

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 January 2019

Public Authority: Ministry of Defence

Address: Main Building
Whitehall
London
SW1A 2HB

Decision (including any steps ordered)

1. The complainant submitted a request to the Ministry of Defence (MOD) seeking information about a robbery of a post office in 1972 in Bangor, Northern Ireland committed by four soldiers. The MOD provided the complainant with some of the information it had located but sought to withhold further information on the basis of section 40 (personal data) and section 38 (health and safety) of FOIA. The complainant sought to dispute the application of these exemptions and argued that the MOD was likely to hold further information falling within the scope of his request. During the course of the Commissioner's investigation, the MOD located a small amount of further information but also argued that this was exempt from disclosure on the basis of section 40 and that part of it was also exempt from disclosure on the basis of section 32 (court records). The Commissioner has concluded that on the balance of probabilities, the MOD does not hold any further information falling within the scope of the request. Of the information which the MOD has sought to withhold, the Commissioner is satisfied that it is exempt from disclosure on the basis of section 40(2) of FOIA.

Request and response

2. The complainant submitted the following request to the MOD on 14 June 2018:

'Please provide Army records re Jan/Feb 1972 incident re robbery/charging/conviction of 4 soldiers Clandeboy Post Office, Bangor Northern Ireland to include any report of case at time or subsequently.'

3. The MOD contacted him on 16 July 2018 and confirmed it held information falling within the scope of his request but it considered this to be exempt from disclosure on the basis of section 31 (law enforcement) and 38 (health and safety) of the FOIA. However, it needed additional time to consider the balance of the public interest test.
4. The MOD provided him with a substantive response to his request on 30 July 2018. The MOD explained that the information falling within the scope of the request had been located in a range of documents. The MOD provided the relevant extracts of these documents to the complainant and explained that the original documents had not been provided in redacted form as they would have been highly redacted in order to remove information outside the scope of the request. Nevertheless, the MOD offered to provide the complainant with the documents in redacted form if he wished. Furthermore, the MOD explained that it was seeking to withhold some information which did fall within the scope of the request, and was contained in these documents, on the basis of sections 38 and 40(2) (personal data) of FOIA.
5. The complainant contacted the MOD on 31 July 2018 in order to ask for an internal review of this decision. He argued that it was inconceivable that the only information which could be disclosed were the extracts provided given the public nature of the trial and conviction. He also suggested that some of the individuals involved were known to have died.
6. The MOD informed him of the outcome of the internal review on 23 August 2018. The review explained that both sections 38(1)(a) and 40(2) were being relied on to withhold the names of the individuals linked to the robbery and also the name of the reporting officer from the Royal Military Police (RMP).

Scope of the case

7. The complainant contacted the Commissioner on 30 August 2018 in order to complain about the MOD's handling of his request. More specifically, he was dissatisfied with the MOD's decision to withhold the information it acknowledged holding on the basis of the exemptions cited above. He has also questioned the absence of any information about the arrest/charging/trial and conviction of the soldiers for the robbery.
8. The Commissioner has initially considered whether the MOD has located all of the information falling within the scope of this request. She has then gone to consider whether the information located by the MOD is exempt from disclosure on the basis of the exemptions it has cited.

Reasons for decision

Whether the MOD has holds any further information falling within the scope of the request?

9. The complainant noted that the information disclosed to him at the refusal stage consisted of extracts from logs around the date of the incident. He noted that there was no reference to documentation which must exist regarding the arrest/charging/trial and conviction of the soldiers for the robbery.¹
10. In cases such as this where there is some dispute as to whether information falling within the scope of the request is held – or whether all of the information falling within the scope of the request has been located - the Commissioner, following the lead of a number of Information Tribunal 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 information, or as in this case further information, which falls within the scope of the request.

¹ The MOD provided the complainant with brief extracts from three separate documents. The documents in question were 'Director of Operations Brief Northern Ireland 18 – 19 January 1972', '1 Q O HLDRS unit Log Sheet dated 19 Jan 72') and 'RMP Gazette 1972'.

12. In applying this test the Commissioner will consider the scope, quality, thoroughness and results of the searches as well as any further explanations offered as to why the information is not held.
13. As part of her investigation, the Commissioner asked the MOD to explain the nature of its searches that it had undertaken to locate information falling within the scope of this request and explain why it considers that such searches were sufficient to locate all relevant information.
14. In response, the MOD advised that the arrest of the soldier was believed to have been made by the Royal Ulster Constabulary (RUC) and while it appears that the MOD were called to assist with the incident, they were not involved in the arrest, investigation or subsequent trial. The MOD explained that the RUC was superseded by the Police Service Northern Ireland (PSNI) and it is likely that they would hold information of interest to the complainant. The MOD acknowledged that on reflection it should have suggested to the complainant that he approach PSNI, and considering the historical nature of the case, potentially also the Public Record Office of Northern Ireland.
15. With regard to the searches conducted at the time of the request, the MOD explained that these were undertaken primarily by 38X Brigade, Northern Ireland, which located two of the documents from which extracts were provided to the complainant namely, 'Director of Operations Brief Northern Ireland 18 – 19 January 1972' and '1 Q O HLDRS unit Log Sheet dated 19 Jan 72'. The RMP Gazette from which an extract was also provided to complainant was located in the Provost Martial (Army) records. The MOD explained that given the nature of the information requested these were the most likely archives in which information would be stored. However, the MOD explained that further searches were also conducted in the following areas which were considered to be relevant:
 - Policy Legacy Historical Inquires Team;
 - The Sensitive Review Team at Portsmouth, including the Non-sensitive;
 - Special Investigation Branch case files held within Policy Legacy Branch;
 - The Service Police Crime Bureau;
 - 38 Bde Personnel Discipline Cell;
 - Directorate Judicial Engagement Policy (DJEP).
16. The MOD explained that no information was located in any of these areas. It argued that the most likely reason for this was because the arrest, trial and conviction was not conducted by the MOD. The MOD also explained that it was likely that any information of such a historical

nature would not be kept, or either be archived, or destroyed in line with the MOD's record's management policy.

17. However, the MOD explained that subsequent to the complainant raising this matter with the Commissioner it had identified a possible further source of information relevant to the request; namely the personnel files of the individuals named in the documents previously located. The MOD apologised for not considering this source previously but had only established that information about convictions which lead to an individual being removed from service may be included on their personnel file during the course of the Commissioner's investigation of this complaint. The MOD explained that these further searches located two documents relating to the convictions of two of the named individuals in the previously withheld information. The MOD explained that the relevant information contained within these documents was considered to be exempt from disclosure in its entirety on the basis of section 40(2) of FOIA with some of the information also attracting the exemption contained at sections 32(a) and 32(2)(c)(ii) (court records) of FOIA.
18. Having considered the nature of the MOD's submissions to her, the Commissioner is satisfied that on the balance of probabilities, it has now located all of the information it holds falling within the scope of this request. In reaching this conclusion, the Commissioner acknowledges that the MOD did not initially locate all of the relevant information when it responded to this request. However, the Commissioner considers the searches undertaken as part of the MOD's initial response to the request, allied to the subsequent search of the individual soldiers' personnel files, have now taken a sufficient account of the various locations within the MOD where information about this incident may have been located. Furthermore, the Commissioner notes the MOD's point that it was not involved in the arrest, investigation or subsequent trial of the individuals in question. In the Commissioner's view this provides a compelling explanation as to why the MOD only holds a limited amount of information about the incident in question.

Section 40 - personal information

19. Section 40(2) of the 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(3) or 40(4) is satisfied.
20. In this case the relevant condition is contained in section 40(3A)(a). 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 set out in Article 5 of the GDPR ('the DP principles').

21. 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 2018). If it is not personal data then section 40 FOIA cannot apply.
22. 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 data protection principles under the DPA 2018.

Is the information personal data?

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

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

24. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
25. 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.
26. 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.
27. The information which the MOD is seeking to withhold on the basis of section 40(2) consists of the names of the individuals linked to the robbery along with various biographical details about them, and also the name of the reporting officer from the RMP.
28. As noted above, for information to be personal data it has to relate to an identifiable *living* individual. The complainant argued that it was known that a number of the individuals involved in the robbery had died. The Commissioner asked the MOD to comment on this line of argument.
29. In response, the MOD explained that it had considered a range of open source material related to this incident. However, it explained that having done so it did not consider the content of these sources to be sufficiently reliable to establish whether any of the individuals were in fact deceased. The MOD also explained that given the information that was available in articles found during an internet search, it also searched for any publicly available court records relating to the trial and sentencing of those charged as a result of the robbery. Nothing could be located. A search was also made via the Public Records Office Northern

Ireland which resulted in four records being located, but this information is closed to the public and therefore not accessible by MOD. The MOD therefore explained that it was unable to locate any information that officially confirms the reports that any of the individuals involved were deceased.

30. The Commissioner has located a range of information online which would suggest that at least one of the individuals involved in the robbery is now deceased. However, she agrees with the MOD that none of these sources provide official confirmation of this. In light of the lack of official confirmation of the death of any of the individuals concerned and given the sensitivity of the information, the Commissioner considers it appropriate to err on the side of caution and assume that for the purposes of her consideration of section 40(2) the individuals in question are still alive. The withheld information, both information about the soldiers and the RMP officer, therefore constitutes personal data.

Is the information criminal offence data?

31. Information relating to criminal convictions and offences is given special status in the GDPR.
32. Article 10 of the GDPR defines 'criminal offence data' as being personal data relating to criminal convictions and offences. Under section 11(2) of the DPA 2018 personal data relating to criminal convictions and offences includes personal data relating to:-
- (a) The alleged commission of offences by the data subject; or
 - (b) Proceedings for an offence committed or alleged to have been committed by the data subject of the disposal of such proceedings including sentencing.
33. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that the requested information which concerns the individuals who committed the robbery is criminal offence data. She has reached this conclusion on the basis that it clearly relates to the commission of a criminal offence and subsequent proceedings concerning it.
34. The only exception to this finding is the name of the RMP officer which is not criminal offence data.
35. Criminal offence data is particularly sensitive and therefore warrants special protection. It can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Schedule 1, Parts 1 to 3 of the DPA 2018 can be met.

36. The Commissioner therefore considered each of these conditions and whether any of them could be relied on to disclose the criminal offence data. Having done so, and taken into account the restrictive nature of the Schedule 1, Parts 1 to 3 conditions, the Commissioner considers that they could not.
37. As none of the conditions required for processing criminal offence data are satisfied there can be no legal basis for its disclosure; its disclosure would breach principle (a). It follows that the criminal offence data is exempt under section 40(2) of the FOIA.

Would disclosure contravene principle (a)?

38. As the Commissioner accepts that the name of the RMP officer is not criminal offence data, she has instead considered whether disclosure would contravene principle (a) of GDPR.
39. Article 5(1)(a) GDPR states that:-
- "Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject"
40. 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 (i.e. would meet one of the lawful bases listed in Article 6(1) GDPR), fair, and transparent.

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

41. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "processing shall be lawful only if and to the extent that at least one of the" lawful bases listed in the Article applies. One of the bases in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.
42. The Commissioner considers that the lawful basis most applicable on the facts of this case would be that contained in Article 6(1)(f) GDPR which provides as follows:-

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and

freedoms of the data subject which require protection of personal data, in particular where the data subject is a child”².

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

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

ii) **Necessity test:** Whether 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.

44. 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

45. In considering any legitimate interest(s) in the disclosure of the requested information public 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.

46. 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.

47. In the Commissioner’s view, there is a legitimate interest in public authorities being open and transparent about historic events such as the one which is the subject of this request and therefore she accepts that

² 3 Article 6(1) goes on to state that:- “Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”.

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA 2018) provides that:- “In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second subparagraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.

there is a legitimate interest in the disclosure of the name of the RMP officer.

Is disclosure necessary?

48. '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.
49. The Commissioner is not persuaded that disclosure of the name of the RMP officer involved in investigating the robbery is necessary in order to inform the public about the events in question. This is because the release of the name would add very little to the public's understanding of this historical event and arguably the release of the information already provided to the complainant provides a greater insight into the event in question. In other words, the Commissioner does not accept that disclosure of the RMP officer's name can be said to be more than desirable in the context of this request. Therefore she does not consider that the disclosure of this information is necessary to meet the legitimate interest in question. As such, article 6(1)(f) is not met.
50. Given this finding the Commissioner has concluded that disclosure of the RMP officer's name would not be lawful and disclosure would therefore breach principle (a) of the GDPR. Thus the information is exempt from disclosure on the basis of section 40(2) of FOIA.
51. In light of her findings in respect of section 40(2), the Commissioner has not considered the other exemptions cited by the MOD.

Right of appeal

52. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504
Fax: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

53. 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.
54. 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

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