considers the scope of the case to be whether the MOD holds the documents referred to in the complainant's request. This requires consideration of whether the RA holds them on behalf of the MOD.

Reasons for decision

10. Section 3(2)(b) of the Act states that:

"(2) For the purposes of this Act, information is held by a public authority if

...

(b) it is held by another person on behalf of the authority."

11. Whilst the information is currently retained by the RA and not in the MOD's possession, under the terms of the Act the information would be held by the MOD if the RA holds it on the MOD's behalf.
12. In determining whether the information is held by an organisation on behalf on a public authority the Commissioner makes his decision based on the specifics of the case and a number of aspects such as:
 - The relationship between the two parties
 - Whether the public authority has access to the information
 - Whether the public authority has a degree of control over the information

The complainant's view

13. The complainant explained that the information would be contained in two documents: the nominal roll of 2 SAS regiment, and the next of kin book. His argument is that both of these documents were created by members of 2 SAS regiment or support staff working in an official capacity. Further, as this was for a real administrative purpose the Crown would have the intellectual copyright of the information. This would show the MOD has a right to the information and should be able to gain access to it.
14. The complainant contended that the information was created before the creation of the RA in late 1945. As the information was created by staff in the employ of the MOD before it was transferred to the RA, it follows that the MOD are the authors of the information and have held the information at some point.

The MOD's view

15. The complainant's argument outlined in paragraph 13 was challenged in the MOD's internal review. In this the MOD acknowledged that the information might pre-date the existence of the RA but maintained that at the time of the request the information was held by the RA for its own

purposes. The MOD argued that this meant whilst the information might at one point have been held by service personnel working for the MOD, the information at the time of the request was not held by the MOD.¹

16. In its submissions to the Commissioner the MOD expanded further on this point. It stated that it could not find any record of it holding these documents and that the information did predate the RA and would be held by the authors, who created the information in a private capacity and not for the functions of the MOD.
17. In response to the Commissioner's questions the MOD argued that the RA does not receive any funding from the defence budget so was not financed by the MOD. Although the RA does use MOD accommodation and facilities, as well as use of one member of staff who is employed by the MOD, this is considered to be "donated services" and is viewed as a contribution towards the charity work carried out by the RA. The MOD also made it clear that the donation is only for services; no money is exchanged between the parties.
18. The MOD stated that it has no access rights to the information – despite the member of its staff whose services are donated to the RA – and that the RA has absolutely no obligation to pass information to the MOD. It stated further that it had no purpose for accessing the information held by the RA. Whilst the MOD accepted that it might be possible to obtain the information if it asked it of the RA, this was due to a positive working relationship and not due to any contractual obligation or any formal process which gives it access to the RA's records. The MOD also confirmed that it did not hold the relevant information in another form or in incremental form.

The Commissioner's view

19. The Commissioner accepts that it is possible at some point this information could have been held by the MOD. However, he does not consider that this is particularly pertinent in this case as the information is not currently held by the MOD. The possibility of the MOD holding the relevant information in some form in the distant past is not sufficient to demonstrate that the MOD has any control or access to the information at present. Therefore the Commissioner has not given this argument significant weight when reaching his decision.

¹ The MOD provided further information about this which is contained in a confidential annex.

20. The Commissioner notes the complainant's view that the information was created by individuals working in their official capacity so the information would be under crown copyright. The Commissioner considers that there is not enough information to determine whether this is the situation in this case, and is mindful that the MOD has contradicted the complainant's view by stating the information was created by individuals working in a private capacity.
21. The Commissioner's view of the relationship between the MOD and the RA is that there is a close association, as demonstrated by the donation of services as the RA's use of the MOD's facilities, but that this does not provide the MOD with any formal right of access to the information held by the RA. The Commissioner notes that the MOD is able to ask the RA for information and does not dismiss that it might be entirely possible that the MOD could ask the RA for the requested information. However the critical issue for this decision is not whether the MOD could obtain the information, but whether it holds it under the terms of the Act. The Commissioner is satisfied that the relationship between the two parties does not indicate the MOD has any control over or direct access to the information within the scope of this request.
22. It is evident from the MOD's submissions that it does not have access to the requested information, and that the relationship between the two parties does not afford the MOD any control over the information. The Commissioner considers this key to his decision because 'another person' is only considered to hold information on behalf of a public authority where the public authority is able to access or has a degree of control over the information.
23. The Commissioner does not consider the possibility that the MOD once held the information to be significant, as the basis of his decision is whether the information was 'held' at the time of the request and the MOD has made it clear it has no record of the information within the scope of the complainant's request. The Commissioner notes that there is opposing information about whether the authors of the information were working in a private or official capacity, but does not consider there to be evidence that the relevant information is under crown copyright, which would show that the MOD has some control over the information.
24. The Commissioner's decision is that under the terms of the Act the RA does not hold the requested information on behalf of the MOD, and therefore the MOD does not hold the information under the terms of the Act.

Right of appeal

25. 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: GRC@hmcts.gsi.gov.uk

Website: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

26. 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.
27. 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
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