

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 September 2015

Public Authority: Ministry of Defence

Address: Whitehall
London
SW1A 2HB

Decision (including any steps ordered)

1. The complainant submitted a request to the Ministry of Defence (MOD) for copies of eight documents it held concerning peaceful nuclear explosions. After some delay, the MOD complied with the request withholding some information on the basis of sections 24(1), 27(1)(a), (c) and (d), and 40(2) of FOIA. However, despite upholding the application of these exemptions at the internal review stage the MOD also argued that it should have refused to comply with the request from the outset on the basis of section 14(1) because complying with it was so burdensome. The MOD confirmed that it was now seeking to belatedly rely on this provision of the legislation to refuse to comply with the request. The Commissioner has concluded that the MOD is entitled to refuse to comply with the request on the basis of section 14(1). He does not require the MOD to take any steps as a result of this notice.

Request and response

2. The complainant originally submitted the following request to the MOD on 20 November 2013:

'Please provide a copy of all the documents under the following titles, according to The National Archives these are all retained by the Ministry of Defence:

- a) "*Expected radioactivities from plowshare devices*" under the reference **ES 10/1272** in The National Archives - <http://discovery.nationalarchives.gov.uk/SearchUI/s/res?q=ES+10%2F1272+>

- b) "*Notes on Plowshare programme: peaceful use of nuclear explosives*" under the reference **ES 10/1259** in The National Archives -
<http://discovery.nationalarchives.gov.uk/SearchUI/Details?uri=C10892307>
 - c) "*Third Plowshare symposium, April 1964: peaceful use of nuclear explosives*" under the reference **ES 10/1148** in The National Archives -
<http://discovery.nationalarchives.gov.uk/SearchUI/Details?uri=C10892196>
 - d) "*Hypothetical peaceful nuclear explosion (PNE) device*" under the reference **ES 10/1945** in The National Archives -
<http://discovery.nationalarchives.gov.uk/SearchUI/Details?uri=C11028360>.
 - e) "*Peaceful uses of nuclear energy (PNE): correspondence*" under the reference **ES 13/65** in The National Archives -
<http://discovery.nationalarchives.gov.uk/SearchUI/Details?uri=C11514067>
 - f) "*Notes on a peaceful nuclear explosion (PNE) excavation device*" under the reference **ES 10/1946** in The National Archives -
<http://discovery.nationalarchives.gov.uk/SearchUI/Details?uri=C11028361>.
 - g) "*The French Peaceful Nuclear Explosion (PNE) device and what it tells us about the ATC*" under the reference **ES 12/445** in The National Archives -
<http://discovery.nationalarchives.gov.uk/SearchUI/Details?uri=C11118390>
 - h) "*AWRE Working Party on the Peaceful Uses of Nuclear Explosives*" under the reference **ES 15/334** in The National Archives -
<http://discovery.nationalarchives.gov.uk/SearchUI/Details?uri=C11548899>¹
3. The MOD responded on 18 December 2013 and confirmed that it held the requested information but considered it to be exempt from disclosure on the basis of sections 24 and 27 of FOIA and that it needed a further 20 working days to consider the balance of the public interest test. Further public interest test extension letters followed until the MOD

¹ Peaceful nuclear explosions (PNE) are nuclear explosions conducted for non-military purposes, for example for civil engineering projects. From the 1960s to the 1980s the US and USSR in particular pursued the idea of PNE. The 1996 Comprehensive Nuclear-Test-Ban Treaty prohibits all nuclear explosions, regardless of whether they are peaceful or not.

provided the complainant with the information falling within the scope of parts b) and c) of her request on 14 February 2014.

4. Following the MOD's failure to provide the complainant with a response in relation to the outstanding parts of the request, the Commissioner issued a decision notice on 29 September 2014 which compelled the MOD to issue a response to the outstanding parts of the request within the next 35 calendar days.²
5. The MOD provided this response to the complainant on 31 October 2014. Redacted versions of the documents sought by the following parts of the request were provided: a), d), e), f), g) and h). The MOD explained that the redactions had been made on the basis of sections 24(1), 27(1)(a), (c) and (d), and 40(2) of FOIA.
6. The complainant contacted the MOD on 25 November 2014. She asked the MOD to internally review its decision to redact information from the following documents on the basis of sections 24(1) and sections 27(1)(a), (c) and (d):
 - FOI 2013-00018_ES10_1272-0.pdf
 - FOI 2013-00018_ES10_1945-0.pdf
 - FOI 2013-00018_ES10_1946-0.pdf
 - FOI 2013-00018_ES12_445-0.pdf
 - FOI 2013-00018_ES13_65_1-0.pdf
 - FOI 2013-00018_ES13_65_3-0.pdf
7. The complainant specifically noted that she was not seeking to challenge the application of section 40(2) to any of the redactions and moreover she was seeking to only challenge the application of sections 24 and 27 to the documents listed above rather than to the entirety of the documents withheld by the MOD.
8. The MOD informed the complainant of the outcome of the internal review on 6 March 2015. The review upheld the application of the various exemptions. The review also explained that with the benefit of hindsight the MOD should have recognised this request at the outset as being a burdensome one and therefore it should have refused the request on the basis of section 14(1) of FOIA.

² FS50529535

Scope of the case

9. The complainant contacted the Commissioner on 15 April 2015 in order to complain about the MOD's decision to redact information from documents she had identified at the internal review stage on the basis of the exemptions contained at sections 24(1) and sections 27(1)(a), (c) and (d).
10. Having received this complaint the Commissioner asked the MOD to confirm whether it was, as the internal review response suggested, actually seeking – albeit belatedly – to refuse to answer this request on the basis of section 14(1). Or whether, alternatively, the MOD was simply of the view that, with the benefit of hindsight, it should have applied section 14(1).
11. The MOD confirmed that it was now seeking to refuse the request on the basis of section 14(1) of FOIA. The complainant explained that she disputed the MOD's view that the request was vexatious. Therefore this decision notice focuses on whether the MOD can refuse to answer the request on the basis of section 14(1).

Reasons for decision

Section 14(1) – vexatious requests

12. Section 14(1) of FOIA allows a public authority to refuse to comply with a request if it is considered to be vexatious.
13. In the Commissioner's view, section 14(1) is designed to protect public authorities by allowing them to refuse any requests which have the potential to cause a disproportionate or unjustified level of disruption, irritation or distress. This will usually involve weighing the evidence about the impact on the authority and balancing this against the purpose and value of the request. This should be judged as objectively as possible; in other words, would a reasonable person think that the purpose and value are enough to justify the impact on the public authority.
14. In particular the Commissioner accepts that there may cases where a request could be considered to be vexatious because the amount of time required to review and prepare the information for disclosure would place a grossly oppressive burden on the public authority. This is the position adopted by the MOD in this case.

15. The Commissioner believes that there is a high threshold for refusing a request on such grounds. This means that a public authority is most likely to have a viable case where:
- The requester has asked for a substantial volume of information **AND**
 - The authority has real concerns about potentially exempt information, which it will be able to substantiate if asked to do so by the Commissioner **AND**
 - Any potentially exempt information cannot easily be isolated because it is scattered throughout the requested material.

The MOD's position

16. The MOD advanced the following submissions to support its view that it could rely on section 14(1) to refuse this request:
17. The MOD noted that the Commissioner had contacted it on 12 February 2014 and asked it ensure that a response was provided to the request within the next 10 working days. The MOD explained that as a result of this deadline it disclosed two documents falling within the scope of parts (b) and (c) of the request on 14 February 2014 which consisted of 37 pages. It explained that as this information was not highly classified, once printed, a review of this information could be conducted outside of a secure area and thus it took little effort to retrieve the information. The subject matter experts (SMEs) concluded that there was no significant burden in complying with these two elements of the request. Nevertheless, the MOD explained that the information still had to be scrutinised by two sets of SMEs at Atomic Weapons Establishment (AWE) and the MOD. The SMEs at AWE spent approximately 6.5 hours considering these documents and then MOD's SME as the lead on the request spent a further 7.5 hours printing, organising, checking, redacting, scanning and preparing the information for clearance and subsequent release. The total expended on considering these two documents alone therefore equated to two days work (14 hours).
18. However, the MOD explained that it was clear that the more burdensome task was in processing the six files/documents in the scope of the remaining limbs of the request. The MOD explained that it took longer to process these documents as they consisted of a large volume of highly sensitive material that could only be accessed via a separate secure IT system and then printed within a secure area at a different building. The MOD noted that this building is not always available as there are a limited number of terminals for this system and strategic weapons operational requirements take precedence. The MOD

emphasised that because of the nature of the information a careful and thorough examination of the material had to be conducted by three sets of SMEs at the MOD and AWE in order to consider whether any exempt information was contained within them that might require redaction. The MOD noted that it was evident that the exempt information was scattered throughout the requested material.

19. The MOD explained that between February 14 2014 and receipt of the decision notice FS50529535 dated 29 September 2014, the information in parts a), d), e), f), g) and h) of the request was being reviewed by SMEs in between their higher priority strategic weapons operational commitments.
20. Moreover, the MOD explained that in order to meet the deadline imposed by the decision notice, some pages were withheld in their entirety as opposed to being disclosed in a redacted form. This was on the basis that the exempt information was scattered throughout the documents and where it looked likely that a number of redactions would have been applied to a particular page, the whole page was withheld rather than a redacted version being disclosed. The MOD explained that to undertake a detailed review of every page in order to isolate and redact only specific words or information attracting exemptions would take considerably longer.
21. The MOD emphasised that there are only a handful of staff who have the appropriate subject matter expertise and a limited number of staff with the relevant security clearance and permissions to access and handle the highly sensitive information in the scope of parts a), d), e), f), g) and h) of the request. The MOD noted that these staff have to deal with this request in addition to their regular duties and would divert them away from core functions for a considerable period of time. The MOD estimated that the amount of time spent by the SMEs in dealing with these parts of the request was calculated to be approximately 16 days (125 hours). In addition, the lead SME calculated the time it took her to print, organise and check (several times at different stages), redact, scan and prepare documents for release equated to a total of 8 days' work (60 hours). Therefore, the total time estimated to have been expended to date is 24 days (185 hours).
22. With regard to the three criteria listed at paragraph 15, the MOD confirmed that the eight files/documents falling within the scope of the request comprised 741 pages of information.
23. In terms of its concerns about disclosing potentially exempt information, the MOD argued that although the information referred to the peaceful uses of nuclear weapons it is of contemporary relevance to the use of

nuclear weapons more generally and could still have a proliferative effect.

24. The MOD explained that a key requirement of the Non Proliferation Treaty is for member states to protect information that could be proliferative. The MOD argued that as this information would be likely to assist a terrorist or aspiring nuclear state if released, disclosure would be a clear breach of the UK's obligations.
25. Furthermore, the MOD argued that the disclosure of this sort of information would breach UK/US agreements and would endanger the UK's continuing strategic international agreements, relations and obligations with key collaborative partners on the weapons programme. The MOD suggested that due to its sensitivity the US would reasonably expect the UK to protect such information as part of its obligations under these agreements.
26. The MOD explained that it was evident from the above submissions, and from the information that was eventually disclosed to the complainant, that the exempt information was scattered through the information and could not be easily isolated.

The complainant's position

27. The complainant explained that she considered the request was reasonable in asking for copies of eight documents. Moreover, she emphasised that she had been willing to restrict the number of documents she was seeking access to through this long process by only asking for an internal review to be conducted in relation to some of the documents falling within the scope of the request. Furthermore, she explained that she would be willing to refine the request if the MOD had offered to provide advice on how the 'burden' of complying with it could be reduced.
28. Furthermore, the complainant argued that there is an overwhelming public interest in releasing the Plowshare³ related documents so that the public can have a more complete picture of the extent of British support for, or involvement in, the project especially as it relates to activities in the UK.
29. She argued that after decades it is reasonable for the British public to know what the expert thinking was on the use of Peaceful Nuclear

³ Operation Plowshare was the name given to the US' development of PNEs.

Explosions - PNEs, especially the thinking on the safety of blasts near to population centres. She emphasised that in her view there is an extremely strong case for releasing details of the desk based exercises regarding PNE sites in the UK that were undertaken at the time. That they were sensitive then is understandable - documents already released make that clear - but now it is purely a matter of getting some historical clarity and a fuller picture of events.

The Commissioner's position

30. This is an unusual case: obviously in most scenarios a public authority would seek to argue that a request was too burdensome to comply with *before* commencing significant work on it. Nevertheless, the Tribunal has made it clear that public authorities can raise a new exemption, including section 14, either before the Commissioner or the Tribunal.⁴ Moreover, from a practical point of view, the fact that the MOD has already responded to this request means that it is in a position to provide a more detailed estimate of allegedly potentially burdensome activities involved in fulfilling the request than might have otherwise been the case.
31. Having considered the MOD's submissions, the Commissioner is satisfied that complying with this request would, or more accurately did, place a grossly oppressive burden on it. In the Commissioner's view the subject matter of the requested material understandably necessitates a detailed and considered review of the material. The Commissioner also accepts that the sensitive nature of the requested material means that there are inherent practical complexities in terms of accessing and analysing the information with a view to its disclosure, both in terms of the limited number of staff actually able to do so and practicalities of actually doing so. Furthermore, the material is clearly also of considerable volume and it is self-evident from the disclosed material that the redacted information is scattered throughout the 741 pages of information falling within the scope of the request. Moreover, the Commissioner has no basis to doubt the estimated figures put forward by the MOD in relation to the time it has taken to comply with this request to date.
32. In reaching this finding, the Commissioner is not seeking to dismiss the public interest arguments advanced by the complainant. He recognises there is a public interest in disclosure of information which would shed light on this topic. As the disclosures by the MOD to date in relation to

⁴ *McInerney v IC and Department for Education* [2015] UKUT 0047 (AAC)

this request demonstrate, even disclosure of non-exempt material could increase transparency around this topic.

33. However, despite the merits of the case made by the complainant, the Commissioner believes that as it has taken the MOD 26 days' work to comply with this request to date - i.e. the 2 days in relation parts (b) and (c) and the 24 days in relation to the remaining parts of the request - it is difficult conclude that this has placed anything but a grossly excessive burden on the MOD.

Right of appeal

34. 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 123 4504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

35. 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.
36. 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