

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 November 2021

Public Authority: Ministry of Defence

Address: Whitehall
London
SW1A 2HB

Decision (including any steps ordered)

1. The complainant submitted a request to the Ministry of Defence (MOD) seeking disclosure of UFO reports. The MOD confirmed that it held information falling within the scope of the request, namely information about requests for UFO information processed under FOIA. However, the MOD explained that it considered this information to be exempt from disclosure on the basis of sections 22(1) (information intended for future publication) and 40(2) (personal data) of FOIA.
2. The Commissioner's decision is that the MOD can rely on both exemptions to withhold the information falling within the scope of the request.
3. No steps are required.

Request and response

4. The complainant submitted a request to the MOD on 26 August 2020 seeking the following information:

'disclosure of UFO reports from 2010-present. All files. All departments'

5. The MOD responded on 23 September 2020. It explained that it held information relating to 2013 onwards, however it considered such information to be exempt from disclosure on the basis of section 22

(information for future publication) of FOIA. Under section 16 (advice and assistance) of FOIA the MOD explained that it had released all of the UFO files it held up to 30 November 2009 to The National Archives (TNA).

6. The complainant contacted the MOD on the same day and asked it to undertake an internal review as he disputed its reliance on section 22 of FOIA.
7. The MOD informed him of the outcome of the internal review on 18 November 2020. The MOD explained that the only information it holds about UFOs comprises requests for UFO information processed under FOIA. The MOD explained that other correspondence with the public, outside of FOIA, is destroyed upon completion as it has no business reasons to retain it. The MOD explained that in 2017 it was decided that these requests would form information that could be accessed under its publication scheme. The MOD clarified that the scheme would contain correspondence dating from 1 January 2013 as the enquiries for the period of 2009-12 have been destroyed. The internal review response also explained that in light of this intention to publish the information in the scope of the request the MOD remained of the view that it was exempt from disclosure on the basis of section 22 of FOIA. However, the MOD explained that it considered the personal data of the correspondents to be exempt from disclosure on the basis of section 40(2) (personal data) of FOIA.

Scope of the case

8. The complainant contacted the Commissioner 20 November 2020 in order to complain about the MOD's decision to withhold the information falling within the scope of his request. He argued that there was no good reason for the MOD to withhold this information.

Reasons for decision

Section 22 – information intended for future publication

9. Section 22(1) of FOIA says that information is exempt if it at the time a public authority receives a request for it:
 - the public authority holds the information;
 - the public authority intends to publish the information at some future date, whether determined or not; and

- in all the circumstances it is reasonable to withhold the information prior to publication.
10. Therefore, in order for section 22(1) to be engaged, a public authority has to demonstrate that each of the three criteria set out above are met.

Did the MOD hold the requested information at the time of the request?

11. The MOD provided the Commissioner with the following background to this request:
12. It explained that it closed its 'UFO Hotline' in November 2009 and fast-tracked its pre-November 2009 UFO correspondence files for transfer to TNA where they, and all of the MOD's past written reports relating to UFOs, are available for public viewing.¹
13. The MOD explained that despite publicly stating in 2009 that it had no opinion on UFOs or extra-terrestrial life, it continued to receive an inordinate number of enquiries from members of the public on the subject which nearly always take the form of requests for whatever information the MOD holds on the subject at that time. The MOD explained that whilst it intended to retain such information, and in due course publish such information, other correspondence that was held, such as letters from public reporting sightings or making suggestions for further work into investigating UFOs, was planned to be destroyed after 30 days as the MOD has no business reason to retain it.
14. Therefore, although the complainant requested 'disclosure of UFO reports from 2010-present', the vast majority of information it held which fell within the scope of the request consisted of UFO-related FOI requests and the respective responses. The internal review had explained noted that this was the only category of information, however the MOD explained to the Commissioner that there are also a small number of letters to MPs who have usually raised a query in relation to UFOs on behalf of one of their constituents and received a response from the relevant Defence Minister, in line with Parliamentary protocol. In addition, the MOD explained that there is also a third category of information, namely 'Treat Officials' (TOs), which is correspondence where a member of the public writes to the Department or a Minister and receives a response direct from a MOD official.

¹ <https://www.gov.uk/government/publications/ufo-reports-in-the-uk>

15. In light of the above, the Commissioner is satisfied that the MOD held information falling within the scope of the request at the time of the request.

Did the MOD intend to publish the withheld information at some future date, whether determined or not?

16. The MOD explained that in light of the continuing number of queries it was receiving from the public about UFOs, it decided in 2017 that the only way to satisfy the continued questions received about UFOs would be to pro-actively publish all recent UFO correspondence (ie the information described above at paragraph 14).
17. The MOD explained that its intention was to release all held correspondence onto dedicated pages within the www.gov.uk website, in a manner akin to the Department's FOI response pages which gives public access to all responses under the FOIA which have released substantive information into the public domain. The only difference being that in the case of the UFO response pages, a copy of any FOI request (redacted under section 40(2) of FOIA to protect third-party personal data) would also be included where it provided information in its own right.
18. The MOD explained that the intention behind this proposal was to ensure that responses to future UFO information enquiries to it for 'all UFO information' held could then be refused on the basis of section 21 (information reasonably accessible to the applicant by other means), or section 22 (information intended for future publication) of FOIA, thus reducing the burden of providing the information every time.
19. The MOD provided the Commissioner with a draft screenshot of a top page of the UFO response page as it will look on www.gov.uk (the draft being dated April 2018). As further evidence of its intention to publish the information it holds falling within the scope of the request the MOD noted that statements had been made to the press in relation to this proposed publication, most recently in January 2020 when a RAF spokesperson told The Metro Newspaper:

'A clearance process for the documents is currently underway before publication, which is expected to take place "sometime within the first quarter of 2020"'²

² <https://metro.co.uk/2020/01/30/ministry-defence-insider-reveals-contents-britains-final-ufo-x-files-12152206/>

20. The MOD explained that unfortunately this timetable was not met (for a variety of reasons which are discussed in more detail below), however at the time of the request there was a clear intention to publish the information in the scope of the request.
21. Taking the above into account, the Commissioner is satisfied that the MOD had a clear intention to publish the information at the time of the complainant's request in August 2020.
22. The only exception to this is the parts of the information containing third party personal data which the MOD intended to redact on the basis of section 40(2) of FOIA.

In all the circumstances of the request, was it reasonable to withhold the information prior to publication?

23. In order to assist her in determining whether this criterion was met, the Commissioner asked the MOD to respond to a number of specific questions. The Commissioner has reproduced these questions, and the summarised the MOD's responses, below.
24. *Question: Are you able to explain why, in the period between 2017 and early 2020, work had not progressed to the point that the UFO correspondence files were published?*
25. The MOD explained that the Secretariat of the Headquarters Air Command was responsible for preparing the material prior to publication. It explained that Air Secretariat supports the RAF's operational mission by ensuring the RAF meets its obligations to Ministers, Parliament and the public, including advising Ministers and senior officials, responding to Parliamentary Questions and media enquiries as well as the day-to-day answering of official enquiries and correspondence from members of the public.
26. The MOD explained that the Secretariat consists of five staff, including a team leader, which as well as being responsible for answering UFO requests, is also responsible for basing issues, memorandums of understanding, devolution, engagements with Parliamentarians, commercial issues, geo-engineering, veterans, and heritage matters.
27. The MOD explained that there were vacancies within the team for a large part of the 2017-20 period. As a result the lack of progress in preparing the information for publication is chiefly due to lack of resource and the relative low priority assigned to the task of preparing UFO responses for release. The MOD noted that progress has been made when the relevant team has been fully staffed, with all team members fully trained to deal with such requests, but loss of staff, periods of induction for new staff and the continual need to adjust priorities to

meet the wider roles and responsibilities of the team has slowed the rate of completion.

28. The MOD emphasised that while the intention to complete the pro-active release task is real, the team members have had to give priority to critical outputs. The resource that would be used for this task has, therefore, been engaged in ensuring that critical and time-sensitive tasks (including those involving departmental and statutory deadlines) are completed in a timely fashion.
29. The MOD explained that work on progressing the task had been impacted by the COVID-19 pandemic, as new ways of working were implemented, including increased remote working where possible and tasking prioritised to focus on core outputs.
30. *Question: Can you please explain in more detail the process that needs to be followed in order for this information to be prepared for publication? For example, is it simply a question of redacting material to which section 40(2) applies or is the process more complicated and involved than this?*
31. The MOD explained that the main stages of work are as follows:
 - Step 1 – Check that the previously prepared UFO enquiries (April 2014-March 2018 inclusive) were correctly redacted.
 - Step 2 - Locate/retrieve/redact all UFO enquiries submitted from April 2018 to present day.
 - Step 3 – Convert all redacted documents into correct electronic format and carry out assurance checks that the redactions are secure.
 - Step 4 – Arrange upload of all prepared enquiries 2013-21 onto www.gov.uk.
32. The MOD explained that the most difficult part of the process will be identifying and collating all correspondence received/sent since 2018 and then preparing it for release. It explained that whilst key-word searches can be conducted within the MOD's electronic FOI case management system (eCase) to identify the UFO-related requests, each piece of correspondence has to be manually extracted from each case prior to manual redaction.
33. The MOD also explained that step 4 is not a task that the Secretariat staff can complete themselves. Rather, the MOD's central Directorate of Defence Communications (DDC) are the only team with the relevant rights of access to publish information onto MOD's Gov.uk pages. The MOD noted that it was not aware of any current resource issues in that team that would cause any delays in publication, but they will have their

own existing priorities, including undertaking to upload new FOI responses on the department's FOI log.

34. *Question: Going forward, and taking into account of course the ongoing impact of the pandemic, is the MOD able to offer any indicative dates when this information will be published?*
35. The MOD explained (in its submissions to the Commissioner in July 2021) that while it is planning a phased return to office working, the availability of staff or other resources to complete the outstanding tasks is not known at this time. It estimated that, based on current planning principles, most staff will have access to MOD facilities for at least a proportion of their working week by mid-September 2021.
36. However, the MOD explained that the Secretariat team remains understaffed and is likely to be so for the foreseeable future, due to an unsuccessful recruitment campaign. In light of the ongoing impact of the pandemic, and staffing issues, the MOD explained that it was unable to commit to a provisional date for when the remaining information might become available. The MOD emphasised that its understanding was that use of section 22 of FOIA was not dependent on a set publication date, only a settled intention to publish.
37. Going forward, the MOD explained that it is seeing an increase in the number of UFO enquires it receives as a direct result of the US Department of Defense's establishment of an Unidentified Aerial Phenomena Task Force (UAPTF) in August 2020 and the release in June 2021 of a preliminary report by the Office of the US Director of National Intelligence about the progress the UAPTF has made in its understanding of UAPs³. The MOD explained that these events have had a high media profile in UK⁴ and have prompted enquiries to it from the British UFO community as to whether there is any change in the UK Government stance on the subject.
38. The MOD explained this increase in correspondence has placed additional pressure on the Secretariat's resources. Indeed, the MOD explained that the team has a backlog of FOI requests, across the whole spectrum of their area of responsibility. Consequently, the timing of the release must, therefore, be carefully managed to ensure that the

³ <https://www.dni.gov/index.php/newsroom/reports-publications/reports-publications-2021/item/2223-preliminary-assessment-unidentified-aerial-phenomena>

⁴ <https://www.bbc.co.uk/news/world-us-canada-57559179>

Secretariat team can manage both the expected media interest and maintain its critical outputs.

39. *Question: Are you able to provide an estimate, even a broad one, of the likely time/resource it would take to prepare all of the information for disclosure?*
40. The MOD estimated that the likely effort required to prepare and publish the information held for the period covering 2013 to March 2018 would require one individual to work exclusively on it for up to three weeks (15 working days), with additional time required for the upload and publication tasks by the DDC team.
41. The MOD estimated that there could be more than 150 additional enquiries for the period covering 2018 to present (ever increasing) that would have to be located, extracted, redacted and converted. The MOD explained that if it assumed a somewhat conservative estimate of ten minutes to process the documents in each case, this is a further three or four working days of concentrated effort.
42. *Question: If the MOD only provides the ICO with a sample of the information, please confirm how much information falls within the scope of the request⁵.*
43. The MOD explained that the fully populated MOD UFO publication pages are likely to consist of somewhere in the region of 400 FOI responses from 2013 to 31 March 2021 and would be added to at regular intervals thereafter. It received the complainant's request on 26 August 2020 which would mean approximately 375 (93.75%) of those enquires would be in scope of his request.
44. The Commissioner has carefully considered the MOD's responses. Having done so, she is just persuaded that at the point the request was received in August 2020 it was reasonable in all the circumstances for the MOD to withhold the information prior to publication. In reaching this conclusion, the Commissioner fully appreciates that, at the point of the request, it was three years since the MOD first established its intention to publish the information in scope. In many cases the Commissioner considers that such a delay would undermine a public authority's position that it was reasonable to withhold the information on the basis of section 22 of FOIA.

⁵ The Commissioner had previously explained to the MOD that if there was a considerable volume of information in the scope of the request she would be content to be provided with a representative sample of this information. The MOD provided her with the information for 2013.

45. However, there are a number of factors, the cumulative effect of which, have persuaded the Commissioner that the application of the exemption was reasonable.
46. Firstly, in the recent past from late March 2020 to the point of the request the MOD's ability to prepare the information for publication was impacted as a result of the COVID pandemic.
47. Secondly, in terms of the period since 2017, the Commissioner recognises that the small team responsible for progressing this task has been understaffed.
48. Thirdly, the Commissioner also recognises that this team has a variety of responsibilities, many of which are more pressing, high profile or time sensitive than the process of preparing the withheld information for publication.
49. Fourthly, the Commissioner notes that the MOD estimates that it would take nearly 20 working days to complete the existing work necessary to publish the information. She accepts that given the composition of the team and the nature of its work, completing this level of work simply in response to this request (ie if section 22 was not applied) would have a very significant impact on the ability of the team to continue with its other functions and tasks, including the processing of FOI requests on other subjects.
50. Finally, the Commissioner accepts that publication of the information in the scope of the request is very likely to result in further enquiries and thus further work and pressure on the Secretariat's resources. Therefore, she accepts that timing of the publication of the material needs to be carefully managed.

Public interest test

51. The exemption at section 22(1) is qualified by a public interest test. Therefore, the Commissioner has considered whether in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosure.
52. With regard to the public interest in favour of disclosing the information, the MOD emphasised that it wished to demonstrate that it is completely open and transparent about the enquiries it still receives for information about UFOs which are processed under FOIA and the associated handling policy documents. The MOD also recognised that the publication of the correspondence had not advanced as quickly as it had originally intended.
53. However, as discussed above, the MOD argued that this was due to the exceptional circumstances of the COVID-19 pandemic and the fact that the project has also had to be juggled along with all the other competing demands within the Secretariat of the Headquarters Air Command. The MOD argued that the impact of diverting resources to bring forward the publication of the UFO files in order to fulfil this request would seriously impact the wider work of the Secretariat and result in significant delays to the processing of other FOI requests and delivery of tasks in support of service personnel and operational outputs. It therefore concluded that the public interest favoured maintaining the exemption.
54. The Commissioner agrees that there is a public interest in the MOD being open and transparent about the correspondence it still receives about UFOs. However, the Commissioner accepts that disclosure of the correspondence in response to this request would have a significant impact on the Secretariat of the Headquarters Air Command's ability to conduct other tasks. The Commissioner agrees that this would be against the public interest. Furthermore, the Commissioner is conscious that the withheld information consists primarily of correspondence associated with the processing of FOI requests on the subject of UFOs. The material does not concern more 'substantive' material on the topic. In light of this the Commissioner is of the view that there is a limited public interest in the disclosure of the actual information falling within the scope of the request.
55. Consequently, the Commissioner has concluded that public interest favours maintaining the exemption contained at section 22(1) of FOIA.

Section 40 - personal information

56. The MOD explained that the information which it was seeking to withhold on the basis of section 40(2) was primarily the requesters' and junior officials' personal data, more specifically their names and contact details. The MOD explained that where MPs have forwarded correspondence on behalf of constituents, the MOD had sought their permission to publish. Where consent has not been granted, additional redaction of the MPs' details is required, along with that of their constituent.
57. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
58. In this case the relevant condition is contained in section 40(3A)(a)⁶. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
59. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of FOIA cannot apply.
60. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

61. Section 3(2) of the DPA defines personal data as:

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

62. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
63. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or

⁶ As amended by Schedule 19 Paragraph 58(3) DPA.

more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

64. 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.
65. In the circumstances of this case, the Commissioner is satisfied that the names of the junior officials and their contact details both relate to and identify the individuals concerned. As does the information about requesters, MPs and their constituents. All of this information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
66. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
67. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

68. Article 5(1)(a) of the GDPR states that:

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

69. In the case of an 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 if to do so would be lawful, fair and transparent.
70. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

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

71. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

'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'⁷.

⁷ Article 6(1) goes on to state that:-

72. In considering the application of Article 6(1)(f) of the 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 disclosure of the information 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.
73. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

74. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that 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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. Interests may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

"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) 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".

75. In the circumstances of this case, for the reasons discussed above, the Commissioner accepts that there is a legitimate interest in the disclosure of information about this subject. However, she is not persuaded that there is a particularly strong or compelling interest in the disclosure of the names and contact details of requesters, junior officials, MPs or their constituents.

Is disclosure necessary?

76. '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 a measure would not be necessary if the legitimate aim could be achieved by something less. Disclosure under FOIA must therefore be the least restrictive means of achieving the legitimate aim in question.
77. In the Commissioner's view it is not sustainable to argue that disclosure of the personal data the MOD is seeking to withhold is necessary; disclosure of such information would not add to the public's understanding of this subject matter in any notable way.
78. Given this finding the Commissioner has concluded that disclosure of the names would not be lawful and therefore article 6(1)(f) of the GDPR is not met. Disclosure of the names and contact details of the requesters, junior officials, MPs and their constituents would therefore breach the first data protection principle and thus such information is exempt from disclosure on the basis of section 40(2) of FOIA.

Right of appeal

79. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

80. 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.

81. 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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