

## **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)**

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1. The complainant has requested information from the Ministry of Defence (MOD) regarding the Service Redress of Complaint procedure. The MOD explained that it did not hold any requested information. The complainant contacted the Commissioner as he disputed this response. The Commissioner has concluded that requested information, if held, would constitute the complainant's own personal data. Therefore the MOD does not have to respond to the request under FOIA by virtue of section 40(5)(a) of FOIA.

#### **Request and response**

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2. Since August 2012 the complainant had been in correspondence with the MOD in relation to a number of requests he had submitted concerning various aspects of the Service Redress of Complaint (RoC) procedure.<sup>1</sup>
  3. The complainant submitted the following request to the MOD on 30 March 2013:
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<sup>1</sup> These requests are the subject of a separate complaint to the Commissioner which has been dealt with under reference number FS50524289.

*'Does a copy of the Decision Notice support the E&D Log?'*<sup>2</sup>

4. The MOD responded on 2 May 2013 and explained that it did not hold a copy of the information requested. The response noted that he had previously been advised that the *'Redress of Complaint Level 1 Decision Letter [which concerned his own complaint] is not held on file by the MOD'*.
5. The complainant contacted the MOD on 7 May 2013 in order to ask for an internal review of this decision. In doing so he asked that the MOD confirmed that breaches of its records management policy had occurred as a result of the failure to retain evidence of an investigation outcome. He also queried whether the letter in question had been retained by a 'Higher Authority' within the MOD.
6. The MOD informed the complainant of the outcome of the internal review on 10 May 2013. The MOD concluded that it did not hold any recorded information falling within the scope of the request. It also explained that as the nature of his request related to the outcome of a Service Redress of Complaint that he made, any other information held about this matter would be likely to be his personal data and thus exempt from disclosure under FOIA by virtue of section 40(1).

## **Scope of the case**

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7. The complainant contacted the Commissioner on 9 December 2013 to complain about the way his request for information had been handled.
8. The complainant believed that the MOD would hold information falling within the scope of this request. He also explained that in his view the request sought information regarding the retention practices in respect of any RoC rather than matters directly concerned with his complaint submitted under the RoC procedure.

## **Reasons for decision**

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## **What does the request ask for?**

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<sup>2</sup> A 'Decision Notice' in the context of this request relates to the findings that convey the outcome of a Service Redress of Complaint. 'E&D Log' refers to the Equality and Diversity Log which contains anonymised summaries of harassment complaints.

9. Having initially reviewed the correspondence associated with this complaint the Commissioner was of the provisional view that this request sought information associated with the complainant's own RoC. The Commissioner reached this view given that in a letter of 30 March 2013 to the MOD in reference to this request the complainant stated:

*'As you are aware, the Decision Letter in this case relates to the written findings of a Redress of Complaint about discrimination, harassment and bullying contrary to the Equality and Diversity (E&D) requirements within the MoD'.*

10. The letter goes on to state:

*'The Station (Unit) is required to retain a copy on file for 10 years whilst the records retained by the Higher Authority remain valid for 100 years. The mandatory periods quoted above are a requirement of both the MoD Equality and Diversity Policy and the MoD Harassment Complaints Procedure respectively. MoD holds a copy.*

*Having now provided further explanation, you are requested to review your earlier findings and release this data as part of an amended request for information under FOIA. Alternatively, please submit this as a complaint direct to the MOD for an independent review...'*

11. In letter to the Commissioner dated 29 October 2013, the complainant explained that:

*'in this instance it was not the disclosure of the **content** under DPA98 that was requested, but merely under disclosure under FOIA of a **location** where audit copies are retained in order to meet mandatory requirements for investigations of complaints [emphasis in original].'*

12. And:

*'The fact remains that to date MoD has consistently failed to provide any evidence that can validate unequivocally when and by what means a Decision Letter was despatched or delivered to me at any point in time. However, notwithstanding this fact, the MoD was tasked under FOIA to disclose specifically where it **held** the mandatory copy of this Decision Letter [again emphasis in original].'*

13. The Commissioner informed the complainant of his provisional view on this point, ie that his understanding was that the request focused on information concerning his own complaint submitted under the RoC procedure.

14. In response, the complainant explained that in fact this request, which had initially been submitted in August 2012, had simply sought details

of the location of any file copies that form the record of permanent retention relating to any RoC in general. Indeed he noted, as the Commissioner had himself done, that the request of 30 March 2013 itself did not make reference to the complainant's own RoC.

15. In submissions to the Commissioner the MOD explained that it understood this request to be seeking an opinion about whether the complainant's Commanding Officer's Decision Notice, that conveyed the outcome of his Service RoC, was consistent with the information recorded in the Equality and Diversity Log.
16. The Commissioner has considered this matter carefully. He accepts that the focus of the complainant's earlier requests of August 2012 do focus more on the general operation of RoC procedures. However, in the Commissioner's opinion it is reasonable to conclude that the only objective meaning of the request – submitted as it was on 30 March 2013 – was aimed at seeking information simply concerning the complainant's own RoC. In this Commissioner's view such a conclusion is supported by extracts quoted above from complainant's letters of 30 March and 29 October. Moreover, the Commissioner's view is that that no direct reference to the complainant's own RoC was needed in the request given the volume of correspondence already exchanged between the two parties in relation to this issue, aspects of which had focused on matters associated with the complainant's own RoC. Such a conclusion is also supported, the Commissioner would argue, by the MOD's own separate assumption – i.e. that the information being sought related to the complainant's own RoC.
17. In light of this finding the Commissioner believes that rather than respond to the request and confirm whether or not information was held, the MOD would have been entitled to refuse to confirm or deny whether information was held on the basis of section 40(5)(a) of FOIA. The Commissioner has explained why he has reached this finding below.

### **Section 40(5)(a)**

18. Section 40(1) of FOIA 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'.*

19. Section 40(5)(a) of FOIA states that the duty under section 1(1)(a) of FOIA of a public authority to confirm or deny whether it holds requested information

*'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) [i.e. section 40(1)]',*

20. Personal data is defined by the DPA as:

*'...data which relate to a living individual who can be identified*

*a) from those data, or*

*b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,*

*and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.'*

21. For the reasons discussed above the Commissioner is of the view that the request sought information concerning the complainant's own Service RoC. By responding to this request by confirming that it does not hold information or, conversely confirming that information is held, would in effect confirm that the complainant had in fact submitted a complaint under the RoC procedure. In the Commissioner's view it would not just be the content of any such decision notice that would constitute the complainant's own personal data, but also simply the fact that he had even submitted such a complaint under the RoC procedure.
22. Therefore, under FOIA, the MOD could have refused to confirm or deny whether it held the requested information on the basis of section 40(5)(a) in order to avoid revealing that the complainant had in fact submitted a complaint under the RoC process.
23. Consequently, the Commissioner finds that the MOD does not have to confirm, under FOIA, whether or not it holds the requested information. (Albeit the MOD has of course already informed the complainant that no such information is held. The Commissioner notes that in submissions to him the MOD explained that it would be expected that no such information would be held given that no comparison exercise between a Decision Letter and the relevant Equality and Diversity Log was required under the Queen's Regulations (RAF).)

## **Right of appeal**

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24. 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)

25. 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.
26. 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**