

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 October 2019

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

Decision (including any steps ordered)

1. The complainant submitted requests to the Ministry of Defence (MOD) seeking a copy of an absence management policy for a particular part of the organisation. Following receipt of his first request the MOD asked the complainant to clarify the nature of information being sought. The complainant provided this clarification but argued that such a clarification was not necessary. The Commissioner has concluded that the MOD was correct to seek clarification of the request and was not under an obligation to respond to it. However, the Commissioner has concluded that the MOD breached section 10(1) of FOIA by failing to provide all of the information falling within the scope of the clarified request within 20 working days.

Request and response

2. The complainant submitted the following request to the MOD on 5 September 2018:

'I have been searching on the internet for the Veterans Agency Absence Management Procedures for its own staff. My searches have yielded not results.

Could you send me a copy of these by email within the next 7 days or, preferably, a link to a website address where I can view these on line please?'

3. The MOD responded on 4 October 2018 (under its reference number FOI2018/12115) and asked the complainant to clarify what information he was seeking.
4. The complainant provided the MOD with this clarification on the same day explaining that *'I am content to have access to, or receive a copy of, the current Absence Management Procedures for the Defence Business Services'*.
5. The MOD acknowledged receipt of this request on 10 October 2018, under its reference number FOI2018/12584, and provided him with a response to it on 15 October 2018. This response provided him with a copy of the Defence Business Services' *'Attendance Management Policy'*.
6. The complainant contacted the MOD on 15 October 2018 and explained that the hyperlinks contained in the document he had been provided with did not work. More specifically he explained that *'Out of all the subsidiary documents referred to in this way, I am particularly interested in, and urgently need a copy of, the 'Managing Unsatisfactory Attendance Procedure' together with any associated policies and procedures, diagrams or charts that are referred to via hyperlinks in this procedure'*.
7. The MOD responded on 2 November 2018 and explained that it was treating his email of 15 October as a further request for information, under its reference number FOI2018/12910, and provided him with copies of the documents contained at the hyperlinks.
8. The complainant contacted the MOD on 6 November 2018 in order to raise a number of concerns about how his requests for information had been handled.
9. The MOD responded to this letter on 27 February 2019. As part of this response, the MOD argued that the hyperlinks to the additional guidance and policy documents fell outside the scope of his request of 4 October 2018.
10. The complainant contacted the MOD on 13 March 2019 and explained that its previous response did not address his concerns. He therefore asked it to conduct a formal internal review into its handling of his requests. He also asked the MOD to provide him with the recorded information it held regarding its processing of these requests, ie a *'meta-request'*.
11. The MOD informed the complainant of the outcome of the internal review into its handling of requests FOI2018/12115, FOI2018/12584 and FOI2018/12910 on 11 April 2019.

12. The MOD provided the complainant with a response to his meta-request request on 16 April 2019, under its reference number FOI2019/03432.

Scope of the case

13. The complainant contacted the Commissioner on 12 May 2019 and explained that he remained dissatisfied with the MOD's handling of his requests. More specifically, he raised the following specific points:
 - (i) He remained unhappy that his original request for information of 5 September 2018 was treated as three separate requests and allocated three separate reference numbers.
 - (ii) He argued that the MOD's 'FOI Handling Policy' does not comply with the FOI Code of Practice (the Code) issued under section 45 of FOIA.
 - (iii) He argued that as the MOD's response of 15 October 2018 failed to provide the hyperlinks referred to in the 'Attendance Management Policy' and it did not fulfil his request.
 - (iv) He was concerned that the MOD has failed to log the dates it received requests accurately on its own FOI database.
 - (v) He noted that the internal review referred to a 20 day timescale for requesting clarification from requesters where necessary, but the Code and the ICO's guidance on 'Interpreting and Clarifying Requests' make clear that a requester should be contacted as soon as possible by the public authority if it requires clarification of a request.
14. In the Commissioner's view only points (i) and (iii) concern issues which relate to the MOD's obligations under FOIA. The points raised by (ii), (iv) and (v) are matters of good practice that fall outside the MOD's obligations under the legislation. Therefore, this decision notice only considers points (i) and (iii). The Commissioner has commented on the remaining grounds of complaint in the Other Matters section of this notice.

Reasons for decision

Complaint (i)

15. The right of access to information is provided by section 1(1) of FOIA which 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.'

16. Section 1(3) states that:

'Where a public authority—

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.'

17. In the Commissioner's opinion the MOD's decision to ask the complainant to clarify his request of 5 September 2018, rather than respond to it, was the correct one. Her rationale for reaching this decision essentially mirrors the points made by the MOD in its correspondence with the complainant. Namely that the request asked for the '*Veterans Agency Absence Management Procedures for its own staff*'. The MOD explained to the complainant the Veterans Agency (VA) ceased to exist in 2007 when the Service Personnel and Veterans Agency (SPVA) was formed. In 2014, SPVA became Defence Business Services (DBS). The MOD explained that it was not unusual for individuals to request historic information and it argued that it was not clear from the complainant's request whether he wanted the Absence Management Procedures from when the VA existed as an independent body or the current instructions for DBS staff. The MOD also noted that corporate knowledge indicated that the Absence Management policy followed by VA prior to 2007 is significantly different to that used today by DBS hence the need to ensure that nugatory searches were not undertaken and the complainant was not sent unwanted or out of date information. In light of these factors the Commissioner is satisfied that it

was appropriate for the MOD to seek clarification of the request of 5 September 2018 rather than answer it.

18. In reaching this decision the Commissioner notes, as the MOD did in its responses to the complainant, the her guidance on clarifying and interpreting requests states that:

*'The authority should never attempt to guess which meaning the requester actually intended. Even if it responds correctly to one possible objective reading of a request it may still find itself in breach of the legislation if it fails to identify an alternative interpretation which is equally valid.'*¹

19. The Commissioner acknowledges that in the complainant's view once this clarification was provided, the MOD should not have treated his email of 4 October 2018 as a new request and given it a new reference number.

20. However, as the Commissinoer's guidance also explains:

*'If the requester subsequently provides enough detail to enable the authority to identify and locate the information, then the authority must respond to the clarified request within a new 20 working day time limit with the 'clock' starting the day after it receives the required clarification'*²

21. Therefore, in the Commissioner's opinion a clarified request should be treated as a new request for information. In light of this, in the Commissioner's view it is perfectly understandable that the MOD allocated the clarified request (ie the email of 4 October 2018) a new reference number, (ie FOI2018/12584) and processed this a new request for information and that in doing so complied with its obligations under FOIA.

22. Nevertheless, the Commissioner agrees with the complainant that in response to the request of 4 October 2018, ie the clarified request, the MOD should have provided him with a copy of the 'Attendance Management Policy' and a copy of the relevant hyperlinks necessary to understand this document. This is on the basis that the complainant had asked for the 'Attendance Management Procedures' and whilst the document provided covered the overarching policy in this area, some of

¹ <https://ico.org.uk/media/for-organisations/documents/1162/interpreting-and-clarifying-a-request-foia-eir-guidance.pdf> - Paragraph 10

² Paragraph 40

the hyperlink documents were also necessary to fully understand this policy.

23. Therefore, the Commissioner agrees with the complainant that the MOD failed to properly respond to his request of 4 October 2018 because it did not provide him with all of the information falling within the scope of his request; it only did so after the complainant sent his email of 15 October 2018, an email which the MOD treated as the third information request. However, as the Commissioner's comments above suggest, in her opinion there was no need for the MOD to treat the follow-up email of 15 October 2018 as a separate request for information.
24. Rather, in the Commissioner's view, if the MOD had provided him with a complete response to his request of 4 October 2018 he would not have needed to send the follow-up email of 15 October 2018. In light of the above, in the Commissioner's opinion, this therefore means that the MOD breached section 10(1) of FOIA because it failed to provide the complainant with all of the information falling within the scope of his clarified request within 20 working days. That is to say, the clarified request was submitted on 4 October 2018 but the information contained at the hyperlinks was not provided until 2 November 2018, a period of 22 working days.

Complaint (iii)

25. For the reasons set above, the Commissioner agrees with this point of complaint. Moreover, again for the reasons set out above, the MOD's failure to provide the complainant with the relevant hyperlinks in response to his clarified request resulted in a breach of section 10(1) of FOIA.

Other matters

26. As explained above, the points of complaint raised above at (ii), (iv) and (v) relate to matters of good practice rather than to obligations the MOD is under due to the legislative requirements of FOIA. Therefore, the Commissioner has considered these points in the Other Matters section below and they do not form part of her formal decision.

Complaint (ii)

27. The complainant noted that section 2 of the Code states that two months is an appropriate length of time for public authorities to wait to receive clarification before closing a request. However, the complainant argued that the MOD's FOI Handling Policy does not fit with the Code

because it informed him that it closed his original request once it had contacted him to seek clarification.

28. Paragraph 2.9 of the Code states that:

'2.9 Where a public authority asks for further information or clarification to enable the requester to meet the requirements of section 8, the 20 working day response period will not start until a satisfactory reply constituting a valid request is received. Letters should make clear that if no response is received the request will be considered closed by the public authority. Two months would be an appropriate length of time to wait to receive clarification before closing a request.'

29. The reference to closing a request in the quote above refers to a scenario where a public authority has contacted a requester and asked for clarification but this clarification has not been provided. In the Commissioner's view the intention of this part of the Code is to ensure that public authorities do not keep a request 'open' on their system for an indefinite period of time waiting for clarification from a requester which may not in fact ever be provided. Rather, if no clarification is received within two months, the public authority can close the request thus more efficiently managing its administration of any FOI requests it receives.

30. In this case, the MOD appears to have closed the original request on its system at the point that it had sought clarification from the complainant rather than keeping it open for two months. The Commissioner accepts that such an approach does not accord with the recommendations of the Code. However, as suggested above, in the Commissioner's view the purpose of this particular recommendation in the Code is to ensure that public authorities are effectively managing the administration of any requests that they receive. The intention of this particular part of the Code is not to assist a requester or provide them with any particular assistance or advantage in their use of the legislation.

31. Indeed, in the Commissioner's view, the MOD's decision to close the original request at the point it asked the complainant for clarification did not disadvantage him. The complainant provided the clarification sought on the same day it was sought and the MOD acknowledged receipt of that clarified request in due course. For the reasons discussed above, in the Commissioner's view the MOD was correct to treat that clarified request as a new request and allocate it a new reference number. The MOD would have taken the same course of action – and would have been correct to do so – even if, for administrative purposes, the original request had remained 'open' on its system.

Complaint (iv)

32. The Commissioner has raised with the MOD the importance of logging requests accurately in order to ensure that requesters are provided with a response within the timeframe required by FOIA.

Complaint (v)

33. The Commissioner notes that the MOD's internal review response explained that its own practice is to contact requesters as soon as possible in order to seek clarification. Therefore, the MOD's usual practice – albeit one it did not followed to follow in this case - is line with both the Code and the ICO's guidance.
34. Nevertheless, as with complaint (iv), the Commissioner has contacted the MOD and emphasised the importance of ensuring that requests are clarified as promptly as possible.

Right of appeal

35. 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@justice.gov.uk

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

36. 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.
37. 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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