

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 October 2017

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

Decision (including any steps ordered)

1. The complainant submitted a request to the Ministry of Defence (MOD) seeking the name of the individual who had written a letter to him. He also asked to be provided with the Nuclear Secretariat's full contact address. The MOD withheld the name of the individual on the basis of section 40(2) (personal data) of FOIA. After initially citing section 21 (information reasonably available by other means), the MOD provided the contact address. The Commissioner has concluded that name of the individual is exempt from disclosure on the basis of section 40(2) of FOIA. However, she has also concluded that the MOD breached section 10(1) both in its failure to respond to the request within 20 working days and by not providing the Nuclear Secretariat's full contact address within the same timeframe.

Request and response

2. The complainant submitted the following request to the MOD on 16 March 2017:

'I have just recieved a letter from the Nuclear Secratariat in response to my letter to the MOD yet you have provided no information as to who this person is and the number provided on the letter is the main switchboard number who only put people through if that person has a contact name and/ or address.

So i require the following:-

1. *Who is the Nuclear Secretariat who wrote the letter to me? REF number TO2017/0025*
2. *What is the Nuclear Secretariats full contact address?'*
3. The MOD acknowledged receipt of this request on 27 March 2017 and provided the reference number FOI/03560 (subsequently clarified in later correspondence to be reference FOI**2017**/03560.)
4. The MOD provided the complainant with a response on 19 April 2017 (albeit that its letter was dated 18 April). The response explained that the information sought by the complainant's first question was exempt from disclosure on the basis of section 21 of FOIA as information about the Director General Nuclear and the secretariat was publicly available on the gov.uk website, albeit that the MOD included what it considered to be the relevant extracts in its letter. The MOD explained that the address of the Nuclear Secretariat was contained in its previous correspondence, Ref TO2017/0025, but it provided it again for clarity.
5. The complainant contacted the MOD on 26 April 2017 and explained that he wished for an internal review to be undertaken. The complainant contacted the MOD again on 29 April 2017 and explained that:

'I did not ask what the nuclear secretariat does. I asked for the name of the nuclear secretariat and his or her contact details, not the MOD main address. For clarity, if the nuclear secretariat is a team of individuals and not a singular person as the title implies, then what are the names of the persons who make up this team?

You were also late in responding to my request and gave no explanation as to why you were late in responding. Please explain the delay also.'
6. The MOD interpreted the complainant's email of 29 April to be a new request for information.¹ It provided him with a response to this request, under reference number FOI2017/05266, on 5 May 2017. In respect of the first part of this request the MOD explained that it considered the name of the nuclear secretariat to be exempt from disclosure on the basis of section 40(2) (personal data) of FOIA. The MOD argued that the information falling within the scope of the second part of the request was exempt from disclosure on the basis of section

¹ Although in the Commissioner's opinion this email could simply have been seen as a further confirmation that the complainant wished an internal review to be conducted into its response of 18/19 April 2017 rather than treating this email as a fresh request.

21 because the What Do They Know link, via which he had submitted his requests, already contained details of the MOD's timeliness in handling his original request.

7. The complainant contacted the MOD on 7 May 2017 and explained that he was dissatisfied with this response for the following reasons:

'Once again, what is the reason for the exemption for question 1. And also what other means is the information to my second question available?

You still havent explained why you were late in responding to this request in the first place also. I expect a full explanation.'

8. The complainant contacted the MOD again on 22 May 2017 to formally ask for an internal review of this response. The MOD responded on the same day and clarified the points he had raised in his email of 7 May and invited him to submit a request for an internal review if he remained dissatisfied with its position.
9. The MOD informed him of the outcome of the internal review, in relation to request FOI2017/03560, on 25 May 2017. The review explained that the information sought by the first question contained in his email of 16 March, namely the name of the individual who wrote the response to TO2017/0025, was not in the public domain. The review therefore concluded that section 21 had been incorrectly applied to this part of the request. Instead the MOD explained that the name of the individual official who wrote the response was considered to be exempt from disclosure on the basis of section 40(2) of FOIA. In relation to question 2, the MOD agreed that he was only provided with MOD's main address and instead it provided the full address for the Director General Nuclear Secretariat. However, the MOD did accept that its response to his request of 16 March 2017 was issued one day late and this represented a breach of section 10(1) of FOIA.

Scope of the case

10. The complainant contacted the Commissioner on 18 May 2017 in order to complain about the MOD's handling of request FOI2017/03560. The Commissioner has therefore considered whether the MOD is entitled to withhold the information falling within the first part of this request on the basis of section 40(2) of FOIA; whether the MOD breached FOIA by not disclosing the information falling within the second part of the request until the internal review stage; and whether the MOD responded to the request in line with the time limits set out at section 10(1) of FOIA.

Reasons for decision

Section 40(2) – personal data

11. Section 40(2) of FOIA states that personal data is exempt from disclosure if its disclosure would breach any of the data protection principles contained within the Data Protection Act 1998 (DPA).

12. Personal data is defined in section (1)(a) of the DPA as:

'.....data which relate to a living individual who can be identified from those data or from those data and other information which is in the possession of, or likely to come into the possession of, the data controller; and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any person in respect of the individual.'

13. The MOD withheld the name of the individual who wrote the response concerning reference TO2017/0025. The Commissioner accepts that such information constitutes personal data within the meaning of section 1 of the DPA as it clearly relates to an identifiable individual.

14. The MOD argued that disclosure of this information would breach the first data protection principle which states that:

'Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.'

15. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:

- The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
 - what the public authority may have told them about what would happen to their personal data;
 - their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights (ECHR);
 - the nature or content of the information itself;

- the circumstances in which the personal data was obtained;
 - any particular circumstances of the case, eg established custom or practice within the public authority; and
 - whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.
 - The consequences of disclosing the information, ie what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor the Commissioner may take into account:
 - whether information of the nature requested is already in the public domain;
 - if so the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?
16. Furthermore, notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling legitimate interest in disclosure to the public.
17. In considering 'legitimate interests', in order to establish if there is a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sake, as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to consider a proportionate approach.
18. The MOD explained that it has a policy which means that the names and posts of members of staff below the senior civil service (SCS), and their military equivalents, whose names are not in the public facing roles are not disclosed. The names of such individuals are therefore normally redacted from any information released under FOIA. The MOD explained that it had adopted this policy as it takes the view that whilst it is reasonable for senior staff to face public exposure, it is unfair for junior officials undertaking activities under the direction and control of senior staff to have the same level of public exposure.
19. The MOD confirmed that the individual who drafted the response in question occupies a junior role which is not an outward facing post. As a result the MOD explained that the individual who wrote the response in question was not employed at a level or in a capacity where they would

expect direct contact from members of the public. Furthermore, the MOD asked the individual whether, on this occasion, they would be willing for their name and direct contact details to be provided under FOIA and the employee declined.

20. In these circumstances, the MOD argued that the employee would consider the consequent loss of privacy to be distressing and unnecessarily intrusive. As a result the MOD concluded that disclosure would be unfair to the individual concerned and that disclosure would therefore breach the first data protection principle.
21. The Commissioner is satisfied that junior officials at the MOD would have a reasonable expectation, based upon established custom and practice, of their names and contact details being redacted from any disclosures made under FOIA. The Commissioner also recognises that in the particular circumstances of this case the individual in question has refused to consent to their name being disclosed. The Commissioner therefore accepts that disclosure of the individual's name would be unfair and breach the first data protection principle.
22. In reaching this conclusion, the Commissioner recognises that from the context of the request the complainant wishes to be provided with the individual's name so that he can speak to somebody at the MOD about the response to TO2017/0025. The Commissioner accepts that public authorities should be open and transparent about decisions that they have taken and this will obviously include engaging with stakeholders. However, the Commissioner notes that the complainant has been given the written address of the Nuclear Secretariat. Consequently, and taking into account the reasonable expectations of the individual in question, the Commissioner believes that the legitimate interests of the data subject outweigh the legitimate interests in disclosure of the individual's name.
23. For the above reasons, the Commissioner has concluded that the name of the individual is exempt from disclosure on the basis of section 40(2) of FOIA.

Section 10 – time for compliance

24. Section 1(1) of FOIA states that:

'Any person making a request for information to a public authority is entitled—

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.'

25. Section 10(1) of FOIA requires a public authority to comply with section 1(1) promptly and in any event within 20 working days.

26. As the MOD's internal review response acknowledged it failed to respond to the request within 20 working days and therefore breached section 10(1) of FOIA. The Commissioner agrees with that assessment. Furthermore, the Commissioner recognises that the MOD only provided the complainant with the information sought by the second part of his request at the internal review stage after it had concluded that this information was not exempt from disclosure on the basis of section 21 of FOIA. The MOD's delay in providing this information, and thus its delay in complying with the obligation contained at section 1(1)(b) of FOIA, also represents a breach of section 10(1) of FOIA.

Right of appeal

27. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

28. 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.

29. 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