

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 March 2020

Public Authority: Ministry of Defence

Address: Main Building
Whitehall
SW1A 2HB

Decision (including any steps ordered)

1. The complainant submitted a request to the Ministry of Defence (MOD) seeking a number of files concerning the nuclear programme. The MOD explained that it only held a number of the requested files, the remainder still being held at The National Archives pending their return to the MOD as part of a security review. Of the files that it did hold the MOD relied on section 14(1) of FOIA to refuse to disclose them because of the burden of complying with the request.
2. The Commissioner has concluded that the MOD is entitled to refuse to comply with the request on the basis of section 14(1). However, she has also concluded that the MOD breached sections 10(1) and 17(5) of FOIA by failing to confirm what information it actually held within 20 working days of the request and by failing to provide a refusal notice citing section 14(1) within the same timescale.
3. The Commissioner does not require the MOD to take any steps.

Background

4. In mid-2018 concerns arose that a large number of open records held at The National Archives (TNA) and The Nuclear and Caithness Archives (Nucleus) at Wick may contain classified material. In order to address the potential security risk, the MOD asked TNA to immediately withdraw the records from public access. The material concerned consists of around 100,000 nuclear related records, both military and civil, which require analysis and review.
5. At the point that the archived records were closed TNA began to receive a large number of requests seeking access to these files under FOIA. TNA concluded that it was not able to process the requests as they were unable to complete the third party consultations with the MOD and Atomic Weapons Establishment subject matter experts (SME). This was due to the volume of information in scope and how the SMEs would conduct the review. In June 2019 the MOD agreed to a proposal from TNA to begin the transfer of the records and any relevant requests to the MOD.

Request and response

6. The complainant submitted a request to the MOD on 22 July 2019 seeking access to 15 files.¹ The complainant had previously submitted requests for these files to TNA but it had advised him that it could not process these requests due to the ongoing security review which meant that the files would be transferred back to the MOD.
7. The MOD acknowledged receipt of this request on 23 July 2019 and contacted the complainant again on 20 August 2019 and explained that it needed at least a further 20 working days in order to provide a full response to the request.
8. The complainant contacted the MOD on 20 August 2019 and explained that he was unhappy with this delay given that he had previously requested some of these files from TNA in December 2018 and the remainder in February 2019.

¹ The files in question were: AB 38/2122, AB 38/2071, AB 38/1972, AB 38/2030, AB 38/2128, AB 38/1917, AB 38/1776, AB 38/2037, AB 38/1909, AB 38/1907, AB 65/1222, AB 65/977, AB 54/187, AB 54/188, AB 54/186.

9. In response the MOD explained that it would conduct a review into its handling of this request.
10. The MOD informed the complainant of the outcome of this review on 22 October 2019. This explained that only four of the requested files were held by the MOD, namely: AB 38/2122, AB 38/1972, AB 38/2030 and AB 38/2128.
11. The MOD explained that the remaining files were still held at TNA awaiting transfer to it as part of the ongoing security review. Furthermore, the MOD explained that the principal reason for the delay in answering the request was due to the ongoing discussions over the handling of the requests concerning these files. The MOD noted that the volume of requests transferred and the processes necessary in relation to the security review had placed a unique burden on it. In order to try and prevent further delay the MOD explained that it would issue a substantive response to this request by 31 October 2019.
12. On 1 November 2019 the MOD provided such a response. The response explained that it was relying on section 14(1) (vexatious) of FOIA to refuse the request given the disproportionate or unjustified level of disruption in complying with it. The MOD's response noted the obligation placed upon it by section 16 of FOIA to provide advice and assistance and provided the complainant with some details of the ongoing security review of nuclear information records and explained how this had impacted upon his requests. The MOD also explained that the review of one of the files, AB 38/2030, was almost complete and it should be in position to release this to him within the next three weeks. The MOD explained that it was also part way through reviewing a second of the files, AB 38/2122. The MOD also offered to update the complainant when the other two files he had requested had been reviewed, and indeed when the other files from TNA which he had originally requested had been transferred and reviewed.
13. The complainant contacted the MOD on 11 November 2019 and asked it conduct an internal review of this decision. In doing so he asked the MOD to provide any further details of the timescales of the review in relation to the remaining files he had requested.
14. The MOD informed him of the outcome of the internal review on 10 December 2019. The review concluded that the request had been correctly refused on the basis of section 14(1) of FOIA and provided some additional reasoning to support this position. The MOD also noted that although there was no obligation after the serving a refusal notice citing section 14 to continue dialogue with a requester, the MOD intended to let the complainant know of the outcome of the review of the other files requested.

Scope of the case

15. The complainant contacted the Commissioner on 10 December 2019 in order to complain about the MOD's handling of his request. More specifically, he raised the following grounds of complaint:
 - He was unhappy with the MOD's general handling of the request, including its delays in providing him with a substantive response and its failure to initially confirm what information it held falling within the scope of his request.
 - He disputed the MOD's reliance on section 14(1) as a basis to refuse his request.
 - Whilst he welcomed the MOD's apparent commitment to keep him updated about the gradual release of files he had requested, he would prefer this commitment to be solidified.
 - He was concerned by the fact that he originally submitted requests for the 15 files in question to TNA in December 2018 and February 2019 but despite the ongoing security review some of these files had not yet been transferred to the MOD.
16. The Commissioner has considered the complainant's first three grounds of complaint in the main body of this decision notice as they relate directly to the MOD's obligations under FOIA to the request of July 2019.
17. The fourth ground of complaint concerns information not held by the MOD. The MOD is not under any obligation under FOIA in respect of information which it does not hold and therefore the Commissioner has not considered this ground of complaint in the main body of the decision notice. However, she has commented on this in the Other Matters section at the end of this notice.
18. During the course of the Commissioner's investigation the MOD informed her that the internal review response had incorrectly stated that it held file AB 38/2128. Rather, this file was still in fact held by TNA. Therefore, at the point that the complainant submitted his request to the MOD the only files it held were AB 38/1972, AB 38/2030 and AB 38/2122. Furthermore, at the point that this decision notice is being issued the MOD had now completed the security review of the latter two of these files and both files were provided to the complainant. No redactions had been applied to either file.
19. For the purposes of this decision notice it is important to note that the Commissioner's remit is limited to considering the circumstances as they

existed at the point that the request was refused. Her focus therefore is on whether the MOD was entitled to rely on section 14(1) to refuse to disclose the three files it held in July 2019.

Reasons for decision

Section 14(1) – vexatious requests

20. Section 14(1) of FOIA allows a public authority to refuse to comply with a request if it is considered to be vexatious.
21. 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.
22. 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.
23. 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

24. With regard to the first criterion, the MOD explained that the three files in question contained 1517 pages in total which broke down as follows: AB 38/1972 (563 pages), AB 38/2030 (376 pages) and AB 38/2122 (578 pages).

25. With regard to the second criterion, the MOD pointed to the decision to remove the files on this subject matter from public access and the comprehensive security review of the contents of these files which was being undertaken. The MOD argued that the fact that some of the files subject to review had been released without any redactions could not be taken that an assessment of any other file would result in the same outcome.
26. With regard to the third criterion, the MOD argued that based on the experience of the security review currently underway, it was satisfied that potentially exempt information contained within these files is spread throughout the documentation. The MOD explained that each file requires a page by page assessment to determine whether it contains any exempt information.
27. In further support of this application of section 14(1), the MOD emphasised that the process of reviewing the material in the scope of this request could only be undertaken by the limited number of suitably qualified and experienced SMEs who are also assigned to conducting the wider security review. The MOD suggested that based on a reasonable estimate of two minutes to review each page of information in the scope of the request this equated to around 50 working hours of effort to process this request. As a result the MOD argued that processing this request would disrupt the ongoing security review and would also have the impact of disrupting the ability of the staff to work on other tasks related to the nuclear programme. The MOD explained that a triage system was used to determine the order the files would undergo the review system and whilst it could place greater priority on files subject to FOI requests, each new request received would require an adjustment to that plan. Moreover, the MOD argued that constantly diverting resources and disrupting the security review to consider requests made through FOIA would undoubtedly place a significant burden on the MOD and the wider security review.

The complainant's position

28. In support of his view that section 14(1) did not apply to his request, the complainant explained that he was aware of seven files released during 2019, which were subject to the security review, but none of these files had any information withheld. He emphasised that this was also the case for the two files falling within the scope of his request which had now been disclosed, ie files AB 38/2122 and AB 38/2030. In light of such disclosures the complainant has questioned whether there is actually any information within the requested files that is exempt from disclosure and as a result questioned whether the second and third limbs of the test are met.

29. The complainant acknowledged that the security review had resulted in a high workload being placed on the MOD and that he understood the principle behind the review. However, he emphasised that he had originally submitted these requests sometime ago and that these files, along with the others which were subject to the review, had been closed off since November 2018. Consequently, the complainant argued that a considerable amount of time had passed since he first sought access to these files during which, in his view, the MOD could have processed his request.
30. The complainant also explained that he relied on the requested files for his research and the MOD's delay, and as result its ongoing failure, to provide the files was impacting on this.

The Commissioner's position

31. With regard to the first criterion, the Commissioner accepts that 1517 pages can be correctly described as a substantial amount of information.
32. With regard to the second criterion, the Commissioner appreciates that the point made by the complainant that two of the three files held by the MOD falling within the scope of his request have now been disclosed without redactions. Moreover, so have a number of other files as a result of the security review. However, the Commissioner accepts that the concerns that led to the decision to remove the files in 2018 which are subject to the security review are clearly genuine ones. Furthermore, the Commissioner notes that the files received by the MOD have been triaged in order to assess the sensitivity of information contained in them. Consequently, the Commissioner is persuaded by the MOD's position that each file has to be considered on its own content and simply because previous files have been disclosed without any redactions this will not necessarily mean that the same will be true of another file. In addition, the Commissioner considers it is important to remember that in order for the second criterion to be met the information only has to *potentially* contain withheld information. For the reasons set out above, the Commissioner is satisfied that at the point that the MOD received the complainant's request in July 2019 it had genuine concerns that the files it did hold could *potentially* contain withheld information.
33. Finally, with regard to the third criterion, the Commissioner appreciates that from the MOD's experience of conducting the security review it has been necessary to conduct a page by page assessment in order to locate any potentially exempt information. Based on this experience, the Commissioner is satisfied that the third criterion is met.

34. The Commissioner is therefore satisfied that the MOD has demonstrated that the three criteria are met. Furthermore, she accepts that the MOD's estimate of two minutes per page to review and assess information is a reasonable one and that it would take the MOD approximately 50 working hours to process this request. Consequently the Commissioner accepts that the MOD has provided compelling evidence to demonstrate that complying with the request would place a grossly excessive burden on it. Nevertheless, the Commissioner has considered whether the purpose and value of the request are enough to justify the impact on the public authority.
35. The Commissioner has considerable sympathy with the position that the complainant finds himself in. He is seeking access to files that were previously open and needs access to them for his academic research. More broadly, the Commissioner appreciates that there is obviously a legitimate interest in disclosure of historical information about the UK's nuclear programme, both civil and military, a fact clearly evidenced by the fact that the requested files in question were originally retained. She also appreciates that the complainant is unlikely to be the only academic researcher who needs access to these files. She therefore accepts that there is a genuine purpose and value to the request.
36. However, the Commissioner believes that the impact of answering this request on the MOD has to take into account the broader context of the security review. That is to say, in the Commissioner's view simply complying with this request would place a significant burden on the MOD given that to do so would involve approximately 50 hours work. However, this burden is arguably compounded by the broader impact processing would have on the wider security review. The Commissioner accepts that if the MOD were to prioritise each and every FOI request it received for these files then this would have a significant impact on the effectiveness of the security review and indeed the ability of the very limited number of SMEs to work on other tasks associated with the nuclear programme. The Commissioner accepts that there is obviously a genuine purpose and value to the wider security review and moreover that it is in the wider public interest that this review is completed as efficiently as possible. Consequently, the Commissioner has decided that despite the purpose and value of this request these are not enough to justify the impact on the MOD of complying with the request in July 2019 given the broader impact of processing this request within the timeframe required by FOIA would have on the MOD. She has therefore concluded that the MOD was entitled to refuse to comply with the request on the basis of section 14(1) of FOIA.

Handling of the request

37. Section 1(1) of FOIA provides that any person making a request for information to a public authority is entitled, subject to the application of any exemptions,

'(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.'

38. Section 10(1) of FOIA provides that a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.

39. Section 17(5) of FOIA states that if a public authority wishes to refuse a request on the basis that it is vexatious then it requires a public authority to issue a refusal notice stating this fact within the same timescale.

40. As is clear from the above chronology of the request, the MOD failed to correctly inform the complainant what files it actually held falling within the scope of his request within 20 working days. The complainant submitted his request on 22 July 2019 but it was not until its letter of 22 October 2019 that the MOD informed him that it only held four of the requested files. Moreover, it subsequently transpired that this statement was not accurate as the MOD only held three of the files. The MOD's failure to correctly inform the complainant as to which parts of the withheld information it held within 20 working days represents a breach of section 10(1) of FOIA.

41. Furthermore, as is also clear from the above chronology, the MOD failed to provide the complainant with a refusal notice citing section 14(1) of FOIA within 20 working days. It therefore breached section 17(5) of FOIA.

Section 16 – advice and assistance

42. Section 16 of FOIA places a duty on public authorities to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

43. Both the refusal notice and internal review provided the complainant with details of the wider security review and more specifically the progress it was making in processing the files it held falling within the scope of his request. In its internal review response the MOD also stated that although there was no obligation to maintain a dialogue with a

requester following the issuing of a section 14 notice, it would contact him and let him know the outcome of the review of the other files he had requested.

44. The Commissioner's guidance on section 16(1) of FOIA confirms that if a public authority refuses a request on the basis of section 14(1) then there is no obligation on it to provide any advice and assistance. Therefore, whilst the Commissioner appreciates that the complainant would like the MOD's offer to keep him updated on the status of the remaining files placed on a more formal footing, there is no basis to do this within the provisions of FOIA.
45. However, the Commissioner understands that the MOD's intention is to continue dialogue with all requesters where requests for files subject to the security review are refused on the basis of section 14(1) because of the burden in complying. As part of this dialogue the MOD intends to provide updates on when or if any of the files they have requested will be returned to TNA and public access. The Commissioner welcomes this intention and would strongly encourage the MOD to continue with this.

Other matters

46. With regard to the complainant's fourth ground of complaint, the MOD explained to the Commissioner that there had been some changes made to the security review process to try and minimise the time required to process some records in the AB series which are currently withdrawn from public access and retained by TNA. The MOD explained that the review of the 12 files in the scope of the request which will be retained by TNA will be conducted in situ, rather than transferring the files to the MOD. However, the MOD explained that due to the significant volume of files in the scope of the ongoing review and assessment process, it was not possible to give any firm date when the review of these specific files will be completed.
47. The Commissioner welcomes the revisions to the process in order to attempt to minimise the time taken to review these remaining files, albeit that she appreciates that the lack of any firm date is not helpful from the complainant's point of view.
48. More broadly, the Commissioner is liaising with the MOD about its approach to the requests for the nuclear files which have been transferred to it from TNA given the issues that this situation raises for requesters such as the complainant.

Right of appeal

49. 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

50. 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.
51. 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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