

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 September 2020

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 copies of 'Defence Air Safety Occurrence Reports' filed by air traffic control personnel at RAF Wittering for the period November 2014 to March 2018. The MOD refused to comply with the request on the basis of section 14(1) (vexatious) of FOIA.
2. The Commissioner's decision is that the MOD cannot rely on section 14(1) as a basis to refuse to comply with this request.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Issue a fresh response to the request without relying on section 14(1) of FOIA.
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 the Act and may be dealt with as a contempt of court.

Request and response

5. The complainant submitted the following request to the MOD on 17 April 2018:

'Please provide copies of all Defence Air Safety Occurrence Reports filed by air traffic control personnel at RAF Wittering in the period 1st November 2014 to 31st March 2018.

'Please note that a response in electronic spreadsheet form, containing the Report ID, Incident Type, Date of Occurrence, Brief Title, Description, and Perceived Severity, is acceptable.'

6. The MOD contacted the complainant on 16 May 2018 and confirmed that it held information falling within the scope of his request but it considered this to be exempt from disclosure on the basis of the following sections of FOIA: 26 (defence), 36 (effective conduct of public affairs) and 38 (health and safety) and that it needed additional time to consider the balance of the public interest in relation to these exemptions.
7. The MOD provide him with a substantive response to his request on 9 July 2018. The MOD explained that sections 26 and 38 were not considered to apply but that all of the information was exempt from disclosure on the basis of section 36(2)(c) of FOIA and that the public interest favoured maintaining the exemption.
8. The complainant contacted the MOD on 19 July 2018 in order to ask for an internal review of this response.
9. The MOD informed him of the outcome of the review on 10 October 2019. This concluded that the request should have been refused on the basis of section 14(1) of FOIA given the burden in complying with it. Although not obliged to do so, the MOD provided the complainant with some advice and assistance to allow him to submit a less burdensome request.
10. The complainant contacted the MOD on 26 October 2019 in order to question this decision.
11. The MOD responded on 4 December 2019 and confirmed its position that section 14(1) had been correctly applied.

Scope of the case

12. The complainant contacted the Commissioner on 29 December 2019 to complain about the way his request for information had been handled. He disputed the MOD's reliance on section 14(1) to refuse to comply with this request because in his view complying with the request would not place a grossly oppressive burden on it. His grounds of complaint to support this position are set out below.

Reasons for decision

Section 14 – vexatious requests

13. Section 14(1) of FOIA allows a public authority to refuse to comply with a request if it is considered to be vexatious.
14. In the Commissioner's view, section 14(1) is designed to protect public authorities by allowing them to refuse any requests which have the potential to cause a disproportionate or unjustified level of disruption, irritation or distress. This will usually involve weighing the evidence about the impact on the authority and balancing this against the purpose and value of the request. This should be judged as objectively as possible; in other words, would a reasonable person think that the purpose and value are enough to justify the impact on the public authority.
15. In particular, the Commissioner accepts that there may be cases where a request could be considered to be vexatious because the amount of time required to review and prepare the information for disclosure would place a grossly oppressive burden on the public authority.¹ This is the position adopted by the MOD in this case.

¹ The Commissioner has adopted this position cognisant of the fact that although a public authority can rely section 12 (cost limit) of FOIA if the cost of complying with the request exceeds the appropriate limit, which for central government departments is £600 or 24 hours work, this cannot include the cost and effort associated with considering exemptions or redacting information.

16. The Commissioner believes that there is a high threshold for refusing a request on such grounds. This means that a public authority is most likely to have a viable case where:
- The requester has asked for a substantial volume of information **and**
 - The authority has real concerns about potentially exempt information, which it will be able to substantiate if asked to do so by the Commissioner **and**
 - Any potentially exempt information cannot easily be isolated because it is scattered throughout the requested material.²

The complainant's position

17. The complainant disputed the MOD's position that complying with his request would place a burden on it. In order to support this position he raised the following grounds of complaint:
- Firstly, he argued that the MOD fundamentally misunderstood the information security classification of the records he had requested. He explained that Air Safety Information Management System ('ASIMS') database, which contains all Defence Air Safety Occurrence Reports ('DASOR') reports which were the focus of his request, is classified as 'Official'. He noted that material classified as 'Official-Sensitive' or above cannot be transmitted via ASIMS and since DASORs cannot therefore contain any classified information, the burden of searching the requested records for classified items is significantly less than the MOD has estimated.
 - Secondly, he argued that he had specifically not requested any part of the DASOR that contains personal information relating to the reporting individual. Therefore, in his view there is no possibility of the release of the records resulting in individuals being reluctant to report incidents because they think they might be '*held accountable in the court of public opinion*' as the MOD has stated in its internal review response. The complainant also noted that since the MOD has had no problem in releasing de-identified DASOR data before, both to him and to others, and there is no evidence that individuals have become less willing to report incidents, there is no basis for this '*detriment to the reporting*'

² This approach is set out in the Commissioner's guidance on section 14 of FOIA, see paragraphs 69 to 73 <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>

culture' advanced by the MOD argument. He also emphasised that the MOD personnel responsible for those previous releases of DASOR data clearly also thought that releasing the data would not have a detrimental impact on the reporting culture.³

- Thirdly, since submitting his request for an internal review the complainant explained that he found a further case of the MOD releasing DASOR data for a much longer period, namely five years, than the request which is the subject of this complaint. The complainant also noted that this disclosure was for a front line operational airfield (RAF Lossiemouth) where he suggested that the security sensitivity of operational information is much greater than at RAF Wittering where the only aircraft movements are by Tutor basic training aircraft.⁴

The MOD's position

18. With regard to the first criterion, the MOD explained that the requested information comprised details of 160 incidents contained on the DASOR database. The MOD explained that the amount of information contained in the detailed incident description for all of these incidents alone comprised 32,148 words.
19. With regard the second criterion, the MOD explained that it had real concerns about the requested information containing potentially exempt information. It explained that its chief concern about releasing information of this kind is the risk it posed to the integrity of the DASOR reporting system.
20. The MOD explained that in accordance with Regulatory Article 1410⁵, the DASOR form is to be used to report all air safety related occurrences, be it notification of an event which has already occurred or identification of a potential air safety hazard.⁶ The MOD explained that DASORs are primarily submitted on-line through the ASIMS which is available to

³ The complainant identified a number of previous disclosures of reports from DASOR database.

⁴ Request submitted on 4 February 2014 and processed under the reference number 05-02-2014-145407-011.

⁵ <https://www.gov.uk/government/publications/regulatory-article-ra-1410-occurrence-reporting>

⁶ <https://www.gov.uk/government/collections/reporting-air-safety-concerns>

MOD users only and is not accessible to members of the public. The MOD explained that the use of an internal tool such as this creates a safe environment in which individuals can self-report incidents without the risk of being held accountable in the court of public opinion or inadvertently exposing details of defence capability.

21. The MOD explained that since the inception of the DASOR system in 2009, the RAF has worked hard to build trust in the DASOR reporting system and develop a 'no blame' culture to a point where individuals feel comfortable providing open and honest reports on safety matters. This effort has resulted in an increased number of reports being submitted especially pre-event reports where individuals highlight where they could have made mistakes. The MOD explained that previously individuals believed they might be open to criticism from superiors, peers and subordinates alike which meant that although an individual could recognise a hazard and take action to avoid it themselves, they would not necessarily share this information with others. The MOD explained that this improved reporting culture, and assurance that those submitting reports do not suffer any detriment, has increased it's awareness of the human factors that can lead to errors, which has in turn reduced air safety risk for the UK military.
22. The MOD argued that any release of data which could allow the identification of an individual who had submitted a report could result in them being laid open to criticism, which would be unfair. It is assessed that a release of this nature would breach the first data protection principle and thus such information would be exempt from disclosure on the basis of section 40(2) of FOIA.
23. The MOD argued that a further risk of harm from allowing the re-identification of those involved in air safety incidents is that individuals could be deterred from reporting incidents. The MOD acknowledged that it is highly unlikely that individuals would fail to submit a report following an incident that had resulted in damage to equipment, personnel or the environment, but it is likely that there would be a decrease in the number of pre-event reports being submitted. In short, the MOD argued there is the danger of a chilling effect if DASORs are released without careful consideration as to whether an individual (primarily the individual submitting the report) could be identified.
24. The MOD emphasised that any self-censoring or diminution of relevant information in a report would limit the accurate identification of an incident's root cause, lead to erosion of safety standards and a weakening of a process whereby lessons learnt are identified and shared. In short, it would reduce the amount of information available to ensure that flying operations are conducted effectively.

25. The MOD argued that the level of detail included in the description of some of the incidents could provide those with hostile intent insight into how they might be able to disrupt flying operations undertaken at RAF Wittering (or other UK military airfields). The MOD argued that a careful analysis of the reports would certainly provide confirmation of working practices and procedures used on such sites and some contain information about the technical capabilities of current aircraft.
26. The MOD explained that most of the aircraft flying out of RAF Wittering are operated by Babcock International and the Air Traffic Control is also supported by the same company, so MOD would need to examine each report to determine if there were any risks of commercial prejudice occurring from the release of information relating to a commercial partner.
27. Furthermore, the MOD explained that the civilian equivalent of the DASOR system, operated by the Civil Aviation Authority (CAA) under EU Regulation 996/2010 (as amended by Regulation 376/2014) specifically provides that information contained in occurrence reports should be protected appropriately and 'should not be used for purposes other than maintaining or improving aviation safety'. The MOD explained that it is on this basis that the CAA is able to withhold information from disclosure under section 44 of FOIA, specifically, section 44(1)(b), which states that 'information is exempt information if its disclosure is incompatible with any EU obligation'. Where incidents involve both military and civil aircraft it could be argued that the MOD would have a duty to support the civilian aviation operators in ensuring the EU Regulation is not circumvented and such information is not released
28. In light of the above, the MOD argued that full consideration would need to be given to the application of exemptions including those at sections 26 (defence), 40 (personal information) 43 (commercial interests) and 44 (prohibitions on disclosure).
29. However, the MOD acknowledged that information on this kind has been disclosed to the complainant, and others, on numerous occasions in the past. The MOD explained that while there is not recorded evidence to show that the previous public release of extracts from the DASOR database for specified locations and timeframes has led to individuals being less willing to report incidents, it was no longer willing or able to release the same level of detail relating to incident descriptions into the public domain where this risks exposing military personnel to the court of public opinion and undermining the improved reporting culture.
30. It noted that civilian safety reports are not published without appropriate protections that ensure the integrity of the reporting process which is done through the release of only those reports which are

required to promote air safety or prevent accidents. The MOD argued that many of the incidents in scope of this request fall short of this threshold.

31. With regard to the third criterion, the MOD argued that isolating the potentially exempt information within the description of the incidents would be a particularly difficult task. The MOD explained that its subject matter experts had undertaken an estimate of the time it would take to conduct a line by line assessment of all the information in scope and prepare it for disclosure. In its internal review response the MOD explained that its subject matter experts had estimated that this process would take in the region of 148 hours of work. In its submissions to the Commissioner the MOD explained that there had been a misunderstanding with the time estimate and apologised that this had not been picked up previously. In order to clarify the position the MOD explained that it had asked the subject matter experts to conduct a small sampling exercise in order to establish how long reviewing and redacting the information would take.
32. The MOD explained that having done so it estimated that the easier entries on the database would take on average 10 minutes whereas more difficult entries might take anything from between 20 to 30 minutes each. The MOD estimated that of the 160 DASOR entries two thirds are in the easier category while the remaining third are more challenging in terms of assessing the potential harm that could be caused as the information within the descriptions may fall under multiple exemptions.
33. Therefore, the MOD's revised estimate for time taken to consider the request was as follows:

Easier report entries: 107×10 minutes = 1070 minutes
More difficult report entries $53 \times 20-30$ = between 1,060 and 1590 minutes

Total between 2,130 or 2,660 minutes which equates to 35.5 hours or 44.5 hours.
34. Finally, the MOD responded to the complainant's grounds of complaint.
35. The MOD acknowledged that the complainant is correct in saying that the ASIMS database, which contains all DASOR reports, is classified as 'Official'. However, the MOD suggested that the interpretation he has put upon this is not correct This is because although the protective marking or security classification of a system may provide an indication of the harm that may be caused by the release of the information it holds, it has no direct bearing on whether or not the information held

within it can be released without harm. The MOD noted that there have been instances where information contained within documents marked 'secret' or above have been released and those where information marked 'official' has been subject to absolute exemptions and withheld. Therefore, the MOD noted whilst it is true to say that DASORs cannot contain any information that is classified higher than 'official', it does not remove it from the burden of considering the application of relevant exemptions to an information request involving DASORs.

36. Similarly, whilst the complainant may not have specifically requested personal information in relation to any part of his request, and has excluded the column that contains the details of the person submitting the report, it still remains necessary for MOD to determine whether the release of any of the information within the columns that he has requested could allow the re-identification of living persons involved in these incidents, leading to a breach of their privacy. The MOD explained that sample exercise found that most of the entries in the 'Description' field are written from the first-person perspective, and often start with a description that could help identify the individual reporting the incident, or contain reference to details such as car registration numbers or post details that could help individuals identify those reporting or involved in the reported incidents.
37. The MOD noted that the complainant has also sought to claim that the 'security sensitivity of operational information' will have been greater in a relation to the previous request for DASORs relating to RAF Lossiemouth, which is one of two RAF Quick Reaction Alert stations, whereas this request relates to RAF Wittering, which is a major training station (with multiple units and various training functions) as well as the home to the RAF A4 force which provides logistic and engineering support for RAF operations overseas.
38. The MOD explained that regardless as to the classification of information relating to a particular location, FOIA requires a public authority to consider all the necessary exemptions which need to be applied to the information in scope. It could therefore be argued that the preparation for release of information relating to a front-line flying station might be an easier task as there would be more information likely to engage the exemption at section 26 whereas, information contained in DASOR reports from a training station such as RAF Wittering, where civilians, University Air Squadron students and Air Cadets (aged between 12 and 20), can get their first flying experiences, might require the consideration of a greater number of exemptions.
39. The MOD noted that the complainant had sought to compare the effort involved in processing this present request with similar requests in the past. In doing so, he had emphasised that his specific intention was to

avoid vexatious or burdensome requests to MOD by following advice obtained by him from the Military Aviation Authority (MAA) in 2013 that was purposely intended to minimise the effort involved in processing his requests. The MOD explained that the organisational and cultural changes that have occurred in the last seven years have led to a review of the advice that was previously given to ensure that it reflects the current position in terms of where the burden and effort in processing such requests now lie, taking in the opportunity to rely upon the Commissioner's advice on the use of section 14 for burdensome cases post-Dransfield and the additional responsibilities placed upon MOD by the Data Protection Act 2018.

40. Finally, the MOD noted that the complainant contacted it following the internal review expressing his disappointment that the MOD was no longer prepared to carry out the processing of a further request of this kind. The MOD emphasised that it was willing to process requests relating to DASORs, and suggested a refinement that would enable it to do so without placing undue burden on any specific team or individual. The MOD noted that the complainant had chosen not to accept its suggestion.

The Commissioner's position

41. With regard to the first criterion set out above, the Commissioner is not persuaded that this is met. In her view the volume of information falling within the scope of this request is not one that can be described as a substantial volume. As noted above, the volume of information in scope consists of 160 entries on a spreadsheet. The column of information for each entry which contains the most words is the incident description, the total word count for all 160 incidents being 32,148 words. This equates to approximately 72 pages of single spaced, 12 point type in Arial font.⁷
42. In previous decisions notices issued by the Commissioner where public authorities have relied on section 14(1) because of the burden of complying with the request, the amount of information in the scope of these requests is significantly greater than in this case. For example, many hundreds if not thousands of pages of information.⁸

⁷ Calculated using <http://wordstopages.com>

⁸ See decision notices [FS50879093](#), [FS50882580](#) and [FS50698949](#)

43. However, the Commissioner is conscious that her guidance on section 14 states that a public authority is '*most likely to have a viable case where*' (emphasis added) the three criteria set out above at paragraph 16 are met. Consequently, in theory, there could be cases where the volume of information is not substantial but the burden of complying with the request is still one that is grossly oppressive. For example, in a case involving the FCO the Commissioner concluded that the first criterion was not met, but that complying with the request still placed a grossly excessive burden on the public authority.⁹
44. The Commissioner has therefore gone on to consider whether, despite her view that the first criterion is not met, whether complying with the request would still place a grossly oppressive burden on the MOD.
45. Having considered the MOD's submissions, and having reviewed the withheld information herself, she is satisfied that it clearly does contain information that is potentially exempt from disclosure under FOIA on the basis of the exemptions cited by the MOD. In reaching this position the Commissioner disagrees with the complainant's first and third points of complaint. As the MOD set out, the classification of the information is not determinative as to whether information is likely to attract exemptions contained within FOIA. Furthermore, the Commissioner is not persuaded that comparisons between the content of the requested information and previous disclosures are necessarily that useful in establishing whether the requested information potentially contains exempt material. The Commissioner is satisfied that requested information in the scope of the request clearly contains information that could potentially attract exemptions – notably it would seem to her section 40 – and the fact that a larger but different extract of information from the DASOR database has been released does not negate that finding.
46. Furthermore, the Commissioner accepts that in calculating the burden actually involved in complying with the request the MOD have, subsequent to the internal review, undertaken a sampling exercise of the likely time to comply with the request. Having considered these figures, alongside the requested information, the Commissioner accepts the validity of them.
47. The remaining, and indeed fundamental question, is therefore whether in the circumstances of this request the Commissioner accepts that

⁹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2019/2615378/fs50786762.pdf>

spending between 35.5 hours to 44.5 hours on complying with the request would place a grossly oppressive burden on the MOD. On the basis of this case the Commissioner is not persuaded that it would. In the majority of other decision notices where the Commissioner has concluded that the burden of complying with a request is a grossly oppressive one, the estimated taken by public authorities to comply with the request has significantly exceed the estimates advanced by the MOD in this case.

48. The Commissioner is conscious that in a recent MOD decision notice, the Commissioner did accept that undertaking 50 hours work to process a request placed a such burden on the public authority such that section 14(1) had been correctly applied to that request.¹⁰ However, in that case the Commissioner had no concerns about the volume of information being withheld, i.e. the first criterion set out above because in that case the withheld information consisted of 1517 pages. Furthermore, the Commissioner considers that in this present case the burden that would be imposed on the MOD is lower still; 35.5 hours at the lower estimate or 45.5 hours at the higher one.
49. The Commissioner acknowledges that section 12(1) of FOIA allows a public authority, such as the MOD, to refuse to comply with a request if the time of locating, retrieving and collating the information exceeds 24 hours. However, as her guidance makes clear when considering the application of section 14 to burdensome requests, the burden must be a grossly oppressive one and threshold for relying on section 14(1) in such circumstances is a high one. The decision notices which the Commissioner has previously issued accord with that approach. Therefore, whilst the Commissioner appreciates that complying with the request will place some burden on the MOD, in her view this cannot be seen as a grossly oppressive one, particularly taken into account the size of a public authority such as the MOD.
50. The MOD cannot therefore rely on section 14(1) of FOIA as a basis to refuse to comply with the request.

¹⁰ <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2617413/fs50879093.pdf>

Other Matters

51. Although there is no statutory time limit for completing internal reviews in the FOIA, the Commissioner considers that, as a matter of good practice, internal reviews should generally take no longer than 20 working days and even in exceptional circumstances should still be completed within 40 working days.
52. In light of this the Commissioner asked the MOD to explain why the delays in conducting the internal review occurred in this present case. In response the MOD explained that delays were indicative of the extent to which its Information Rights Team had explored the issues surrounding the processing of this request with officials within the RAF. The MOD provided the Commissioner with further details of these internal discussions and considerations. The MOD acknowledged that it was regrettable that this process took so long, but this due to the careful considerations involved in a thorough internal review.
53. The Commissioner cannot condone an internal review taking approximately 15 months to complete and she would urge the MOD to endeavour to complete internal reviews, even in more complex requests, within a shorter timeframe in the future. However, she accepts that this request raised a number of complicated issues and there was clearly a genuine intention on the MOD's part to ensure that the internal review process was sufficiently detailed to ensure that such issues were addressed.

Right of appeal

54. 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@justice.gov.uk

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

55. 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.
56. 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