

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 19 October 2017

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

#### Decision (including any steps ordered)

---

1. The complainant has requested information relating to the service record of a named person and whether they were still alive in 1948. The Ministry of Defence (MoD) confirmed they held the service record of the named person but stated that they were unable to disclose the requested information, citing the exemption under section 40(2) of the FOIA (third party personal data) as its basis for doing so.
2. The Commissioner's decision is that the MoD has correctly applied the exemption.
3. The Commissioner does not require any steps to be taken as a result of this decision notice.

#### Request and response

---

4. On 24 July 2017, the complainant wrote to the MoD and requested information in the following terms:

*"I am looking for information about what has happened with my uncle captain [name redacted], of Polish nationality, born on [redacted] in [redacted] near [redacted], son of [name redacted] and [name redacted], family name [name redacted]...*

*What I need is the application for the final termination of service in the Polish Resettlement Corps of [name redacted], produced in August*

*1948, with his personal signature or any other document showing that he really lived at the time.*

*...I need the personal files of captain [name redacted] from MoD only to confirm, if he really came back to the UK after May 1947 and was still alive in August 1948, when he – according to [name redacted] - finally relinquished his commission on 16.08.1948."*

5. This was a follow up request to information provided by the MoD in relation to the same named person that was received by the complainant's family on 24 August 2016.
6. The MoD responded on 28 July 2017. It stated that it could confirm it held the service record of the named person but that all the information could not be provided to the complainant by virtue of section 40(2) of the FOIA.
7. The MoD's response of 28 July 2017 effectively represented its internal review, as the complainant had already provided detailed arguments for disclosure in previous correspondence.

### **Scope of the case**

---

8. The complainant contacted the Commissioner on 10 August 2017 to complain about the way her request for information had been handled.
9. The Commissioner considers the scope of this case to be to determine if the MoD has correctly applied section 40(2) to the withheld information.

### **Reasons for decision**

---

#### **Section 40(2) – third party personal data**

10. This exemption provides that any third party personal data is exempt from disclosure, if that disclosure would contravene any of the Data Protection Principles set out in Schedule 1 of the Data Protection Act 1998 (DPA).

#### **Is the withheld information personal data?**

11. Personal data is defined by the DPA as any information relating to a living and identifiable 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, has them as its main focus or impacts on them in any way.

13. The withheld information in this case is the named person's service record.

### **Would disclosure breach the Data Protection Principles?**

14. The Data Protection Principles are set out in Schedule 1 of the DPA. The first principle, which is the most relevant in this case, states that data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations in relation to fairness are detailed below.
15. In considering fairness the Commissioner finds it useful to balance the reasonable expectations of the individual, the potential consequences of the disclosure, and whether there is a legitimate public interest in the disclosure of the information in question.

### **The MoD's view**

16. The MoD advised the complainant that they do not normally disclose personal data to a third party without the consent of the subject unless it is known the data subject is deceased. Once it has been established that an individual has passed away, information relating to them ceases to be personal data for the purposes of the DPA.
17. In the absence of a death certificate, the MoD will assume that a person is still alive until they would have reached 116 years of age. This stipulation is detailed on the form to apply for deceased military personnel's service records<sup>1</sup>
18. The MoD implemented this strict policy as they had previously released personal information of an individual over 100 years old, only to find that the individual was still alive. As a result, the MoD was considered to have breached the DPA.

### **The complainant's view**

19. The complainant asked the Mod to consider a number of factors that they thought were relevant to this case.

---

1

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/545057/request\\_service\\_details\\_general\\_enquirers\\_pt1\\_v6.doc](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/545057/request_service_details_general_enquirers_pt1_v6.doc)

20. The first argument that the complainant asked the MoD to consider was that they were the named person's nearest living kin. They provided a number of documents to support this assertion including their birth certificate, the named person's birth certificate and the complainant's father's birth certificate, who was the brother of the named person.
21. The complainant argued that the assumption that a person is still alive until they reach 116 years of age is just that, an assumption, and not something founded in law.
22. The complainant considers that the lack of a death certificate is not proof that somebody is not dead. The complainant points out that there are numerous people killed during war times that will have no death certificate or gravestone, for example, those victims killed in prison camps.
23. The complainant states that "*the argumentation of MoD that to disclose to the nearest kin such information about the person born years ago would be unfair and unlawful is in my opinion grotesque*".

### **The Commissioner's position**

24. As stated, section 40(2) of FOIA will only apply where the requested information relates to a living individual. The Commissioner recognises that a public authority may not always know the whereabouts and status of an individual. Where there this is the case however, there is a considerable privacy risk attached to the making of an assumption that the individual is deceased.
25. Accordingly, in such a scenario, the Commissioner has accepted as reasonable the MoD's approach that in the absence of a death certificate an individual should be assumed to be living if they were born less than 116 years ago. The Commissioner has therefore decided that the requested information would constitute personal data and gone on to consider whether disclosure would be fair for the purposes of the first data protection principle.
26. Given the importance of protecting an individual's personal data, the Commissioner's 'default' position in cases where section 40(2) has been cited is in favour of protecting the privacy of the individual. Therefore, in order to find in favour of disclosure, it would need to be shown that there is a compelling interest in disclosure which would make it fair to do so or that the release would be within the expectations of the individual.
27. In this case the Commissioner accepts that the complainant has a legitimate reason for wanting to obtain the withheld information.

28. However, given the importance of protecting an individual's personal data and that a disclosure under FOIA is to the world at large, not just to the individual requesting it, the Commissioner accepts the MoD's view that disclosure would be an unfair intrusion into the individual's private life.

## **Conclusion**

---

29. In view of the above, and despite the Commissioner sympathising with the complainants position, the Commissioner is satisfied that the withheld information is personal data and that disclosure would breach the first data protection principle as it would be unfair to the individual concerned. The Commissioner upholds the MoD's application of the exemption provided at section 40(2) of the FOIA.

## Right of appeal

---

30. 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)

31. 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.
32. 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 .....**

**Alun Johnson**  
**Team Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**