

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

### **Decision notice**

**Date:** 9 January 2023

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

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

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1. The complainant requested information relating to a near miss incident involving a Royal Navy submarine and a ferry in 2018. The Ministry of Defence (MOD) confirmed that it held information falling within the scope of the request but that it considered this to be exempt from disclosure on the basis of sections 24 (national security), 26(1)(b) (defence), and 44(1)(a) (statutory prohibitions on disclosure) of FOIA. The MOD also refused to confirm or deny whether it held information in respect of one part of the request, in reliance on section 40(5B) (third party personal data).
2. The Commissioner's decision is that the MOD was entitled to rely on section 26(1)(b) in respect of the withheld information, and section 40(5B) in respect of the refusal to confirm or deny that information was held. The Commissioner does not require the MOD to take any further steps.

### **Request and response**

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3. On 18 July 2020, the complainant wrote to the MOD and requested information in the following terms:

"I should be grateful if you would provide me with the following information held by the Ministry of Defence relating to the near miss incident involving a Royal Navy submarine and the car ferry Stena Superfast VII in the North Channel on 6 November 2018

(<https://www.gov.uk/maib-reports/near-miss-between-ro-ro-ferry-stena-superfast-vii-and-royal-navy-submarine>).

- The final report of the Ministry of Defence investigation into the incident, including recommendations and lessons learnt.
- Copies of all correspondence between the Ministry of Defence and Marine Accident Investigation Branch relating to the incident.

Please also inform me what corrective or disciplinary action was taken towards the Royal Navy submarine personnel involved as a result of the incident.”

4. The MOD responded on 22 September 2020. The MOD stated that the requested information was exempt from disclosure on the basis of sections 26(1)(b) (defence), 40(2) (personal data) and 44(1)(a) (statutory prohibitions on disclosure) of FOIA.
5. The complainant requested an internal review on 18 October 2020, and the MOD provided him with the outcome of that review on 28 July 2021. The MOD upheld its application on the exemptions cited, albeit that it now cited section 40(5B)(a)(i) to neither confirm nor deny that it held personal data. It also sought to rely on section 24(1) of FOIA (national security).

### **Scope of the case**

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6. The complainant contacted the Commissioner on 3 October 2021 to complain about the way their request for information had been handled.
7. The complainant confirmed that he accepted the MOD's reliance on section 44(1)(a) in respect of part 2 of the request, ie correspondence between the MOD and the Marine Accident Investigation Branch (MAIB). Accordingly his complaint related only to part 1 (the final report) and part 3 (details of corrective or disciplinary action) of the request. With regard to part 3 the complainant confirmed that he was content to exclude the names of any individuals or information that would allow the identification of individuals by the public.

## Reasons for decision

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### Section 26: defence

8. Section 26(1)(b) of FOIA provides an exemption where disclosure would, or would be likely to, prejudice the capability, effectiveness or security of any relevant forces. The MOD claimed reliance on section 26(1)(b) in respect of the withheld information relating to part 1 of the request.
9. In the Commissioner's opinion, three criteria must be met in order to engage a prejudice based exemption:
  - first, 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.
10. The MOD argued that disclosure of the withheld information would enable hostile actors and potential aggressors to understand the way the UK's submarine flotilla operates. The MOD maintained that this would provide them with an opportunity to target, disrupt and degrade a crucial element of Armed Forces capability.
11. The MOD confirmed that it was applying the higher threshold of prejudice, ie "would" as opposed to "would be likely". The MOD provided the Commissioner with more detailed information to support the application of this exemption. However, these submissions refer to information which is itself sensitive and therefore such submissions cannot be set out in this decision notice.
12. The Commissioner accepts that the type of harm that the MOD believes would occur if the information was disclosed is applicable to the interests protected by section 26(1)(b) of FOIA. Having

considered the submissions provided to him by the MOD, the Commissioner is satisfied that disclosure of this information clearly has the potential to harm the capability and effectiveness of UK forces. The Commissioner is therefore satisfied that there is a causal link between the potential disclosure of the withheld information and the interests which section 26(1)(b) is designed to protect. He is further satisfied that the prejudice identified by the MOD can be correctly categorised as real and of substance.

13. The Commissioner is also satisfied that the likelihood of prejudice occurring if the withheld information was disclosed is clearly one that is more than hypothetical. Rather, taking into account the arguments set out in the MOD's submissions to the Commissioner, he is satisfied there is a real and significant risk of this prejudice occurring as the information would assist aggressors as claimed by the MOD. He also accepts that the higher threshold of 'would' prejudice is met.
14. The Commissioner therefore finds that section 26(1)(b) is engaged in respect of this portion of the withheld information.

#### **Public interest in maintaining the exemption**

15. The MOD maintained that the public interest clearly favoured the protection of sensitive details regarding operational capabilities of the submarine. It also favoured protection of tactical information regarding the operation of the UK's submarine flotilla.
16. The MOD argued that it would not be in the public interest to disclose information that would assist hostile actors' efforts to understand, and undermine, the effectiveness of UK armed forces, particularly regarding nuclear submarines.

#### **Public interest in disclosure**

17. The MOD recognised that disclosure of the withheld information would demonstrate the MOD's commitment to transparency and openness in defence matters. It would provide reassurance to the public that such incidents are investigated thoroughly in order to ensure lessons are learned to avoid similar occurrences in the future.
18. The complainant argued that the MOD had been able to release information relating to similar incidents without compromising national security or operations of the armed forces. He believed that there were strong public interest and public safety grounds for disclosing at least some of the requested information.

## **Balance of the public interest**

19. The Commissioner agrees with the complainant that there is a significant public interest in the disclosure of information about nuclear submarines. In particular there is a legitimate interest in informing the public about matters of public safety.
20. The Commissioner notes that, as referred to in the complainant's request, a report into the incident has been published by MAIB. The report includes factual information regarding the incident, analysis and recommendations. The Commissioner considers that the level of detail in the MAIB report contributes significantly to the public interest in disclosure.
21. With regard to the withheld information, the Commissioner is mindful that the MOD has demonstrated that disclosure would undermine the effectiveness of the UK's nuclear submarine flotilla. Furthermore disclosure would assist hostile actors and potential aggressors. The Commissioner considers this to be clearly against the public interest.
22. The Commissioner is also mindful that the MOD has demonstrated that disclosure of the information would, rather than simply being likely to, result in prejudice. In the Commissioner's opinion this adds further weight to the public interest in maintaining the exemption.
23. For the reasons set out above the Commissioner finds that the public interest in maintaining the exemption at section 26(1)(b) outweighs, by a clear margin, the public interest in disclosure.

## **Section 40(5B)(a)(i) – neither confirm nor deny that personal data is held**

24. Section 40(5B)(a)(i) of FOIA provides that a public authority may refuse to confirm or deny that it holds information if doing so would contravene any of the principles relating to the processing of personal data (the DP principles), as set out in Article 5 of the UK General Data Protection Regulation (the UK GDPR).
25. Therefore, for the MOD to be entitled to rely on section 50(5B) of FOIA in this case, the following two criteria must be met:
  - Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data (ie someone other than the requester); and
  - Providing this confirmation or denial would contravene one of the DP principles.

**Would the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?**

26. Section 3(2) of the Data Protection Act 2018 (the DPA) defines personal data as:
- “any information relating to an identified or identifiable living individual”.
27. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural, or social identity of the individual.
28. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
29. The complainant confirmed to the Commissioner that he was content to exclude information which named or would allow identification of any individuals involved.
30. The MOD maintained that confirming or denying whether information was held in respect of part 3 of the request would necessarily reveal whether or not corrective or disciplinary action had been taken in respect of any individual involved in the incident. The MOD considered that such information would comprise personal data relating to any such individuals, therefore confirmation or denial would disclose their personal data.
31. The Commissioner agrees with the MOD's position. He observes that the act of disclosing whether or not relevant information was actually held would in fact inform the public as to whether or not action had been taken. This would itself reveal something about the individual or individuals, whether or not they were publicly named.
32. The Commissioner has therefore gone on to consider the second criterion of the test, ie to determine whether such a confirmation or denial would contravene any of the DP principles.
33. The most relevant DP principle in this case is principle (a). Article 5(1)(a) of the UK GDPR states that:
- “Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”.

34. In this case, the personal data would be processed at the point that the MOD confirmed or denied that it held it in response to the request. This means that the MOD may only confirm or deny that it holds the information if to do so would be lawful, fair and transparent.
35. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing, ie confirmation or denial as to whether the requested information is held. The processing must also be generally lawful.

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

36. Article 6(1) of the UK GDPR specifies that "processing shall be lawful only if and to the extent that at least one of the" lawful bases for processing listed in the Article applies.
37. The Commissioner considers that the lawful basis most applicable is Article 6(1)(f) which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child".<sup>1</sup>

38. Accordingly, in considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:

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<sup>1</sup> Article 6(1) goes on to state that:

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".  
However, section 40(8) of FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:

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

- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
  - ii) **Necessity test:** Whether confirmation or denial as to whether the information is held is necessary to meet the legitimate interest in question;
  - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
39. The Commissioner further considers that these tests should be considered in sequential order, ie if the legitimate interest is not met then there is no need to go on to consider the necessity test, and so on.

### **Legitimate interests**

40. In considering any legitimate interest(s) in confirming or denying whether the information is held in response to an FOIA request, the Commissioner recognises that a wide range of interests may be legitimate interests.
41. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
42. The MOD acknowledged that the legitimate interest in transparency in this case. It recognised that confirming or denying that information was held would inform the public as to whether or not action was taken against one or more individuals following the near miss incident. It accepted that this would provide reassurance to the public that the Royal Navy takes its obligations to protect the safety of lives (military and the public) and the protection of its sea-going vessels seriously.

### **Is disclosure necessary?**

43. Having identified a legitimate interest, the next step is to consider whether disclosure of the personal data in question is actually necessary to meet that legitimate interest or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under FOIA must

therefore be the least intrusive means of achieving the legitimate aim in question.

44. The Commissioner accepts the MOD's assessment of the legitimate interest as set out above. He is of the opinion, however, that publication of the MAIB report adequately serves the legitimate interest identified. The Commissioner does not believe that knowing whether any individual was subject to further action would, in practical terms, better inform or reassure the public as to the MOD's commitment to its obligations.
45. In light of the above the Commissioner is not persuaded that it is necessary for the MOD to confirm or deny that it holds information which would disclose personal data of the individuals involved. Rather, he considers that the MAIB provides a less intrusive route to meeting the legitimate public interest. The Commissioner finds that the necessity test is not met, therefore the MOD would not be able to rely on Article 6(1)(f) as a lawful basis for processing the personal data in question. It follows that confirmation or denial would not be lawful, and would contravene principle (a). For this reason the Commissioner finds that the MOD was entitled to rely on section 40(5B)(a)(i) in respect of part 3 of the request.

## Right of appeal

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46. 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)

47. 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.
48. 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** .....

**Sarah O’Cathain**  
**Senior Case Officer**  
**Information Commissioner’s Office**  
**Wycliffe House**  
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**SK9 5AF**