

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 October 2016

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

Decision (including any steps ordered)

1. The complainant has requested a sample of radar data. The Commissioner's decision is that the requested information is not held by the Ministry of Defence (the MoD) or held on its behalf by another person for the purposes of FOIA by virtue of section 3(2)(b). The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

Background

2. National Air Traffic Services (NATS) is a private limited company, part-owned by the Government. NATS co-operates with the MoD in exercising its functions with the objective of developing, implementing and sustaining a joint and integrated air navigation service in UK airspace. The MoD provides air traffic services to military and civilian aircraft and provides NATS with certain services in connection with the provision of air traffic services.
3. The complainant previously requested a sample of radar data from the MoD in April 2015. The complainant requested a particular format. The MoD confirmed it held data but explained that it could not be provided in the requested format without employing contractors to convert the format. The cost for this exceeded the appropriate limit; therefore the MoD claimed reliance on section 12 of the FOIA (cost of compliance).
4. The MoD explained that the information in scope of the request was a composite radar picture consisting of NATS and military radar returns which were collated in a central database. Due to the way that the feeds

are collected, the military and civil returns could not be separated. The MoD explained that the military element of the information in scope would engage the exemptions at section 26 (defence) and section 24(1) (national security).

Request and response

5. On 10 November 2015 the complainant wrote to the MoD and requested information in the following terms (the full text embedding the request is set out in an Annex at the end of this notice):

"I would like to make another FOIA request for a 2 hour sample of recorded radar data e.g. a copy of the data that would have been part of a feed from NATS to the MoD. (I would presume that MOD would approach NATS for a copy of the sample data, and that NATS data would not originate from military radars, or include returns from military radars. NATS is already obliged to record all radar data, so a copy of data fed to MoD should not pose a problem...)"

6. The MoD responded on 23 November 2015. It stated that the request was a repeated request and was therefore refused in reliance on section 14(2) FOIA.
7. Following an internal review the MoD wrote to the complainant on 5 February 2016. It stated that because it had not previously provided the requested information the exemption provided by section 14(2) did not apply. Consequently the MoD re-considered the request and explained the following:

"In your request you indicated that MoD should approach NATS [National Air Traffic Services] for a copy of the sample data which would fall in scope of your request. Whilst NATS are contractually obliged to provide assistance as reasonably requested by MoD to enable this Department to respond to a request for information, they retain the right to keep certain information confidential. In the case of Surveillance, the MoD would require permission in writing from NATS to release the information to a third party."

8. The MoD went on to explain that it had consulted with NATS and it had refused permission to disclose the information in this case.
9. During the course of her investigation the Commissioner asked the complainant to clarify his request to a specific time period, in order to meet the requirements of section 8 of the FOIA, describing the specific information requested. The complainant agreed to refine his request as follows:

"I am asking for data covering the period 11:00 GMT to 13:00 GMT for the date of 10/11/15."

10. The MoD responded confirming that:

".. the position remains unchanged and as outlined to you in MOD's internal review of 5 Feb 2016."

Scope of the case

11. The complainant contacted the Commissioner on 15 February 2016 to complain about the way his request for information had been handled. As indicated by the wording of the request, the complainant has accepted that the NATS and military radar returns are collated and for the reasons explained above cannot be separated. As NATS is not a public authority for the purposes of the FOIA it would not be obliged to respond to a direct request for the information in question. However, the complainant is of the view that, since the feed from NATS is separate until combined with military data at the MoD, the information could be requested by the MoD from NATS before the returns are collated.
12. The Commissioner considers the scope of her investigation is to ascertain whether the MoD could in fact require NATS to provide it with a copy of the requested information. If this is the case then the requested information will be held by NATS on behalf of the MOD within the meaning of section 3(2) of the FOIA.

Reasons for decision

13. Section 1(1) of the FOIA states that any person making a request for information is entitled to be informed whether the information is held and, if the information is held, to have that information communicated to them. Section 1(4) clarifies that section 1(1) only applies to information held by the public authority at the time the request is received.
14. Section 3(2)(b) of the FOIA states that information will be held by a public authority if it is held by another person on behalf of the authority. In this case the main issue is whether or not the requested information is held by NATS on behalf of the MoD.
15. In support of his position the complainant explained to the Commissioner his on-going interest and knowledge of the type of information requested in this case. He explained:

"I've been able to plot sets of recorded radar data obtained from the U.S., because their citizens have automatic access to these data via their FoI legislation. As a consequence, as a British citizen, I began to wonder if the same data were available in the UK - and if not then why not.NATS (amongst others) acts as an agent to collect data that may be used by a number of different government bodies. In this respect, it is a matter of practicality for NATS to act as an agent to record and store the data, acting as a repository..... NATS isn't obligated to respond to FOIA requests, on a technicality i.e. because they are no longer wholly owned by the government. However, the government does own shares, including the 'golden' share with special rights, mentioned previously. In conjunction with CAA regulation (a legal obligation to record and store data), I believe NATS should be considered a special case."

16. The complainant also pointed out that the FMARS Contract specifically covers freedom of information and sets out relevant procedures for requested information held by NATS on behalf of the MoD (which is not already held by the MoD itself). The complainant took this as an indication that NATS may hold the requested information on behalf of the MoD, and it formed the basis of his request. This can be seen in the full wording of the request, as set out in the Annex at the end of this decision notice.
17. The MoD explained to the Commissioner that the sample of radar data (the requested information) was physically held by NATS at the time of the request since it was collected by NATS's own network of radars. The MoD does not own any equipment or data provided by NATS. The MoD procures technical services from NATS that enable the provision of military area radar services within the "En-route" area, ie the UK. Consequently the requested information is physically obtained and held by NATS rather than the MoD.
18. The Commissioner asked the MoD to clarify the relationship between it and NATS. The MoD provided the Commissioner with a copy of the contract between it and NATS, entitled "Agreement STC/N/008 Amendment No.10 dated 2015" and referred to as the FMARS Contract (the Future Military Area Radar Services Contract).
19. The Commissioner asked the MoD to describe how it differentiated between information held and not held on its behalf. The MoD explained that positional data was held by NATS on behalf of the MoD, but surveillance data was held by NATS in its own right. NATS provides surveillance data to a range of customers, so it is clear to the Commissioner that NATS obtains and holds surveillance data for its own purposes rather than solely to provide to the MoD.

20. The Commissioner notes that the complainant suggested that his request was for positional data rather than surveillance data. He explained his reasoning to the Commissioner:

"...my request is technically for positional data (ranges, azimuths & times), however, the general umbrella term used for radar returns is 'surveillance data' for which different rules seem to apply."

21. Nonetheless the Commissioner understands the complainant's comments as indicating his acceptance that the requested information – ie the radar feed over a two hour period - does fall under the recognised term "surveillance data".
22. In identifying which information held by NATS, is held on behalf of the MoD, the MoD provided the Commissioner with an example as follows; the MoD owns Ultra High Frequency ('UHF') direction finding equipment that is based at a number of military sites across the UK. The information processed by these sites belongs to the MoD, and is specific to direction finding equipment and auto-triangulation, which utilises radio frequencies rather than radar. This information is sent to NATS for amalgamation with their own VHF Direction Finding Data. Once the data has been received by NATS the information is held by NATS on behalf of the MoD and remains the MoD's information. However the Commissioner recognises that this does not comprise the information requested by the complainant.
23. In addition the MoD explained to the Commissioner that
- "...if the request related to a specific military aircraft transmitting on the UHF Emergency frequency, then this would fall within the scope of military information held by NATS on our behalf. That said, there is no regulation relating to how long this data needs to be kept, and in all likelihood, the information would not be available by the time a request was made".*
24. The Commissioner notes the complainant's acknowledgement of the security considerations associated with military information, as set out above. Therefore the Commissioner has only considered the MoD's arguments with regard to surveillance data rather than positional data.
25. The Commissioner asked the MoD for a generic description of the differentiation of information held or not held on its behalf. The MoD explained that surveillance data recordings belong to NATS and do not include any MoD radar feeds (prior to being received and collated by the MoD). Notwithstanding this 'ownership', the FMARS Contract necessarily provides the MoD with surveillance data for use as set out in the schedules to the FMARS Contract. However, Schedule 9 to the FMARS Contract covers information confidentiality which relates to exporting the

data outside the military air traffic management environment (i.e. for use by an internal or external third party.)

26. Schedule 9 of the FMARS Contract provides for the provision of surveillance data used for air traffic control services. The schedule entitled "Information and Confidentiality" " defines air traffic surveillance data as confidential information. This confidentiality clause relates to exporting data out of the military air traffic management environment for use by an internal or external third party. The schedule provides that confidential information may be disclosed to certain specified organisations for the purposes of investigations. However, third party requests for such data, outside of the specified provisions, require the written consent of NATS. Since the complainant is not one of the specified organisations, permission would be required in order for him to receive this data from NATS, and as set out above, permission was refused in this case.
27. In providing its written response to the MoD NATS explained that the request had been subject to review against its corporate policy criteria. The MoD advised the Commissioner that NATS is not obliged to provide any further explanation in this regard. It went on to explain that if the request for release of surveillance data was required for legitimate MoD business, and refused, further explanation would be expected from NATS. However, in making such a request (for legitimate MoD business), the MoD would not expect the request to fail NATS' internal corporate policy criteria.
28. The Commissioner notes the complainant's view that NATS should be considered a 'special case' in respect of the provision of information. The complainant explained:

"I'm also wondering if the premise that the data are owned by NATS is wholly accurate, when one takes into consideration the contractual arrangements, including the stipulations for how long the data are to be stored and in what manner (combined with a regulatory requirement to initially record the data and the fact that NATS is partially owned and ultimately controlled by the Government.)"

Conclusion

29. The Commissioner understands the complainant's frustration in his failure to obtain the information sought. She acknowledges the complexity of determining the nature of the relationship between the MoD and NATS. However it is clear that, while the MoD is a public authority under Schedule I to the FOIA, NATS is not. The FMARS Contract makes clear that the two parties are equal in their working relationship, they are not 'partners' as defined by the Partnership Act.

The Contract defines the relationship in respect of access to the information held by NATS on behalf of the MoD or in its own right.

30. In determining her decision the Commissioner has considered the arguments put forward by both parties alongside her own guidance on whether information is held by another party on behalf of the public authority, which states:

"The primary source that we would consider is the contract between the authority and the contractor. As this defines the relationship between, and the responsibilities of, the two parties, it provides an objective, evidence-based approach to resolving the issue."

31. The Commissioner is satisfied that the FMARS Contract establishes the access to the information NATS obtains and holds. In considering her own guidance the Commissioner notes that the MoD does not control the recording, the removing, the storage or the access to the requested information.
32. The Commissioner is further satisfied that the information requested by the complainant is surveillance data, and therefore it does fall under the definition of confidential information as set out in the FMARS Contract. Accordingly disclosure requires the consent of NATS, which in this case has been refused.
33. With regard to the complainant's suggestion that NATS be treated as a special case, the Commissioner should stress that her responsibility is to regulate the FOIA as it stands. She has no authority to require NATS to disclose information to the complainant or to anyone else.
34. In conclusion, the Commissioner finds that the requested information is not held by the MoD or by NATS on behalf of the MoD. Therefore the Commissioner cannot require NATS to disclose the information, or the MoD to obtain it.

Right of appeal

35. 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: 0300 1234504
Fax: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

36. 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.
37. 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
Water Lane
Wilmslow
Cheshire
SK9 5AF