

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 18 February 2020

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 information about the monitoring of the health and welfare of crew on nuclear submarines. The MOD confirmed that it held information falling within the scope of the request but explained that it considered this information to be exempt from disclosure on the basis of section 26 (defence) of FOIA. After some delay, the MOD provided the complainant with information falling within the scope of her request albeit that it redacted some information on the basis of section 40(2) (personal data) of FOIA. At the internal review stage the MOD clarified the nature of the information it held falling within the scope of the request and explained that some of the requested information should have been considered under the EIR and furthermore some of this information was exempt from disclosure on the basis of regulation 12(5)(a) (defence and national security) of the EIR and that the public interest favoured maintaining this exception. The complainant has argued that the information provided to her by the MOD does not fulfil her request.
2. The Commissioner has concluded that the information provided by the MOD to the complainant does fulfil her request and that on the balance of probabilities the MOD does not hold any further information falling within the scope of the request. The Commissioner has also concluded that the MOD is entitled to withhold some of the information in scope on the basis of regulation 12(5)(a) of the EIR and some of the information on the basis of section 40(2) of FOIA. However, she has also concluded

that the MOD breached regulation 7(1) of the EIR by failing to provide her with a substantive response to her request within 40 working days.

3. The Commissioner does not require the MOD to take any steps.

Request and response

4. The Commissioner understands that the complainant had been in correspondence with the MOD for a number of months in early 2018 in order to try and gain access to information regarding the monitoring of the health and welfare of crew on nuclear submarines. She needed this information to assist with an appeal regarding her war widow pension.
5. More specifically, on 5 January 2018 the complainant submitted the following request to the MOD:

'I am looking to have my appeal heard in the forthcoming months and would be grateful if you could supply some further information which would be included in the Statement of Case.'

On page 241 – Statement of Case - point 10 Navy Expert. I would like copies of the internal monitoring regime that crew members serving on submarines with identical reactor systems to the submarine my late husband was serving on and the recorded results as detailed in point 10, page 241 Statement of Case. There were no internal monitoring systems available to my late husband'.

6. In response the MOD provided her with a letter from the Submarine Delivery Agency dated 27 March 2018. This letter explained that routine internal monitoring was only conducted on members of the crew on board an SSBN¹ and as her husband did not serve upon an SSBN no such records exist for him. The letter also noted that no positive results have ever been identified for crew serving on a SSBN.
7. The complainant contacted the MOD again on 3 April 2018 and stated that:

*'I received the reply from The Submarine Delivery Agency regarding my query . However this was definitely not what I requested in my email dated 5/1/18 and subsequent emails.
I have included copies of the relevant parts from The Statement of*

¹ Ballistic missile submarine.

Case point 4 page 240 and point 10 page 241 .

I require copies of " The routine monitoring of 10% of the crew on the Resolution Class SSBN 3 " as clearly stated by your expert in my Statement of Case.'

8. It is the Commissioner's understanding that the complainant did not receive a response to this correspondence.
9. The complainant then subsequently submitted the following request to the MOD on 29 June 2018:

'Please supply all information on any monitoring for internal radionuclides carried out on nuclear submarine personnel from 1979 to the present day. This must include data on which radionuclides were analysed in urine, faeces, or by whole body monitoring, and must include the radionuclides assessed, particularly Tritium, the dates of monitoring, type of examination and the results with the type of measurement, the standard errors of the method, and the limits of detection.'
10. The MOD contacted her on 30 July 2018 and confirmed that it held information falling within the scope of her request but it considered this to be exempt from disclosure on the basis of section 26 (defence) of FOIA and it needed additional time to consider the balance of the public interest test.
11. After a significant delay, the MOD provided her with a substantive response to her request on 21 May 2019. The MOD explained that it had concluded that the public interest favoured disclosing the information it had located as falling within the scope of her request and disclosed this to her, albeit with a number of redactions made on the basis of section 40(2) of FOIA. The information disclosed to her consisted of two letters from the Defence Science and Technology Laboratory (Dstl, which is an executive agency of the MOD) to another part of the MOD. This first letter was dated 10 May 2018 and had the heading 'Submarine Crew – Tritium in Urine Monitoring'. The letter explained that a search for tritium-in-urine monitoring results for submarine crew had been undertaken and provided an annual breakdown for the period 1993 to 2017 of the number of individuals who had been monitored. The letter explained that all of the results were zero, which meant that they were below the reporting threshold. The second letter was dated 9 May 2019 and had the heading 'Submarine Crew – Whole Body Monitoring'. The letter explained that it had conducted a full search of its records and found 13 whole body monitoring results for nuclear submarine personnel. These results were provided and covered the period 1983 to 1992.

12. Following this response the complainant contacted the Commissioner about the MOD's handling of her requests. However, during the course of the Commissioner's investigation the MOD completed an internal review in relation to its handling of the request submitted on 29 June 2018. The MOD provided the complainant with the internal review on 21 August 2019. The internal review concluded that the request should have been handled under the EIR rather than FOIA given that the requested information related to health and safety monitoring that was conducted in relation to possible exposure by submarine personnel to radioactive material in their work environment. The internal review described the nature of the searches undertaken for information falling within the scope of the request.
13. With regard to the information that had been disclosed, the MOD explained that the letter of 9 May 2019 was outside the scope of the request as it did not exist at the time of the request. However, the letter was provided in order to be helpful. Furthermore, the MOD explained that the monitoring results contained in that letter were a re-presentation of information that was held at the time of the request. The MOD explained that of the results that had been provided, although they were accurate, one of the notes was not included; it therefore provided the complainant with the data again, this time with the previously omitted note included.
14. With regard to the letter of 10 May 2018, the MOD confirmed that this was in the scope of the request. However, it remained of the view that the names and contact details of individuals had been correctly redacted on the basis of section 40(2). Furthermore, the MOD explained that information contained in that letter was an annual summary of the tritium-in-urine monitoring results of those individuals who could be positively identified as submarine crew. In particular, the MOD explained that whilst the year of the monitoring was provided to the complainant, the actual information held that identified the exact testing dates is recorded as 'Monitoring from date' and 'Monitoring to date'. The MOD explained that this was withheld as it considered this to be exempt from disclosure on the basis of regulation 12(5)(a) of the EIR and the public interest favoured maintaining this exception. However, the MOD confirmed that for all of the tests a result of 0.00 was recorded.

Scope of the case

15. The complainant contacted the Commissioner on 22 May 2019 following the MOD's response to her request of 29 June 2018. The complainant argued that the MOD had failed to provide her with the information falling within the scope of that request. (She was also dissatisfied with the MOD's delays in processing that request.) She remained of that view following the completion of the internal review response. This decision notice therefore considers whether the MOD has complied with the requirements of FOIA/EIR in handling the complainant's request of 29 June 2018.
16. The complainant also explained to the Commissioner that she was dissatisfied with its handling of the request she had submitted to the MOD on 5 January 2018. The Commissioner's findings in relation to that complaint are the subject of a different decision notice, reference FS50883087, which is being issued at the same time as this notice.

Reasons for decision

The applicable access regime

17. Regulation 2(1) of the EIR defines environmental information as:

'any information in written, visual, aural, electronic or any other material form on —

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among those elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a)'

18. Given the subject matter of the request, the Commissioner agrees with the MOD that the request should be considered under the EIR rather than under FOIA. (The only exception to this is a small amount of personal data which the MOD has withheld on the basis of section 40(2) of FOIA; the Commissioner agrees that such information falls instead to be considered under that legislation).

Regulation 5(1) – right of access to information

19. Regulation 5(1) of the EIR requires a public authority holding environmental information to make it available on request.
20. As noted above, although the MOD has provided the complainant with information in response to her request, in her view this information does not fulfil her request.
21. In cases such as this where there is some dispute as to whether information falling within the scope of the request is held, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
22. 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. Or, more accurately in the terms of this request, whether on the balance of probabilities the information provided to the complainant by the MOD fulfils the request, and whether it would be likely to hold any further information falling within the scope of the request.
23. In applying this test the Commissioner will consider the scope, quality, thoroughness and results of the searches, or as in the circumstances of this complaint, other explanations offered as to why the information which has now been disclosed is the only information held by the MOD which falls within the scope of the request.

The complainant's position

24. Following the completion of the internal review, the complainant reiterated her position that the information provided to her by the MOD on 21 May 2019 did not fulfil her request. She explained that this was because *'...they did not give me what they did, what they tested for, all the isotopes, the type of testing, the details of the statistical sensitivity of the method, minimum detectable amount in the test, uncertainty of the result . The dates on the table also don't relate to my late husbands period of service - Jan 79 to June 89'*

The MOD's position

25. In its internal review response, the MOD noted that the request was seeking information from '1979 to the present day', and that the complainant was particularly interested in 'tritium' monitoring results. The response confirmed that the Dstl business unit holds the information falling within the scope of the request.

26. The MOD explained that the Dstl Approved Dosimetry Service (ADS) holds tritium monitoring results on its approved Dosimetry Record Keeping System (an Oracle database). The MOD explained that all results in this system are indexed by assessment type and therefore, all results identified as 'tritium', particularly tritium-in-urine assessments, had been found. The MOD explained that the earliest submariner tritium-in-urine records held by ADS date from 1993.
27. The MOD explained that although tritium-in-urine monitoring results are held electronically, the whole body monitoring records are held in hard copy format. The MOD explained that Dstl have undertaken a physical search of approximately 4000 records, of which thirteen whole body monitoring records relating to submariners had been identified. The MOD argued that the information provided for whole body monitoring contained all of the information requested, ie dates of monitoring, type of examination, results, errors and limits of detection.

The Commissioner's position

28. The Commissioner has carefully considered the complainant's comments along with the information disclosed to her by the MOD. Having done so, in the Commissioner's view the MOD has provided the complainant with all of the recorded information that it holds which falls within the scope of this request, with the exception of the information which it has sought to withhold on the basis of exceptions discussed below.
29. To take each of the complainant's concerns in order, in terms of the nature of testing undertaken, the Commissioner notes that the MOD's letter of 9 May 2019 explains that the testing involved whole body testing and its letter of 10 May 2018 explains that testing involved urine testing.
30. In terms of what was tested, the letter of 9 May 2019 explains that radionuclides tested for were Caesium-137 and Cobalt-60 and the letter of 10 May 2018 explains that the testing was for tritium.
31. In terms of the complainant's point about what isotopes were tested for, as explained in the previous paragraph, the MOD has identified the isotopes it has tested for.
32. In terms of the types of test conducted, the Commissioner considers that the MOD has explained this by noting that the test results relate to whole body testing and urine testing.
33. In terms of the details of the statistical sensitivity of the methods, the Commissioner notes that the minimum detectable amount and the uncertainty of the result are set out in the letter of 9 May 2019 which explains that limits of detection were approximately 20 Becquerels (Bq)

and 10 Bq respectively and for some results a +/- figure of accuracy is given. In relation to the letter of 10 May 2018, this explained that all of the results were zero, and the reporting threshold was 0.01 mSv. In the Commissioner's view, the provision of this information and figures addresses the part of the request which sought the standard errors of the method and the limits of detection.

34. Finally, the Commissioner appreciates that the request sought data from 1979 to the present day but the information provided by the MOD ranged from 1983 to 1992 and from 1993 to 2017. However, it is the Commissioner's understanding that for whole body monitoring the MOD only holds records beginning in 1983 and the earliest submariner tritium-in-urine records held by the MOD dates from 1993. It is for this reason that information provided to the complainant in response to her request of 26 June 2018 does not go as far back as 1979, despite the fact that the request sought information dating from 1979.
35. The Commissioner is therefore satisfied that on the balance of probabilities the MOD has located all of the information falling within the scope of the complainant's request and provided this to her (with the exception of the withheld information considered below).

Regulation 12(5)(a)

36. Regulation 12(5)(a) of the EIR provides that a public authority can refuse to disclose information to the extent that its disclosure would adversely affect international relations, defence, national security or public safety.
37. The MOD argued that it considered the specific dates of the tritium monitoring to be exempt from disclosure on the basis of regulation 12(5)(a). This was on the basis that the information may reveal operational practices and techniques that are still in use or might otherwise compromise current or future operations or the capability, effectiveness or security of British forces. More specifically, the MOD argued that disclosure of the specific dates of tritium monitoring, would allow potential adversaries to build up knowledge of continuous at sea deterrent patrols and assist them in developing a reasonable understanding of the pattern of monitoring activity, which in turn provides valuable information on the pattern and duration of the patrols conducted by the UK's SSBN fleet. The MOD explained that Trident remains a critical component of the UK's national security infrastructure, and the disclosure of information that risks the safety and operational capability of its submarine platform and its personnel would have an adverse affect on both defence and national security.

38. The Commissioner accepts the rationale of the MOD's argument that disclosure of the specific dates of the monitoring would provide potential adversaries with a reasonable understanding of the pattern of monitoring activity which in turn would provide an insight into the pattern and duration of patrols conducted by the UK's SSBN fleet. In light of this the Commissioner is satisfied that disclosure of the withheld information would be likely to adversely affect national security and therefore regulation 12(5)(a) is engaged.

Public interest test

39. Regulation 12(5)(a) is subject to the public interest as set out at regulation 12(1)(b) of the EIR. Therefore, the Commissioner has considered whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
40. The MOD acknowledged that release of the information would demonstrate its commitment to transparency and openness and would help to inform and maintain public confidence in defence matters. It also accepted that disclosure would broaden public understanding of the routine measures taken to ensure that the health, safety and welfare of naval service personnel while undertaking their duties at work on submarines.
41. However, the MOD argued that there was a greater public interest in safeguarding national security and in withholding any information that would harm security and defence matters.
42. The Commissioner agrees that there is public interest in broadening public understanding of the routine measures taken by the MOD to monitor the health, safety and welfare of navy personnel on submarines. However, in her view disclosure of the withheld information would only provide a limited additional insight into such measures, beyond the information already disclosed by the MOD. That is to say, the MOD has already disclosed the number of tests which took place within each calendar year, the nature of those tests and the outcomes. Disclosure of the withheld information would only confirm that actual monitoring period within each calendar year of these tests. Conversely, the Commissioner considers there to be a very significant public interest in ensuring that the UK's defence and national security is not adversely affected. Therefore, in the circumstances of this case she has concluded that the public interest favours maintaining the exception contained at regulation 12(5)(a).

Section 40 – personal data

43. The MOD redacted the names of what it described as relatively junior officials from the disclosed information. It explained that it considered it more appropriate to withhold this information under section 40(2) FOIA than the equivalent exception in the EIR, regulation 13, because the redacted information was not environmental information.
44. Section 40(2) provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
45. In this case the relevant condition is contained in section 40(3A)(a)². This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
46. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of FOIA cannot apply.
47. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

48. Section 3(2) of the DPA defines personal data as:

'any information relating to an identified or identifiable living individual'.

49. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
50. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

² As amended by Schedule 19 Paragraph 58(3) DPA.

51. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
52. In the circumstances of this case, the Commissioner is satisfied that the names of the officials both relate to and identify the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
53. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
54. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

55. Article 5(1)(a) of the GDPR states that:

'Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject'.

56. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
57. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

58. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

'processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child'³.

³ Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

59. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
60. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

61. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
62. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
63. In the circumstances of this case, for the reasons discussed above, the Commissioner accepts that there is a legitimate interest in the disclosure of information about the steps the MOD takes to ensure the health,

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

safety and welfare of personnel on submarines. However, she is not persuaded that there is a particularly strong or compelling interest in the disclosure of the names of officials named in the withheld information in order to inform the public about this topic.

Is disclosure necessary?

64. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so a measure would not be necessary if the legitimate aim could be achieved by something less. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
65. In the Commissioner's view it is not sustainable to argue that disclosure of the names of the junior officials is necessary; disclosure of such information would not add to the public's understanding of this subject matter.
66. Given this finding the Commissioner has concluded that disclosure of the names would not be lawful and therefore article 6(1)(f) of the GDPR is not met. Disclosure of the names would therefore breach the first data protection principle and thus such information is exempt from disclosure on the basis of section 40(2) of FOIA.

Regulation 5(2) – Time for compliance; Regulation 7(1) – Extension of time

67. Regulation 5(2) of the EIR states that, where a public authority holds environmental information, the *'information shall be made available... as soon as possible and no later than 20 working days after the date of receipt of the request.'*
68. Under regulation 7(1), where a public authority reasonably believes that the volume and complexity of the information requested means that it is impracticable either to comply with a request within 20 working days or to make a decision to refuse to do so, it may extend the time for compliance by a further 20 working days, to a total of 40.
69. The MOD received the complainant's request on 29 June 2018 and it contacted her on 30 July 2018 and explained that it held information falling within the scope of the request but it considered section 26 of FOIA to apply and it needed additional time to consider the balance of the public interest. However, the MOD did not provide the complainant with a substantive response to her request until 21 May 2019. Since the response was provided more than 40 working days from the date of the

Reference: FS50839314



request the Commissioner has concluded that the MOD breached regulation 7(1) of the EIR.

Right of appeal

70. 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

71. 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.
72. 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

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