

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 October 2023

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

Decision (including any steps ordered)

1. The complainant requested information from the Ministry of Defence (the 'MOD') about a previous version of Joint Service Publication 441 ('JSP 441'). The MOD stated that it did not hold the requested information.
2. The Commissioner's decision is that, on the balance of probabilities, the MOD does not hold the requested information.
3. The Commissioner requires no steps to be taken.

Background

4. The complainant's request in this case related to a Joint Service Publication (JSP) which is a UK MOD authoritative set of rules or guidelines with defence wide applicability or interest.¹
5. Previous versions of the JSP at issue, JSP 441, were conventional PDF documents published online related to Defence information, knowledge, digital and data policy commitments.
6. The Commissioner is aware from information provided by the MOD that JSP 441 has changed both in the way it is held and delivered to MOD personnel and the content contained within it.
7. The current JSP 441 is now in a 'Wiki' format. A wiki is a website or database developed collaboratively by a community of users, allowing any user to add and edit content.²
8. JSP 441 is therefore now an internal MOD electronic knowledge base providing guidance to MOD staff on information management issues in its broadest sense. The scope of information captured in JSP 441 is much wider than in previous versions.
9. The MOD has explained that the new Wiki format JSP 441 consists of multiple, interconnected sections. Using hyperlinks, users access information from it by clicking on one five main category areas (information legislation, information management, data, information exploitation and knowledge exploitation) and then selecting what is termed an "activity" within, drilling down to the specific information they are wishing to locate.

¹ <https://www.gov.uk/government/collections/joint-service-publication-jsp>

² <https://dictionary.cambridge.org/dictionary/english/wiki>

Request and response

10. The complainant made a series of requests for information to the MOD about previous versions of JSP 441.
11. The refined request that forms the substance of this complaint to the Commissioner was as follows.
12. On 17 February 2023, the complainant requested information of the following description (the 'refined request'):

"I understand that, after your organisation published an updated version of JSP 441 online on 12 June 2017, your organisation published a further updated version of JSP 441 online on 25 May 2018.

I have updated my refined request accordingly:

"Please can you provide me with the following information:

(a) a copy of the version of JSP 441 published online by your organisation on 25 May 2018; and

(b) a comparison document showing all differences between:

(i) the version of JSP 441 published online by your organisation on 25 May 2018; and

(ii) the version of JSP 441 which is currently in force."

13. The MOD responded on 20 March 2023 advising that "no information is held in scope of your request" and that "no comparison document of previous and current iterations of JSP 441 exists, and we are not obliged to create one."
14. The complainant requested an internal review that same day on 20 March 2023 stating:

"You have neither confirmed whether you hold "a copy of the version of JSP 441 published online by your organisation on 25 May 2018" nor provided me with "a copy of the version of JSP 441 published online by your organisation on 25 May 2018 ...

Please respond to my request for "a copy of the version of JSP 441 published online by your organisation on 25 May 2018", bearing in mind your responsibility to avoid misleading the requester (i.e. myself), by providing extra information (i.e. "a comparison document showing all differences between: (i) the version of JSP 441 published online by your organisation on 25 May 2018; and (ii) the version of JSP 441 which is currently in force")."

15. The complainant contacted the Commissioner on 19 May 2023 to complain about the MOD's failure to provide an internal review response.
16. Following intervention by the Commissioner, the MOD provided an internal review to the complainant on 8 June 2023. The MOD upheld its position that no information was held that met the description of the refined request. It further advised the complainant that no comparison document of previous and current iterations of JSP 441 existed.

Scope of the case

17. The Commissioner contacted the complainant on 12 June 2023 to ask if they were satisfied with the internal review response, namely, that the MOD did not hold a copy of the version of JSP 441 dated 25 May 2018 or a comparison document of the May 2018 and current version of JSP 441.
18. On 19 June 2023 the complainant advised the Commissioner in a six page document that they remained unsatisfied with the way their request for information had been handled.
19. Their grounds of complaint refer to other requests and issues in addition to the refined request itself. The complainant asked for the following arguments to be addressed (note: the key points only are set out by the Commissioner in this decision notice, taken from a detailed six page letter):
 - a. The Ministry of Defence (henceforth referred to as "the PA") has still not balanced the burden of complying with the request against the value and public interest in complying with the request;
 - b. The PA has not explained why it is treating my request for the current version of JSP 441 differently from a request for the same information made on a previous occasion by another member of the public [i.e its response to a Freedom of Information request made by another requester on 9 February 2017];
 - c. The PA has not provided me with the [current] version of JSP 441 upon which its refusal of my two subject access requests is based;
 - d. The PA has provided information which is "out of date" without providing "extra information"... I asked the PA to provide: (a) the latest version of JSP 441 to be published by the PA; and (b) extra information (i.e. the changes between the latest version of JSP

441 to be published by the PA and the version upon which its refusal of my subject access requests is based).

- e. The PA has not provided me with "advice and assistance" to enable me to make a "refined, less burdensome request" ... – in order that they might request even part of its policy entitled "JSP 441" (for example, the parts of the policy which relate to law enforcement information and the parts of the policy which relate to subject access requests).
20. The Commissioner has considered the complainant's arguments above in so far as they are relevant to the specific information requested on 17 February 2023 in this case (ie the complainant's refined request).
21. As regards the complainant's "wish to challenge the PA's refusal of **my** subject access requests", as set out in their grounds of complaint above, the Commissioner understands from his knowledge of other complaints³ investigated by him recently that the complainant may in fact be referring to subject access requests made to the MOD by another individual known to the complainant and not to the complainant's own subject access requests.
22. The scope of the case is to determine whether the requested information in the complainant's refined request dated 17 February 2023 is held by the MOD. He has also considered whether the MOD complied with its duty to provide advice and assistance under section 16 of FOIA.

Reasons for decision

Section 1 FOIA - determining whether information is held

23. The complainant's refined request was for:
 - (a) a copy of the version of JSP 441 published online by the MOD on 25 May 2018; and
 - (b) a comparison document showing all differences between:
 - (i) the version of JSP 441 published online by your organisation on 25 May 2018; and

³ <https://ico.org.uk/media/action-weve-taken/decision-notice/2023/4026078/ic-232699-g2t3.pdf>

(ii) the version of JSP 441 which is currently in force.”

24. Under section 1(1) of FOIA anyone who requests information from a public authority is entitled under subsection (a) to be told if the authority holds the information and, under subsection (b), to have the information communicated to them if it is held and is not exempt information.
25. FOIA concerns recorded information only. It does not require a public authority to answer general questions, provide opinions or explanations, generate answers to questions, or create or obtain information it does not hold. Nor does the legislation require a public authority to amend or verify the accuracy of the information it holds. The information must already be held at the point a request is made.
26. In cases where there is a dispute as to the information held by a public authority, the Commissioner will use the civil standard of proof, i.e. the balance of probabilities. 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. His remit is not to determine whether information should be held, but only whether, on the balance of probabilities, the requested information was held at the date of the request. If a public authority does not hold recorded information that falls within the scope of the request, the Commissioner cannot require the authority to take any further action.
27. Accordingly the investigation will consider the scope, quality, thoroughness and results of the searches, and/or other explanations offered by the MOD as to why the information is not held. The Commissioner will also consider any arguments put forward by the complainant as to why the information is likely to be held (as opposed to why it ought to be held).
28. As discussed above, the complainant provided the Commissioner with a large volume of generic information in support of their complaint which the Commissioner has carefully examined. The grounds of complaint appear to the Commissioner to be wide ranging and not a document specifically tailored to the precise facts of the complainant's refined request. In addition, they appear to relate to the complaint of the third party individual known to the complainant referred to above.
29. In the Commissioner's opinion, the complainant's arguments set out in (a) to (c) and (e) of paragraph 19 above do not relate specifically to the complainant's refined request. However, the Commissioner will consider the argument set out in (d) above which can be adapted, via the information in square brackets, to be of more relevance to the complainant's own refined request, namely:

- d. I asked the PA to provide: (a) the version of JSP 441 to be published by the PA [on 25 May 2018]; and (b) extra information (i.e. the changes between the version of JSP 441 to be published by the PA [on 25 May 2018] and the version upon which its refusal of my subject access requests is based) [the version of JSP 441 which is currently in force.]
30. The Commissioner has considered the MOD's explanation in its internal review response of the searches conducted for the requested information, and how it had concluded that it did not hold it. This information was sufficient for the Commissioner to reach his decision and he did not require further submissions from the MOD.
31. As regards the complainant's request for a copy of the version of JSP 441 published online by the MOD on 25 May 2018, the MOD explained in the internal review that this was not held by the MOD because "the dated version of JSP 441 specified by you did not match up with any recorded information held." The MOD confirmed to the complainant that: "no updates to JSP 441 were made on the 25 May 2018. Prior to the change to the JSP 441 Wiki in 2019, the last edition of JSP 441 in its previous document format was created in January 2017."
32. The MOD went on to explain that:
- "There was in your request the assumption that JSP 441 was updated on "25 May 2018". However, the entry we believe you are referring to here: <https://www.gov.uk/government/publications/jsp-441-defence-records-management-policy-and-procedures--2#full-publication-update-history> on the 25 May 2018 states "Updated the content on the webpage and changed the name". As such this entry refers to a change to the webpage's Document Title and its associated Detail rather than JSP 441 itself and a change to the description of JSP 441."
33. To further illustrate the point, the MOD provided the complainant with two weblinks. The first link contained the information on the site before 25 May 2018, and the second, the information after that date. MOD noted that the webpage has changed and the description/title of the JSP 441 has changed but that "These were the changes undertaken on the date in question." The Commissioner sees no reason to doubt the MOD's explanation.
34. As regards the complainant's request for the comparison document between the version of JSP 441 published online on 25 May 2018 and the version of JSP 441 which is currently in force, the MOD explained to the complainant in both the original response and internal review that "no comparison document of previous and current iterations of JSO 441 exists".

35. The Commissioner has carefully considered the points made by the complainant and the MOD. The Commissioner is not persuaded that the MOD holds information falling within the scope of the refined request. The Commissioner is satisfied that adequate searches were carried out by the MOD to determine whether recorded information within scope of the request was held. The Commissioner therefore accepts that the MOD's conclusion that it does not hold information falling within the scope of the request is a reasonable one in the circumstances.
36. Primarily, it is the Commissioner's view, that the complainant's request for a copy of the version of JSP 441 published online by the MOD on 25 May 2018 does appear to be based on a misunderstanding. This is because, as the MOD explained, no substantive updates to JSP 441 were made on 25 May 2018. Rather, on that date, there was a change to the webpage's Document Title and its associated Detail rather than to the contents of JSP 441 itself.
37. The Commissioner also agrees with the MOD that FOIA does not oblige a public authority to create information in response to a request, such as the comparison document requested by the complainant. ICO guidance⁴ is clear that FOIA only applies to recorded information that a public authority already holds at the time of the receipt of the request.
38. In addition, the Commissioner is unable to identify any further action that the MOD could reasonably be expected to take as part of its statutory obligations under FOIA in order to identify or locate the requested information. As has been set out above, if information is not held then it cannot be disclosed in response to a request.
39. The Commissioner is aware that the complainant considers that the MOD *should* have been able to provide them with more information. However, whilst the Commissioner recognises that the complainant does not consider that the MOD has fulfilled the request, that appears to be conjecture by the complainant rather than known facts. No evidence is available to the Commissioner which would indicate that the MOD holds recorded information falling within the scope of the request.
40. The Commissioner also appreciates that the complainant has raised a wide ranging number of grounds of complaint in submissions to the Commissioner to support their complaint which set out why, in their

⁴ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/determining-whether-we-hold-information/>

view, the MOD would hold relevant information. However, for the reasons set out above, the Commissioner does not consider that most of the complainant's submissions were relevant to the refined request at issue in this decision notice and considers that the MOD's submissions to him have adequately addressed the arguments of the complainant that were relevant to the refined request.

41. In conclusion, the Commissioner finds, on the balance of probabilities, the MOD does not hold any recorded information falling within the scope of the request.

Section 16 - advice and assistance

42. Section 16(1) of FOIA states that:

"It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it."

43. The Commissioner notes that throughout their correspondence (in relation to this and other related requests, and the requests made by the third party known to the complainant), that the MOD provided the complainant (and the third party) with a wide range of information about the current and previous versions of JSP 441. It also provided advice and assistance about submitting refined requests for the relevant parts of interest to the complainant (and the third party) in the current Wiki version of JSP 441. The Commissioner notes that the complainant (and the third party) have since made several refined requests for this information which the MOD is in the process of responding to.
44. Following the provision of this information to the complainant, the Commissioner is satisfied that the MOD has provided all advice and assistance to the complainant that it could be reasonably expected to do in the circumstances of this request.

Other matters

45. FOIA does not contain a time limit within which public authorities have to complete internal reviews. However, the Commissioner's guidance⁵ explains that in most cases an internal review should take no longer
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⁵ <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/refusing-a-request/#20>

than 20 working days in most cases, or 40 working days in exceptional circumstances.

46. In this case the MOD took over 50 working days to complete its internal review response.
47. The Commissioner notes the apology provided to the complainant for the delay. Nevertheless, he still considers this length of delay to be unacceptable. The Commissioner has therefore recorded this delay for his own purposes of monitoring the MOD's performance in terms of completing internal reviews in a timely manner.

Right of appeal

48. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

49. 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.
50. 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
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