

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

### **Decision notice**

**Date:** 12 May 2014

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

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

---

1. The complainant submitted a number of requests to the Ministry of Defence (MOD) seeking various pieces of information regarding the Redress of Complaint procedure. The MOD provided some information in response to these requests but withheld a small portion of information on the basis of section 42(1) of FOIA. The complainant argued that further information relevant to some of the requests was held and had not been disclosed; he disputed the MOD's reliance on section 42(1) of FOIA; and also argued that the MOD had failed to respond to the requests when they were originally submitted to it.
2. The Commissioner's decision is as follows:
  - In relation to requests (1) and (2) the MOD does not hold any further information falling within the scope of these requests;
  - In relation to request (3) the MOD does not hold copies of reports for the months of January and February 2007;
  - The information redacted from the documents disclosed in response to request (3) is exempt from disclosure on the basis of section 42(1).
  - The MOD did respond to a similar set of requests when they were first submitted on 6 August 2012.

## Request and response

---

3. On 6 November 2012 the complainant submitted the following requests to the MOD regarding the Redress of Complaint (RoC) procedure<sup>1</sup>:
- (1) *Excluding Complainant/Respondent, what is the full distribution list for the RoC findings law single-Service Standard Operating Procedures (SOPs)?*
  - (2) *What stipulations are laid down by the MOD with regard to the taking of copies or extracts of RoC findings that are disclosed prior to submission to the DO [Deciding Officer]?*
  - (3) *Please provide a copy of the signed Appendix to Annex P of JSP 763.*
  - (4) *Please provide a copy of the signed Appendix 2 & Appendix 3 to Annex P of JSP 763 which relates to the RoC outcome and follow-up report.*
  - (5) *Does a copy of the Decision Letter support the E&D [Equality and Diversity] Log?*
- Bi-annual reports relating to each of the above complaints would have been made by each until and submitted to command headquarters at 31 Mar and 30 Sep each year. A copy of these records is required also as part of this FOI request.*
4. The MOD acknowledged receipt of these requests on 20 November 2012. It explained that request (4) would be processed as a Subject Access Request under the Data Protection Act (DPA).
5. The MOD contacted the complainant again on 6 December 2012 and confirmed that it held some information falling within the scope of his requests. However, it considered the exemptions provided by 'section 40(b)' and section 42(1) of FOIA to apply and it needed further time to consider the balance of the public interest test.
6. The MOD provided him with a substantive response to his requests on 8 January 2013. The MOD provided him with information in relation to requests (1) and (2). In relation to request (3) the MOD provided 'Equality and Diversity Redress Log – Executive Summary Sheets' for RAF Waddington but explained that certain information had been redacted on the basis of sections 40(2) and 42(1) of FOIA. In relation to request (5), i.e. *'Does a copy of the Decision Letter support the E&D*
- 

<sup>1</sup> This refers to the MOD's procedures concerning complaints about bullying and harassment.

*log?*', the MOD referred him to the attached Redress Logs and explained that if he had any further questions he should submit a further FOI request. Finally, the MOD also provided the complainant with copies of the bi-annual reports as requested.

7. The complainant then exchanged a series of letters with the MOD in an attempt to informally resolve his concerns regarding this response. Such steps did not prove to be satisfactory and therefore he contacted the MOD on 10 June 2013 and asked it to undertake an internal review of its handling of these requests. In relation to requests (1) and (2) he argued that the MOD would hold further recorded information beyond that previously provided to him. In relation to request (3), he queried the application of sections 40(2) and 42(1) of FOIA and also the MOD's failure to provide records covering the period January and February 2007.
8. The MOD informed him of the outcome of the internal review on 12 July 2013. The review concluded that he had been provided with all of the recorded information held by the MOD which fell within the scope of requests (1) and (2). In relation to request (3) it confirmed that no records were held for months January and February 2007 and that the two exemptions cited had been applied correctly.

### **Scope of the case**

---

9. The complainant contacted the Commissioner on 9 December 2013 to complain about the way his requests for information had been handled. The complainant raised the following points of complaint:
  - (a) He had actually initially submitted these requests to the MOD on 6 August 2012 but it had failed to respond to these requests.
  - (b) In terms of request (1) he believed that the MOD held further recorded information falling within the scope of this request.
  - (c) Similarly, in terms of request (2) he believed that the MOD held further recorded information falling within the scope of this request.
  - (d) With regard to request (3) he disputed the MOD's position that it did not hold copies of reports for the months January and February 2007.
  - (e) He also disputed the MOD's application of section 42(1) of FOIA to redact some information from the documents provided in response to request 3.

## Reasons for decision

---

### Complaint (a)

10. The Commissioner understands that the complainant submitted the following requests to the MOD on 6 August 2012:

*'Please provide details as follows:*

*'(1) Who receives a copy of the letter containing the findings of the Deciding Officer (DO) following a Redress of Complaint (ROC) investigation as above?*

*(2) What is the minimum retention period for copies of such Decision Letters?*

*(3) What stipulations are laid down by MOD with regard to the taking of copies or extracts of RoC findings that are disclosed prior to submission to the DO?*

*(4) What departments receive notification of the E&D Log content?*

*(5) How is the outcome of the RoC verified for the E&D Log entry?*

*(6) Does a copy of the Decision Letter support the E&D Log?'*

11. The MOD responded to these requests on 4 September 2012.
12. The complainant was unhappy with this response and contacted the MOD on 2 October 2012 and provided some further explanation of the information which he sought. The complainant invited the MOD to process his letter as new request or treat it as a request for an internal review in relation his initial requests of 6 August 2012.
13. The MOD contacted the complainant on 30 October 2012 and explained that before it processed his requests of 6 August 2012, it needed him to provide some further clarification regarding the nature of the information he sought. It explained that once such clarification had been provided it would process his requests.
14. The complainant contacted the MOD again on 6 November 2012 – i.e. the correspondence containing the requests which are the focus of this complaint – and provided the clarification sought by the MOD.
15. Having reviewed this correspondence the Commissioner is satisfied the MOD did respond to the complainant's initial request of 6 August 2012;

the fact that the complainant was dissatisfied with the outcome of that response dated 4 September 2012 does not alter the fact the requests were responded to.

16. Furthermore, it should be remembered that section 1(3) of FOIA allows public authorities to ask a requester to clarify a request before they respond to it if they deem such clarification necessary. Moreover, in the Commissioner's opinion a clarified request should be considered as a new request for information.
17. When the complainant contacted the MOD on 2 October 2012 and invited the MOD to treat this as a new request for information this is precisely what the MOD did. However, in line with section 1(3) of FOIA it determined that it needed the complainant to clarify this request before it could consider it. Such clarification was provided in the complainant's correspondence of 6 November 2012, which in the Commissioner's view the MOD was correct to treat as new requests for information – on the basis that a clarified request constitutes a new request for information – and thus the MOD had a further 20 working days to respond to the requests of 6 November 2012.

### **Complaint (b)**

18. This complaint concerns request (1) which read:

*'Excluding Complainant/Respondent, what is the full distribution list for the RoC findings law single-Service Standard Operating Procedures (SOPs)?'*

19. In response to this request the MOD provided the complainant with copies of the relevant extracts from the January 2007 version of the Joint Service Publication (JSP) 763 – Harassment Complaints Procedures – and Annex A to Air Publication (AP) 3392 Vol 4, Leaflet 1806, dated September 2006, both of which contain information concerning notification of a RoC decision. The MOD explained that the JSP states that where a respondent is outside the Deciding Officer's (DO's) chain of command or line management chain the DO must also notify the Respondent(s) Commanding Officer or Senior Line Manager of their decision.
20. The complainant argued that the fact that the MOD must retain additional copies of such records was well established; what request (1) sought to establish was *where* such records would be held. The complainant identified (in a letter to the MOD dated 10 June 2013) a variety of locations and departments where such information could be housed. The complainant therefore argued that he had not been

provided with all of the information falling within the scope of his request.

21. In circumstances such as this where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
22. In other words, in order to determine such complaints the ICO must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request.
23. In applying this test the ICO will consider:
  - The scope, quality, thoroughness and results of the searches; and/or
  - Other explanations offered as to why the information is not held.
24. In submissions to the Commissioner the MOD argued that the information provided to the complainant met the description of the request in full given that it described the distribution list for the RoC findings. It therefore argued that the issue of making a wider or more detailed search of the MOD for information of this description was not relevant to this particular point of complaint.
25. The Commissioner has considered the information that has been disclosed to the complaint in response to this request. He agrees with the MOD that the recorded information provided fulfils the request as it clearly sets out the MOD's recorded policy in respect of the distribution of RoC findings in the circumstances described by the request. Whilst the complainant may consider it likely that there will be a variety of other locations where RoC findings may be held, it must be remembered that FOIA simply provides an applicant with the right to access recorded information held by a public authority. The legislation does not require a public authority to create information and nor does it extend to providing requestors with descriptions of, or explanations for, particular processes or procedures.
26. Moreover, in the Commissioner's opinion the MOD is correct to interpret the request as simply seeking access to recorded information it holds which stipulates the distribution list for the outcome of RoC findings and this information has been provided in the form of the disclosed extracts. Therefore, whilst the Commissioner does not necessarily seek to disagree with the complainant's suggestion that the outcomes of a RoC may be held in a variety of locations, this does not alter the fact that the request sought a copy of the distribution list for such documents and in

the Commissioner's view such a document has been provided. Consequently, the Commissioner is satisfied that the complainant has been provided with the recorded information held by the MOD which falls within the scope of his request.

### **Complaint (c)**

27. This complaint concerns request (2) which sought the following information:

*'(2) What stipulations are laid down by the MOD with regard to the taking of copies or extracts of RoC findings that are disclosed prior to submission to the DO?'*

28. In response to this request, the MOD explained that both the January 2007 version of the JSP 763 and AP3392 Vol 4, Leaflet 1805, Guide for Dealing with Complaints Relating to Harassment, Discrimination and Bullying, dated December 2005 state that the requirements of the Data Protection Act (DPA) must be complied with fully. In addition, the complainant asked the MOD to clarify the legitimacy of two certificates (A and B), which are receipt forms sent to a complainant when they are provided with a copy of all information compiled for presentation to the DO under Queen's Regulations (RAF) 1000 Redress of Complaint. Certificate A asks the individual to acknowledge receipt of the redress papers; certificate B is a similar acknowledgment letter for an individual's legal representative.
29. The MOD explained that it had searched for further information that may fall within the scope of this request and no information was found, including information that would confirm the legitimacy or otherwise of the certificates in question. These searches included checking the Service Complaints policy expert at RAF Air Command, the Data Protection Cell and the RAF HQ Air Command Secretariat. The rules themselves governing the administration of the Redress of Complaints process are contained in the Air Publication (AP) 3392 Vol 4, Leaflet 1806.
30. The complainant argued that the MOD was a public authority steeped in tradition and bound by regulation. Therefore it would not declare the RoC findings as being 'official property' disclosed for temporary retention only if no policy procedures were in place to support this claim. Therefore the MOD's claim that it cannot find any information where it placed any further constraints – other than the DPA – on a complainant taking copies or extracts from RoC investigations was not in his view considered acceptable.

31. In relation to the certificates the complainant noted that these would have been issued by the Harassment Investigation Officer (HIO) in line with existing policies. Therefore the complainant argued that if the taking of extracts or copying the findings of the formal investigation is forbidden this effectively prevents a complainant from presenting such evidence either on appeal or to subsequent tribunal hearing. The complainant argued that the MOD must either concede that it issued certificates without the appropriate authority or that it has prevented the interests of justice being served.
32. The Commissioner has considered the searches the MOD has undertaken to locate recorded information falling within the scope of request (2), i.e. the procedures referred to and the DPA. In the Commissioner's view the focus of these searches were logical and sufficiently adequate given the subject matter of the request to conclude that on the balance of probabilities, the MOD has located all of the recorded information it holds. The fact that the procedures referred to by the MOD in response to this request do not refer to the type of further constraints envisaged necessary or likely to be in place by the complainant is not in the Commissioner's opinion sufficient evidence to suggest that further recorded information - which does contain such potential constraints - is actually held. With regard to the complainant's suggestion that the MOD must either concede that it issued certificates without the appropriate authority or that it has prevented the interests of justice being served is simply not an issue that falls within the scope of FOIA.

### **Complaint (d)**

33. This complaint concerns the part of the request which sought the following information:

*'Bi-annual reports relating to each of the above complaints would have been made by each until and submitted to command headquarters at 31 Mar and 30 Sep each year. A copy of these records is required also as part of this FOI request.'*
34. In response to this request the complainant was provided with copies of the bi-annual reports (concerning RAF Waddington which was the focus of the request). However, the complainant was dissatisfied that reports had not been provided for the months January and February 2007. The complainant argued that such information was likely to be held somewhere by the MOD as it would have retained in two different locations, namely the 'Station File Copy' and the 'Command Headquarters Copy'.
35. In order to address this point of complaint the Commissioner asked the MOD to explain what searches were carried out for records relating to



the months of January and February 2007 and to explain why those searches would have been likely to retrieve any relevant information.

36. The MOD explained that three different areas were searched: the Station Administration at RAF Waddington; the Equality and Diversity Policy Office at RAF HQ Air Command; and the Air Personnel Casework Office responsible for collating the Equality and Diversity returns from each station with the result that no records for this period were found. The MOD explained that searches were carried out in these areas as they were the only ones involved in the processing of this information; it was, in its view, improbable that information would be elsewhere.
37. The Commissioner also asked the MOD whether it was the case that these records for the months January and February 2007 were 'missing' or whether it was the case that records for these months would simply not have ever existed.
38. In response, the MOD explained the background of the Equality and Diversity ('E&D') logs. The sponsor of JSP 763 (that regulates the MOD's Harassment Complaint Procedures) confirmed that it was first introduced in April 2005 and was next updated in an edition dated 31 January 2007. Prior to the 2007 edition there was no summarising of E&D casework and reporting up the chain of command. Annex P, or the Executive Summary Sheets (Appendix 4) and the bi-annual reports were introduced in the January 2007 version. The MOD explained that in its view although the JSP of January 2007 states that this new process of reporting is to be undertaken, the fact that no earlier E&D Log reports were found with the other reports held at the Station indicates that there were no other reports created prior to the one date 3 April 2007. The MOD surmised that the process would have taken a short time to establish; it was only a matter of four weeks between the 31 January 2007 JSP being issued and RAF Waddington starting to collect the information needed to compile their return dated 3 April 2007. Alternatively, the MOD suggested that it may have been the case that a decision was taken not to commence the process until the beginning of the financial year. On the balance of probabilities, the MOD suggested that it was reasonable to conclude that the information for the months January and February 2007 was never held, rather than it was 'missing'.
39. Taking into account the detail and rationale underpinning this explanation provided by the MOD, along with the adequate and logical searches undertaken for any relevant information – including the two locations identified by the complainant – the Commissioner is satisfied that on the balance of probabilities the MOD does not hold information for the months of January and February 2007.

## **Complaint (e)**

40. The complainant disputed the MOD's decision to redact part of the E&D reports that were provided to him on the basis of section 42(1) of FOIA.
41. This section of FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings.
42. There are two categories of legal professional privilege: advice privilege and litigation privilege.
43. In this case the category of privilege the MOD is relying on is advice privilege. This privilege is attached to confidential communications between a client and its legal advisers, and any part of a document which evidences the substance of such a communication, where there is no pending or contemplated litigation. The information must be communicated in a professional capacity; consequently not all communications from a professional legal adviser will attract advice privilege. For example, informal legal advice given to an official by a lawyer friend acting in a non-legal capacity or advice to a colleague on a line management issue will not attract privilege. Furthermore, the communication in question also needs to have been made for the principal or dominant purpose of seeking or giving advice. The determination of the dominant purpose is a question of fact and the answer can usually be found by inspecting the documents themselves.
44. The redacted information concerns legal advice provided by MOD legal advisers to their client in another part of the MOD. The MOD therefore argued that section 42(1) was engaged in respect of the withheld information.
45. The complainant argued that the advice could no longer be considered to be confidential and thus privileged because it was distributed beyond the 'client team' to third parties neither involved with nor considered as part of the RoC.
46. In the Commissioner's view in a FOI context, legal professional privilege will only have been lost if there has been a previous disclosure to the world at large with no restrictions on its use. In such circumstances the information can therefore no longer be considered to be confidential. The Commissioner understands that the redacted information in this case was not released in an unrestricted fashion and remained within the MOD. Furthermore, having reviewed a copy of the withheld information he is satisfied that the dominant purpose of this information was the provision of legal advice. He is therefore satisfied that the legal advice remains confidential and thus still attracts legal advice privilege. It is therefore exempt from disclosure on the basis of section 42(1) of FOIA.

### Public interest test

47. However section 42 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

#### *Public interest in favour of maintaining the exemption*

48. The MOD emphasised that the importance of protecting the lawyer – client relationships was built into the exemption. It argued that protecting such relationships was important because if advice were to be routinely disclosed lawyers may be less willing to give free and frank advice to their clients. The MOD emphasised that the Information Tribunal had stated that at least equally strong countervailing considerations would need to be adduced to override that inbuilt interest. The MOD argued that as no such countervailing considerations existed, the balance of the public interest clearly lay in withholding the information.

#### *Public interest in favour of disclosing the information*

49. The complainant did not identify any particular public interest in the disclosure of the redacted information. The MOD acknowledged that disclosure could further aid public understanding of the E&D redress log procedure and how decisions are made in the RAF. Transparency could also enhance the accountability of this procedure.

#### *Balance of the public interest test*

50. Although the Commissioner accepts that there is a strong element of public interest inbuilt into legal professional privilege, he does not accept, as previously argued by some public authorities that the factors in favour of disclosure need to be exceptional for the public interest to favour disclosure. The Information Tribunal in *Pugh v Information Commissioner* (EA/2007/0055) were clear:

*'The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty than those in favour of maintaining the exemption'. (Para 41).*

51. Consequently, although there will always be an initial weighting in terms of maintaining this exemption, the Commissioner recognises that there are circumstances where the public interest will favour disclosing the information. In order to determine whether this is indeed the case, the Commissioner has considered the likelihood and severity of the harm

that would be suffered if the advice were disclosed by reference to the following criteria:

- how recent the advice is; and
- whether it is still live.

52. In order to determine the weight that should be attributed to the factors in favour of disclosure the Commissioner will consider the following criteria:

- the number of people affected by the decision to which the advice relates;
- the amount of money involved; and
- the transparency of the public authority's actions.

53. With regard to the age of the advice the Commissioner accepts the argument advanced on a number of occasions by the Tribunal that as time passes the principle of legal professional privilege diminishes. This is based on the concept that if advice is recently obtained it is likely to be used in a variety of decision making processes and that these processes are likely to be harmed by disclosure. However, the older the advice the more likely it is to have served its purpose and the less likely it is to be used as part of any future decision making process.

54. In many cases the age of the advice is closely linked to whether the advice is still live. Advice is said to be live if it is still being implemented or relied upon and therefore may continue to give rise to legal challenges by those unhappy with the course of action adopted on that basis.

55. With regard to the advice, the Commissioner understands that it dates from some seven years ago, i.e. the date of the report from which the advice was redacted. However, the MOD explained that as the complainant himself is an example of an individual who remains unhappy with the outcome of a Service Redress of Complaint even several years old, it was reasonable to say that the legal advice was very much live in that the MOD would seek to rely on it should any persons whose cases are recorded in the E&D Log resort to legal action. In light of this the Commissioner believes that there is a significant and weighty public interest in upholding the exemption.

56. With regard to the public interest in disclosure of the information, while there may be a general public interest in improving accountability in the way acknowledged by the MOD it is difficult to envisage how a significant number of people are affected by the decision to which the advice relates. Furthermore, in respect of the transparency of the MOD's

actions, the Commissioner notes that the remainder of the E&D logs have been disclosed.

57. Therefore in light of the strong inherent public interest in maintaining legal professional privilege and the fact that the MOD would still seek to rely on the advice, the Commissioner has concluded that the public interest favours maintaining the exemption.

## Right of appeal

---

58. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

59. 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.
60. 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**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**