

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 March 2018

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) seeking a copy of the Service Inquiry report into the deaths of three soldiers in the Brecon Beacons in July 2013 along with a copy of the Non-Statutory Inquiry report. The MOD argued that the request was vexatious because complying with it would place a grossly oppressive burden on it. It therefore refused the request on the basis of section 14(1) of FOIA. The Commissioner has decided that the MOD is entitled to rely on section 14(1) to refuse the request on this basis.

Request and response

2. The complainant submitted a request to the MOD on 24 April 2017 regarding the Service Inquiry (SI) report into the deaths of three soldiers in the Brecon Beacons in July 2013. The request sought the following information:
 - a. A copy of the SI terms of Reference.*
 - b. A full, un-redacted copy, copy of the SI report.*
 - c. Advice on options to challenge the whitewash report.*
 - d. An un-redacted copy of the NSI Report'.*
3. The MOD responded on 23 May 2017. In relation to parts A and B of the request, the MOD explained that the SI report had been assessed as falling within the scope of section 23(1) (security bodies) of FOIA. However, the parts of the SI which were not covered by this exemption have been proactively published. The MOD explained that it did not hold

any information that could answer part C of the request. Finally, in relation to part D, the MOD explained that the Non-Statutory Inquiry (NSI) report was considered to be exempt from disclosure on the basis of section 22(1) (future publication) of FOIA.

4. The complainant contacted the MOD on 6 June 2017 in order to ask it to conduct an internal review of this response.
5. The MOD informed him of the outcome of the internal review on 20 October 2017. The review concluded that section 23(1) was likely to apply to the information sought by parts A and B beyond the parts of the SI report in the public domain; no information was held falling within the scope of part C; and that section 22(1) applied to the information sought by part D. However, the MOD explained that it was now of the view that complying with the request was burdensome and therefore it was seeking to refuse to comply with the request on the basis of section 14(1) of FOIA.

Scope of the case

6. The complainant contacted the Commissioner on 9 October 2017 in order to complain about the MOD's handling of his request.
7. During the course of the Commissioner's investigation the MOD confirmed that it was seeking to refuse to comply with the entirety of the request on the basis of section 14(1) of FOIA. In light of this, the Commissioner has not considered the MOD's position that section 23(1) of FOIA would apply to the previously unpublished parts of the SI report (ie parts A and B of the request) nor the MOD's reliance on section 22 of FOIA to part D of the request.¹

¹ In relation to the part D of the request the MOD explained to the Commissioner that since the internal review the decision had been taken not to publish the NSI report. This was on the basis of the objections raised by the families of the deceased as they believed that such publication would cause them great distress. The MOD explained that if it received a further request for the NSI report it would therefore seek to withhold this on the basis of section 38 (health and safety). It also argued that section 40(2) (personal data) may apply to parts of this document.

Reasons for decision

Section 14(1) – vexatious requests

8. Section 14(1) of FOIA allows a public authority to refuse to comply with a request if it is considered to be vexatious.
9. 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.
10. In particular, the Commissioner accepts that there may be 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.
11. 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

12. By way of background, the MOD explained to the Commissioner that service inquiries are conducted in accordance with the MOD Joint Service Publication (JSP) 832 – 'Guide to Service Inquires' which sets out the relevant regulations and policy. The MOD explained that SI reports are normally prepared in two parts:
 - Part one – This contains the Convening Order and Terms of Reference for the panel, a description of the events, the panel findings and recommendations.

- Part two – This part of the report is where the witness statements, inquiry attendees' details, and lists of exhibits are presented.
13. The MOD explained that in cases such as the one which is the subject of this request where there is a significant public interest, information from the SI report is proactively published. The proactive releases are limited to information contained in part one of the SI as this part is less likely to contain personal data and sensitive military information. Where such information is disclosed it should be redacted in accordance with the principles of FOIA. Exceptionally, in cases where it is judged that all of the information contained within part one of an SI report is exempt from disclosure under FOIA, no information will be proactively published.
 14. In terms of the information sought by part D of the request, ie the copy of the NSI report, the MOD explained that there is no requirement for such reports to be proactively published. The MOD were only considering its publication due to the high-profile nature of the case as a supplementary report to sit 'alongside' part one of the SI.
 15. With regard to the first criterion, the MOD explained that part one of the SI report contained 267 pages.² Part two of the SI contained 7240 pages including 59 separate witness statements (2701 pages) and 172 exhibits of evidence (4197 pages).
 16. With regard to the second criterion, the MOD explained that in terms of part one of the SI, entire sections or paragraphs had been withheld rather than disclosed proactively. Such information was simply withheld on the basis that it would attract the exemption contained at section 23(1) of FOIA. The MOD noted that a line by line assessment had not been conducted, and nor was such an approach necessary for any proactive disclosure. In terms of preparing part one of the SI report for disclosure under FOIA the MOD explained that a line by line assessment of the 267 pages would necessary in order to establish if the initial proactive release had resulted in more material being withheld that was necessary, and furthermore if other exemptions, other than section 23, were applicable.
 17. In terms of part two of the SI, the MOD emphasised that as this consisted of witness evidence and statements, and also exhibits, and it was reasonable to conclude that section 23 would apply to considerable portions as would the exemptions contained at section 32 (inquiry

² The MOD noted that the internal review had incorrectly stated that part one of the SI contained 867 pages. The MOD explained that this was due to an error in the drafting of the internal review response and apologised for any confusion caused.

records) and section 40. The MOD also explained that disclosure of some of the information contained in part two of the SI was likely to cause emotional distress, not only to those involved in the incident, but also to members of the family of those who are deceased and therefore such information would be exempt from disclosure on the basis of section 38 of FOIA.

18. With regard to the third criterion, the MOD explained that the material which it considered would attract these various exemptions was scattered throughout both parts of the SI report. It estimated that it would take two minutes per page to review the SI report to determine which exemptions might apply and therefore it would take more than 240 hours to conduct an initial review of the SI report. Following this the MOD explained that the information would have to be viewed by a number of different subject matter experts within the Defence Safety Authority and the Army, prior to final redactions taking place.
19. The MOD argued that the burden arising from the compliance with the parts of the request seeking the SI report (ie parts one and two) meant that the complying within the request in its entirety (ie parts A, B and D) is disproportionate when balanced against the achieving the aims of FOIA and it would be manifestly unreasonable to expect the MOD to devote such a high volume of its resources in a specialist area to handling a request from a single requestor or organisation.

The complainant's position

20. The complainant explained to the Commissioner that he had a direct professional connection to the events which are covered by the SI report and the NSI report. He argued that he needed to access this information in order to identify and correct any factual errors that they may contain and to establish whether there had been an attempt to cover up the full extent of the (alleged) negligence of senior officers. The complainant noted that he had signed a lifetime binding document that would prevent him sharing anything he read within the reports except with Service Police, the Service Prosecuting Authority and the Coroner that dealt with the three deaths.

The Commissioner's position

21. With regard to the first criterion, the Commissioner has no hesitation in accepting that this is met; 7507 pages, ie the total number of pages in the SI report, is clearly a substantial volume of information.
22. With regard to the second criterion, given the subject matter of the SI report the Commissioner accepts that the MOD's concerns that it contains sensitive information likely to be exempt from disclosure on the basis of the exemptions contained at sections 23, 32, 38 and 40 is entirely plausible.

23. With regard to third criterion, the Commissioner is satisfied that the MOD has conducted a sufficiently thorough examination in order to establish that the exempt information would be scattered throughout the SI report. Furthermore, the Commissioner considers the MOD's estimate that it would take, on average, two minutes to assess each page of the SI to identify any exempt information is a reasonable one. Therefore, the Commissioner accepts that it would take at least 240 hours (or 30 working days at 8 hours per day) to fulfil the request. In addition to this further clearances with the subject matter experts identified by the MOD would need to be undertaken before the disclosable material could be released.
24. The Commissioner is therefore satisfied that the MOD has demonstrated that the three criteria are met.
25. With regard to the complainant's submissions, it is vital to note that FOIA is considered to be applicant and purpose blind. Furthermore, any disclosure of information under FOIA is considered to be a disclosure into the public domain. Nevertheless, the Commissioner recognises the public interest in the events which are the focus of the complainant's request and she accepts that there is a public interest in processing the request so that the disclosable parts of the requested information can be placed in the public domain. However, despite this interest the Commissioner believes that complying with the request would have a very detrimental impact on the MOD and despite the potential benefits in the disclosable data being released, such a burden cannot be objectively justified. The Commissioner is therefore satisfied that the MOD is entitled to refuse to comply with the entirety of the request on the basis of section 14(1) of FOIA.
26. In reaching this conclusion, the Commissioner recognises that it is only complying with parts A and B of the request which would place such a burden on the MOD. Part C of the request could presumably be responded to on its own without any such burden.³ Nevertheless, the Commissioner considers it acceptable, and in line with the rationale and purpose of the provision provided by section 14(1), for a public authority to consider a request in a holistic way when applying his provision of the legislation.

³ Albeit as noted, the MOD's view is now that the the NSI report is exempt in its entirety on the basis of section 38 and parts of it are likely to be exempt on the basis of section 40 of FOIA. The Commissioner would also note that in light of the MOD's explanation that that the families of the deceased soldiers have explained that disclosure of the NSI report would cause them great distress she envisages that the MOD would have a strong case to argued that the NSIO report would be exempt from disclosure on the basis of section 38 of FOIA.

27. The Commissioner also notes that section 16 of FOIA provides an obligation on public authorities to provide advice and assistance in certain circumstances which are described in the section 45 Code of Practice (the Code). However, the Code explains that a public authority is not expected to provide requesters with advice and assistance when section 14(1) is applied to a request, this is in contrast to a situation when a public authority relies on section 12 (the cost limit) of FOIA to refuse a request. Consequently, there was no obligation on the MOD provide the complainant with any advice and assistance following its decision to apply section 14(1) to the request in order to allow him to submit a refined request which could be answered without placing a burden on the MOD.

Right of appeal

28. 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

29. 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.

30. 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
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