

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

### **Decision notice**

**Date:** 31 August 2022

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

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

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1. The complainant submitted a request to the Ministry of Defence (MOD) seeking a copy of a Watchkeeper's Log for C Company, 2nd Battalion Royal Regiment Fusiliers covering the period of the McGurk's bombing in Belfast in December 1971. The MOD provided the complainant with a copy of the log but redacted information on the basis of the following sections of FOIA: 24(1) (national security), 26(1)(b) (defence), 38(1)(a) and (b) (health and safety) and 40(2) (personal data).
2. The complainant accepted that personal details would be redacted but sought to challenge the MOD's reliance on the exemptions cited to withhold all other information. He also argued that the MOD was likely to withhold more information falling within the scope of his request.
3. The Commissioner's decision is that the MOD is entitled to withhold the redacted information on the basis of sections 38(1)(a) and (b) and 26(1)(b) of FOIA. The Commissioner is also satisfied that on the balance of probabilities the MOD does not hold any further information falling within the scope of the request. However, the Commissioner has concluded that the MOD breached sections 10(1) and 17(3) of FOIA as a result of the delays in processing the request.
4. No steps are required.

## Request and response

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5. The complainant submitted the following request to the MOD on 7 October 2019:

'May I make a request for information, please, which should be easily found in MOD/British Army archives as they are key documents maintained by the British Army at the time. Information from these files was also included in a publication by David Barzilay called 4 Months in Winter, written with the support of MOD in 1972 so I know it exists.

1. Watchkeeper's Log/Diary for C Company, 2nd Battalion Royal Regiment Fusiliers, December 1971. This is the Company-level Diary maintained for C Coy, 2RRF [2<sup>nd</sup> Battalion Royal Regiment], then based in North Belfast, Northern Ireland
2. Tactical Headquarters Diary/Log for 2nd Battalion Royal Regiment Fusiliers for December 1971. This is a battalion-level log for 2 RRF.'

6. The MOD responded on 4 November 2019 and explained that it did not hold any information falling within part 2 of the request. In relation to part 1 of the request, the MOD explained that the work involved in reviewing and preparing the information in scope meant that section 14(1) (vexatious) of FOIA applied to this part of the request. The MOD suggested that the complainant submit a refined request specifying a shorter timeframe, eg 1 December to 6 December 1971.

7. He submitted the following refined request on the same day:

'May I, as advised, (1) shorten the timeframe for consideration to 2nd December – 8th December 1971 inclusive, please.

Also, (2) could you advise whether the search encompasses the following as well as the Operation Archive at Thiepval as it could be that these basic but significant 2 RRF company and Tac HQ files are elsewhere:

Regimental Museum for 2 RRF in Bury and the Imperial War Museum

MOD files stored at the National Archives

Kew Intelligence Corps Archive, Chicksands Bedfordshire

The MOD Archive at Swadlincot, South Derbyshire

The MOD's Sensitive Archive, Portsmouth

Reported databases handed by MOD to Police Service Northern Ireland relating to MOD information during Operation Banner<sup>1</sup>

8. The MOD contacted him on 7 November 2019 and explained that the Regimental Museum for 2RRF in Bury and the Imperial War Museum did not come under its remit. It also explained that it had looked at the MOD files in Kew and the only file that may hold relevant information is WO 305/4277 which is an open file. The MOD also explained that it had already approached the necessary focal points within MOD and it was processing his refined request.
9. The MOD contacted the complainant on 3 December 2019 and confirmed that it held some information that related to 2RRF Watchkeeper Logs but it considered this information to be exempt from disclosure on the basis of section 38 (health and safety) of FOIA and that it needed additional time to consider the balance of the public interest test. The response noted that additional exemptions may also be considered to apply.
10. The MOD contacted the complainant again on 3 January, 31 January, 19 February, 9 March and a number of times in June 2020 and further extended the time it needed to consider the public interest test and provided updates on its progress.
11. The MOD sent the complainant a substantive response on 24 June 2020. The MOD provided him with 52 pages of logs relating to 2RRF which fell within the scope of his request. The response explained that some information had been redacted on the basis of the exemptions contained at the following sections of FOIA: 24 (national security), 26 (defence), 38 and 40 (personal data). In relation to the qualified exemptions, the MOD concluded that the public interest favoured maintaining the information. The MOD also explained why some of the log sheets falling within the scope of the request were missing.
12. The complainant contacted the MOD on 26 June 2020 and queried why some of the log sheets could not be located and also challenged its reliance on the exemptions to withhold parts of the information that had been located. He also asked the MOD to confirm whether there were any other annexes to this file relating to the period, as he knew that the

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<sup>1</sup> The dates covered by the refined request included the bombing of McGurk's bar on 4 December 1971, which for the reasons discussed further below, was of particular research interest to the complainant.

information disclosed was from Annex A of a larger file. He suggested that other annexes could include 'for example, situation reports, intelligence summarises, maps etc, etc'. He contacted the MOD again on 23 July 2020 and raised some additional arguments to challenge some of the redactions.

13. The MOD provided him with a partial response to his queries on 3 September 2020. The MOD confirmed that it was of the view that the exemptions had been applied correctly and that the copies of the 2RRF log sheets are the cleanest copies that it could achieve. The response did not refer to the complainant's query as to whether there were any other annexes in the file relating to this period.
14. The complainant contacted the MOD on the same day and asked it to undertake a formal internal review of its handling of this request. He explained that he could understand why names and addresses were redacted but sought to challenge the decision to redact the remaining information.
15. The MOD informed him of the outcome of the internal review on 17 February 2021. The MOD accepted that its delays in handling this request meant that it had breached the procedural requirements of FOIA set out at sections 10 and 17 of the legislation. In relation to the application of the exemptions, the MOD explained that it was satisfied that these had largely been correctly applied, the only exception to this were a number of redactions scattered throughout the log sheets which it was now content to disclose to him. Copies of the less redacted log sheets were provided to him.

## Scope of the case

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16. The complainant contacted the Commissioner on 23 March 2021 in order to complain about the MOD's handling of his request. He raised the following grounds of complaint:
  - Complaint 1: He was unhappy with the MOD's delays in processing his refined request of 4 November 2019.
  - Complaint 2: He disagreed with the MOD's reliance on the exemptions cited in the refusal notice of 24 June 2020 and the internal review of 17 February 2021 to withhold information. The only exception to this was in relation to the MOD's decision to withhold 'the names of people potentially still alive, addresses and car registration etc' which he accepted could be redacted.
  - Complaint 3: He was unhappy with the MOD's failure to provide key parts of the requested log sheets, namely log sheets 5 and 7

for 4 December 1971 and logs sheets 3 and 4 for 5 December 1971.

- Complaint 4: In line with his query of 26 June 2020, he alleged that the MOD had not provided annexes from the Watchkeeper's Log which could include information relevant his refined request.

## **Reasons for decision**

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### **Complaint 1**

17. 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.'

18. 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.

19. Under section 17(3) a public authority can, where it is citing a qualified exemption, have a 'reasonable' extension of time to consider the balance of the public interest. The Commissioner considers it reasonable to extend the time to provide a full response, including public interest considerations, by up to a further 20 working days, which would allow a public authority 40 working days in total. The Commissioner considers that any extension beyond 40 working days should be exceptional and requires the public authority to fully justify the time taken.

20. In this case, as the chronology above explains, the complainant submitted his request on 4 November 2019 and the MOD issued its first public interest test extension letter to him on 3 December 2019. Following further extension letters, the MOD issued him with a substantive response to his request on 26 June 2020, clearly in excess of 40 working days.

21. As part of his investigation the Commissioner asked the MOD to explain the reasons for this delay.

22. In response the MOD explained that the processing of the refined request required the FOI team at HQ 38 (Irish) Brigade to conduct a careful line by line assessment of the Watchkeeper log entries in consultation with the Police Service Northern Ireland (PSNI) and required the necessary Government security and document clearances.

The MOD noted that the complainant was kept regularly updated (on 9 March and in June 2020). The MOD explained that from these updates it became clear that finalising and clearance of the response was delayed by the national lockdown and restrictions implemented to prevent the spread of COVID-19 pandemic.

23. The MOD also explained that during the processing of this request, the MOD received three more information requests of equal complexity from the complainant, all of which involved historic documents which required careful assessment by the same core subject matter specialists within the department.
24. The Commissioner is sympathetic to the pressures the MOD faced in processing this request both in terms of dealing concurrently with similarly complicated requests from the complainant, and from March 2020 onwards, with the unprecedented difficulties presented by the Covid pandemic. Nevertheless, the Commissioner finds that the time taken to process the request was not a reasonable one, particularly taking into account the fact that the request was submitted on 4 November 2019, a number of months before restrictions as a result of the pandemic came into effect. This therefore presents a breach of section 17(3) of FOIA. Furthermore, by failing to provide the complainant with the information it considered to be disclosable within the time period set out at section 10(1) of FOIA the MOD also breached that provision of the legislation.

## **Complaint 2**

25. As noted above, the complainant did not seek to dispute the MOD's decision to redact material which contained 'the names of people potentially still alive, addresses and car registration etc'. The MOD primarily had redacted such information on the basis of sections 38(1)(a) and (b) and 40(2) of FOIA and therefore the Commissioner has not considered such redactions as part this decision notice. The Commissioner notes that a significant portion of the redactions to the logs fall within this category of information.
26. The Commissioner has considered whether the remaining information which has been redacted is exempt from disclosure on the basis of the exemptions cited by the MOD.

## **Section 38 – health and safety**

27. The MOD relied on sections 38(1)(a) and (b) to redact various parts of the log. This states that:

'(1) Information is exempt information if its disclosure under this Act would, or would be likely to-

- (a) endanger the physical or mental health of any individual, or
- (b) endanger the safety of any individual.'

### The MOD's position

28. In support of its reliance on this exemption the MOD argued that to release information which contains personal data and individuals' involvement in incidents could, even now after 49 years, endanger the physical or mental health of any individual. The MOD argued that the risks of reprisals still exist today despite the age of the information and those who could be identified, or re-identified, from the withheld information would not expect this information to be disclosed. Therefore, the MOD argued that consideration must be given to the wider impact of release. In particular, it explained that consideration must be given to families who could be linked to the details recorded within the withheld information and if such details were disclosed this could put their safety at risk. The MOD explained that the log sheets contain the names of individuals that came to the attention of either the civil police or military and also names or information that could enable others to identify some of those who provided sensitive information to the security forces at the time. The MOD argued that it is possible that the release of such information could enable them to be located and consequently targeted or attacked, directly or indirectly. Therefore the MOD argued that sections 38(1)(a) (and b) applies to the risk to the health and safety of the families concerned, and/or surviving relatives.
29. The MOD argued that the exemption was engaged on the basis that disclosure 'would' endanger individuals' safety rather than the lower level of 'would be likely to'.
30. In its submissions to the Commissioner the MOD explained that the application of the exemptions to this request was consistent with application of exemptions in the case of Ciaran Arthurs v Information Commissioner<sup>2</sup> (EA/2016/0060). That case considered the release of material contained within a Watchkeepers' Log as part of a wider Commander's Diary to which the same exemptions cited in this present case had been applied.

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<sup>2</sup> This Tribunal case involved a request submitted to The National Archives for document reference WO 305/4617 which was the Headquarters Northern Ireland Log for December 1971. The MOD were joined to the appeal given that the document sought originated from that department.

[https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1947/Arthurs,%20Ciaran%20EA.2016.0060%20\(15.01.17\).pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1947/Arthurs,%20Ciaran%20EA.2016.0060%20(15.01.17).pdf)



### The complainant's position

31. The complainant argued that whilst he understood that personal details and addresses needed to be redacted for safety reasons, he anticipated that much of the context of the information need not be redacted as he could cross reference it with 39 Brigade Commander's Diary and Headquarters Northern Ireland Logs already in his possession. He also queried why after nearly half a century such redactions were necessary.

### The Commissioner's position

32. In order for a prejudice based exemption such as section 38 to be engaged the Commissioner considers that three criteria must be met:

- Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.

33. With regard to the first criterion, the Commissioner is satisfied that the potential prejudice described by the MOD clearly relates to the interests which the exemptions contained at sections 38(1)(a) and (b) are designed to protect. With regard to the second criterion, the Commissioner notes that the MOD's submissions focus mainly, albeit not exclusively, on the disclosure of information about individuals, which for the reasons set out above is information which is outside the scope of this complaint (and in any event would also be caught by the MOD's application of section 40(2) of FOIA). However, beyond such information the Commissioner is satisfied that there is a causal link between the disclosure of the remaining information withheld on the basis of sections 38(1)(a) and (b) and the endangerment to the health and safety of the individuals. The Commissioner has reached this finding given the content of the information itself. He is satisfied that, as the MOD has argued, disclosure would result in families being linked to the details



recorded within the withheld information. The Commissioner is satisfied that disclosure of such information would put their health and safety at risk, including specifically by allowing links to individuals who provided authorities with information at the time to be made.

34. With regard to the third criterion, the Commissioner appreciates that there has been a considerable passage of time between the creation of the information and the request. However, the Commissioner is conscious of MOD's evidence (and the Tribunal's acceptance and comments on it) in the case referred to above. In relation to the history of the Troubles in Northern Ireland, the present security threat (at the time of that request in 2015) and the risks of disclosing information from the Watchkeeper Logs that were the focus of that request the Tribunal stated:

'88. [the MOD's] statement sets out in some detail the history of The Troubles in Northern Ireland and the present security threat. Most significantly, (i) the threat from terrorism remains assessed as "severe", meaning an attack is "highly likely"; (ii) continuing hostilities exist within the community, as more recent incidents have shown; and (iii) the McGurk bar bombing is still a source of tensions, with a memorial recently being vandalised. The Tribunal agrees that this is not a case that can be characterised simply as historic, although it has its roots in The Troubles.

89. The Upper Tribunal judgment of *Keane v IC, Home Office and MPS* [2016] UKUT 0461 (AAC) upheld the application of the s.24(1) (national security) and s.38(1) (health and safety) exemptions in respect of material from TNA covering a period from 1890-1910. The information in the present case is considerably more recent.'

35. Although the request which is the focus this complaint dates from November 2019 as opposed to 2015, the Commissioner considers the Tribunal's finding that the request could not be considered to be historic to be equally relevant to this case. The Commissioner also notes that at the point that this request was submitted the threat from terrorism in Northern Ireland remained assessed as 'severe'. In light of this, and again taking into account the content of the withheld information, the Commissioner is satisfied that there is a real and significant risk to the health and safety of individuals being harmed if the information was disclosed. The Commissioner is also satisfied that the risk of prejudice meets the higher threshold of 'would' endanger.
36. In reaching this conclusion, the Commissioner has given careful consideration to whether, as the complainant suggests, further information could be disclosed without risking the health and safety of individuals. However, for the reasons set out above the Commissioner is

satisfied that this is not case, including for contextual information which contains the personal details and addresses of individuals.

### **Public interest test**

37. Section 38 is a qualified exemption and therefore subject to the public interest test set out in section 2(2)(b) of FOIA. The Commissioner has therefore considered whether in all the circumstances of the case the public interest in maintaining the exemptions outweighs the public interest in disclosing the withheld information.

#### Public interest in disclosing the information

38. The MOD acknowledged that there was a public interest in disclosure of the requested information in order to meet the desirability of greater openness and transparency for the purposes of increasing public understanding in relation to incidents surrounding the McGurk's Bar bombing on 4 December 1971. The MOD noted that the British Army's role in Northern Ireland is a matter of historic and legitimate public interest. The MOD further acknowledged that it is desirable that its conduct, policies and activities should be as open as security considerations will allow which will contribute to public support of its operations and potentially aid the peace and reconciliation process.
39. The complainant explained that the intention of his request was to access information relating to the bombing of the McGurk's Bar on 4 December 1971. More specifically, his request was targeted at MOD records from the British Army battalion resident in the area at the time of the explosion, namely 2RRF.
40. The complainant explained to the Commissioner how members of his family had been murdered or injured in the attack and that he also acted as an advocate for many other families impacted by the bombing. He argued that there was a compelling public interest in disclosure of the information, particularly if it related to the bombing and 'subsequent state cover-up'.<sup>3</sup> Furthermore, the complainant argued that given the history of this case and the 'subsequent discoveries I have made regarding the police and British Army cover-up, I believe all of these taken together...amounts to an on-going attempt to withhold critical evidence from our families and legal representatives.'

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<sup>3</sup> In the aftermath of the bombing the police wrongly briefed politicians and the public that the attack had been an IRA 'own goal'. Some years after the bombing a member of a loyalist paramilitary group was convicted for these murders.

### Public interest in maintaining the exemption

41. The MOD argued that despite the public interest in disclosure of the information the public interest remained in favour of ensuring that the health and safety of individuals was not harmed and therefore the redacted information should be withheld.

### Balance of the public interest arguments

42. The Commissioner agrees that there is clear and significant public interest in the disclosure of information regarding the British Army's role in Northern Ireland. Such disclosures can not only assist with increasing public understanding of particular incidents, such as the McGurk's Bar bombing as in this case, but as the MOD suggests, more broadly potentially contribute to the peace and reconciliation process.
43. Furthermore, in the particular circumstances of this case the Commissioner accepts that the inaccurate nature of briefings provided to politicians and the public in the immediate aftermath regarding responsibility for the bombing adds to the public interest in disclosure of any relevant information which would shed light on that particular issue. More broadly, the Commissioner is also conscious of the more recent developments in respect of this case, including a finding by Northern Ireland's Police Ombudsman in 2011 which identified investigative bias in how the Royal Ulster Constabulary (RUC) handled the case and a later report by the PSNI's Historical Enquiries Team (HET) which reached a different verdict; it claimed there was no evidence of any bias on the part of the RUC. Again, the Commissioner acknowledges that such ongoing controversy regarding the investigation of the bombing arguably adds further to the public interest in disclosure of any information related to it.
44. However, the Commissioner considers there to be a very significant public interest in protecting the health and safety of individuals. In his view despite the strong public interests in disclosure in this case, these are outweighed by the greater public interest in ensuring that such individuals are not harmed.

### **Section 26 - defence**

45. There is a small amount of information which the MOD sought to withhold on the basis of section 26(1)(b) of FOIA which is not covered by section 38(1), does not identify particular individuals and therefore falls to be considered as part of this ground of complaint.
46. Section 26(1)(b) states that information is exempt if its disclosure would, or would be likely to, prejudice the capability, effectiveness or security of any relevant forces.

### The MOD's position

47. The MOD explained that although the passage of time can be a factor in diminishing the applicability of exemptions to information, some of the tactics, techniques and procedures used in the period covered by the request are the same as, or very similar to, those employed by UK Forces today. The MOD argued that revealing such information could give an insight into defence capabilities, assisting those with hostile or criminal intent to compromise operational security or develop countermeasures that would undermine defence capabilities.

### The Commissioner's position

48. In considering whether section 26(1)(b) applies the Commissioner needs to consider whether the three criteria set out above at paragraph 32 are met.
49. With regard to the first criterion, the Commissioner is satisfied that the potential prejudice described by the MOD clearly relates to the interests which the exemption contained at section 26(1)(b) is designed to protect. In terms of the second criterion, and having taken into account the content of the withheld information, the Commissioner is satisfied that there is a causal link between disclosure of the information and prejudice occurring. Again, given its content and taking into account the MOD's submissions about the relevant techniques in the information to current operations, he is also satisfied that the third criterion is met and that disclosure would be likely to prejudice the interests set out at section 26(1)(b). In the context of the applicability of this exemption, and the content of the information, the Commissioner has also noted the findings of the Tribunal in the previously mentioned case in respect of the application of section 26:

'101...the Tribunal's approach to judgements involved in assessing damage to national security and defence acknowledges the relevant institutional competence of the public authority which makes the assessment. Precisely the same approach has been applied in the context of this case, where the Ministry of Defence has made an informed assessment based on its own institutional competence and having sought guidance from the relevant government and military departments'.

50. Section 26(1)(b) is therefore engaged.

### **Public interest test**

51. Section 26 is a qualified exemption and therefore subject to the public interest test.

Public interest arguments in favour of disclosing the information

52. The complainant's arguments for disclosing the information are set out above.
53. For its part, the MOD acknowledged that disclosure of information withheld on the basis of this exemption would demonstrate its commitment to the general obligations of openness and transparency required by FOIA and provide the public with an insight into the extent and nature of the conduct of UK Armed Forces. In particular, the withheld information would provide insight into the role of both Army & other Government departments, in how they conducted their work and interacted with other security forces and agencies during Op BANNER.

Public interest arguments in favour of maintaining the exemption

54. The MOD argued that any information that would impact upon the ability of British Forces and their Allies to deliver or support the UK's defence objectives could not be in the public interest.

Balance of the public interest arguments

55. For the reasons set out about above the Commissioner acknowledges that there is a public interest in disclosure of information falling within the scope of this request. However, in respect of the particular information to which the Commissioner has considered the application of section 26(1)(b) (ie the information which is not exempt on the basis of section 38 or out of scope of the complaint), in the Commissioner's view such information would not meet or advance the particular arguments identified by the complainant. In contrast, the Commissioner considers there to be a significant, and ultimately compelling, public interest in protecting the capability and effectiveness of the armed forces. He has therefore concluded that the public interest favours maintaining the exemption.

**Complaint 3**

56. The complainant raised concerns about the MOD's failure to provide specific log sheets, namely log sheets 5 and 7 for 4 December 1971 and logs sheets 3 and 4 for 5 December 1971.
57. The MOD's response to the complainant of 24 June 2020 explained that such sheets could not be provided for the following reasons:  

'I have numbered the log sheets for ease of reference. Please note page 20 dated 4 December 1971, serial 5 and 7 are missing, we believe that this is due to the way the information was scanned on, if you look carefully you may be able to make out some of the

information it appears that the pages have been scanned on top of each other.

You will also notice on page 26 the log sheet is dated 31 December 1971 and on page 27 the log sheet is dated 31 December 1971. I believe that these pages have been incorrectly dated by the unit at the time as the serials run in sequence. Page 28 is dated correctly [as 5 December] however the serial numbers start of [off] at 149 and end at serial 62, I believe that again human error has numbered the log sheet incorrectly as the serial Date Time and Group (DTG) also run in sequence.

On page 30, log sheet dated 5 December 1971, finishes at sheet 7, on page 31 the date is still 5 December 1971 however it jumps to Sheet No 19. We have searched the tapes in which these records are stored on and we have been unable to locate the missing log sheets. As part of our search for information we have approached all locations where the missing information may be stored, however, we have been unable to locate any further copies of the logs'.

58. As part of his investigation the Commissioner sought clarification from the MOD as to what happened to the original logs sheets that had been electronically scanned. In response the MOD explained that the original paper copy of the Watchkeeper log had not been retained. The MOD referred the Commissioner to its submissions on a related complaint from the complainant which he was investigating in which it explained that:

'The amount of material held in the early 1970s is limited in scope and mainly stored on microfilm/microfiche. As the hard copy originals of this material are not held, it is believed that hard copy material was destroyed once it was copied to microfilm/microfiche. The quality of the microfilm/microfiche items can vary significantly from very good readable copies to nearly illegible copies. Recent technology has allowed Op Archive staff to provide more legible copies in some cases, but this is not always possible.'

59. The MOD noted that it was regrettable the electronic version was corrupted and the original data had been lost.
60. 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.
61. 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.

62. In applying this test the Commissioner will consider the scope, quality, thoroughness and results of the searches, and/or other explanations offered as to why the information is not held.
63. In the circumstances of this case, the Commissioner is satisfied that having carefully examined the log sheets that have been disclosed to the complainant, the MOD's response of 24 June 2020 provides a logical explanation as to why the sheets 5 and 7 for 4 December 1971 are not held. The Commissioner is satisfied that it appears that from the log sheets that there has been an error in the scanning process resulting in sheets 5 and 7 for 4 December 1971 not being held on the electronic version of the log retained by the MOD.
64. Furthermore, the Commissioner is also satisfied that having examined the log sheets, he considers the MOD's explanation as to why sheets 3 and 4 of 5 December 1971 appear to be missing to be a reasonable one. That is to say, they are not missing rather they were mis-dated as log sheets 3 and 4 for 31 December 1971 when they were originally created.
65. In respect of the actual missing sheets for 4 December 1971, in light of the MOD's response to his queries during his investigation the Commissioner is satisfied that hard copies of the Watchkeeper log have not been retained and cannot therefore be used as a separate source in which to provide the complainant with copies of the missing sheets 5 and 7.
66. On the balance of probabilities the Commissioner is therefore satisfied that the MOD does not hold copies of the further log sheets identified by the complainant.

#### **Complaint 4**

67. The complainant's submissions to the Commissioner in relation to this ground of complaint were as follows:

'I would also have concerns that MOD has left out whole annexes from the request as well as the missing and out-of-sequence pages [ie ground of complaint 3].

For example, the files which were redacted are Battalion level logs from Annex A. There may be other Annexes including relevant information in the same and/or related file:

- A. Duty Officer's Log
- B. Messages connected with the Log
- C. Operation orders and instructions issued



- D. Operations orders and instructions received
- E. Sitreps issued
- F. Orders of battle and location reports issued
- G. Intelligence reports and summaries issued; Appreciations made
- H. Administrative orders and instructions issued
- J. Administrative orders and instructions received (my note: no letter "I" in the list as per the document itself)
- K. Administrative reports and bulletins; ammunition returns; field strength returns
- L. Standing orders issued
- M. Commander's policy and demi-official letters
- N. Action reports (if required)
- O. Other papers, e.g., Maps and diagrams, air photos, reports from sub units
- P. Periodical summaries of operations
- Z. Top Secret Supplementary Diary'

68. In the Commissioner's view the complainant's refined request specifically sought copies of the 'Watchkeeper's Log/Diary for C Company, 2nd Battalion Royal Regiment Fusiliers' for the dates he specified. Therefore, the Commissioner is satisfied that this request would not cover any documents beyond the log/diary in question.
69. However, as part of his investigation of this ground of complaint the Commissioner sought clarification from the MOD as to the nature and structure of the requested log/diary and whether in its view the additional documents, labelled by the complainant as 'A to Z', would form part of this log/diary.
70. In response the MOD noted that the complainant was advised on 4 November 2019 that the only information held in scope of his original request was the Watchkeepers' Logs for 2RRF. The MOD explained that

the refined request was therefore understood by it to be specifically seeking an extract from the 2RRF Watchkeeper's Log.

71. With regard to the structure of a Watchkeeper's Log (sometimes referred to as a Duty Officer's Log), the MOD explained that this is a contemporaneous chronological record created by a designated 'watchkeeper'. The role of the Watchkeeper is to act as the first point of contact within a unit or headquarters. They maintained a log of all the communications received by the unit (whether they were in the form of telephone calls, signals or radio messages) as well as noting any outward communications and actions taken as a result of those calls. The log is not a verbatim account of these calls but should capture the key points.
72. The MOD explained that at the point the log which is in the scope of this request was created, logs were created by a Watchkeeper typing individual entries into a standard form as and when necessary. The MOD explained that the Log has no annexes or supplementary pages and consists solely of the forms that were completed during each 'watch'. The MOD explained however that Watchkeeper Logs could be collated and form an Annex within a Commander's Diary.
73. The MOD suggested that the list of documents which the complainant had listed in his submissions to the Commissioner had been released to him by the MOD in response to a separate FOI request in which the complainant had himself referred to the Duty Officer's Log as 'Annex A' to a Commander's Diary.
74. The MOD further explained that a 'Commander's Diary' is the term used to describe a collection of papers that are collated to provide an operational account of activities undertaken within a unit during a specified period. The MOD noted that while there was a standard form that could be used to index such diaries, whether Regimental or Brigade level, each diary did not have to contain all annexes listed on that form.
75. Finally, the MOD explained that it had not been able to locate any 'diary' relating to 2RRF or any of its companies for the period which the complainant was interested in.
76. Based on the MOD's description of the purpose and structure of a Watchkeeper's Log the Commissioner is satisfied that the additional documents described by the complainant would not be expected to form part of such a log. Furthermore, the Commissioner notes that the MOD has confirmed that the Log in question does not contain any annexes or supplementary pages. In light of this the Commissioner is satisfied that there are not, as the complainant suggested, missing annexes to the Log which the MOD has failed to provide him with in response to this request.

## Other matters

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77. FOIA does not impose a statutory time within which internal reviews must be completed, albeit that the section 45 Code of Practice<sup>4</sup> explains that such reviews should be completed within a reasonable timeframe. The Commissioner expects that most internal reviews should be completed within 20 working days, and even for more complicated requests, reviews should be completed within a total of 40 working days.<sup>5</sup>
78. In this case the complainant requested an internal review of the MOD's initial response on 3 September 2020 and the MOD informed him of the outcome of the review on 17 February 2021.
79. In respect of the delay, the MOD explained that it processed this internal review as quickly as possible in conjunction with other resource demands and the fact that they were reliant on the availability of subject matter experts who processed the request. The MOD noted the review involved independent scrutiny of 52 pages of information and that this was one of three internal reviews that were being processed for the complainant at the same time.

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<sup>4</sup> <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

<sup>5</sup> <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/request-handling-freedom-of-information/#internal>

## Right of appeal

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80. 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)

81. 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.

82. 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**