

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 17 March 2011

Public Authority: The Ministry of Defence
Address: Level 6, Zone E
Main Building
Whitehall
London
SW1A 2HB

Summary

The complainant requested from the Ministry of Defence (MoD) details of MoD officials in specific pieces of correspondence. The MoD disclosed some information but withheld the rest, citing the exemption in section 40(2) (personal information). The Commissioner has investigated the complaint and has found that the requested information constitutes personal data and that its disclosure would breach the first data protection principle. The Commissioner has decided that the public authority dealt with the complainant's request in accordance with the Act and requires no steps to be taken.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. The complainant wrote to the Ministry of Defence (MoD) on 16 September 2010 with the following request for information about the Air Secretariat post known as Sec(AS)2a (Secretariat (Air Staff)2a):

"Documents recently released by the Air Secretariat to individuals and via the National Archives routinely redact the name of the desk

officers who corresponded with members of the public from Sec (AS)2a. It is my view that the post is unquestionably public-facing, since letters from Sec(AS)2a written by for example [names redacted] have been widely published in UFO journals, books and on the Internet.

I would like to point out at this stage that I am not suggesting that all of the material so far released should be revisited and the redactions removed, but that future releases should not be so redacted and that requests to remove those redactions from specific correspondence should be acceded.

In order to test this case, I request the removal of the redaction of:

(a) the signature block on page 24 of TNA file reference DEFE24-1955 which equates to page 23 (enclosure 98) of file Sec(AS)/12/3/H; and

(b) a review of all the redactions other than the member of the public's personal details from pages 1423-145 of TNA file DEFE24-19778 which I think corresponds to pages 142-144 of file Sec(AS)/64/3/B (enclosure 56)."

3. The MoD's reply of 27 September 2010 disclosed some of the requested information but withheld the rest under section 40(2) of the Freedom of Information Act 2000 ('the Act'). The MoD upheld its decision in an internal review which was sent to the complainant on 1 October 2010.

The Investigation

Scope of the case

4. The complainant contacted the Commissioner on 12 October 2010 to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following point about the MoD's policy on the redaction of personal names of MoD staff:

"In redacting the names in question from released documents the MoD seem to be over-sensitive and over-cautious, as if they are petrified that they may contravene the DPA [Data Protection Act] in some way. The policy defies common sense ...".

Chronology

5. The Commissioner wrote to the MoD on 12 January 2011 asking it for further explanation of its reasons for citing section 40 in relation to the

request. He also wrote to the complainant to tell him that he was starting the investigation into his complaint.

6. The complainant contacted the Commissioner on 15 January 2011 to provide further evidence in support of his complaint. He referred the Commissioner to an entry in Hansard which he considered to be of relevance as it was on the subject of MoD employees employed to investigate unidentified aerial phenomena. The Commissioner brought this to the attention of the MoD.
7. The MoD responded to the Commissioner on 17 January 2011.

Analysis

Exemptions

Section 40 Personal information

8. Section 40(2) of the Act is an absolute exemption which relates to the personal information of persons other than the requestor.
9. Section 40(2) together with the condition in section 40(3)(a)(i) or 40(3)(b) provides an absolute exemption if disclosure of information falling within the definition of personal data contained in section 1(1) of the Data Protection Act 1998 (the DPA) would breach any of the data protection principles
10. In order to reach a view on the MoD's arguments in relation to this exemption, the Commissioner has first considered whether the withheld information is the personal data of one or more third parties.

Is the information personal data?

11. Personal data is defined in section 1(1) of the Data Protection Act (DPA) as:

"data which relate to a living individual who can be identified-

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual."

12. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way. The information can be in any form, including electronic data, images and paper files or documents.
13. Refusing his request for information, the MoD told the complainant it was unable to release "*the personal details of those MoD employees below the rank of senior civil service*".
14. Having considered the withheld information at issue in this case, the Commissioner is satisfied that each redaction constitutes the name or physical signature of an identifiable individual. He is there satisfied that it constitutes information that falls within the definition of 'personal data' as set out in section 1(1) of the Data Protection Act 1998.

Will disclosure breach one of the Data Protection principles?

15. Having accepted that all the information requested constitutes the personal data of a living individual other than the applicant, the Commissioner must next consider whether disclosure would breach one of the data protection principles as set out in schedule 1 of the Data Protection Act (DPA). He considers the most relevant principle in this case is the first principle which states that:

"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met".

Would it be fair to disclose the requested information?

16. In determining whether a disclosure is fair under the first principle of the Data Protection Act 1998 for the purposes of section 40 of the Freedom of Information Act, the Commissioner considers it appropriate to balance the consequences of any disclosure and the reasonable expectations of the data subject with general principles of accountability and transparency.

Reasonable expectations of the data subject

17. The Commissioner's guidance, (*Awareness Guidance 1, Personal Information*), states that it is important to draw a distinction between

the information which senior staff should expect to have disclosed about them compared with what junior staff should expect. The rationale for this distinction is that the more senior a member of staff is, the more likely it is that they will be responsible for making influential policy decisions and/or decisions related to the expenditure of significant amounts of public funds.

18. The MoD relied on this argument at the internal review stage when it quoted from an earlier Decision Notice (DN) issued by the Commissioner:

"there is a reasonable expectation of anonymity that extends in general to all junior officials and on that basis it would be unfair to disclose their names and contact details." (DN FS50266728)

19. In general, the Commissioner's view is that more senior staff, and those carrying out public-facing functions, should expect more information about them to be disclosed. In this case, the complainant appears to be arguing that the withheld information should be disclosed because it relates to staff in a public-facing role rather than because it relates to senior staff.
20. With respect to whether or not the individual(s) in this case carry out public-facing functions, the Commissioner notes that there are opposing views. When making his request for information the complainant expressed the view that the post of Sec(AS)2a *"is unquestionably public-facing"*. However, the MoD responded saying:

"Whilst your view is that the post of Sec(AS)2a is public facing, the personal names of individuals within that department are not and therefore remain redacted."

21. The Commissioner asked the MoD to clarify this statement. As a result he understands the MoD's argument is that it is the post of Sec(AS)2a, a recognised post within the organisational structure of the Air Staff Secretariat, which is public-facing and made known to the public, rather than the holder of the post.
22. In considering this matter, the Commissioner has taken into account the fact that disclosure under the Freedom of Information Act is effectively an unlimited disclosure to the public at large. Having due regard to the circumstances of the case, the Commissioner does not consider that the seniority, or otherwise, of the data subject(s), would lead them to have an expectation of disclosure of their personal details under the Act.
23. In particular, the Commissioner does not consider that a reasonable person, having signed correspondence as a junior official on behalf of

their employer, would expect details of their signature to be disclosed to the world at large.

Has the data subject actively put some or all of the requested information into the public domain?

24. When first bringing his complaint to the Commissioner, the complainant argued:

"The MoD's position appears untenable to me – the information which I am seeking removal of redactions from has already been published in newspapers, the MoD web site (in one instance), UFO books and magazines."

25. In response to the Commissioner's question about his claim that relevant information has been published on the MoD website, the complainant provided the Commissioner with a link to an article now deposited in the National Archives.

26. In response to the complainant's observation about relevant information being published in Hansard, the MoD told the Commissioner:

"Any further disclosure ... other than that stated by Minister in the House of Commons would, we believe, constitute unlawful processing [of their personal data]."

27. Where the data subject themselves has put some or all of the requested information into the public domain, the Commissioner considers that this weakens the argument that disclosure would be unfair. He notes that the MoD recognised this in its initial handling of the complainant's request when it disclosed some information to him which has already been placed in the public domain by the data subject himself.

28. With respect to the withheld information in this case, the MoD told the complainant:

"The same consideration does not apply to the processing of personal data of junior officials whose information may already be in the public domain (often placed there by third-parties) but where they have themselves not consented or contributed to this outcome."

29. With respect to the information published in Hansard, the Commissioner notes that it is a written reply to a Parliamentary Question. He therefore does not consider it represents information actively put into the public domain by the data subjects.

Has the data subject consented to disclosure?

30. In correspondence with the Commissioner, the MoD told him that it has not sought consent to disclosure. In this respect, the Commissioner notes that there is no obligation on a public authority to seek a data subject's consent to disclosure. However, he considers it good practice to inform the data subject that a request for access to information about them has been made and to take any objections into account.

Consequences of disclosure on the data subject

31. On the basis that the withheld information in this case relates to the personal information of junior official(s), the MoD argued that it has a common law duty towards both current and former employees. It argued that, as an employer, it has an obligation to exercise care over the processing of employees' personal data where it might breach their privacy or endanger their personal security.
32. The Commissioner accepts that it is reasonable to argue that disclosure of the withheld information in this case could lead to the identification of the individual(s) concerned which could, in turn, lead to them being subject to unwanted communication.
33. With respect to the question of the disclosure of a physical signature, the Commissioner again notes that disclosure under the Act is disclosure to the public at large. In considering this matter, he has taken into account the fact that a signature is commonly used on documents as proof of identity, and may also be used, for example, to signify approval, acceptance, or obligation. In the circumstances, and given the potential for fraud or misrepresentation, he considers it would not be fair in this case to disclose an individual's signature into the public domain.

Accountability and transparency

34. In the Commissioner's view, transparency and accountability can improve public trust and confidence in public authorities. He therefore accepts that it can be appropriate to disclose information where to do so would help determine whether public authorities are acting appropriately.
35. With respect to the context of the information at issue in this case, the Commissioner acknowledges that related information held by the MoD has been, and is being, transferred to the National Archives. He also notes that the MoD disclosed some information within the scope of the request when it first responded to the applicant on 27 September 2010.

Conclusion

36. In considering the opposing arguments in this case, the Commissioner has taken into account the authority of the source of any relevant published material, the reasonable expectations of the data subject(s), and whether disclosure in this case would cause additional damage or intrusion. He also recognises the complainant's obvious interest in the subject matter.
37. Having considered all the circumstances of the case, the Commissioner has concluded that it would be unfair to the individual(s) to disclose the withheld information and to do so would contravene the first principle of the DPA. As disclosure would not be fair, the Commissioner has not gone on to consider whether disclosure is lawful or whether one of the Schedule 2 DPA conditions is met.
38. As section 40 is an absolute exemption there is no need to consider the public interest in disclosure separately.

The Decision

39. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

40. The Commissioner requires no steps to be taken.

Right of Appeal

41. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

42. 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.
43. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 17th day of March 2011

Signed

**Jon Manners
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Personal information.

Section 40(1) provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

Section 40(2) provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

Section 40(3) provides that –

“The first condition is-

- (c) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - 1. any of the data protection principles, or
 - 2. section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (d) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

Section 40(4) provides that –

“The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).”

Data Protection Act Schedule 2: Conditions relevant for purposes of the first principle: processing of any personal data

Condition 1 provides that –

The data subject has given his consent to the processing.

Condition 2 provides that –

The processing is necessary—

(e) for the performance of a contract to which the data subject is a party, or

(f) for the taking of steps at the request of the data subject with a view to entering into a contract.

Condition 3 provides that –

The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.

Condition 4 provides that –

The processing is necessary in order to protect the vital interests of the data subject.

Condition 5 provides that –

The processing is necessary—

(g) for the administration of justice,

(h) for the exercise of any functions conferred on any person by or under any enactment,

(i) for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or

(j) for the exercise of any other functions of a public nature exercised in the public interest by any person.

Condition 6 (1) provides that –

The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any

particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

Condition 6 (2) provides that –

The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.