

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 November 2017

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 correspondence David Beckham or his representatives may have exchanged with the department over the period January 2011 to March 2014. The MOD refused to confirm or deny whether it held information falling within the scope of the request on the basis of section 40(5) (personal data) of FOIA. The Commissioner has concluded that the MOD is entitled to rely on this exemption as a basis to refuse to confirm or deny whether it holds information falling within the scope of the request.

Request and response

2. The complainant submitted the following request to the MOD on 3 April 2017:

'My request concerns the football star David Beckham (born 2 May 1975)

Please note that the reference to David Beckham below should be taken to mean Mr Beckham himself and or his representative Simon Oliveira and or the management company Doyen Global and or anyone else specifically acting on Mr Beckham's behalf.

Please note that the reference to the Secretary of State should include the Secretary of State him/herself and or their private office and or anyone acting specifically on their behalf.

Please note that I am only interested in information which relates to 1 January 2011 to 1 March 2014.

Please treat any environmental information as a request for information under the Environmental Information Regulations (EIRs).

1...During the aforementioned period did Mr Beckham exchange correspondence or communications including emails with the Secretary of State.

2...If the answer is yes can you please provide copies of this correspondence and communication including emails. Please note that I am interested in receiving both sides of the correspondence and communication'

3. The MOD responded on 19 April 2017 and explained that to determine whether information was held would exceed the cost limits under FOIA. This was because all personnel, both civilian and military, working with the MOD, are deemed to be acting on the Secretary of State's behalf. Therefore, any searches for the information falling within the scope of the complainant's request would need to encompass all areas and staff within the MOD. The request was therefore refused on the basis of section 12(2) (cost of compliance) of FOIA. The MOD provided the complainant with advice and assistance with regard to how his request could be refined to bring it within the cost limits.
4. The complainant contacted the MOD on 22 April 2017 and asked it to conduct an internal review of this response.
5. The MOD informed him of the outcome of the internal review on 23 May 2017. The MOD explained that it had taken his request back to first principles and it had concluded that the whole of the request engaged section 40 of FOIA, the personal data exemption. More specifically, the MOD argued that the exemption contained at section 40(5)(b)(i) was engaged which states that the duty to confirm or deny whether requested information is held does not apply if providing such a response would breach the data protection principles. The MOD argued that Mr Beckham, although a well-known public figure, has the right to conduct personal matters and private business with the expectation that such information would not be released to the public. The MOD argued that communications with the MOD, where Mr Beckham is acting in a private capacity, if they were held, would be exempt from disclosure.

Scope of the case

6. The complainant contacted the Commissioner on 6 June 2017 in relation to the MOD's handling of his request.
7. In relation to this complaint it is important to note that the right of access provided by FOIA is set out in section 1(1) and is separated into two parts: Section 1(1)(a) gives an applicant the right to know whether a public authority holds the information that has been requested. Section 1(1)(b) gives an applicant the right to be provided with the requested information, if it is held. Both rights are subject to the application of exemptions.
8. As explained above, the MOD is seeking to rely on section 40(5) to refuse to confirm or deny whether it holds information falling within the scope of the request. Therefore, this notice only considers whether the MOD is entitled, on the basis of this exemption, to refuse to confirm or deny whether it holds the requested information. The Commissioner has not considered whether the requested information – if held – should be disclosed.

Reasons for decision

Section 40 – personal data

9. Section 40(5)(b)(i) of FOIA states that a public authority is not obliged to confirm nor deny under section 1(1)(a) of FOIA whether third party personal data is held if, or to the extent that:

'the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded'.

10. In the circumstances of this case, the MOD is relying on the first part of section 40(5)(b)(i), ie that complying with section 1(1)(a) would breach the data protection principles, specifically the first principle.
11. Therefore, for the MOD to be correct in relying on section 40(5)(b)(i) to neither confirm or deny whether it holds information falling within the scope of the request the following two criteria must be met:
 - Confirming or denying whether information is held would reveal the personal data of a third party; and

- That to confirm or deny whether information is held would contravene one of the data protection principles.

Would the confirmation or denial that information was held reveal the personal data of a third party?

12. The Commissioner is satisfied that this criterion is met. This is because if the MOD confirmed whether it held information falling within the scope of the request it would reveal whether or not Mr Beckham, or someone acting on his behalf, had corresponded with the MOD. In the context of this request the Commissioner is satisfied that revealing whether Mr Beckham had contacted the MOD would constitute the disclosure of his personal data as it would tell you something about him of biographical significance, ie that during the period in question he had corresponded with the MOD.

Would confirmation or denial as to whether information is held contravene one of the data protection principles?

13. The Commissioner must therefore consider whether confirmation or denial as to whether information is held would contravene one of the data protection principles.

14. In support of its application of section 40(5)(b)(i), the MOD argued that to confirm or deny whether it held information falling within the scope of request would contravene the first data protection principle.

15. The first data protection principle states that:

1. Personal data must be processed fairly and lawfully; and
2. Personal data shall not be processed unless at least one of the conditions in the Data Protection Act (DPA) schedule 2 is met.

16. The most relevant condition in relation to this request is the sixth condition which states that:

'The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject'

17. In deciding whether complying with section 1(1)(a) 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;
 - the nature or content of the information itself (if held);
 - the circumstances in which the personal data was obtained;
 - particular circumstances of the case, e.g. 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 confirming whether information is held, i.e. what damage or distress would the individual suffer if the public authority confirmed whether or not it held the requested information? 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 confirmation; and even if the information has previously been in the public domain does the passage of time mean that confirmation now could still cause damage or distress?
18. Furthermore, notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to confirm whether or not the information is held if it can be argued that there is a more compelling public interest in disclosure. In considering 'legitimate interests' in order to establish if there is such a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests.
19. The MOD argued that although Mr Beckham is a well-known public figure, he has a right to conduct personal matters and private business with the expectation that such information would not be released to the public at large under FOIA.
20. The complainant explained that his request was inspired by press reports that Mr Beckham and his representatives were actively lobbying for him to receive an honour. The complainant noted that the reports claimed that Mr Beckham had taken part in certain activities precisely because it would boost his chances of being recognised. Consequently, the complainant argued that there were strong public interest grounds

for disclosing any information that the MOD may hold which falls within the scope of his request.

21. In the circumstances of this case, whilst Mr Beckham is obviously a high profile public figure the Commissioner does not accept this means that he would expect government departments to reveal, under FOIA, whether he had corresponded with them or not. Despite his public profile, the Commissioner agrees with the MOD that Mr Beckham is entitled to conduct his personal matters and private business affairs with a degree of privacy and this extends to any discussions he may or may not have with government departments. The Commissioner is therefore of the view that Mr Beckham would have had a reasonable expectation that the MOD would not reveal whether or not it had corresponded with him over the period in question and moreover that to provide such a confirmation would represent an infringement into Mr Beckham's privacy. In reaching this conclusion the Commissioner acknowledges that there have been suggestions that Mr Beckham only took part in certain activities in order to potentially boost his chances of receiving an honour. However, even taking this into account, the Commissioner is not persuaded that the legitimate interests of the public in knowing whether this information is held outweigh Mr Beckham's legitimate interests.

Right of appeal

22. 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

23. 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.
24. 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
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