

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 27 September 2022

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

### **Decision (including any steps ordered)**

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1. The complainant has requested copies of information contained in reports regarding a patrol conducted by HMS Vigilant. The Ministry of Defence (MOD) stated It would neither confirm nor deny (NCND) holding the requested information, citing the exemptions at sections 24(2) (national security), and 26(3) (defence).
2. The Commissioner's decision is that the MOD was entitled to rely on section 24(2) of FOIA to neither confirm nor deny (NCND) holding the requested information.
3. The Commissioner does not require any steps to be taken as a result of this decision notice.

## Request and response

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4. On the 26 May 2021, the complainant made a request for information in the following terms:

"I should be grateful if you would provide me with the following information.

For the nuclear CASD patrol conducted by HMS Vigilant, which concluded in February 2021, please provide:

A copy of the relevant sections of the post-patrol report (or equivalent) and / or 'lessons learnt' report (or equivalent) relating to coronavirus infections on board the submarine, their impact, and measures to deal with them."

5. On 22 June 2021, the MOD advised their response was going to be delayed, and on 28 June 2021 they responded citing section 24(2) (national security) and section 26(3) (defence) of FOIA to neither confirm nor deny they hold any information in scope of the request.
6. The complainant requested an internal review on 2 July 2021.
7. The MOD provided an internal review on 11 August 2021 in which it maintained its original reliance on section 24 and section 26 of FOIA to neither confirm nor deny holding information in scope of the request.

## Scope of the case

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8. The complainant contacted the Commissioner on 16 October 2021, to complain about the way their request for information had been handled. They said:

"I am concerned about the handling of this request and consider that the decision to withhold information was incorrect. I am therefore writing to ask the Information Commissioner to seek to resolve the matter informally with MoD, or if this is not possible, make a decision on the matter using powers under section 50 of the Freedom of Information Act 2000." And "If the MoD insists on maintaining that it can neither confirm nor deny whether it holds the information I have requested on national security grounds, I should be grateful if the Information Commissioner would investigate whether a certificate has been signed by a Minister of the Crown certifying the exemption, as specified in section 24(3) of the Freedom of Information Act 2000, and

advise me accordingly. If such a certificate has not been obtained, I submit that it weakens the case that the information is as critical to maintaining national security as has been maintained by MoD.”

9. The Commissioners focus of investigation is to look at whether the MOD was entitled to rely on NCND holding the requested information.

## **Reasons for decision**

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### **Neither confirm nor deny (“NCND”)**

10. Section 1(1)(a) of FOIA requires a public authority to inform a requester whether it holds the information specified in the request.
11. The decision to use a NCND response will not be affected by whether a public authority does, or does not, in fact hold the requested information. The starting point, and main focus for NCND in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not a particular type of information is held.
12. A public authority will need to use the NCND response consistently, over a series of separate requests, regardless of whether or not it holds the requested information. This is to prevent a single instance of refusing to confirm or deny being taken by requesters as an indication of whether or not information is in fact held.
13. The MOD has taken the position of neither confirming nor denying whether it holds any of the requested information in its entirety, citing sections 24(2) (national security), and 26(3) (defence) of FOIA. The issue that the Commissioner has to consider is not one of disclosure of any requested information that may be held, it is solely the issue of whether or not the MOD is entitled to NCND whether it holds any information of the type requested by the complainant.
14. Put simply, in this case the Commissioner only needs to consider whether or not the MOD is entitled to NCND whether it holds any information about a specific patrol by HMS Vigilant. The Commissioner has not needed to consider whether the requested information – if held – should be disclosed.

### **Section 24 – National security**

15. Section 24(2) provides an exemption from the duty to confirm or deny where this is required for the purpose of safeguarding national security.

16. The FOIA does not define the term national security. However, in *Norman Baker v the Information Commissioner and the Cabinet Office* (EA/2006/0045 4 April 2007) the Information Tribunal was guided by a House of Lords case (*Secretary of State for the Home Department v Rehman* [2001] UKHL 47) concerning whether the risk posed by a foreign national provided grounds for his deportation. The Information Tribunal summarised the Lords' observations as follows:
- 'national security' means the security of the United Kingdom and its people;
  - the interests of national security are not limited to actions by an individual which are targeted at the UK, its system of government or its people;
  - the protection of democracy and the legal and constitutional systems of the state are part of national security as well as military defence;
  - action against a foreign state may be capable indirectly of affecting the security of the UK; and,
  - reciprocal co-operation between the UK and other states in combating international terrorism is capable of promoting the United Kingdom's national security.
17. The approach that the Commissioner takes to the term 'required' as it is used in this exemption is that this means 'reasonably necessary.' In effect, this means that there has to be a risk of harm to national security for the exemption to be relied upon, but there is no need for a public authority to prove that there is a specific, direct, or imminent threat.
18. Therefore, section 24(2) is engaged if the exemption from the duty to confirm or deny is reasonably necessary for the purpose of safeguarding national security. The Commissioner considers that section 24(2) should be interpreted so that it is only necessary for a public authority to show that **either** a confirmation **or** a denial of whether requested information is held would be likely to harm national security. It is not necessary to show that harm would flow from both.

### **The MOD's position**

19. In its refusal notice, the MOD explained the following in respect of its NCND stance:

"Confirming or denying whether such information is held could be prejudicial to national security because it may provide confirmation or

not of a Continuous At Sea Deterrent (CASD) patrol at that particular time which could assist potential adversaries in determining our operating pattern and patrol capabilities. The cumulative effect of potential adversaries gathering information from various sources could allow them to build a picture of potential or perceived vulnerabilities within certain scenarios, such as coronavirus infections, which could be used to their advantage."

### **The complainant's view**

20. When requesting an internal review, the complainant said:

"The Ministry of Defence has indicated in the public domain that every aspect of the planning and execution of each SSBN patrol is rigorously analysed by its Strategic System Performance Assessment and Analysis Group (SSPAG). It is absurd for MoD to claim that it will neither confirm nor deny that it holds the requested information when it has previously made a virtue of the fact that it reviews SSBN patrols in detail for the very purpose of learning lessons about their execution."

And that "The Ministry of Defence has previously provided information, admittedly in limited amounts, about SSBN patrols in response to past requests for information made by myself and others, and I do not consider there is any reason why such information cannot be provided in this case. If necessary, any detail which is genuinely covered by the section 24 and 26 exemptions can be redacted from the released documentation."

21. In countering this view, the MOD has said:

"It recognises that confirming or denying whether information in scope of your request is held would meet the general public interest in openness and transparency and would provide assurance that the RN had taken precautions in managing SSBN patrols during the ongoing coronavirus pandemic."

And "also noted that confirmation would provide reassurance to the families of submarine crew members that the RN is taking their welfare seriously." "However, if the Department was to confirm or deny that information in scope of your request was held, it would have the effect of undermining the measures in place that contribute to maintaining national security."

22. The MOD also stressed:

"section 24(2) applied because confirming or denying whether information was held would be likely to compromise any operations to protect the security and infrastructure of the UK and increase the risk of harm to the public. Section 26(3) applied because confirming or denying whether information was held would be likely to prejudice the capability, effectiveness, and security of the Royal Navy."

### **The Commissioner's conclusion – engaging the exemption**

23. The Commissioner accepts that this reasoning is relevant to section 24; undermining the ability of the MOD to provide protection to the public and would be harmful to national security. He also notes that the terrorist threat level was, at the time of the request, classified as "substantial" meaning that the Home Office considered that an attack was "likely," thereby potentially increasing the extent of any prejudice following disclosure, or acknowledgement of information in respect of national security. He agrees with the MOD that it is reasonable to proceed on the basis that this includes a threat to the defence of the realm.
24. The next step is to consider whether there would be a causal link between disclosure of the information in question and the predicted outcome of undermining the ability of the MOD to provide effective protection. This could be, for example, by worsening or extending the threat of a terrorist attack. The Commissioner accepts that there is a reasonable likelihood of there being individuals or groups who would seek to exploit this information.
25. The Commissioner recognises, for example, that terrorists can be highly motivated and may go to great lengths to gather intelligence. He acknowledges that gathering information from publicly available sources may be a strategy used by those planning terrorist activities.
26. The Commissioner recognises that the routine confirmation or denial as to whether specific reports were recorded for specific operations would, in itself, paint a picture of what strategic plans are in place and when patrols were being carried out.
27. The MOD has also explained that confirmation or denial would provide information on their resilience and contingency planning. While recognising the positives of transparency it recognises that disclosure may also be useful to "hostile actors" who would be able to "build a picture of potential weaknesses in the UK's national security strategy. This could put the general public at risk, and also hamper future security provisions.

28. In reaching his conclusion in this case, the Commissioner does not dispute the very real risks which exist around the security of the nation. It follows that, when considering the application of section 24, the Commissioner recognises that there may be grounds for issuing a NCND response in respect of what, on the face of it, appears to be harmless information. For example, it may be necessary to NCND holding information on the basis that confirmation (or otherwise) of its existence it may assist terrorists or lone individuals when pieced together with other information they may obtain from other sources. Furthermore, were an attack planned, this may have wider safety implications for the general public, depending on the specific nature of such an attack.
29. In view of the above, the Commissioner finds that it is reasonably necessary for the purpose of national security for the MOD to NCND whether or not the requested information is held. His conclusion is, therefore, that the exemption provided by section 24(2) of FOIA is engaged.

### **The public interest test**

30. Having found that the exemption is engaged, the next step is to consider the balance of the public interest. In forming a conclusion on the balance of the public interest in this case, the Commissioner has taken into account the considerable public interest inherent in the maintenance of the exemption, as well as specific factors that apply in relation to the requested information.

### **Public interest arguments in favour of confirming or denying whether information is held**

31. The Commissioner has taken into consideration the complainant's views, which are included above.
32. The MOD advised that to confirm or deny whether the information is held would demonstrate the MOD's commitment to openness and transparency, provide assurance to the public that incidents of infectious disease occurring on board submarines, if they exist, are investigated and that lessons are learned.
33. It also accepted that confirmation or denial would provide reassurance to the public that appropriate testing and quarantine was in place to detect and respond to Coronavirus outbreaks on submarines during the COVID-19 pandemic.

### **Public interest arguments in favour of maintaining the exemption**

34. The MOD argued that confirming or denying whether it held information "could be prejudicial to National Security because it may provide confirmation or not of a Continuous At Sea Deterrent (CASD) patrol at that particular time which could assist potential adversaries in determining our operating pattern and patrol capabilities. The cumulative effect of potential adversaries gathering information from various sources could allow them to build a picture of potential or perceived vulnerabilities within certain scenarios, such as coronavirus infections, which could be used to their advantage."
35. The news article was based on unofficial statements and commentary, and relied on a line to take which has been used for general responses to press requests. Any confirmation that information is held could be perceived as confirming that the entire story is true. A formal denial that information is held would cause confusion as this would mean that either the story was false or that the RN did not have appropriate systems in place to detect and manage a serious illness outbreak. This would have the potential to be exploited by malicious actors to undermine the credibility of the nuclear deterrent by questioning the integrity of those involved in any patrols, or safety of the policies, processes, and protocols in place.
36. The effective operational capability of RN submarines has been deemed essential for safeguarding national security by successive Governments. Confirming or denying whether a specific post-patrol report is held would provide invaluable information on the movements of specific vessels during a set time-period. This would clearly undermine the RN's ability to safeguard national security and to deliver the UK's nuclear deterrent.
37. And, while it is widely known MOD routinely undertakes CASD patrols, details of when they do are not disclosed, and to confirm this specific information existed would provide the ability to potentially work out patrol patterns. If such information was released, this could compromise future CASD patrols and ongoing/future operations. The MOD is tasked with protecting the security and infrastructure of the UK and to limit the risk of harm to the UK and its people. Therefore, section 24(2) of FOIA neither confirm nor deny applies.

### **The Commissioner's view**

38. Covering those factors in favour of confirmation or denial, the Commissioner recognises that there is a public interest in disclosure of this information, owing to its subject matter. The Commissioner's view is that any information that concerns the efforts of the Royal Navy (RN) to ensure the safety and security of the nation will improve the public's



knowledge and understanding of the work being undertaken by the RN in this vital area.

39. Furthermore, any such protection would be paid for by the public purse. Accordingly, the Commissioner's view is that there is a valid public interest in confirming or denying whether any information is held in order to aid openness, transparency, and accountability.
40. Turning to the public interest in favour of maintenance of the exemption, in any situation where section 24(2) is found to be engaged, the Commissioner must recognise the public interest inherent in this exemption. Safeguarding national security is a matter of the most fundamental public interest; its weight can be matched only where there are also fundamental public interests in favour of confirmation that the requested information is held.
41. In this case the public interest in the maintenance of the exemption concerns preserving the ability of the RN to provide an effective nuclear deterrent. The Commissioner recognises that the nuclear deterrent represents the apex of both the UK's armed forces' capabilities and the national security strategy. Therefore, the potential harm caused by complying with section 1(1)(a) of FOIA is therefore a very serious one with broad and wide ranging consequences. As a result, in the Commissioner's view the public interest weighs very heavily in favour of maintaining the exemption.
42. In conclusion, the Commissioner has recognised the valid public interest in favour of disclosure, given the subject matter of the requested information. He does not, however, believe that it matches the weight of the public interest in avoiding a disclosure that could be detrimental to national security. The finding of the Commissioner is, therefore, that the public interest in the maintenance of the exemption outweighs the public interest in disclosure and so the MOD was not obliged to confirm or deny whether the requested information is held.
43. As the Commissioner has determined that this exemption is properly engaged, he has not found it necessary to consider the other exemption cited.

## **Right of appeal**

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44. 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

45. 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.
46. 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 .....**

**Phillip Angell**  
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