

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 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 a list of all editions of the document 'JSP900: UK Targeting Policy', copies of each edition and copies of any drafts. The MOD provided the complainant with a list of each edition, some in its initial response and some at the internal review stage, but refused to comply with the remainder of the request on the basis of section 14(1) (vexatious) because of the burden of doing so.
2. The Commissioner has concluded that the MOD is entitled to refuse to comply with those parts of the request on the basis of section 14(1) of FOIA. However, she has also concluded that the MOD breached section 10(1) by failing to provide the complainant with a list of all editions of the document in question within 20 working days of the request.
3. The Commissioner does not require any steps to be taken.

Request and response

4. The complainant submitted the following request to the MOD on 6 June 2019:

'1. Please provide a full list of all editions of the document "JSP900: UK Targeting Policy" including dates of these editions, highlighting the most current edition.'

- 2. Please provide full copies of each edition of "JSP900: UK Targeting policy" with policy changes from previous editions highlighted.*
- 3. Please provide related drafts of these documents and any records showing reasons for policy changes in each new edition.'*
5. The MOD contacted the complainant on 5 July 2019 and confirmed that it held information falling within the scope of the request but it needed additional time to consider the balance of the public interest test.
6. The MOD provided him with a substantive response to his request on 13 August 2019. With regard to part one of the request the MOD explained that the editions of JSP 900 which were held were edition 1 dated 2009 and edition 2 dated September 2015. With regard to part two of the request, the copies of JSP 900 were considered to be exempt from disclosure on the basis of sections 26 (defence) and 27 (international relations) of FOIA and that the balance of the public interest favoured maintaining these exemptions. With regard to part three of the request the MOD explained that there is no information held about policy changes between editions and only a line by line review of the two editions would enable such information to be provided. The MOD also explained that under section 1 of FOIA there is no requirement for public authorities to create information in order to fulfil a request.
7. The complainant contacted the MOD on 13 August 2019 and asked it to conduct an internal review of this response.
8. The MOD informed him of the outcome of the internal review on 9 October 2019. The MOD explained that it should have informed him of the burdensome nature of processing parts 2 and 2 of his request at the outset. In light of this burden the MOD explained that it was now refusing to comply with parts 2 and 3 of the request on the basis of section 14(1) (vexatious) of FOIA. However, in terms of part 1 of the request the MOD explained to the complainant that in addition to the editions of JSP 900 identified in the refusal notice it also held the following: JSP 900 'Version 3 dated February 2018' and JSP 900 'UK Full Spectrum Targeting Policy - Edition 4, Part 1 Directive and Part 2 Guidance' which was held in draft form at the point the request was submitted.

Scope of the case

9. The complainant contacted the Commissioner on 16 October 2019 in order to complain about the MOD's handling of his request. He raised the following grounds of complaint:
- He was unhappy with the MOD's failure to provide him with all of the information falling within the scope of part 1 of his request until the outcome of the internal review;
 - He disagreed that complying with parts 2 and 3 of this request would be burdensome and thus could be refused on the basis of section 14(1) of FOIA;
 - Even if these parts of the request were to be considered to be burdensome, the complainant argued that the MOD should have provided him with advice and assistance to allow him narrow down the scope of his request so that it was less of a burden.
10. This decision notice therefore considers these grounds of complaint.
11. By way of background, it is important to note at this stage that the complainant had submitted a request to the MOD (its reference FOI2018/12834) on 15 October 2018 seeking a copy of the second edition of JSP900. The MOD had initially refused to disclose this document in full and the complainant contacted the Commissioner about this refusal. During the course of the Commissioner's investigation of that complaint, the MOD had disclosed a redacted version of this document to the complainant with parts of the document being withheld on the basis of sections 23(1) (security bodies), 24(1) (national security), 26(1)(b) (defence), 27(1)(a) (international relations) and 40(2) (personal data). The Commissioner's findings in relation to the MOD's handling of that request are set out in a separate decision notice, FS50838374.

Reasons for decision

Part 1 of the request

12. Part 1 of the request sought a full list of all editions of the document 'JSP900: UK Targeting Policy' including a clarification as to which was the current policy.
13. As detailed above, as part of its initial response the MOD explained that it held editions 1 and 2 of the document in question. In the internal review response the MOD explained that it also held edition 3 of the

document and edition 4, the latter being in draft form at the point that the request was made.

14. Section 10(1) of FOIA requires a public authority to comply with a request promptly, and in any event, within 20 working days of receipt. As the MOD did not provide the complainant with all of the information it held falling within the scope of part 1 of his request within 20 working days of FOIA it therefore breached section 10(1) of FOIA.

Parts 2 and 3 of the request

15. Section 14(1) of FOIA allows a public authority to refuse to comply with a request if it is considered to be vexatious.
16. 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.
17. 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.
18. 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

19. With regard to the first criterion, the MOD explained that the volume of information in the scope of the request was as follows:
 - Edition 1 (2009) - 65 pages.
 - Edition 2 (2015) - 120 pages, noting that the annexes listed in contents page of part 2 were not published.
 - Edition 3 (2018) - 130 pages in main document and 28 pages of annex material.
 - Edition 4 (2019) - 130 pages in main document and 37 pages of annex material.
20. The total number of pages contained in four editions of the JSP 900 was therefore 510 pages.
21. The MOD explained that it been unable to calculate the total volume of information that may be held in any relevant drafts of each edition, as sought by part three of the request, as it had not conducted a full search to retrieve any that may still be held in the email accounts or electronic and hard copy document holdings belonging to individual members of the targeting community.
22. With regard to the second criterion, the MOD explained that edition 1 of JSP 900 bears little resemblance to edition 2, while edition 3 is similar in format and content to edition 2. There is an overlap in the content of editions 3 and 4; however, there were significant re-writes, quite a lot of content was either removed or expanded. The MOD also explained that the annexes are available only to suitably cleared and qualified individuals within the targeting community. In terms of whether the various editions contained potentially exempt information, the MOD argued that it was clear from its handling of the complainant's request for edition 2 of the JSP 900, and its submissions to the Commissioner in relation to the related complaint, that it had genuine concerns that all editions of JSP 900 contained exempt information. It emphasised the exemptions which it had applied to withhold the redacted parts of edition 2 which it was seeking to withhold in response to the complainant's previous request.
23. With regard to the third criterion, the MOD argued that the material provided to the Commissioner in relation to the linked complaint – including a redacted and unredacted version of edition 2 of the JS P900 – clearly showed that the exempt material was scattered throughout the document. The MOD explained that the total effort expended by it in preparing edition 2 for disclosure was now estimated at being at least 40

working hours which included assessing, reviewing, redacting and preparing the document for release.

24. The MOD argued that it is not unreasonable to assume that a full and proper consideration of the content of the remaining editions (and any drafts of these that may be held) would require a similar effort in terms of staff time and expertise. It explained that expertise in considering requests on this subject matter rests with a small number of suitably qualified and experienced officials within the targeting community and that such officials would not have the capacity to comply with this request without significant impact upon current operational, contingency and policy taskings as well as handling requests promptly from other FOI requesters. Therefore, the MOD argued that the burden of compliance with the request has to be viewed in the context of the demand placed by the complainant on MOD's resources.
25. The MOD noted that the complainant submitted this request the day after it had completed its internal review in relation to his earlier request. It argued that submitting this much broader request, in conjunction with raising a complaint to the Commissioner about the earlier request, had meant that the MOD had not been able to disclose a redacted version of edition 2 in as timely manner as possible.
26. Finally, the MOD acknowledged that FOIA is designed to give individuals the right of access to official information with the intention of allowing them to hold public authorities to account and improve transparency. It argued that the release of a redacted version of JSP 900 edition 2 goes some way to meet this public interest.

The complainant's position

27. The complainant argued that his request was not, as claimed by the MOD, so overly burdensome as to be vexatious. Rather, he was making a fresh and reasonable request following on from information disclosed to him in the internal review response issued in relation to the first request. That is to say, the internal review explained that the second edition of JSP 900 was not the current edition of JSP 900. He therefore submitted a new request seeking clarification of the various versions of JSP 900 that existed and copies of the same. He also argued that it was unfair to accuse him of overburdening the MOD by asking for all versions of the JSP 900 due to the MOD's failure to disclose the full facts when responding to his previous request.¹

¹ The internal review in relation to his previous request explained that the second edition was not the current edition but did not indicate what the current version was.

28. Furthermore, the complainant argued that the engagement of section 14(1) of FOIA by the MOD was based upon a personal attack on his motives. Even if it were the case that the request was overly burdensome and disruptive (which he did not accept) then the MOD could have provided at least some of the information falling within parts 2 and 3 of the request or assisted further by asking the complainant to narrow his request to be less of a burden. The complainant added that the MOD's use of section 14(1) was an irrational conclusion based on its assumption that he was acting with deliberate intent to disrupt the MOD and this was without foundation, other than the apparent prejudice towards him and its efforts to discourage him from lawfully exercising his information rights.
29. The complainant suggested that if it were the case that the second edition of JSP 900 was the current edition then the release of a redacted – albeit a much less redacted version than the one so far released by the MOD – might possibly meet the public interest in disclosure. However, he argued that this could not be the case given that the second edition was not the current version. He argued that in his view there was an overwhelmingly strong public interest in the disclosure of information which clarified the UK's current targeting policy, not simply what was current in September 2015 (the date of the second edition).
30. The complainant provided the Commissioner with detailed submissions to support this position and the Commissioner has summarised these submissions below.
31. The complainant argued that there is a clear and growing public debate over US targeting policy, particularly in relation to apparent assassinations (so called targeted killings outside of armed conflicts) by the Central Intelligence Agency and US Special Forces across Asia and the Middle East and North Africa region by use of drone strikes.
32. The complainant argued that this request concerns pressing questions as to what extent the UK is following the US down this targeting policy slope which breaks a long history of customary international law and undermines the body of international humanitarian law and international human rights law that has been developed to protect the status of civilians in armed conflicts, and the right to life of individuals outside of war.
33. The complainant argued that a clear understanding of these issues can only be fostered with clarity and transparency of the government's position which included the full disclosure of details of the UK's targeting policy. The complainant argued that a number of international civil society organisations, parliamentary inquiries and legal experts attest to the urgent need for clarity of UK targeting policy which is still growing.

34. In order to illustrate this point the complainant cited, amongst other sources, the findings of the All Parliamentary Group on Drones report 2018 which concluded that:

*'The position of the Government on the proper test to be applied to determine who may be targeted in a non-international armed conflict is not clear. The Joint Service Manual on the Law of Armed Conflict does not address the issue of the 'continuous combat function' principle. The Government has confirmed that JSP900: UK Targeting Policy (edition II, September 2015) contains the policy and direction on targeting, and guidance on the processes involved and best practice to apply. However it has confirmed that no copy will be released to Parliament or the public. In the absence of any information on the test the UK armed forces apply when targeting members of ISIL, it is impossible to determine if the targeting process is lawful.'*²

35. And a report of the Joint Committee on Humans Rights:

*'If the availability of drone technology is not to lead to a significant lowering of the level of protection for the right to life, it is important to ensure that there is absolute clarity about the legal frameworks that apply to the use of drones for targeted killing, and that all those involved understand exactly what those legal frameworks require of them.'*³

36. More broadly, the complainant argued that violations of the universal right to life affect us all. The imposition of unaccountable military power over civilian populations in the name of counterterrorism is counterproductive. Terrorism of all kinds must be prevented, but to allow a paradigm shift in the state power over life to pass by in the shadows of secret government policy unchecked is the height of irresponsibility to present and future generations, allowing a far more dangerous state terrorism to prosper at the expense of civil, minority and individual human rights, the rule of law, and international peace and security. In such grave circumstances the complainant argued that there could hardly be a more seriously strong and urgent public interest than that for disclosure of the information falling within the scope of his request.

² APPG on Drones report (2018) <http://appgdrones.org.uk/appg-inquiry-into-the-use-of-armed-drones-working-with-partners/> p. 63

³ Joint Committee on Human Rights 'The Government's policy on the use of drones for targeted killing' <https://publications.parliament.uk/pa/jt201516/jtselect/jtrights/574/574.pdf> paragraph 1.34

The Commissioner's position

37. With regard to the first criterion, the Commissioner accepts that 510 pages is a significant volume of information. She also notes that it is possible that the MOD holds additional information in the scope of the request in the form of drafts. The first criterion is therefore met.
38. With regard to the second criterion, the Commissioner accepts that the MOD's concerns about the information in scope containing potentially exempt information are justified given its response to the complainant's earlier request seeking a copy of the second edition. It is clear that this version of the document contains information which the MOD considers to be exempt from disclosure on the basis of a number of exemptions, namely sections 23(1), 24(1), 26(1)(b), 27(1)(a) and 40(2). Whilst the various editions were subject to re-writes, they obviously contain information on the same issue, namely the UK's targeting policy, and given this the Commissioner accepts that it is plausible to argue that other editions of the JSP900, and indeed any drafts if held, are likely to contain potentially exempt information.
39. With regard to the third criterion, having examined the version of the second edition that the MOD has now provided to the complainant, the Commissioner accepts that any exempt information cannot be easily isolated from non-exempt information. Whilst some parts of the document have been redacted in a broad fashion, eg entire paragraphs or entire pages or sections, other redactions have only resulted in certain lines or particular words being removed. This suggests to the Commissioner that a close and forensic analysis of the documents in the scope of the request would be necessary in order to identify any exempt information. In terms of the burden of undertaking this task, the Commissioner notes that the MOD has estimated that preparing a version of the second edition took 40 working hours. The Commissioner accepts that it is logical to argue that a full and proper analysis of the remaining versions – and any drafts – are likely to take a similar amount of effort. In reaching this finding, the Commissioner appreciates that it could be argued that the work already undertaken in respect of the second edition may mean that it would take less time to prepare the other information falling within the scope of the request for disclosure. However, the Commissioner notes that there were significant re-writes with quite a lot of content either removed or expanded, and thus any 'savings' which may be gained from having already done this work on the second edition are likely to be minimal. In light of this the Commissioner accepts that it could take approximately 160 hours to prepare the four editions for disclosure (including of course the 40 hours work already undertaken in respect of the second edition) and further work should any drafts be located. This is the equivalent of 20 working days at 8 hours work per day.

40. The Commissioner is therefore satisfied that the MOD has demonstrated that the three criteria are met and consequently 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.
41. With regard to the purpose and value of the request, the Commissioner acknowledges the arguments advanced by the complainant in terms of the public interest in this information and she accepts the importance and significance of the information falling within the scope of the request. As perhaps best illustrated by the quote from the APPG, there is a clear and undisputable public interest in the disclosure of the UK's targeting policy, and the Commissioner acknowledges that the complainant has made forceful and persuasive arguments to demonstrate the broader public interest in disclosure of the information on that topic.
42. However, as the complainant himself has argued there is particularly strong public interest in the disclosure of information about the current targeting policy. The Commissioner agrees that the disclosure of the current policy would arguably be of most use to the public. As a result, in the context of assessing the purpose and value of the request she considers that it is important to recognise that this is not limited to the current version; rather it extends to previous versions and any existing drafts. Therefore, in the Commissioner's view whilst the purpose and value of disclosing information on this topic is not disputed, she considers that the justification for making the MOD comply with this request in its entirety and prepare the earlier editions – and any drafts – for disclosure, in addition to current version of JSP 900, is a less compelling one.
43. The Commissioner notes the complainant's point that he had to submit this request in the manner in which he did, ie asking the MOD to identify all versions of the JSP 900 and ask for these to be provided to him given the ambiguity of the MOD's responses to his earlier request seeking just a copy of the second edition. The Commissioner can understand the complainant's desire, following the internal review in relation to that request, to seek clarity as to which was the current edition so that in turn he could seek access to it.
44. Moreover, she is not impressed by the MOD's point that in submitting this request and complaining to the Commissioner about his previous request, this undermined its efforts to provide him with a timely release of the second edition of the JSP 900. The Commissioner notes that the complainant's request for that document alone was submitted on 15 October 2018; the refusal notice issued on 1 February 2019 and the internal review issued on 5 June 2019. In her view this timeline gave the

MOD ample time to determine whether it was prepared to disclose a redacted version of the second edition and she considers it unfair to criticise the complainant for simply exercising his right under the legislation to appeal that refusal to the Commissioner. Nevertheless, this does not mean that the burden and impact on the MOD of answering this subsequent request is reduced or mitigated in some way.

45. On balance, and after careful consideration, the Commissioner has concluded that the burden of complying with the request that would be placed on the MOD in complying with cannot be justified, despite the public interest in disclosure of information on this subject matter and the legitimate purpose and value of the request.
46. Finally, the Commissioner also notes the complainant's suggestion that in handling this present request the MOD could have provided him with more advice and assistance by helping him to narrow down his request so that it would be less burdensome. The Commissioner can understand why a requester would make such a suggestion. However, unlike when public authorities apply section 12 (cost limit) to refuse a request, there is no obligation under FOIA when citing section 14 for a public authority to provide any advice and assistance to help a requester submit a narrower, less burdensome request.

Right of appeal

47. 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

48. 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.

49. 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
Water Lane
Wilmslow
Cheshire
SK9 5AF