

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 September 2024

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

Decision (including any steps ordered)

1. The complainant has requested a copy of service records. The Ministry of Defence ('MoD') disclosed a copy of the record with redactions made under section 41(1) (information provided in confidence).
2. The Commissioner's decision is that the withheld information has been appropriately withheld under section 41(1).
3. The Commissioner does not require further steps.

Request and response

4. On 12 September 2023, the complainant applied for the records of a deceased serviceperson via the government portal¹:

"Serviceperson First Name: [Redacted]
Middle Name(s): Field left blank
Serviceperson Last Name: [Redacted]
Service: Army (including Territorial & Army Emergency Reserve)
Regiment: Field left blank
Rank: Field left blank

¹ [Get a copy of military records of service: Apply for the records of a deceased serviceperson - GOV.UK \(www.gov.uk\)](https://www.gov.uk/get-a-copy-of-military-records-of-service-apply-for-the-records-of-a-deceased-serviceperson)

Service Number: [Redacted]
Place Of Birth: [Redacted]
Date of Birth: [Redacted]
Died In Service: No
Date left: Field left blank
Reason For Leaving: Other Additional Service
TA: Field left blank
Additional Service TA Number: Field left blank
Additional Service TA Regiment: Field left blank
Additional Service TA Date: Field left blank
Additional Service AER: Field left blank
Additional Service AER Number: Field left blank
Additional Service AER Regiment: Field left blank
Additional Service AER Date: Field left blank
Disability Pension: No
Death Certificate [Redacted]"

5. This request was forwarded on to the MoD who acknowledged it on 30 October 2023.
6. On 17 January 2024, the MoD responded to the request under FOIA. It disclosed a copy of the report with redactions made under section 40(2) (personal information) and section 41(1) (information provided in confidence).
7. The complainant requested an internal review on 27 February 2024. They didn't raise any concerns about the application of section 40(2) but they did dispute the application of section 41(1).
8. At the date of issuing this decision notice, the MoD had failed to provide its internal review outcome.

Scope of the case

9. The complainant contacted the Commissioner on 15 May 2024 to complain about the way that their request had been handled, specifically that information had been withheld under section 41(1).
10. The Commissioner therefore considers that the scope of his investigation is to determine whether section 41(1) has been applied appropriately.

Reasons for decision

11. The MoD has redacted information from the service record under section 41(1) of FOIA. According to the complainant, the redacted information is information relating to the individual's enlistment information and details of their religion.
12. According to the complainant this information can't be withheld under section 41(1) because:

“Trade on enlistment and religion is not information provided in confidence. This is personal information (religion is special category data) that may be disclosed once the data subject is assumed deceased (over 100 years old) or proven deceased.”
13. Section 41 of FOIA states that:

‘(1) Information is exempt information if—

 - (a) it was obtained by the public authority from any other person (including another public authority), and
 - (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.’
14. For this exemption to be engaged two criteria have to be met; the public authority has to have obtained the information from a third party and the disclosure of that information has to constitute an actionable breach of confidence.
15. The Commissioner has dealt with similar requests for the records of a deceased serviceperson.²
16. The withheld information was provided to the Army by the serviceperson in question, for the purpose of processing their application, or serving, in Army. The withheld information didn't originate from the MoD, it obtained it from the Serviceperson themselves. The first criteria above is met.

² [ic-66204-l6y9 \(ico.org.uk\)](https://www.ico.org.uk/our-work/cases/66204-l6y9)

17. Moving to the second criteria, in order for the disclosure of this information to represent a breach of confidence, the information:
 - must have the necessary quality of confidence;
 - must have been imparted in circumstances importing an obligation of confidence;
 - must be an unauthorised use of the information to the detriment.
18. Information about an individual's religion, or their enlistment application, is neither trivial nor otherwise accessible to the world at large. Therefore, it has the necessary quality of confidence.
19. The Commissioner is also satisfied that the information was imparted in circumstances imparting an obligation of confidence. When an individual enlists to the Army, they do so with the expectation that any information they give will be treated in confidence.
20. The Commissioner must now consider whether unauthorised disclosure would cause a specific detriment to the party that provided it or any other party.
21. Paragraph 57 of IC-66204-L6Y9 elaborates that disclosure of this type of information, even after death of the service person, could constitute an actionable breach of confidence i.e. from the next of kin or family members.
22. The MoD also explained to the Commissioner that it had an enduring obligation of confidentiality to service personnel and their families, even after death, with regard to information they provided in confidence for the purposes of military service.
23. The Commissioner acknowledges that such requests for the records of a deceased serviceperson are often made by their next of kin or family members. However, disclosure under FOIA is disclosure to the world at large and disclosure of this information under FOIA is the equivalent of releasing this information into the public domain, for any member of the public's access. As a result of complaints from the families of deceased personnel, the MoD explained that it has made a commitment to protect service families from such intrusion and distress as far as is reasonable.
24. The Commissioner acknowledges that in this instance a redacted copy of the service record has been disclosed to the serviceperson's next of kin. He acknowledges that the decision to disclose some information from the record, but withhold other information, will be a fine judgement. The Commissioner appreciates the MoD's previous experience of disclosing

information from service records and the potential consequences for relatives of service personnel of doing so.

25. Furthermore, FOIA considers access to information, not whole documents, and in light of this experience, he understands the MoD's cautious, and selective, approach to disclosing such information and specifically withholding personal information such as religious beliefs or motivation behind joining the army.
26. Developments in case law have established that information which relates to an individual's personal and private life can be protected by the law of confidence, even if disclosure would not result in any tangible loss to the confider - any invasion of privacy resulting from a disclosure of private and personal information can be viewed as a form of detriment in its own right.
27. Therefore, the Commissioner is satisfied that disclosure of the withheld information would represent a breach of confidence. The second criteria is met and therefore section 41(1) is engaged.
28. Section 41 is an absolute exemption and so there is no requirement to conduct a public interest test. However, the common law duty of confidence contains an inherent public interest test. This test assumes that information should be withheld unless the public interest in disclosure outweighs the public interest in maintaining the duty of confidence
29. The Commissioner is therefore required to consider whether the MoD could successfully rely on such a public interest defence to an action for breach of confidence in this case.
30. The Commissioner recognises and appreciates the complainant's strong personal interest for wanting to access the withheld information. However, the Commissioner would again emphasise the distinction between disclosure of such information under FOIA and a private or limited disclosure of information to the next of kin. The Commissioner considers there a particularly strong public interest in ensuring that the confidentiality between servicepersons' and the Army is maintained, especially when it comes to personal information that's been obtained during the enlistment process.
31. It's in the public interest that confidences should be respected. The Commissioner believes there is a public interest in ensuring that an employee can give their employer all necessary private or domestic information about themselves with the certainty that it will be held by the employer in confidence and only used for specific purposes that are within an employee's reasonable expectations.

32. As discussed previously, the duty of confidence owed to a living individual will continue after their death. The Commissioner has concluded that there is not a sufficiently compelling argument in support of a public interest defence against an action for breach of confidence. Therefore, the MoD was correct to withhold the information it did under section 41(1).

Procedural matters

33. Section 10 of FOIA states that a request must be complied within twenty working days of receipt. The MoD grossly exceeded this timescale in its handling of this request and so breached section 10.

Other matters

34. The Commissioner's guidance³ states that any internal review should be completed within twenty working days. In particularly complex cases, this can be extended to forty working days.
35. In failing to provide an internal review outcome at all, the MoD failed to comply with the Commissioner's guidance.

³ [Request handling, Freedom of Information – Frequently Asked Questions | ICO](#)

Right of appeal

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

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

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

37. 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.
38. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Alice Gradwell
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF