

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 July 2019

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

Decision (including any steps ordered)

1. The complainant submitted a request to the Ministry of Defence (MOD) seeking information regarding which army chiefs claimed the Continuity of Education Allowance and or were granted INVOLSEP, a benefit paid to service personnel in certain circumstances for undertaking service unaccompanied by their family. The MOD relied on section 40(5) (personal data) of FOIA to refuse to confirm whether it held any information falling within the scope of the request.
2. The Commissioner has concluded that the MOD is entitled to rely on section 40(5) to refuse to confirm or deny whether it holds any information falling within the scope of the request. The Commissioner does not require the MOD to take any steps as a result of this decision.

Background

3. The Continuity of Education Allowance (CEA) is provided to eligible service personnel in the armed forces to assist them in achieving continuity of education for their children that would otherwise be denied in the maintained day school sector if their children accompanied them on frequent and consecutive assignments.
4. Each claimant is required to make a contribution of at least 10% of the fees. The allowance may be claimed for service children from the beginning of the academic year in which they reach the age of 8 until the end of the stage of education during which they reach the age of 18 providing the service person meets the eligibility criteria. CEA claimants

must be accompanied by their immediate family at their duty station and any child for whom CEA is claimed must complete the stage of education at the school for which the allowance has been claimed.

5. Service personnel in the armed forces, who are separated from their immediate family, normally for service reasons, will be classified as 'INVOLSEP' and eligible for benefits related to unaccompanied service in certain circumstances.

Request and response

6. The complainant submitted the following request to the MOD on 5 September 2018:

'I would like to know how much the following army chiefs claimed under the Continuity of Education Allowance (CEA) between 2008 and 2014. I would be grateful if you could tell me how much each individual claimed for each year during this period (they may not have claimed for the allowance every year).

I would also like to know if any of these individuals were granted INVOLSEP during this period and if so, for which years.

Sir Jonathan Band

Sir Nick Carter

Sir Stephen Dalton

Sir Timothy Granville Chapman

Sir Stuart Peach

Sir Andrew Pulford

Sir David Richards

Sir Graham Stirrup'

7. The MOD responded on 3 October 2018 and refused to confirm or deny whether it held information falling within the scope of the request on the basis of section 40(5) (personal data) of FOIA.
8. The complainant contacted the MOD on 8 October 2018 and asked it to conduct an internal review of this decision.

9. The MOD informed her of the outcome of the internal review on 2 November 2018. The internal review upheld the application of section 40(5) of FOIA.

Scope of the case

10. The complainant contacted the Commissioner on 30 November 2018 to complain about the way her request for information had been handled.
11. In relation to this complaint it is important to note that the right of access provided by FOIA is set out in section 1(1) and is separated into two parts: section 1(1)(a) gives an applicant the right to know whether a public authority holds the information that has been requested. Section 1(1)(b) gives an applicant the right to be provided with the requested information, if it is held. Both rights are subject to the application of exemptions.
12. As explained above, the MOD is seeking to rely on section 40(5) to refuse to confirm or deny whether it holds information falling within the scope of the request. Therefore, this notice only considers whether the MOD is entitled, on the basis of these exemptions, to refuse to confirm or deny whether it holds the requested information. The Commissioner has not considered whether the requested information – if held – should be disclosed.

Reasons for decision

Section 40 - Personal data

13. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny whether information is held does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the General Data Protection Regulation EU2016/679 ('GDPR') to provide that confirmation or denial.
14. Therefore, for the MOD to be entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny whether it holds information falling within the scope of the request the following two criteria must be met:
 - Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
 - Providing this confirmation or denial would contravene one of the data protection principles.

Would the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?

15. Section 3(2) of the DPA 2018 defines personal data as:-

"any information relating to an identified or identifiable living individual".

16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

17. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

18. The MOD argued that confirming or denying whether each of the individuals listed in the request had received CEA or INVOLSEP would reveal not only the personal data of those individuals but also the personal data of their family members.

19. The complainant disagreed with this and argued that confirming whether the individuals in question had claimed CEA would only reveal that they had children, not information about the children or the schools they attended.

20. Given the circumstances in which CEA is paid, the Commissioner accepts that confirming whether or not an individual had received this allowance would reveal not only their personal data, ie that they were in receipt of CEA, but would also reveal the personal data of their children by confirming whether or not they had had their education paid for, at least in part, by this allowance.

21. With regard to the claiming of payments because of INVOLSEP status, the Commissioner also accepts that confirming whether or not an individual was in receipt of such a payment would reveal the personal data of the service personnel, as well the personal data of their immediate family. That is to say, that during the course of their service they had been separated from their family and had been compensated for this.

22. The fact that confirming or denying whether the requested information is held would reveal the personal data of a third party does not automatically prevent the MOD from refusing to confirm whether or not it holds this information. The second element of the test is to determine whether such a confirmation or denial would contravene any of the data protection principles.

Would confirming whether or not the requested information is held contravene one of the data protection principles?

23. Article 5(1)(a) GDPR states that:-

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”

24. In the case of a FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed – or as in this case the public authority can only confirm whether or not it holds the requested information - if to do so would be lawful (i.e. it would meet one of the conditions of lawful processing listed in Article 6(1) GDPR), be fair, and be transparent.

Lawful processing: Article 6(1)(f) GDPR

25. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that *“processing shall be lawful only if and to the extent that at least one of the”* conditions listed in the Article applies. One of the conditions in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.

26. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) GDPR which provides as follows:-

“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child”¹.

¹ Article 6(1) goes on to state that:-

“Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”.

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA 2018) provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.

27. In considering the application of Article 6(1)(f) GDPR in the context of a request for information under FOIA it is necessary to consider the following three-part test:-

(i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;

(ii) **Necessity test:** Whether confirmation as to whether the requested information is held (or not) is necessary to meet the legitimate interest in question;

(iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

28. The Commissioner considers that the test of “necessity” under stage (ii) must be met before the balancing test under stage (iii) is applied.

(i) Legitimate interests

29. In considering any legitimate interests in confirming whether or not the requested information is held in response to a FOI request, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests.

30. Further, a wide range of interests may be legitimate interests. They can be the requester’s own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

31. The complainant argued that it was a matter of public interest how taxpayer funds are being used to support claims under the CEA and INVOLSEP. She emphasised that the individuals named in her request held some of the most senior positions in the armed forces which added to the legitimate interest in understanding what allowances they had received. She noted that the MOD published details of expense claims for senior officials, including 2* generals and above, and the requested information was akin to such information. The complainant disputed a point made by the MOD in its responses to her that the requested

information did not relate to the various individuals' duties rather it concerned information outside the scope of their public role. Instead, the complainant argued that the claims of these benefits and the individuals' public roles were inextricably linked; without undertaking such roles they would not be entitled to these allowances.

32. The Commissioner recognises that the MOD, along with other public authorities, proactively publishing the details of some expenses claims and benefit received by senior officials. In line with this approach, the Commissioner accepts that there is arguably a legitimate interest in confirming whether the individuals in question claimed either CEA or INVOLSEP.

(ii) Is confirming whether or not the requested information is held necessary?

33. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so confirming whether or not the requested information is held would not be necessary if the legitimate aim could be achieved by something less. Confirmation or denial under FOIA as to whether the requested information is held must therefore be the least intrusive means of achieving the legitimate aim in question.
34. The MOD argued that it did not consider it necessary to confirm which officials had claimed CEA in order to inform the public about the MOD's position on the payment of CEA claims, particular as it would add very little to what has been released already regarding this allowance. The MOD noted that to improve transparency and inform debate, it had previously released annual figures on the number and total value of CEA claims made by military personnel² and advice on the CEA process including eligibility and rates.³ Similarly, details of eligibility for INVOLSEP have also been published and it was not necessary to reveal

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/757930/01793.pdf

³ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/745157/20180830-DCYP CEAS INFO 02 CEA BOARDING CONSIDERATIONS-v2.0s-O.pdf

information relating to INVOLSEP that could potentially disclose individuals' personal circumstances.⁴

35. The complainant argued that confirming whether the information was held was necessary in order that the public could understand how CEA and INVOLSEP is claimed by the senior officials in question.
36. The Commissioner is persuaded that confirming whether or not the requested information is held is necessary in order to meet the legitimate interests identified above. Whilst the information published by the MOD to date provides some insight into how CEA and INVOLSEP is claimed and the costs to the MOD of providing such allowances, it does not provide an indication as to which particular senior officials have claimed particular benefits, and given the seniority of such individuals the Commissioner considers there to be legitimate interest in such a confirmation.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

37. It is necessary to balance the legitimate interests in confirming whether or not the requested information is held against the data subject(s)' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of the confirmation or denial. For example, if the data subject would not reasonably expect the public authority to confirm whether or not it held the requested information in response to a FOI request, or if such a confirmation or denial would cause unjustified harm, their interests or rights are likely to override legitimate interests in confirming or denying whether information is held.
38. The MOD explained that it does not release details of specific CEA claims made by particular individuals and therefore they would have no expectation that a decision, which relates directly to their family and personal life, would come under public scrutiny. Similarly, the MOD argued that disclosure of details of individuals INVOLSEP claims would be far outside the expectations of the individuals in question given that details are also not usually released and moreover because the basis for receiving such benefits related to the personal family circumstances of the individual involved. The MOD argued that confirmation that INVOLSEP had been given (if it had) would be intrusive and allow

⁴ Chapter 10 of 'JSP 752: Tri-Service Regulations on Expenses and Allowances'
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/791580/20190401- JSP 752 Version 38 Apr 2019.pdf

speculation as to reasons for which it was given. Unnecessary media attention and public scrutiny may be focused on a specific family (or child) if it was confirmed that CEA or INVOLSEP had been claimed by one of the named individuals, and not by others.

39. The MOD noted that whilst it routinely publishes selected information relating to the public life of senior officials, confirming whether or not named individuals have made a claim for CEA or INVOLSEP, would reveal information not only about that individual, but also their family circumstances. The individuals, and their family members, would not have any expectation that information relating to their private lives would be published. The MOD therefore considered that there is an insufficient legitimate interest to outweigh the data subject's, and the data subject's family's fundamental rights and freedoms, and that the disclosure of the information would not be lawful.
40. The complainant argued that there was a clear public interest in the disclosure of information about allowances claimed by senior military officials. She also argued that the impact on the individuals' privacy if the MOD complied with section 1(1)(a) of FOIA was limited because considerable amounts of information was already in the public domain about the individuals' spouses and children. The complainant drew the Commissioner's attention to a number of media articles, some of which involved interviews with the individuals in question, which she noted contained biographical information about the individuals' families, and other public domain sources. The complainant also noted that using such information the names and dates of birth of the individuals' children could be located on the electoral role.
41. The Commissioner accepts that there is some information already in the public domain about the family circumstances of the individuals in question. However, in the Commissioner's view this does not mean that by complying with section 1(1)(a) the infringement on the individuals, and their families, would be limited. This is because the information in the public domain does not reveal any information, or provide any indication, as to which of these individuals may have claimed either CEA or INVOLSEP which of these benefits.
42. The Commissioner accepts that as a general rule that senior officials in public authorities should expect details of their remuneration, including benefits or allowances, to be disclosed. However, in the particular circumstances of this case complying with section 1(1)(a) would not simply result in the disclosure of the personal data of such officials but also the personal data of their families. The Commissioner agrees with the MOD that such a disclosure would be firmly against the expectations of the individuals involved, both the officers and their families. Furthermore, the Commissioner accepts that the consequences of

disclosure would result in an infringement into their family lives, eg it would confirm whether or not a particular official's children had attended a boarding school. Furthermore, the Commissioner considers it important to remember that the individuals named in the request have not (potentially) received CEA and/or INVOLSEP because of their seniority. Rather, such payments are available to all service personnel, assuming that they meet the qualifying criteria. In the Commissioner's view such a factor arguably reduces the legitimate interest in confirming whether or not the requested information is held.

43. Therefore, whilst the Commissioner accepts that there is a legitimate interest in the disclosure of information regarding allowances paid to senior officials, in the particular circumstances of this case she is not persuaded that this is sufficient to outweigh the data subjects' fundamental rights and freedoms, and that confirming whether or not the requested information is held would not be lawful.
44. Given the conclusion the Commissioner has reached above on lawfulness, she does not need to go on to separately consider whether confirming or denying whether the information is held would be fair and transparent. The Commissioner has therefore decided that the MOD was entitled to refuse to confirm whether or not it held the requested information on the basis of section 40(5)(B) of FOIA.

Right of appeal

45. 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@justice.gov.uk

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

46. 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.
47. 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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