

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 16 March 2017

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

#### Decision (including any steps ordered)

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1. The complainant has requested information on specific radar replay recordings in respect of military flights in the proximity of his property.
2. The Commissioner's decision is that the Ministry of Defence ('the MoD') has appropriately refused the request in reliance of the FOIA exemptions at section 43(2) - Commercial interests and section 40(2) - Personal data.
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

#### Background

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4. 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. NATS provides air traffic services to military and civilian aircraft and provides the MoD with certain services in connection with the provision of air traffic services. 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.
5. 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 this as the FMARS Contract (the Future Military Area Radar Services Contract). 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.

## Request and response

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6. On 6 October 2015 the complainant wrote to the MoD and requested information in the following terms:

*"I would like to make the same request for any radar replay recordings as regards another incident that occurred on 19 Aug 2015 (14:19Z) . ... I would also like to repeat my requests for the release of replay information concerning past incidents on 15 Aug 2012 (FOI2015-04357) and 02 Jun 2015 (FOI2015/07098)."*

7. The MoD responded on 9 November 2015. It stated that the information was withheld in reliance of the exemption at section 43 of the FOIA. However, the MoD provided a document with a summary of the requested radar information for 19 August 2015 as it had previously provided for 15 August 2012 and 2 June 2015.
8. Following an internal review the MoD wrote to the complainant on 12 April 2016. It stated that it upheld its initial response and in addition cited section 40(2) – personal information to withhold third party information. The MoD also suggested that further discussions with the Defence Complaints and Inquiry Team Investigation Manager, outside of the access to information legislation, may be helpful.

## Scope of the case

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9. The complainant contacted the Commissioner on 4 May 2016 to complain about the way his request for information had been handled. He explained that in his opinion he had been experiencing harassment by low level flights of military helicopters over his property. He went on to state that he was:

"...particularly interested in further examining two events in more detail."

The two events the complainant cited as occurring on 15 August 2012 and 19 August 2015.

10. The Commissioner considers the scope of her investigation is to consider the MoD's application of section 43(2) and 40(2) to the requested information.

## Reasons for decision

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### Section 43(2) – commercial interests

11. Section 43(2) of FOIA states that information is exempt information if its disclosure under the FOIA would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
12. In order for a prejudice based exemption, such as section 43(2) 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 must 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. The resultant prejudice which is alleged must be real, actual or of substance; and
  - Thirdly, to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e. 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; 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.
13. The MoD explained to the Commissioner that part of the service provided to it by NATS is to retain air traffic, including radar replay, information. In accordance with the FMARS contract, replay information

is determined to be confidential when accessed by the MoD. As referenced in paragraph 5 the MoD has permission to disclose this information to specific third parties, including the Military Police. However, further disclosure to other third parties is not permitted without the written consent of NATS.

14. The requested information was provided by NATS to the Defence Flying Complaints Investigation Team ('DFCIT') which is a branch of the Royal Air Force Police in order to conduct an investigation into the complainant's flying complaint. However, NATS refused to provide the written consent required by the FMARS contract to allow the radar replay information to be provided to the complainant under FOIA.
15. The MoD explained that the radar summaries provided to the complainant are interpretations of the NATS radar replay data as observed by the Radar Analysis Cell (a team of military personnel). Consequently these documents were created and held by the MoD and did not engage the section 43 exemption. The summaries focus on aircraft activity near to the complainant's location. The MoD considered that the release of this summary information comprised an acceptable compromise between protecting NATS' commercial interests and providing the complainant with assistance in accordance with section 16 FOIA.
16. The Commissioner notes that NATS' view regarding the provision of radar information is that the data should not be put into the public domain, in accordance with the FMARS contract. The Commissioner notes that radar information has a commercial value to NATS as it may sell access to the information. The Commissioner therefore accepts that providing the information without charge may adversely affect NATS' commercial interests.
17. The Commissioner's guidance provides examples of the circumstances where a public authority may hold commercial information. This includes when information is provided in order to perform a regulatory function such as the circumstances of this case. The MoD obtained the requested information whilst investigating potential breaches of regulations which are within its responsibility, and would not otherwise hold the information.
18. The MoD explained its concerns to the Commissioner that disclosure of radar information would result in restrictions being placed on the current method of access to the information. The MoD considers that disclosure of the requested information, without the consent of NATS, would be likely to result in a review of the existing agreement which in turn could adversely impact on how the information is accessed by the listed agencies, such as Military Police. For example, access may be restricted to visits in person to view the information rather than NATS directly

providing the information. This would result in less timely access to information and adversely impact on defence resources. The MoD emphasised that it and NATS have a common interest in ensuring that air navigation services are as cost effective as possible. The parties currently operate successfully within the terms of the FMARS Contract to provide an integrated approach to Air Traffic Services and management for the benefit of their mutual commercial interests and any breakdown in this partnership would impact on the commercial interests of both parties. Furthermore, the MoD explained that disclosure of the requested information by it under FOIA would represent a breach of its contract with NATS and this could also further harm the MoD's commercial interests.

19. With regard to the first criterion of the three limb test described in paragraph 12, the Commissioner accepts that the potential prejudice described by the MoD relates to the commercial interests which the exemption contained at section 43(2) is designed to protect.
20. The Commissioner is satisfied that the second criterion is met as disclosure of the information withheld on the basis of this exemption has the potential to harm both NATS and MoD's commercial interests as described above. The Commissioner considers that the likely prejudice could be broadly interpreted as prejudicing the working relationship between the two parties.
21. The MoD specified that it believed that prejudice to commercial interests *would be likely to* result, rather than *would* result. This means that the test that the Commissioner has applied here is whether there is more than a hypothetical or remote possibility of prejudice occurring. She is satisfied that the level of prejudice has been met.

### **Public interest test**

22. In considering whether there is an overriding public interest in providing the requested information, the Commissioner has considered the arguments put forward by both the complainant and the MoD. She must consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
23. The complainant argues that the public interest in disclosure of the radar replay recordings is significant in:  
  
"ensuring that the military are properly conducting investigations into their own activities."
24. The MoD acknowledged that there is always the public interest in disclosure of information to demonstrate openness and transparency in

public authorities. In this case the MoD specifically noted the public interest in favour of disclosing information to demonstrate openness and transparency in the investigation of low flying incidents.

25. In favour of maintaining the exemption the MoD explained that NATS and the MoD share a partnership and a common interest in ensuring that air navigation services are delivered as cost effectively as possible. Any breakdown in this longstanding operational relationship would be likely to adversely impact on the commercial interests of both parties. The success of this working relationship weighs heavily in favour of maintaining the exemption.
26. The Commissioner notes that the release of the requested information is specifically related to the complainant and his concerns in respect of low flying and his property rather than of general public interest. The Commissioner notes that the MoD, outside of the FOIA, has visited the complainant and enabled him to view the radar replay as part of its investigation. The Commissioner understands that the complainant wishes to verify the results of the MoD's investigation, however, she has explained to the complainant that the FOIA concerns access to information and not the verification of information already provided outside of the FOIA. The Commissioner is aware that the MoD remains happy to discuss the complainant's concerns with a view to achieving resolution of his low flying complaint.
27. The complainant informed the Commissioner that in respect of the information provided by the MoD:

"I obviously do not trust what they are telling me"

He further explained:

"Person or persons have been using military equipment to try and terrorise civilians including performing highly dangerous manoeuvres literally a few inches above a rooftop and nearly crashing into a tree in a garden as a consequence."

The Commissioner understands that the complainant is dissatisfied by the investigations and explanations provided by the MoD in regard to the incidents the complainant has explained.

She acknowledges the complainant's frustration and notes his opinion that:

"Whoever was responsible for these incidents seemed supremely confident that they were never going to be held to account.

The military are effectively allowed to set their own terms of access to their data in circumstances where this is not necessary."

However, she does not consider that these matters which are specifically related to the complainant hold a significant weight in favour of disclosure in the public interest. The Commissioner would seek to reassure the complainant that each complaint to her is considered on the specific circumstances of the case and the application of the FOIA.

28. The Commissioner understands that, specifically with respect to 15 August 2012, the complainant considers that the information presented and explained to him is contradictory. The findings of the MoD investigation concluded that no military aircraft had descended below the local height restrictions (below 1000 feet) during the early afternoon time frame as described by the complainant to the MoD in his low flying complaint. However, the MoD did confirm that a helicopter flew below 1000 feet at 1900 on 15 August 2012. The complainant has concluded that:

"Due to these enormous discrepancies I believe that we may have been shown evidence from the wrong day designed to confuse us and obscure the seriousness of what took place."

The Commissioner can find no evidence to support this allegation. She notes that the complainant has advised her that the MoD has previously upheld several of his complaints. This appears to suggest that the MoD has previously conducted fair and appropriate investigations. The Commissioner has no reason to determine that other investigations would be less robust.

29. The Commissioner agrees that there is a public interest in the transparency of public authorities and their investigation of complaints. However, the investigation which resulted from the complainant's contact with the MoD is specific to him. The MoD provided a written summary of the radar information which the Commissioner considers to have been an attempt to assist the complainant in accordance with its duty in respect of section 16 of the FOIA. The complainant's issue is that he is not content with the accuracy of the radar replays shown to him outside of the FOIA, the calculations provided, and considers there to be discrepancies which he seeks to verify. The Commissioner has viewed the withheld information and can confirm that without expert analysis and explanation disclosure of the radar replay would not enable this verification.
30. Having considered the public interest in the disclosure of the requested information the Commissioner believes that the MoD has provided written information to demonstrate transparency in its investigation of the issues raised by the complainant. She considers that the public interest in not undermining the commercial interests of NATS and the MoD outweighs the public interest in disclosure of the withheld information given the specific nature and therefore limited interest of

the information to the wider general public. On balance, in the circumstances of this case, she is satisfied that the public interest favours withholding the information.

## **Section 40 – personal data**

31. Section 40(2) of the FOIA states that personal data is exempt from disclosure if its disclosure would breach any of the data protection principles contained within the Data Protection Act 1998 (DPA).
32. In deciding whether section 40 is engaged the first thing to consider is whether the requested information is personal data. Personal data is defined in the DPA as follows:

*“personal data” means 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 intentions of the data controller or any other person in respect of the individual;”*
33. The information withheld under this exemption comprises the names and contact details of officials below the Senior Civil Service who are not in a public facing role. The information obviously relates to the individuals concerned and allows them to be identified. The Commissioner is satisfied that this information can be said to be personal data.
34. The next step is to consider is whether disclosure would contravene any of the data protection principles.
35. The MoD has explained that in its view disclosure would contravene the first data protection principle which requires that personal data be processed fairly and lawfully and in particular that it shall not be processed unless one of the conditions in schedule 2 is satisfied.
36. The Commissioner’s approach when considering the first principle is to begin by looking at whether the disclosure would be fair. Only if the Commissioner finds that disclosure would be fair will she go on to look at lawfulness or whether a schedule 2 condition can be satisfied.
37. In assessing whether disclosure would be unfair, and thus constitute a breach of the first data protection principle, the Commissioner takes into account the reasonable expectations of the data subject and the likely consequences of disclosure including any damage or distress that would be caused.



38. The Commissioner has considered the MoD's explanation that the junior officials concerned are not in public facing roles and therefore have an expectation that their names will not be put into the public domain. The Commissioner accepts that even though the information relates to their public rather than private life, the individuals would have a reasonable expectation that this would not be disclosed, based upon established custom and practice. This leads the Commissioner to conclude that disclosure would be unfair.
39. Notwithstanding individuals' expectations of privacy or any harm that could be caused, there may be occasions when it is fair to disclose information if there is a public interest in doing so or if the legitimate interests of the applicant outweigh the rights and freedoms of the data subject. The Commissioner has considered whether there is a more compelling legitimate interest in disclosure to the public but in her view releasing the names and contact details of the officials in this case would add very little, if anything, to the public understanding of the circumstances in this case, beyond the information which has been disclosed in written form. Therefore, the information redacted under section 40(2) is exempt from disclosure.
40. In its submission to the Commissioner the MoD also relied on the exemptions at section 26(1)(b) – Defence, section 30(1)(b) – Investigations and proceedings and section 41 – Information provided in confidence. The Commissioner has not considered these exemptions in this Notice as she finds that the information is exempt under section 43(2).

## Right of appeal

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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,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504  
Fax: 0870 739 5836  
Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

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.

**Signed** .....

**Jonathan Slee**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**