

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 28 February 2017

**Public Authority:** Ministry of Defence

**Address:** Whitehall  
London  
SW1A 2HB

### Decision (including any steps ordered)

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1. The complainant submitted two requests to the Ministry of Defence (MOD) seeking information relating to the Service Justice system. The MOD originally refused to comply with the requests on the basis of section 14(1) of FOIA. The complainant brought an appeal in respect of one of these requests and the First-Tier Tribunal (Information Rights) found in his favour. As a result, the MOD subsequently complied with both requests and provided information albeit that some information was withheld on the basis of sections 40(2) (personal data) and 42(1) (legal professional privilege) of FOIA. The complainant alleged that the MOD is likely to withhold further information beyond that previously located and disputed the MOD's reliance on section 42(1) of FOIA.
2. The Commissioner has concluded, on the balance of probabilities, that the MOD does not hold any further information. She has also concluded that the MOD is entitled to rely on section 42(1) in the manner in which it did.

### Request and response

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3. This complaint concerns two requests the complainant submitted to the MOD on 16 April 2015 and 2 October 2015. There is a long and involved history to these requests and the Commissioner has summarised the key details regarding the MOD's handling of these requests below.
4. The complainant's request of 16 April 2015 was as follows:

*'My understanding is that specific cases have resulted in media and political pressure on the Service Justice System. Initially I would like to focus on a document sent on 27 July 2012 in which SO1 Disc Pol PS2(A) advises of the affect of guilty finding at a Court Martial or Summary Hearing. The document highlights Soldiers may have been wrongly advised of the implications of a guilty finding by unit staff and may be unaware that a conviction may be recorded on the Police National Database.*

*Please provide this document, and all other documents held by SO1 Disc Pol PS2(A) that deal with the specific issue of Soldiers failing to have been advised of a conviction being recorded on the Police National Database.'*

5. The MOD considered this request to be vexatious and therefore refused to comply with it on the basis of section 14(1) of FOIA.<sup>1</sup> The complainant complained to the Commissioner about its refusal of this request; the Commissioner upheld the MOD's application of section 14(1).<sup>2</sup> The complainant appealed this decision to the First-Tier Tribunal (Information Rights) (the Tribunal); the Tribunal upheld the appeal.<sup>3</sup> In examining the MOD's claim that the request posed an unacceptable burden to process, the Tribunal was of the view that the MOD's estimate that complying with the request would take 180 days was a 'wildly exaggerated position' and that:

*'But in any event we consider that if steps were taken to talk to [the complainant] and to clarify or narrow down further what he is seeking (as required in any event by section 16 of FOIA and paras 8 to 11 of the Code issued under section 45(5)) and if some further thought and imagination were applied to the matter the request could be dealt with in a way that was not unduly onerous to the post holder or the MOD as a whole. We note that the memo of 6 October 2015 states that the post holder has said that he believes that a search would identify 50 emails dealing with the issue " ... which were largely generated from casework ..." . We take it from that that he is pretty familiar with the area concerned and has a good idea what information is going to be available.'*

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<sup>1</sup> The document trail associated with the administration of this request is in the public domain at the following link:

[https://www.whatdotheyknow.com/request/emails\\_sent\\_and\\_received#outgoing-550196](https://www.whatdotheyknow.com/request/emails_sent_and_received#outgoing-550196)

<sup>2</sup> [FS50586835](#)

<sup>3</sup> [EA/2016/0004](#)

6. However, in its conclusion, the Tribunal stated that:

*'Although he has succeeded on the appeal we would urge [the complainant] to take a reasonable approach hereafter and to further clarify and narrow down what he wants if possible and to have fair regard to the limited resources of the public authority.*

*We also note the number of earlier requests he has made, the rather unfocussed nature of the three requests we have considered and the fact that the last request says "Initially, I would like to focus on [the] document sent on 27 July 2012". All that indicates that he may be approaching the line where further requests may become vexatious.'*

7. The complainant subsequently contacted the MOD on 8 June 2016 as follows:

*'As requested, I will attempt to have a reasonable approach to further clarify and narrow down the scope of the information requested.*

*It has been acknowledged that there are approximately 50 or so emails identified on this subject, many of which pertain to specific cases. Having fair regard to the departments limited resources, and the time taken for redactions for personal data I am less interested in the details of the specific cases.*

*I am more interested in the position of the MOD given the failure to correctly advise Soldiers whom may have Criminal Records without their knowledge. Any acknowledgement that this has happened, and emails and documents that highlight the Fairness/transparency of the Summary hearing Process and how Convictions are recorded.*

*How many have been wrongly advised, any discussions to identify others who may have criminal records without being aware.*

*The options available to those that find out about a Criminal Record and wish to appeal.*

*How this impacts on the Service Justice System.'*

8. In a separate email, dated 11 June 2016, the complainant challenged the MOD's reliance on section 14(1) in relation to a request he had submitted on 2 October 2015. This request read as follows:

*'The official position of the Ministry of Defence as to whether or not Service Personnel have been unaware of the consequences of a Criminal Record resulting from a Service disciplinary hearing.*

*Additionally I kindly request any Legal advice provided to CGS and Former/Current Ministers on this issue.'*

9. In response the MOD contacted the complainant and highlighted the overlapping nature of this request with the one considered by the Tribunal, ie the request dated 16 April 2015 the scope of which was revised by virtue of the complainant's email of 8 June 2016. The complainant contacted the MOD on 13 July 2016 and responded in the following terms:

*'Thank you for your response, just to clarify, the refinement to the request on 8 June 2016 was provided to assist and reduce the workload upon the MOD. It was the request of the Tribunal in Decision Notice EA/2016/0004 that I take a "...reasonable approach hereafter and to further clarify and narrow down what I want, and if possible and to have fair regard to the limited resources of the public authority."*

*It is my understanding there is some dispute within the MOD regarding the issue of Soldiers not having been correctly advised of the implications of a Summary Hearing.*

*I am aware when asked by a Member of Parliament the MOD responded on 18 February 2013 that Armed Forces Personnel who are arrested, charged, prosecuted or convicted of an offence against Service or Civilian law are made aware of every stage of an investigation of which they are charged. This statement seems at odds with the document written by SO1 Disc Pol PS2(A).*

*I requested all documents on this subject held by SO1 Disc Pol PS2(A) in my request dated 15 January 2015, and now that the Information Access Tribunal have ruled s.14 was wrongly applied I hope to receive this information in the near future.*

*The purpose of this request is to determine the extent and knowledge of the situation in which Soldiers found themselves incorrectly advised further up the chain of Command (up to and including at Ministerial Level). I'm Hoping to find documents less related to specific cases but more general and I'm hoping to determine: -*

*Is it a legal requirement to advise Soldiers of the nature and implications of the charges against them?*

*What were CGS and Ministers briefed regarding the situation?*

*How many Soldiers does this affect?*

*Have any efforts been made to locate individuals whom may have criminal records without being aware?*

*What redress or appeal mechanism is available?*

*How does that impact on Service Justice?*

*I appreciate that this request is very similar to the first however the first is related specifically to SO1 Disc Pol PS2(A) and this is related higher up the Chain of Command.'*

10. The MOD responded on 10 August 2016. It explained that it had conducted relevant searches to locate the requested information and the information located was provided to the complainant. The MOD explained that some information was being withheld on the basis of sections 42(1) and 40(2) of FOIA.
11. The complainant responded on 14 August 2016 and highlighted a number of reasons why he believed that the MOD was likely to hold more information than had been located. He also questioned the MOD's reliance on section 42(1) to withhold some of the information which had been located.
12. The MOD completed an internal review and informed the complainant of the outcome on 16 September 2016. The MOD outlined the nature of the searches it had undertaken to locate information and explained why it considered these searches sufficient to locate any requested information. For the purposes of this notice, the Commissioner considers it necessary to quote the MOD's response on this point at length:

*'With regard to your query whether there is more information that could be provided in relation to this request, you will recall that the scope of the search was as defined in the original request to be the information held by the Army Secretariat post holder SO1 DiscPolPS2(A). Moreover, the FTT [Tribunal] overturned the MOD's application of the section 14(1) exemption on the understanding that an adequate search of this account for relevant information for this request would not be onerous. As part of this review I can confirm that the information provided to you represents copies of all archived emails and documents for the years 2011 to 2013 (inclusive) identified by means of the following electronic key word searches:*

*Service Justice Board*

*Summary Hearing  
Unfair  
Disgruntled  
Your Rights  
Criminal Record*

*The electronic search identified many hundreds of documents and these have all been read for their relevance and the ones in scope redacted in order to protect the personal data of living individuals in accordance with the provisions of section 40. Information relating to specific cases was excluded as in your email of 8 June 2016 (quoted above) you expressed yourself "less interested" in information of this type and you were mindful of the burden the search and preparation of such information for release would cause.*

*As you know, the FTT noted that "50 or so" emails had been identified on this subject but "many of which pertain to specific cases". I can advise that the figure of 50 was a rough estimate of the information in scope of the request on the part of the account holder. However, in order to meet the requirement of the section 1 of the Act the search of the account has been comprehensive and the number of relevant emails identified and redacted is rather more than the original 50 envisaged. In an attempt to identify any other relevant information, particularly with regard to the briefing of senior persons within MOD, the search was extended to the People Secretariat who have the tri-Service lead on Service Justice issues and on briefing members of the Defence Board on this topic.*

*In terms of the effort applied to the task, I can advise that the Department has spent in excess of 100 hours locating, retrieving and extracting the information provided, much of which was held in archive files that did not have a ready-use search function. Discounting the time spent on technical issues, which cannot be included in a calculation of the effort involved, MOD has spent some 40 hours in processing this request afresh, which is nearly double that expected by law makers in answering a Freedom of Information request as specified in the fees regulations associated with the legislation.*

*Taking all of these factors into consideration, I am satisfied that the searches undertaken by the Department in response to this case have been reasonable and met the requirement of the FTT. In addition, as part of this review, I have sought assurance as to whether any other related information has been identified but not released. We are not aware of any other policy-related information on the subject of Service Justice: all the relevant*

*information was captured in your original request for information in relation to the subject post title in the HQ Army Secretariat.'*

13. The internal review also upheld the application of section 42(1). However, the review concluded that the redactions on the basis of section 40(2) had been overdone on one particular document and a less redacted copy was provided.

### **Scope of the case**

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14. The complainant contacted the Commissioner on 19 September 2016 in order to complain about the MOD's handling of his requests dated 16 April and 2 October 2015 which were refined in his subsequent emails dated 8 June and 13 July 2016. The complainant raised two grounds of complaint.
15. Firstly, the complainant was dissatisfied with the MOD's decision to withhold some of the information on the basis of section 42(1) of FOIA.
16. Secondly, the complainant argued that the MOD was likely to hold further information beyond that previously located and disclosed. In order to support this position, in his initial submissions to the Commissioner the complainant identified the following examples of information that he envisaged that the MOD's searches should have located:
  - (a) The complainant explained that it was his understanding that Greg Clark MP wrote to the MOD regarding the issue of Service Personnel failing to distinguish between Criminal Conduct and Service Disciplinary Offences at Summary Hearing. The complainant explained that he understood that Greg Clark received a Ministerial response, however the disclosed information did not refer to such correspondence. The complainant argued that there should clearly be MOD briefing material to facilitate the writing of any Ministerial correspondence and he believed this would fall within the scope of the information requested.
  - (b) The complainant explained that it was his understanding that the House of Commons Defence Committee had raised the subject which is the focus of his requests with the MOD on numerous occasions. However, the MOD's response of 10 August 2016 explained that only one briefing could be found relating to correspondence from the Chair of this Committee on this subject.
  - (c) The complainant suggested that the Army Secretariat post holder SO1DiscPolPS2(A) is the Adjutant of the Army Justice Board (AJB) and the Service Justice Board (SJB). He argued that the AJB

and SJB was likely to have discussed information about the subject matter of his requests. Given the role of the post holder SO1DiscPolPS2(A) the complainant argued that any such discussions by the AJB and SJB would fall within the scope of his request.

(d) The complainant suggested that there is an email to ArmyPersSvc-PS2-Pol-SO1 from Director General Army Legal Services that contains an apology and admission that Soldiers and Commanding Officers have been incorrectly advised of the consequences of certain offences leading to a Criminal Record. He argued that background emails around this correspondence is likely to be held.<sup>4</sup>

17. In order to assist the complainant's understanding of its position, the MOD provided the complainant with a copy of its submissions to the Commissioner during the course of the investigation of his complaint. Following receipt of these submissions, the complainant raised the additional further points with the Commissioner in respect of the second aspect of his complaint:

(e) The complainant queried whether the Commissioner has established whether the subject matter of his requests had been discussed by the SJB and AJB and whether any such notes of these discussions fall within the scope of his requests.

(f) The complainant noted that he expected the MOD to have located additional Ministerial correspondence dating from 2012 or 2013 that specifically identifies if service personnel had been informed as to the nature and particulars of the charges against them and if they have made an informed unequivocal choice to elect for a Summary Hearing. The complainant explained that it was his understanding that the MOD had responded to Greg Clark MP in early 2013 categorically stating that all personnel are being informed as to the implications of disciplinary action.

## Reasons for decision

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### Is further information held by the MOD?

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<sup>4</sup> During the course of the Commissioner's investigation it was established the email to which this point of complaint relates to, is an email written by Major General Nugee, DG Personnel and not the head of the Army Legal Department as the complainant had suggested.



18. In cases 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 Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
19. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request.
20. In applying this test the Commissioner will consider the scope, quality, thoroughness and results of the searches; and/or, other explanations offered as to why the information is not held.
21. In order to investigate the complainant's allegation that further information was held falling within the scope of his requests, the Commissioner asked the MOD to explain why it considered the searches described in its internal review to be sufficiently detailed to locate the four pieces of information identified by the complainant, see points (a) to (d) at paragraph 16 above. The Commissioner also asked for some further details about the nature of the searches undertaken by the MOD as described in the internal review response at paragraph 12 above.
22. The MOD outlined to the Commissioner its position in respect of each of the four examples of information identified by the complainant. The Commissioner has summarised the MOD's responses below.
23. In relation to point (a), the MOD explained that it had located the Ministerial correspondence concerned and confirmed that the MP forwarded a letter from a constituent. The MOD noted that the subject matter of the correspondence was more wide ranging than the scope of the complainant's request, albeit the MOD acknowledged that it was at fault for not identifying it previously. However, the MOD explained that the constituent's letter was exempt from disclosure on the basis of section 40(2) of FOIA. The MOD explained that it had also located a draft of the ministerial and background note (which it explained constituted all the written briefing the Minister received on this occasion), and the Minister's signed reply. The MOD provided the complainant with copies of these documents during the course of the Commissioner's investigation, redacted to protect the identity of the constituent. In mitigation of this oversight, the MOD noted that the letter to the MP only contained a brief reference to Summary Hearings and the information on this subject had already been provided to the complainant by the provision of other documents which contained the same information. The MOD also noted that the complainant had informed it in his email of 8 June 2016 that it he 'was less interested in the details of specific cases'.

24. In relation to point (b) the MOD noted that it had already informed the complainant, when replying to his email of 10 August 2016, that only one briefing was held in relation to correspondence from the Chair of the House of Commons Defence Committee (HCDC) on this subject. The MOD emphasised that the complainant had previously been provided with a redacted copy of the ministerial submission and links to the original letter from the Chair and the Secretary of State's reply. The MOD confirmed again to the Commissioner that no further submissions in relation to HCDC and the topic of Summary Hearings was held. The MOD suggested that if, as the complainant suggested, the HCDC made further representations to the MOD on this subject, there would be reference to it recorded on HCDC's homepage of the Parliamentary website and there are none.
25. In relation to point c) MOD noted that the complainant had suggested that the post holder SO1 Disc Pol PS2(A) is the 'Adjutant' of the AJB and the SJB. The MOD explained to the Commissioner that SO1 Disc Pol PS2(A) was not the Adjutant of the AJB; no such appointment exists. The post holder attended the AJB but was not its secretary. The MOD also explained that the post holder was not a member of, nor had ever attended, the SJB. The MOD argued that regardless as to the role and functions of the occupant of the post, the complainant's request of 16 April 2015 was whatever was held by the post holder that related to 'the specific issue of Soldiers failing to have been advised of a conviction being recorded on the Police National Database'. The MOD explained that its searches had not identified any such discussions within the information held by the specified post holder.
26. Finally, in relation to point (d), during the course of the Commissioner's investigation, it was established that the email to which the complainant was referring was sent by Major General R E Nuguee CBE, Director General Personnel (DGP) (Army) to a former serviceman. The MOD explained that in response to the Commissioner's investigation it had contacted the Directorate Army Legal Services who carried out additional searches of both their electronic and paper holdings and nothing that would match the complainant's description of the type of further information, surrounding an email of this description, was located. Furthermore, the MOD explained that it had undertaken additional searches of the Director General Personnel's (Army) Office and of the ArmyPersSvcs-PS2-Pol-SO1 Role account. The MOD confirmed that neither holds a copy of the email which it was established that the complainant's point (d) referred to, or any correspondence relating to it. The MOD explained that it could only conclude that the General Nuguee wished to send it to the recipients on a personal basis and the correspondence was not archived.
27. The MOD also provided the Commissioner with further details about the nature of the searches undertaken and why they would be sufficient to

locate all of the requested information. The MOD explained that the People Secretariat, along with the Army Secretariat and Army Personnel Services organisation, undertook searches as they were the areas of the organisation most likely to hold information on the topic of the requests. The MOD explained that these searches involved interrogating its electronic file system using key word search terms to locate files in their areas; any documents appearing to meet the description of the request were then accessed and scrutinised to determine if they were indeed relevant. The MOD argued these searches, whilst limited to specific keyword searches, were reasonable in the circumstances and should have located all key documents in the scope of the request. The MOD argued that in light of the further searches it had undertaken in response to the specific points of complaint raised with the Commissioner, along with the extensive searches and work it had already undertaken, it was of the view that it had taken all reasonable steps to find the information requested and that there is now very little likelihood of any further significant documents on this subject being found.

28. The Commissioner recognises that the two requests which are the focus of this complainant have a long and somewhat convoluted history. However, for the purposes of reaching a decision in respect of this aspect of the complaint the Commissioner simply has to be satisfied as to whether, on the balance of probabilities, the MOD holds any further information within the scope of these requests. On the basis of the actions taken by the MOD, and in light of its submissions to her, the Commissioner is satisfied that on the balance of probabilities, no further information is held. The Commissioner has reached this conclusion given the extensive searches undertaken by the MOD, both when originally processing the complainant's requests, and as a result of the further searches undertaken during the course of her investigation of this matter and specifically as direct result of the grounds of complaint raised by the complainant (ie points (a) to (d) above). Furthermore, the Commissioner believes that the MOD's explanation as to why it conducted the searches in the manner that it did to be reasonable and logical.
29. In respect of the complainant's additional points (e) and (f), the Commissioner accepts that minutes/notes of the SJB and AJB meetings could arguably fall within the scope the complainant's second request (ie the one submitted on 2 October 2015, later clarified 13 July 2016) if they discussed matters about the subject matter the complainant is interested in.
30. This is because although the first request of 16 April 2015 focused simply on the information held by a specific post holder, the complainant's later request was broader in scope. That is to say, in his email of 13 July 2016 the complainant specifically stated that:

*'The purpose of this request is to determine the extent and knowledge of the situation in which Soldiers found themselves incorrectly advised further up the chain of Command (up to and including at Ministerial Level). I'm Hoping to find documents less related to specific cases but more general... I appreciate that this request is very similar to the first however the first is related specifically to SO1 Disc Pol PS2(A) and this is related higher up the Chain of Command.'*

31. In the Commissioner's view any meeting minutes or notes related to discussions of this subject at either SJB or AJB meetings could be correctly seen as discussions '*higher up the Chain of Command*'.
32. However, in the Commissioner's view the comprehensive nature of the searches undertaken by the MOD, as described in paragraph 28 above, are, on the balance of the probabilities, likely have been sufficient to locate any such information. Similarly, the Commissioner believes that such searches would have been likely to locate any further Ministerial correspondence if it was held.
33. The Commissioner accepts that the MOD did, when conducting these further searches locate some additional information in respect of the complainant's point b). However, the Commissioner is satisfied that the MOD's explanation as to why such information was not located originally is plausible. Moreover, the Commissioner wishes to emphasise that she has simply concluded that on *the balance of probabilities*, no further information is held by the MOD. Such a conclusion does not therefore rule out the possibility that some additional information could potentially be held, but in the Commissioner's view the likelihood of this is very low. Consequently, in the Commissioner's opinion the fact that the MOD located some further information during the scope of her investigation does not necessarily undermine her finding that no further information is held.

## Section 42(1) – legal professional privilege

34. Section 42 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.
35. There are two categories of legal professional privilege: advice privilege and litigation privilege.
36. 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.
37. In this case the information withheld on the basis of section 42(1) consists of the contents of an email dated 14 February 2013 sent by a member of the MOD Central Legal Service to a member of the then MOD Personnel Training Secretariat. The advice relates to the proposed contents of a pamphlet entitled, 'Your rights if you are accused of an offence'. Having examined this information the Commissioner is satisfied that the dominant purpose of this correspondence clearly constitutes the seeking and provision of legal advice. She is therefore satisfied that the withheld information is exempt from disclosure on the basis of section 42(1) of FOIA.

### Public interest test

38. 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 disclosing the information*

39. The MOD acknowledged that there were several generic arguments in favour of releasing this information, primarily about increasing transparency and potentially improving public confidence by demonstrating that decisions have been made on the basis of good quality legal advice.

40. The complainant argued that the email sent by Major General Nuguee undermined the position, allegedly stated in a letter to Greg Clark MP, that all personnel are being informed as to implications of disciplinary action. The complainant argued that this demonstrated that the MOD has failed to comply with their legal obligations under the Human Rights Act 1998 (HRA) to act in accordance with the Convention. The complainant argued that this sufficient to justify disclosure of all information withheld by the MOD on the basis of section 42(1) of FOIA.

*Public interest in favour of maintaining the exemption*

41. The MOD noted that legal professional privilege (LPP) is used to allow a client to discuss confidential matters with their lawyer with the knowledge that those matters which are discussed do not become publicly known. The MOD emphasised that safeguarding LPP is a fundamental principle of English law and that previous Tribunal rulings have recognised the strong element of public interest inbuilt into privilege itself and the need for clear, compelling and specific justification that at least equals the public interest in protecting the information.
42. In the circumstances of this case the MOD argued that public interest favoured clearly favoured maintaining the exemption. It explained that it had reached this conclusion for a number of reasons:
43. It explained that whilst the legal advice was not currently being used to consider further amendments to the pamphlet upon which the advice was given, the advice is still 'live' in as much as that pamphlet is still in use, and the legal advice was relied upon to guide what was included in the extant document. The MOD noted that the Tribunal had accepted that the fact that legal advice was still 'live' carries weight in favour of maintaining the exemption.
44. The MOD accepted that whilst it is recognised that there may be a public interest in knowing the reasons behind policy decisions, the legal advice in question did not cover or affect actual policy, but was instead requested and given on the presentation and wording of information in the pamphlet. It argued that this reduced the weight in favour of disclosing the information.
45. The MOD argued that the public interest in disclosing advice subject to LPP is also reduced where that advice has been followed. The MOD noted that the complainant is concerned with whether service personnel 'may have been wrongly advised of the implications of a guilty finding by unit staff and may be unaware that a conviction may be recorded on the Police National Database'. The MOD explained that the legal advice given in respect of this issue was substantially followed in the amended version of the pamphlet - albeit that the advice did go slightly wider

than this issue – and that following that advice the pamphlet clearly states (1) if criminal charges are proven at a Summary Hearing or a Court Martial a record will be made on the Police National Database in the majority of cases, and (2) convictions may have to be declared to people like prospective employers or when making applications for citizenship or residency.

46. Finally, the MOD argued that the public interest had been adequately satisfied given that the final version of the legal pamphlet (upon which the advice was given) was publicly available and, under FOIA, the complainant had been provided with a draft of the pamphlet showing contemporaneous amendments made partly in response to the legal advice obtained.

*Balance of the public interest test*

47. Although the Commissioner accepts that there is a strong element of public interest inbuilt into legal professional privilege, she 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).*

48. 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.

49. 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.

50. 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.
51. 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.
52. In the circumstances of this case the Commissioner accepts the MOD's rationale in relation to the advice still being live. She also recognises that it is also relatively recent. In light of this the Commissioner believes that there is a significant and weighty public interest in upholding the exemption.
53. With regard to the public interest in disclosure of the information, the Commissioner accepts that the disclosure of the withheld information would provide the public with sight of the actual legal advice relating to the pamphlet in question. Whilst such advice would be unlikely to be of interest to a significant number of individuals, the Commissioner acknowledges that some individuals, including the complainant, will have an interest in it. However, for the reasons identified by the MOD, the Commissioner accepts that there has already been considerable transparency in respect of the matters upon which the legal advice was sought.
54. Furthermore, the Commissioner is not persuaded that based upon the information she has seen that the MOD has failed to comply with its obligations under the HRA and that this could therefore justify a clear, compelling or specific justification such that the public interest would favour disclosure of the withheld information. Consequently, in all the circumstances of the case, and taking account of the points advanced by the MOD along with the significant public interest in protecting LPP, the Commissioner is satisfied that the public interest clearly favours maintaining the exemption contained at section 42(1) of FOIA.



## Right of appeal

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55. 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: 0870 739 5836

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)

56. 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.
57. 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** .....

**Jonathan Slee**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**