

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 March 2022

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

Decision (including any steps ordered)

1. The complainant requested information relating to Intellectual Property between the Ministry of Defence (the 'MOD'), the Atomic Weapons Establishment and the United States. He asked for information where he was named on a patent or 'form 32' as an inventor. The MOD initially provided some of the requested information, withheld some of it under section 42, the exemption for legal professional privilege and said it did not hold the remainder. At the internal review stage the MOD revised its position. It now refused to confirm or deny whether the requested information was held, citing section 40(5), the 'neither confirm nor deny' provision for personal information. It said that some of the information, if held, would be the personal data of the complainant and the remainder the personal data of third parties.
2. The Commissioner's decision is that the MOD was entitled to neither confirm nor deny holding information within the scope of the request by virtue of sections 40(5A) of FOIA. As this covers the whole wording of the request the Commissioner has not found it necessary to consider any third party personal data concerns.
3. The Commissioner does not require the MOD to take any steps as a result of this notice.

Background

4. The request below refers to "form 32". Through correspondence from the complainant, the Commissioner understands this to be a notification of invention form which contain personal information.

Request and response

5. On 14 October 2020, the complainant wrote to the MOD and requested information in the following terms:

"I would like to request information relating to Intellectual Property and its management, transactions, interactions and business dealings between the Ministry of Defence, the Atomic Weapons Establishment, and the United States (including national laboratories). The focus of the transactions should relate to IP [Intellectual Property] in which I am an identified inventor, Patents:- [patent numbers redacted]. There are however other pieces of IP in which I have been identified on the "form32" for which I am identified as an inventor, but have not been formally progressed to patent

Information supplied should include, **but not be limited to**:-

- business dealings (monetary values, or values "in-kind") as it relates to US interactions
- personal incentives, (including those covered by personal contracts and named roles and individuals) associated with IP / knowledge transfer to the US
- all associated roles, accountabilities and authorities with the IP interactions with the US (including supporting functions as it relates to the identified pieces of IP)
- Optional (timelines associated with the above)."

6. The MOD responded, late, on 18 November 2020. It provided some information within the scope of the request and asked the complainant to clarify what he was seeking for part of his request. The MOD also refused to provide part of the requested information, citing section 42 of FOIA, the exemption for legal professional privilege and denied holding the remainder.
7. The complainant requested an internal review on 20 November 2020. He also provided the requested clarification in relation to what he was seeking via "interactions" as referenced under the third bullet point of his request above.

Scope of the case

8. The complainant contacted the Commissioner on 15 February 2021 to complain about the way his request for information had been handled. Specifically, he complained about the MOD's failure to carry out an internal review. In his grounds of complaint he stated:

"The public body needs to divulge the requested material (there is no valid national security concern), which may require investigation, as the information requested relates to activities of an illegal nature (fraud/theft) which is pending legal action in relation to the intellectual property (IP). Furthermore there are also potential breaches of GDPR as it relates to my personal information that is associated with the IP. (i.e. the form 32 mentioned in my response contains information of both an IP and personal nature)".

9. On 1 March 2021, the Commissioner wrote to the MOD to ask it to conduct an internal review.
10. Having completed its internal review, the MOD wrote to the complainant on 12 March 2021. It revised its position and refused to confirm or deny whether the MOD held the requested information, citing section 40(5) – the 'neither confirm nor deny' ('NCND') exemption for personal information.
11. Specifically, the MOD advised the complainant as follows:

'Section 40(5) of the Act sets out the conditions under which a public authority can give a neither confirm nor deny (NCND) response where the information requested is, or would constitute, the personal data of the requester. Section 40(5A) relieves a public authority of its obligation under section 1(1)(a) of the Act, of confirming or denying whether it holds the information requested where it constitutes personal data of which the applicant is the data subject. Section 40(5A) states that:

"The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1)."

When a public authority receives a request for information that constitutes the personal data of the requester, it must decide whether disclosure (or in this case the confirmation or denial any information is held) would be fair and lawful. In determining whether confirming or denying the requested information is held is fair and lawful, one of the key factors I have considered is whether there is a legitimate public interest in making the section

1 declaration, and the balance between this and the rights and freedoms of the data subjects.

As the FOI Act does not require individuals to provide proof of identification, there have been cases where individuals have been found to have submitted requests to the MOD under a false name to try and access information to which they had no legitimate right. It is for this reason that we neither confirm nor deny that information is held when a request made under the FOI Act relates directly to a named individual or individuals. This ensures that the rights of data subjects are not breached by confirming to the world at large that specific information about them is or is not held.

I find that, the confirmation or denial that information is held in scope of any part of your request would not be fair and lawful, as to do so would breach the Data Protection Principles. For the avoidance of doubt, I should make it clear that this response should not be taken as an indication that information in scope of your request is or is not held by the Department.

In addition, the element of your request that seeks information that would be held in 'personal contracts' has been determined to relate to the personal information of multiple named roles and individuals, if held. Section 40(5)(b)(i) relieves a public authority of its obligation under section 1(1)(a) of the Act, of confirming or denying whether it holds the information requested relating to third parties where to do so would contravene any of the data protection principles of the DPA 18.'

12. In addition, the MOD advised the complainant that the correct route for requesting his own information was to make a subject access request or 'SAR' in accordance with the GDPR/Data Protection Act 2018. The MOD said it would process his FOIA request as a SAR.

13. The complainant advised the Commissioner that he remained dissatisfied following the MOD's internal review as follows:

"Whilst there may be a legal basis for not supplying the requested information under a FOI, and that in the instance of information relating to myself it would be appropriate to raise an SAR, it fails to address the fundamental points and issues raised...".

14. He also raised concerns about what he described as breaches of the GDPR, Fraud Act 2006, 1977 Patent Act and other matters, providing examples. His grounds of complaint culminated with:

"The MoD response in relation to the requested information is both obstructive and obfuscatory (and could even be considered perversion of the course of justice). I asked for the specifics in relation to my IP and the handling of that IP in reality, not the due process which they have failed to follow. At this point the information is required to support legal avenues, and there has [sic] been multiple failures to supply the requested information covering multiple pieces of Intellectual Property."

15. The Commissioner wrote to the complainant on 18 January 2022, setting out the scope of his investigation, and advised him as follows:

"I note your grounds of complaint. Please be advised that the Commissioner's role is not to investigate your allegations that the MOD has breached the Fraud Act 2006 or the 1977 Patent Act as these are not within his remit.

It is not clear to me why you consider there has been a breach of the GDPR; please can you elaborate on this aspect of your complaint. It would also be helpful to understand whether the MOD has considered your request as a subject access request or 'SAR' in line with the GDPR/DPA 2018, as stated in its internal review (section 16 advice and assistance paragraphs). If you have received a response, I would ask you to please provide a copy."

16. The complainant responded stating that there are several instances and provided one example, but he did not wish to go into detail. He asked the Commissioner to 'stay' his investigation until he had received legal advice.

17. On 24 January 2022, the Commissioner replied to the complainant as follows:

"I note that you do not wish to go into detail as to the (alleged) breaches of the GDPR and that you have provided one example as to how you consider the GDPR has been breached. Please note that without the specifics and accompanying correspondence, the Commissioner is not able to consider any GDPR breaches.

I wrote to the MOD last week at the same time as writing to you so my investigation is underway; the MOD has until 15 February 2022 to respond. It would be helpful to understand whether you anticipate having the legal advice you are seeking by that time.

My investigation can be 'stayed' pending that legal advice given that you are requesting this in the knowledge that this will further delay the outcome. However, as I do not know the nature of the legal advice you are seeking, it's difficult to determine at

this stage whether it will, or is likely to, have a bearing on my investigation.

If the advice is due on or shortly after 15 February 2022, I can see no issue in delaying the investigation. If it may be several months, it would be helpful to understand how you consider the legal advice will have a bearing on my investigation..."

18. The complainant subsequently provided further details of his concerns which are outside the Commissioner's remit, but confirmed there were no issues with him continuing his investigation.
19. On 25 and 27 January 2022, the complainant wrote to the Commissioner providing his view of the MOD's reliance on section 40(5) in "strictest confidence". Whilst the Commissioner has therefore not been able to replicate these submissions in this notice, he has taken them into account.
20. The Commissioner also understands that the MOD is still progressing a SAR which will be provided to the complainant separately.
21. The Commissioner has considered whether the MOD was correct to rely on section 40(5) in relation to this request. The MOD has cited both sections 40(5A) (personal data of the complainant) and what should be 40(5)(b)(i) (third party personal data) at internal review. However, although he has not needed to consider it, the correct writing of the exemption in relation to NCND third party personal data should be section 40(5B)(a)(i).
22. The Commissioner has, therefore, examined whether the MOD was entitled to NCND that the requested information was held.

Reasons for decision

Section 40 - personal information

23. The Commissioner would initially like to point out that the way the request is worded makes the complainant, and his place of work, readily identifiable. He has included three IP references which are searchable online and he is listed as one of the interested parties for each one. Furthermore, he is the only person who is listed in all three references so it is obviously him. His colleagues are also identifiable from the reference numbers and it is not known whether they are aware of the request or of any of the complainant's concerns. If not, then release of the reference numbers under FOIA would tell them something about the complainant which they may currently not know. Therefore, whilst it is clear that the complainant's association with the IP is already in the

public domain, whether or not the MOD holds any further information in respect of this request is not known.

24. Section 1(1) of FOIA provides two distinct but related rights of access to information, that impose corresponding duties on public authorities:
 - a) the duty to inform the applicant whether or not the information they have requested is held; and, if so
 - b) the duty to communicate the information to the applicant.
25. Section 1(1)(a) is commonly known as "the duty to confirm or deny". However, the duty does not always apply and a public authority may refuse to confirm or deny whether it holds information through reliance on certain exemptions under FOIA. It follows that where section 1(1)(a) is disapplied, there is no duty on a public authority to go on to comply with section 1(1)(b).
26. The Commissioner will first consider whether any part of the request would relate to personal data which is that of the complainant, were it held.

Section 40(5A) - Personal data of the applicant (or complainant)

27. Section 40(5A) of FOIA excludes a public authority from complying with the duty to confirm or deny in relation to information which, if held, would be exempt information by virtue of section 40(1) of FOIA.
28. Section 40(1) of FOIA states that:

"Any information to which a request relates is exempt information if it constitutes personal data of which the applicant is the data subject".
29. Therefore, where the information requested is the requester's own personal data within the meaning of section 40(1) of FOIA, the effect of section 40(5A) is that a public authority is not required to confirm or deny whether it holds the information.
30. 'Personal data' is defined in sections 3(2) and (3) of the Data Protection Act 2018 and means any information relating to an identified or identifiable living individual. 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.

31. Having considered the wording of the request in this case, the Commissioner is satisfied that the complainant is, or would be, the subject of at least part of the requested information and that this aspect is therefore his personal data. This is because, as recognised by the complainant himself, the information he has requested specifically relates to his own IP and the handling of that IP. By its own definition, that information, if held, would relate to the complainant.
32. It follows that the Commissioner considers that the complainant is the data subject within the meaning of the exemption at section 40(1) of FOIA.
33. In relation to such information, the provisions of section 40(5A) of FOIA mean that the MOD is not required to comply with the duty to confirm or deny whether the information is held, as the duty to confirm or deny does not arise in relation to information which is (or, if it were held by the MOD, would be) exempt information by virtue of subsection (1).
34. The Commissioner is satisfied that complying with section 1(1)(a) in this case would effectively confirm or deny whether the requested information is held in connection with the complainant and his work as he is readily identifiable from the wording in the request.
35. There is no right of access to an individual's own personal data under FOIA. The information, if it were held, would be exempt from disclosure under section 40(1) and therefore, under section 40(5A), the MOD is not required to confirm or deny whether it holds it.

Conclusion

36. The Commissioner therefore considers that the MOD was entitled to rely on section 40(5A) of FOIA to issue an NCND response in relation to any data that it may hold about the complainant's IP in this case. As this covers the whole wording of the request the Commissioner does not find it necessary to consider any third party personal data concerns.

Other matters

Advice for the complainant

37. As part of its investigation response to the Commissioner, the MOD said:

“Of course, if [the complainant] were to submit a request that did not name or link individuals, including himself, to the information he is seeking, then the MOD would be willing to consider it and potentially release information under the terms of the FOI Act.”

38. The Commissioner has not made a formal view on this however, the complainant's obvious personal connection to this information may not make this possible.
39. If the complainant wishes to make a complaint under the GDPR/DPA regarding the use of his personal data this should be raised as a separate complaint to the Commissioner.

Internal review

40. In this case, the complainant requested an internal review on 20 November 2020. The MOD did not provide its internal review until 12 March 2021.
41. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of FOIA. Rather they are matters of good practice which are addressed in the code of practice issued under section 45 of FOIA.
42. Part 5 of the section 45 Code of Practice¹ (the Code) states that it is best practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information. The Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by FOIA, the Code states that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may take longer but in no case should the time taken exceed 40 working days; it is expected that this will only be required in complex and voluminous cases.
43. In this case, the complainant has not complained about the delay in receiving a substantive response to the request, only about the lack of an internal review. The Commissioner notes the MOD's explanation for both delays. However, much of this relates to the delay with the substantive response as opposed to specifically focussing on the internal review.
44. Notwithstanding the MOD's explanation, the Commissioner will use intelligence gathered from individual cases to inform his insight and compliance function. This will align with the goal in his draft "Openness by Design strategy"² to improve standards of accountability, openness

¹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

² <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in his "Regulatory Action Policy"³.

³ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

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: 0203 936 8963

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

Carolyn Howes
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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