

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** **5 February 2024**

**Public Authority:** **Ministry of Defence**

**Address:** **Whitehall  
London  
SW1A 2HB**

#### **Decision (including any steps ordered)**

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1. The complainant has requested correspondence relating to the evacuation of Nowzad staff and animals from Afghanistan in 2021. The MOD refused to disclose any of the requested information, citing the exemptions at section 40(2) (third party personal data), section 38 (health and safety), section 27(1)(a) and (c) (international relations), section 26 (defence) and section 36(2)(c) (effective conduct of public affairs).
2. The Commissioner's decision is that the MOD has failed to demonstrate that any of the exemptions are engaged, albeit that he finds that the MOD was entitled to rely on section 40(2) in respect of some personal data.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the information withheld under section 38, section 27, section 26 and section 36(2)(c).
  - Disclose the information specified in the confidential annex.
  - The public authority is not required to disclose the names, email addresses and contact details of individuals withheld under section 40(2). However the remainder of the information withheld under section 40(2) should be disclosed.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of FOIA and may be dealt with as a contempt of court.

## Request and response

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5. The complainant submitted the following request to the MOD on 2 August 2022:

“Please provide a copy of all correspondence sent and received by Ben Wallace to and from Government Officials and Nowzad staff relating to the evacuation of Nowzad staff, cats and/or dogs from Afghanistan.

Please include emails, texts, WhatsApp messages or messages on equivalent platforms such as Signal, internal work instant messages such as on Slack, Teams or Gchat, and a list of and minutes of any calls. Please also list any attachments to emails or messages within the scope of this request.

A search could be conducted filtering the information by whether the email domain “@nowzad.com” features in the correspondence, which would significantly reduce the scope of the request.

Timespan is 15-28 August 2021”

6. The MOD responded on 15 December 2022 and confirmed that it held information falling within the scope of the request. The MOD stated that the requested information was exempt from disclosure on the basis of sections 24(1), 26(1), 27(1) and 40(2) of FOIA. The MOD also relied on section 23(5) of FOIA to refuse to confirm or deny that it held further information falling within the scope of the request.
7. The complainant requested an internal review on 22 February 2023.

## Scope of the case

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8. The complainant contacted the Commissioner on 9 May 2023, stating that he had not received the outcome of the internal review. The complainant wished to challenge the MOD’s refusal to provide the requested information.
9. The Commissioner considered it appropriate to accept the complaint as valid on the basis that the MOD had failed to complete an internal review. Accordingly he wrote to the MOD on 12 June 2023 to request a copy of the withheld information and further details of the MOD’s reliance on the exemptions claimed.

10. Despite further correspondence the Commissioner did not receive a substantive response from the MOD. He therefore issued an information notice on 9 October 2023 in order to obtain the withheld information and further details from the MOD in order to make a decision.
11. The MOD complied with the information notice on 8 November 2023. At this point the MOD clarified that it was now seeking to rely on the exemptions at section 40(2) (third party personal data), section 38 (health and safety), section 27(1)(a) and (c) (international relations), and section 26(1) (defence). It was not now seeking to rely on section 23(5) (security bodies) or section 24(1) (national security), but was seeking to rely on section 36(2)(c) (effective conduct of public affairs).
12. The withheld information in this case comprises two emails forwarded to the MOD by third parties and a media statement attached to one of those emails, which was issued by one of the third parties. The withheld information as provided to the Commissioner was marked up to indicate the extent to which each exemption was applied.
13. However some of the information did not contain any marking, indicating that the MOD had not applied any exemptions to it. In light of his role as data protection regulator the Commissioner has, however, proactively considered the extent to which this information may constitute personal data, and may be exempt under section 40(2) of FOIA.

## Reasons for decision

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### Section 40: third party personal information

14. 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.
15. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. 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 (the UK GDPR).

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) of the DPA.

16. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 (the DPA). If it is not personal data, then section 40 of FOIA cannot apply.
17. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

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

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

“any information relating to an identified or identifiable living individual”.

19. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
20. 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.
21. 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.
22. In its correspondence with the Commissioner the MOD stated that section 40(2) applied to all of the withheld information. However as set out above the withheld information as provided to the Commissioner was marked up to indicate the extent to which each exemption was applied. Some but not all of the withheld information was marked up as exempt under section 40(2). This comprised names, email addresses and contact details of various individuals, as well as the content of some of the emails.
23. The Commissioner is satisfied that the emails clearly identify the individuals who sent and received them. The specific information in that respect contained in the emails marked up as exempt under section 40(2) therefore falls within the definition of “personal data” in section 3(2) of the DPA. The Commissioner has gone on to consider whether the MOD is entitled to rely on the exemption at section 40(2) in respect of this information.

24. However, the Commissioner considers that some of the content of the emails, while marked as exempt under section 40(2), is not personal data on the basis that it does not relate to any individual. The MOD did not seek to rely on any other exemptions in respect of this information, therefore the Commissioner requires the MOD to disclose it to the complainant. The Commissioner has specified the information to be disclosed in a confidential annex to this decision notice, which has been provided to the MOD but not to the complainant and will not be published proactively.
25. In respect of the information which is personal data, none of the individuals concerned are the complainant, so it is third party personal data. The next step is therefore to determine whether disclosure would contravene any of the DP principles.
26. The MOD did not provide detailed arguments to the Commissioner with regard to its reliance on section 40(2). Instead it stated that it had a responsibility to protect personal data.
27. The Commissioner is disappointed that the MOD failed to demonstrate that it had properly considered the data protection exemption in this case. Protecting personal data when answering an FOIA request is a key function of any public authority, and it is essential to be able to explain to the Commissioner how decisions regarding potential disclosure have been reached.
28. Furthermore the Commissioner is mindful of his own role as the data protection regulator. Accordingly he considers it appropriate to set out proactively his consideration of the extent to which disclosure of the third party personal data under FOIA may contravene the data protection principles. This includes the information identified as personal data by the MOD, and the information identified as personal data by the Commissioner.
29. In the Commissioner's opinion the most relevant DP principle in such cases will be principle (a). 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".
30. 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.
31. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing, ie disclosure of the personal data into the public domain. It must also be generally lawful.

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

32. Article 6(1) of the UK 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” lawful bases for processing listed in the Article applies.
33. The Commissioner considers that the lawful basis most applicable is Article 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”<sup>2</sup>.
34. Accordingly, 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.

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<sup>2</sup> 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) of 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 UKGDPR would be contravened by the disclosure of information, Article 6(1) of the UKGDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.

- iv) The Commissioner considers that these tests should be considered in sequential order, ie if the legitimate interest is not met then there is no need to go on to consider the necessity test, and so on.

### **Legitimate interests**

35. 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.
36. The complainant has referred to a report<sup>3</sup> published by the Foreign Affairs Select Committee, which noted that there was a lack of transparency surrounding the Nowzad evacuations. The Commissioner observes that the complainant's request was made to the MOD rather than the Foreign, Commonwealth and Development Office. However the Commissioner is satisfied that there is a general legitimate interest in the public being informed about the way the MOD interacted with Nowzad during the withdrawal from Afghanistan.

### **Is disclosure necessary?**

37. Having identified a legitimate interest, the next step is to consider whether disclosure of the personal data in question is actually necessary to meet that legitimate interest. 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 be the least intrusive means of achieving the legitimate aim in question.
38. As set out above, the Commissioner recognises that the information withheld in reliance on section 40(2) comprises names, email addresses and contact details of various individuals. It also comprises some of the content of the emails.
39. The Commissioner is not persuaded that it is necessary for the MOD to disclose names, email addresses and contact details in order to meet the legitimate interest identified. This information would not inform the public about the way the MOD interacted with Nowzad during the withdrawal from Afghanistan.

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<sup>3</sup> <https://committees.parliament.uk/publications/23283/documents/169793/default/>, Conclusions and Recommendations paragraph 10, page 19

40. Consequently the Commissioner finds that the necessity test is not met in respect of the names, email addresses and contact details withheld under section 40(2). The MOD would not be able to rely on Article 6(1)(f) as a lawful basis for processing the personal data in question. It follows that disclosure of this information would not be lawful, and would contravene principle (a). For this reason the Commissioner finds that MOD was entitled to withhold the specific information marked as exempt under the exemption at section 40(2) of FOIA.
41. However the Commissioner finds that disclosure of some of the content of the emails is necessary in order to meet the legitimate interest, ie informing the public about the way the MOD interacted with Nowzad during the withdrawal from Afghanistan.

**Do the above interests override the legitimate interests or fundamental rights and freedoms of the data subject?**

42. If the first two tests are satisfied, the public authority must balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, the authority should consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
43. In considering this balancing test, the Commissioner has taken into account the following factors:
- the potential harm or distress that disclosure may cause;
  - whether the information is already in the public domain;
  - whether the information is already known to some individuals;
  - whether the individual has expressed concern about the disclosure; and
  - the reasonable expectations of the individual.
44. The Commissioner considers a key issue to be the extent to which a data subject has a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as:
- the individual's general expectation of privacy;
  - whether the information relates to an employee in their professional role or to them as a private individual; and
  - the purpose for which they provided their personal data.



45. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual. Disclosure under FOIA equates to publication to the world at large. The Commissioner must therefore balance the legitimate interests in disclosure against the data subject's interests when determining whether the information can be disclosed into the public domain, and not just to the complainant.
46. Again, the Commissioner has set out more detailed arguments in the confidential annex attached to this decision notice. As set out at paragraphs 26-28 above the Commissioner observes that the MOD did not provide satisfactory explanation of its consideration, despite the fact that the Commissioner had issued an information notice requiring it to do so. The Commissioner has therefore had to take a proactive approach in order to ensure that the data protection rights of individuals are properly considered.
47. Having taken into account all the circumstances of this case the Commissioner is satisfied that the legitimate interest in disclosing some of the withheld information is not outweighed by the rights and freedoms of the data subjects. The Commissioner also considers that disclosure of this specific information would assist the public's understanding of the interaction between Nowzad and the MOD.
48. Consequently the Commissioner finds that MOD was not entitled to rely on the exemption at section 40(2) in respect of certain information. The Commissioner has specified the information to be disclosed in the confidential annex.

### **Section 38: health and safety**

49. Section 38 of FOIA provides an exemption from disclosing information if it would or would be likely to endanger the physical or mental health or safety of any individual. It is a prejudice based exemption and is subject to the public interest test.
50. The MOD did not explicitly set out to the Commissioner how it considered the exemption to be engaged. Nor did it specify which limb of the exemption it had applied. However it did provide public interest arguments. The Commissioner is mindful that the exemption at section 38 exists to protect individuals' health and safety, therefore he has examined the MOD's public interest arguments to ascertain whether they explain how section 38 could apply.

51. The MOD indicated that the information withheld under section 38 contained candid comments and if these were disclosed into the public domain, there would remain a risk to physical health and safety and endangerment. Specifically, the MOD expressed concern about the repercussive effects of disclosure on Nowzad staff who may be targeted by persons with malicious intent.
52. The MOD maintained that there was a likelihood that the chance of targeted threats to staff could occur. It referred the Commissioner to information indicating that the Nowzad organisation have returned to Kabul to conduct their charity work and as such there is a potential risk of their staff and organisation being targeted.<sup>4</sup>
53. The MOD considered it possible that Nowzad staff may also fear for their own safety if some of the information contained in the emails was released which would have an adverse physical and mental impact to individuals.
54. In addition, the MOD set out that some information relating to flight details could also be considered to fall under section 38. It said it was possible that the conditions and controls may be deployed by the company in similar circumstances and for any future operations.
55. The Commissioner notes the MOD's arguments in this regard but has not been provided with evidence of the causal link between disclosure of the information withheld under section 38, and the risk to health and safety set out. The Commissioner observes that the "candid comments" referred to by the MOD were included in the press release sent to the MOD, which forms part of the withheld information. The Commissioner understands that the content of the media statement was published on Facebook and is also accessible on at least one website. He considers this an indication that the information was likely to be in the public domain at the time of the request.
56. The Commissioner further notes that the flight details were over a year old at the time of the request. He is not persuaded by the MOD's contention that the possibility of similar circumstances arising is sufficient to demonstrate the necessary causal link between disclosure of the information and risk to health and safety.

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<sup>4</sup> <https://www.nowzad.com/our-work/nowzad-afghanistan>

57. The Commissioner has been proactive in considering the MOD's public interest arguments, but cannot speculate or make the assumptions necessary to find that the exemption is engaged.
58. In light of the above the Commissioner cannot be satisfied that the MOD has properly applied the exemption at section 38. He cannot find that the exemption is engaged and is not required to consider the public interest test in maintaining the exemption.

**Section 27(1)(a) and (c): international relations**

59. Section 27(1)(a) provides an exemption from disclosure where it would or would be likely to prejudice relations between the United Kingdom and any other State. Section 27(1)(c) provides an exemption where disclosure would or would be likely to prejudice the interests of the United Kingdom abroad. Both exemptions are subject to the public interest test.
60. The MOD advised the Commissioner that disclosure of the information withheld under section 27 would be likely to prejudice "the support of the UK, for the UN and the Afghan people". Again it did not provide separate arguments to indicate how the exemptions were engaged, so the Commissioner has considered the public interest arguments in this context as well.
61. The MOD argued the information contained candid observations and remarks at the time of the evacuation, and the possible related implications for those who remained in Afghanistan following the evacuation. It set out that the release of such dialogue by the MOD could affect international relations with Afghanistan and undermine the ability of the UK to negotiate on common goals bilaterally.
62. The Commissioner notes that the information withheld under section 27 comprises two sentences in an email sent to the MOD. The Commissioner cannot describe its content in detail since to do so would defeat the purpose of the exemption. However the Commissioner observes that the sentence in question was contained in the press release which, as set out at paragraph 56 above, was in the public domain at the time of the request, as well as when this decision notice was issued.
63. The MOD additionally pointed out that the Nowzad organisation is again operating in Kabul and any release of the comments made in respect of those in power after the evacuation could affect their interests and the work being undertaken in Afghanistan. It argued that any repercussions as a result of the release of some of the information contained in these exchanges would need to be managed by the UK Government and as

such the potential for such a situation to occur could have a knock-on effect to international relations and UK interests abroad as a result.

64. However, again the MOD did not expand on these statements, nor did it explain how disclosure of the information in question would be likely to have the prejudicial effects anticipated.
65. As with section 38, the Commissioner cannot be satisfied, on the basis of the information provided, that the MOD has properly applied the exemptions at section 27(1)(a) and (c). He cannot find that either exemption is engaged and is not required to consider the public interest test in maintaining either exemption.

### **Section 26: defence**

66. Section 26 of FOIA provides an exemption where disclosure would, or would be likely to, prejudice the defence of the British Islands, or capability, effectiveness or security of any relevant forces.
67. The MOD advised the Commissioner that section 26 “could apply” to some of the withheld information because its disclosure “could facilitate aggressive campaigns of correspondence with the intention to disrupt defence operations and capabilities”.
68. The Commissioner is of the opinion that it is not sufficient for a public authority to suggest that an exemption “could apply”. If the public authority wishes to rely on any exemption, it is responsible for providing a clear explanation of this reliance to the Commissioner. In respect of prejudice-based exemptions such as section 26, this includes setting out how the prejudice test has been considered.<sup>5</sup>
69. In light of the above the Commissioner is not satisfied that the MOD is entitled to rely on the exemption at section 26 in respect of the information withheld under that section.

### **Section 36(2)(c): effective conduct of public affairs**

70. Section 36(2)(c) of FOIA provides that information is exempt if in the reasonable opinion of a qualified person (QP), disclosure of the information would, or would be likely to prejudice the effective conduct of public affairs. The exemption is subject to the public interest test.

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<sup>5</sup> The Commissioner has published detailed guidance on the prejudice test: [https://ico.org.uk/media/for-organisations/documents/1214/the\\_prejudice\\_test.pdf](https://ico.org.uk/media/for-organisations/documents/1214/the_prejudice_test.pdf)

71. Section 36(5) sets out who may act as the QP in relation to a public authority. In the case of government departments, any Minister of the Crown may act as the QP.<sup>6</sup>
72. The MOD did not provide the Commissioner with any details of the QP's opinion with respect to this request. It did however advise that it had previously conducted an internal review which had engaged section 36(2)(c) to similar information on the basis that its release could assist members of the public, or adversaries, looking to cause disruption.
73. The Commissioner cannot accept such a brief explanation in support of any exemption. Nor can he accept that section 36 in particular is engaged without details of the QP's opinion. An internal review conducted in another case is not evidence that the QP's opinion has been properly obtained in this case. In the absence of any explanatory information the Commissioner finds that the MOD is not entitled to rely on section 36(2)(c) in this case.

## **Other Matters**

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74. Although internal reviews are not a statutory requirement under FOIA they are recommended as good practice as set out at Part 5 of the Code of Practice issued under section 45 of FOIA.<sup>7</sup>
75. The Commissioner has also published guidance on conducting internal reviews under FOIA.<sup>8</sup>
76. Both documents recommend that internal reviews should be conducted where requested by the complainant, and should normally take no longer than 20 working days.

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<sup>6</sup> Defined at section 8(1) of the Ministers of the Crown Act 1975 as "the holder of an office in [His] Majesty's Government in the United Kingdom".

<sup>7</sup> <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

<sup>8</sup> <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/request-handling-freedom-of-information/#internal>

77. In this case the MOD failed to conduct an internal review. The Commissioner would recommend that steps be taken to ensure that, in all cases, internal reviews are conducted in line with his guidance and the Code of Practice referred to above.
78. The Commissioner also wishes to record his disappointment at the quality of the arguments provided by the MOD in this case. It is for the public authority to demonstrate that it has properly considered the request, and that it has relied on exemptions only after careful consideration.
79. In this case the MOD sought to rely on six exemptions (including two separate limbs of section 27) in order to refuse to disclose the requested information. When questioned by the Commissioner it failed to provide detailed and specific arguments in respect of any of them. The Commissioner cannot make arguments in place of the public authority, although he is obliged to be more proactive when considering the possible disclosure of personal data.
80. As this case demonstrates, a public authority may cite whatever exemptions it wishes to rely on, but if it fails to explain how those exemptions are engaged the Commissioner is likely to uphold a complaint and order disclosure of the withheld information.

## Right of appeal

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81. 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](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

82. 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.

83. 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 .....**

**Sarah O’Cathain  
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Wycliffe House  
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SK9 5AF**