

## Freedom of Information Act 2000

### Decision notice

**Date:** 1 February 2017

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

#### Decision (including any steps ordered)

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1. The complainant requested information from the Ministry of Defence (MOD) on the Gurkha Offer to Transfer (GOTT). He also requested a copy of a letter the MOD intended to send to the complainant, which did not reach the complainant due to an error by the MOD.
2. The MOD provided three letters in response to the request based on its interpretation of the scope of the request. The complainant informed the MOD that this interpretation was not correct, and that the scope was much wider. The MOD refused the request under section 14(1) of the Freedom of Information Act 2000 (the Act) because, based upon the wider interpretation of the request, it considered it to be vexatious.
3. The Commissioner's decision is that the MOD is entitled to refuse the request under section 14(1) of the Act. No steps are required.

#### Request and response

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4. On 7 March 2016, the complainant wrote to the MOD and requested information in the following terms:

*"You may recall that I wrote to you on 4<sup>th</sup> January 2016 to draw your attention to various anomalies in relation to the implementation of the Gurkha Offer to Transfer (GOTT) that have adversely affected the Gurkhas who transferred their pensions and to ask you to take the necessary corrective measures. I have not received any response from you, which makes me wonder if your reply was sent by letter. Post to the Philippines tends to be slow and unreliable.*

*Please provide under the Freedom of Information Act 2000 a copy of your reply to my letter dated 4 January 2016 and copies of any correspondence that has been generated by your Branch on this subject since then."*

5. The MOD responded on the same day. It stated clearly that it interpreted the phrase *"any correspondence that has been generated by your Branch on this subject since then"* to mean correspondence intended for the complainant. Based on this interpretation it provided three pieces of correspondence.
6. On 18 March 2016 the complainant responded and confirmed that he meant all correspondence on the subject, regardless of the recipient, and both internal and external.
7. The MOD responded on 11 May 2016 and refused the request under section 14(1) of the Act because it deemed the request vexatious. The MOD made it clear that this was in part due to the scope of the request being confirmed as much wider than previously appreciated.
8. The MOD issued its internal review on 22 July 2016. The review upheld the section 14(1) refusal, but also made some other points. Firstly, it stated that the correspondence provided in its response of 7 March 2016 should have been refused under section 40(1) where the information was the complainant's own personal data, and section 40(2) where it was the personal data of third parties. In making these points the MOD apologised for the breach of the complainant's data protection rights when it provided correspondence on 7 March 2016. Secondly, the MOD identified some documents relevant to the scope of the request that were available online. The MOD provided the location of these documents, and stated that this was in effect a refusal under section 21 of the Act, as the information was already accessible to the complainant.

## **Scope of the case**

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9. The complainant contacted the Commissioner to complain about the way his request for information had been handled. Specifically, that the MOD refused his request under section 14(1) of the Act.
10. The Commissioner considers the scope of the case to be whether the complainant's request is vexatious as per section 14(1) of the Act.

## **Reasons for decision**

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11. Section 1(1) of the Act states:

*“(1) Any person making a request for information to a public authority is entitled –*

*(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*

*(b) if that is the case, to have that information communicated to him.”*

12. Section 14(1) of the Act states:

*“(1) Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.”*

13. The term “vexatious” is not defined in the Act. The Upper Tribunal (Information Rights) considered the issue of vexatious requests in the case of the *Information Commissioner v Devon CC & Dransfield*.<sup>1</sup> The Tribunal commented that “vexatious” could be interpreted as the “manifestly unjustified, inappropriate or improper use of a formal procedure”. The Tribunal’s definition clearly establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.

14. In the Dransfield case, the Upper Tribunal also found it instructive to assess the question of whether a request is truly vexatious by considering four broad issues: (1) the burden imposed by the request (on the public authority and its staff); (2) the motive of the requester; (3) the value or serious purpose of the request and (4) harassment or distress of and to staff.

15. The Upper Tribunal did, however, also caution that these considerations were not meant to be exhaustive. It stressed that the:

*“[I]mportance of adopting a holistic and broad approach to the determination of whether a request is vexatious or not, emphasising the attributes of manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests” (paragraph 45).*

16. In the Commissioner’s view, this means that whether a request is vexatious is left open to consideration based on the circumstances of the case. Where a situation presents itself which does not fit neatly with the

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<sup>1</sup> GIA/3037/2011 – <http://www.osspsc.gov.uk/Aspx/view.aspx?id=3680>

Commissioner's guidance – or the factors the Tribunal looked at in its case – it would not necessarily mean the request was not vexatious.

*Complainant's view*

17. The complainant is well known to the MOD, as he is an 'Assisting Officer'<sup>2</sup> to 30 Gurkha veterans attempting to redress individual grievances through the Armed Force Pension Scheme's (AFPS) Internal Dispute Resolution Procedure (IDRP). When the complainant requested an internal review he drew the MOD's attention to the definition of an Assisting Officer:

***Role** The officer appointed to act as the AO has a key role in helping to achieve a fair resolution of the complaint... with the minimum of delay. Consequently AOs should be selected with care to ensure that they have the appropriate knowledge and experience to gain the trust and respect of complainants. The AO has the following important duties:*

- a. Help a complainant prepare the service complaint form in a clear concise and unambiguous manner. This will require detailed preparation and thorough scrutiny.*
  - b. Help clarify the issues at the root of the complaint and the nature of the redress sought."*
18. The complainant argued that his motive for the request was a result of his role as an Assisting Officer. He is working to ensure that the veterans he represents receive a fair deal from their pension scheme, and the request for information was part of his work.
19. Similarly, the complainant argued that the request has a serious purpose. From his submissions to the Commissioner he made it abundantly clear that the GOTT scheme left a number of Gurkha veterans much worse off financially than they would have been if they had not transferred their pension scheme. The purpose of the request is not to further any personal grievance, but to ensure that individuals who provided a valued service to the United Kingdom received just remuneration for their efforts.

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<sup>2</sup> As per <https://www.gov.uk/government/publications/jsp-831-redress-of-individual-grievances-service-complaints>

*MOD's view*

20. The MOD's submissions to the Commissioner stated that the "any correspondence" part of the complainant's request encompassed at least 144 documents. These documents contain information that is exempt under the Act, and so would require staff to go through the documents to ensure that it was redacted. The MOD stated that the exemptions engaged would be:
- Section 35 (information relating to the formulation or development of government policy).
  - Section 36 (prejudice of effective conduct of public affairs).
  - Section 40 (personal information).
  - Section 42 (legal professional privilege).
21. The MOD argued that there were only a few relevant subject matter experts for this matter, and that in order to comply with the request it would require this small group to spend a large amount of time reviewing the requested information and making any necessary redactions. The MOD concluded that this would put an unwarranted strain upon the resources of a small number of employees. The MOD's internal review estimated that to comply with the request would take 6.6 working days.
22. The MOD referred the Commissioner to its response to the complainant of 2 March 2016 (which was sent in response to the complainant's letter of 4 January 2016). The letter replies to the complainant on a number of issues, and the MOD stated that this required the involvement of a wide-range of personnel and took up a considerable amount of time. The complainant's letter had gone to 23 pages, and had 29 attachments to it. The MOD then forwarded this round to the relevant business units for comment in order that the letter of 2 March 2016 could be drafted. In the MOD's view, it has spent a substantial amount of time addressing the complainant's concerns, and that it would be disproportionate to spend an additional 6.6 working days complying with the complainant's request.
23. The MOD stated that the catch-all wording of the request for "all correspondence" meant that it encompassed the information collated for a subject access request (SAR) under the Data Protection Act 1998 (DPA) submitted by the complainant on behalf of a Gurkha he represents. This meant that in order for the MOD to legally oblige with both requests it would have to produce two responses for the same information: one intended for the SAR, and one for complainant's the request under the Act.

24. In addition to this the complainant had also submitted a further three requests in the two months prior to the one that forms the basis of this appeal, as well as one in December 2015; all of which were concerned about the same subject. The MOD contended that the most recent request would encompass the documents within those other requests, as well as the documents that showed how the requests had been handled. In the MOD's view, this showed that the complainant had submitted an overlapping request that was making it revisit issues that had already been addressed. This is seen by the MOD as an improper use of the formal procedure afforded under the Act.
25. The MOD informed the Commissioner that the subject of GOTT had been judicially reviewed in 2008 and 2009, and both times found to be fair and reasonable. The MOD also informed the Commissioner that the European Court of Human Rights had found that the pension changes were not discriminatory.<sup>3</sup> The MOD argued that the subject was important to those concerned, but that it had been addressed through legal challenge and found to be fair. There was not a large public interest in allowing a substantial diversion of resources for such a subject.

*Commissioner's decision*

26. The Commissioner's view is that the complainant certainly has commendable intentions with his voluntary assistance to the Gurkha veterans, and it is evident that he has been able to achieve successful redress for some individuals from the MOD's IDRP. Whilst the matter might not affect a large section of the country, it is no doubt of significant value to those whom it does. This shows that whilst he is in a protracted engagement with the MOD it is not one that is wholly unreasonable, but rather one that is improving the financial position of some veterans.
27. However, the Dransfield decision made it clear that the purpose of the vexatious exemption is the protection of public resources where a request may be seen as an unwarranted burden upon a public authority. Whilst the complainant is acting as the Assisting Officer for the Gurkha veterans, the Act establishes a limit for what can be requested in order to help the MOD protect its staff from burdensome requests. The MOD's submissions show that a small group of its staff would have to devote a significant amount of time to ensure that all exempt information is

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<sup>3</sup> <http://www.humanrightseurope.org/2016/09/united-kingdom-gurkha-soldiers-lose-pension-human-rights-challenge/>

redacted, and that these members of staff have already devoted large amounts of time to this subject already.

28. The Commissioner has also taken into account the context and history of the request, in particular the assistance provided to the complainant by the MOD outside of the Act (described at paragraph 22), together with its compliance with the three FOI requests on the same topic being submitted in the period of three months prior to the request considered in this Notice (described at paragraph 24). In this context the Commissioner's view is that the MOD is entitled to refuse the request in order to prevent this disproportionate use of its resources.
29. When the complainant requested an internal review from the MOD he queried the need for it to spend so much time redacting exempt information. His argument is that he was acting an Assisting Officer for the Gurkhas, and also during his time as a commanding officer in a Gurkha regiment he never received a redacted document. The Commissioner can sympathise with these arguments but they are not applicable in this instance. This is because a disclosure under the provisions of the Act is a disclosure to the world, so any information the MOD would disclose to the complainant must also be disclosed to any other individual who requested the information.
30. The Commissioner wishes to make it clear that she does not consider that the complainant is now forbidden from making further requests, but she hopes that it is apparent that the wording of the request is crucial in this decision. She notes that the MOD provided the complainant with advice and assistance in its internal review to help the complainant refine the scope of his request so that it would not represent a significant burden to its resources.
31. The MOD's initial interpretation of the complainant's request was complied with in a prompt manner, it was only when the complainant informed the MOD that the request of 7 March 2016 was intended as a catch-all for any correspondence on the subject that the burden became disproportionate. This demonstrates to the Commissioner that the MOD is being reasonable in its dealings with the complainant in relation to his FOI requests.
32. The Act is designed to provide individuals with access to specific recorded information held in a public authority's records. There is no disputing the value of the complainant's work, but it would be advisable to make more specific requests in order to avoid placing too great a burden upon the MOD. Therefore, for the reasons set out above, the complainant's request of 7 March 2016 is vexatious as per section 14(1). No steps are required.

## Right of appeal

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33. 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 123 4504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

34. 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.
35. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed** .....

**Jonathan Slee**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**