

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 December 2022

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) for information about meetings between itself and specific parties from April 2020 onwards. The MOD provided information in response to the request, but in doing so redacted information from the documents by virtue of section 40(2) (personal data) and section 43(2) (commercial interests) of FOIA.
2. The Commissioner's decision is that the MOD has met its obligations at section 1 of FOIA. He also finds that the MOD is entitled to rely on sections 40(2) and 43(2) to refuse to disclose the redacted information. However, the Commissioner finds that the MOD breached section 10 and section 17 as it failed to provide its response within the statutory timeframe.
3. The Commissioner does not require the public authority to take any further steps.

Request and response

4. On 23 May 2021, the complainant wrote to the MOD and requested information in the following terms:

"Please could you supply minutes and agendas for meetings of both the senior management group and the framework board of the Strategic

Delivery and Development Framework (SDDF) involving Argyll and Bute Council and/or Scottish Enterprise and/or the Ministry of Defence, from April 2020 onwards. As well as minutes and agendas, please include other documents supplied for or considered at meetings, e.g. reports, presentations, etc.”

5. The MOD responded on 8 December 2021. It disclosed some documentation within the scope of the request. Various information within the documentation was redacted as the MOD considered it to be exempt from disclosure by virtue of sections 40(2) and 43(2).
6. Following an internal review the MOD wrote to the complainant on 9 February 2022. It stated that the exemptions at sections 40(2) and 43(2) had been applied too broadly in its initial response, and therefore disclosed some further information within the scope of the request which had previously been withheld.

Scope of the case

7. The complainant contacted the Commissioner on 21 March 2022 to complain about the way their request for information had been handled. In particular, they were dissatisfied with the level of redaction which the MOD had applied to the disclosed documents. They also questioned whether the MOD had considered all relevant meetings within the timeframe specified in the request.
8. The Commissioner considers the scope of his investigation is to consider whether the MOD has met its obligations at section 1 of FOIA, and also to consider if the MOD is correct to rely on sections 40(2) and 43(2) to withhold some of the information within the scope of the request.

Reasons for decision

Section 1 – General right of access

9. Section 1(1) of FOIA requires that any person making a request for information to a public authority must be informed in writing by the public authority whether it holds information relevant to the request, and if so, to have that information communicated to them. This is subject to any exclusions or exemptions that may apply.
10. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following

the lead of a number of First-tier Tribunal (Information Rights) decisions, applies the civil standard of the balance of probabilities.

11. In other words, in order to determine such complaints, the Commissioner must decide whether on the balance of probabilities a public authority holds any - or additional - information which falls within the scope of the request (or was held at the time of the request).
12. During his investigation, the Commissioner asked the MOD to revisit the request and consider whether there were any further relevant meetings within the timeframe specified in the request, which it had not disclosed information for in its previous responses to the complainant.
13. The MOD explained that it had sought advice from an individual who regularly attended both the SDDF Steering Group and SDDF Board meetings, who had confirmed that every meeting which took place during the time period covered by the request had been declared. The MOD further confirmed that every document which it held within the scope of the request had been disclosed to the complainant, either in part or in full. No documents have been withheld in their entirety.
14. The Commissioner is satisfied that the MOD conducted appropriate and proportionate searches to identify relevant information, and, on the balance of probabilities, holds no further information within the scope of the request. Therefore, the MOD has met its obligations at section 1 of FOIA.

Section 40 – personal information

15. 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.
16. In this case the relevant condition is contained in section 40(3A)(a)¹. 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 UK General Data Protection Regulation ('GDPR').
17. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection

¹ As amended by Schedule 19 Paragraph 58(3) DPA

Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.

18. 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?

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

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

20. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
21. 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 more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
22. 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.
23. In the circumstances of this case, having viewed the withheld information, the Commissioner is satisfied that the information relates to the data subjects. The names of the data subjects quite obviously is information that both relates to and identifies those concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
24. 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.
25. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

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

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

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

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

29. 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”.²
30. In considering the application of Article 6(1)(f) of the UK 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.
31. The Commissioner considers that the test of ‘necessity’ under stage (ii) must be met before the balancing test under stage (iii) is applied.

² 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) 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”.

Legitimate interests

32. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.
33. 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.
34. In this case, the MOD recognises that there is a legitimate interest in understanding what involvement ministers and senior civil servants had in decision-making, in order that the decision makers can be held accountable.

Is disclosure necessary?

35. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
36. In this case, the personal information which has been redacted is that of junior MOD employees, as well as members of Argyll and Bute Council whose names have not previously been placed in the public domain. The MOD states that it is not necessary to disclose the personal details of all individuals invited to, or participating in, the meetings in order to fulfil the legitimate interest being pursued.
37. The Commissioner's published guidance states that it is reasonable to expect that a public authority discloses more information about senior public authority employees than more junior ones. Senior employees should expect their posts to carry a greater level of accountability, since they are likely to be responsible for major decisions and the expenditure of public funds. The guidance also states that it may be fair to release more information about employees who are not senior managers but who represent your organisation to the outside world – ie, those who are public facing. However, the same does not apply simply because an employee deals with enquiries from the public.
38. Based on the above analysis, the Commissioner finds that the legitimate interest has already been met by the MOD's disclosing the content of the information along with the names of ministers or senior civil servants.

Disclosing the names of junior officials is thus not necessary to achieve the legitimate interest. Therefore, the MOD was correct to apply section 40(2) to this particular information.

Section 43 – commercial interests

39. Section 43(2) of FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it.
40. The Commissioner's published guidance states that a commercial interest relates to a legal person's ability to participate competitively in a commercial activity. The underlying aim will usually be to make a profit. However, it could also be to cover costs or to simply remain solvent.
41. In order for a prejudice based exemption such as section 43(2) to be engaged there must be likelihood that disclosure would, or would be likely to, cause prejudice to the interest that the exemption protects. In the Commissioner's view, three criteria must be met in order to engage a prejudice based exemption:
 - Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to 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. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and,
 - Thirdly, it is necessary 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.
42. Consideration of the exemption at section 43(2) is a two-stage process: even if the exemption is engaged, the information should be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.
43. The MOD explained that the information which it redacted in accordance with section 43(2) relates to housing and office space location proposals being considered, and the associated decision-making process. The MOD considers that disclosure of this information 'would be likely to' have a

significant impact on the negotiations to secure accommodation and office space for the Royal Navy in the Argyll and Bute area, which remains a live ongoing project, as well as any future negotiations relating to rental charges and tenancy agreements.

44. The MOD further explained that both the office and accommodation requirements will, at some point, require the MOD and Argyll and Bute Council to engage in sensitive commercial negotiations. As such, it considers that placing detailed information into the public domain stating how the MOD had ranked potential offsite opportunities could:
- disadvantage the MOD in contract and commercial negotiations; by revealing its detailed requirements potentially years in advance of a decision it is undoubtedly giving commercial agencies unfair advantage.
 - allow developers to financially speculate on future MOD requirements, artificially raising local land acquisition costs for the MOD (by revealing the details of its decision-making strategy).
 - Have a detrimental impact on the cost to the MOD (and the UK taxpayer) of any future offsite development, should it fall foul of land and/or property speculation.
45. Having viewed the information withheld by virtue of section 43(2), and given due consideration to the MOD's position, the Commissioner is satisfied that the harm which the MOD envisages relates to its own commercial interests. The Commissioner is further satisfied, for the reasons set out above, that a causal link exists between disclosure and prejudice to the MOD's commercial interests. Finally, the Commissioner accepts the MOD's position that the envisioned prejudice 'would be likely to' occur as a consequence of disclosure of the redacted information. Therefore, the Commissioner's decision is that the exemption is engaged for the information which the MOD redacted under section 43(2) of FOIA, and he will go on to consider the associated public interest test.
46. The MOD noted that disclosure of the information would demonstrate its commitment to openness and transparency, as well as furthering the public's understanding of how it conducts negotiations with local councils. However, the MOD also stated that it is in the public interest to preserve its commercial position in any negotiations in order that it is able to conduct a robust competition and obtain the best value for money for the taxpayer. The MOD considers that the public interest in understanding where the project and negotiations are up to is being addressed to an extent, due to Argyll and Bute Council publishing minutes of meetings on its website. On balance therefore, the

Commissoner finds that the public interest favours maintaining the exemption at section 43(2) in this case.

Procedural matters

47. As the request was made on 23 May 2021 and was not refused or responded to until 8 December 2021, the MOD breached section 10 and section 17 as it failed to provide its response within the statutory timeframe.

Right of appeal

48. 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

49. 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.
50. 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

Catherine Fletcher
Team Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF