

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 September 2024

Public Authority: Ministry of Defence

Address: Main Building (Ground Floor, Zone D)
Whitehall
London
SW1A 2HB

Decision (including any steps ordered)

1. The complainant requested information about AB 48/953 Operation Epsilon papers. The Ministry of Defence ("MoD") relied on section 14(1) of FOIA (vexatious) to refuse the request.
2. The Commissioner's decision is that the request was vexatious and therefore the MOD was entitled to rely upon section 14(1) of FOIA to refuse it.
3. The Commissioner does not require any steps.

Background

4. In mid-2018 concerns arose that a large number of open records held at The National Archives (TNA) and The Nuclear and Caithness Archives (Nucleus) at Wick may contain classified material. In order to address the potential security risk, the MOD asked TNA to immediately withdraw the records from public access. The material concerned consists of around 100,000 nuclear related records, both military and civil, which require analysis and review.
5. At the point that the archived records were closed TNA began to receive a large number of requests seeking access to these files under FOIA. TNA concluded that it was not able to process the requests as they were unable to complete the third party consultations with the MOD and Atomic Weapons Establishment subject matter experts (SME). This was due to the volume of information in scope and how the SMEs would conduct the review. In June 2019 the MOD agreed to a proposal from

TNA to begin the transfer of the records and any relevant requests to the MOD.

6. On 17 January 2021 the MOD published an update¹ to the review of nuclear archive records in which it outlined the five stages of the review. At the date of publication, MOD confirmed that stages four and five of the review involved in-depth reviews of remaining files and “due to the nature of this work this is anticipated to take longer than the previous stages”.
7. MOD also outlined its position with respect to information requests received and their consideration against the provisions contained in section 14(1):

“Under the terms of the Freedom of Information Act (the Act) 2000, you are still entitled to request access to files currently under review. However, due to the unprecedented number of FOI requests placing disproportionate burden on the Ministry of Defence and the public interest in the completion of the review, any request will have to be considered against the burden criteria under Section 14(1) of the Act.

The application of Section 14(1) of the Act will remain under continuous assessment and evaluation by MOD during the file review process to evaluate the impact of examining the contents of the withdrawn files and the level of burden placed upon the Department.”

8. On 17 January 2024 the MOD published a further update to the review in respect of the progress of stage five:

“Stage 5 involves an in-depth review of around 9,000 remaining records and, to date, over 1,300 of these files have been released back to public access during phase 1 of the stage. As a result, around 68,000 files in total have been released back to public access at the Kew archive. Further updates on the outcome of stage 5 will be provided in due course.”

Request and response

9. On 14 March 2024, the complainant wrote to TNA to request a review of file AB 48/953: Operation Epsilon papers. TNA wrote to the complainant in the following terms:
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¹ <https://www.gov.uk/government/publications/review-of-nuclear-archive-records/review-of-nuclear-archive-records>

"Please note that we are not in a position to decide if this record can be opened. The National Archives is currently unable to process requests relating to certain AB or ES records until the government department responsible for these series, The Nuclear Decommissioning Authority (NDA), has completed the security review that it is currently undertaking, working in collaboration with colleagues from the Ministry of Defence (MOD) and the Atomic Weapons Establishment. As part of the review, a collection of records (including many relating to the early development of military and civil nuclear technology) has been temporarily withdrawn from public access. At this stage it is still unclear how long the review will take to complete but NDA does anticipate that many of the documents will be restored to public access in due course.

Further to this and in collaboration with the MOD it was determined that to necessitate the security review the above record should be transferred to the MOD. As the information you require will, if it is not already, be held by MOD, The National Archives cannot continue processing your request. However we are happy to advise that following consultation on the review process MOD has offered to respond to any FOI requests for AB and ES records transferred to them. If you would like us to arrange for the transfer of your request to MOD, noting that this will involve the transfer of your personal information (name/address/email address), we can do so."

10. On 27 March 2024 the complainant gave consent for their information request to be transferred to the MOD.
11. On 8 May 2024 the MoD refused the request with reliance on section 14(1), stating the following:

"As you may be aware, the MOD is conducting a security review of historic files relating to the United Kingdom's Nuclear Weapons programme. While this activity is ongoing, a number of the files held at The National Archives (TNA) have been withdrawn from general access until that assessment is complete.

Under the terms of the Act you are entitled to request access to the files currently under review, however, based on the subject matter of the file you have requested, your request may be considered burdensome in isolation. It is with great regret that the MOD must advise you it is unable to comply with your request because the file you have requested is being assessed under stage 5 of the review. We must therefore advise you the MOD is applying Section 14(1) of the Act, as compliance with your request would impose a disproportionate burden on the Department coupled with the work and effort to complete the ongoing review. Processing individual requests would divert the resource of the Subject Matter Experts, who would be required to conduct a line-by-line

review of the information you have requested before it could be released, from essential Defence business activities. It is in the public interest that existing resources are concentrated on completing the review to enable the release of files back into public access for all, rather than focussing on individual requests.

12. On 6 June 2024 the MOD issued its internal review in which it upheld its position.
13. On 12 June 2024 the complainant wrote to the MOD again to request an "independent internal review".
14. On 28 June 2024 the MOD provided the complainant with a second internal review:

"As advised in the substantive response, the MOD is currently undertaking a security review of historic records relating to the UK's nuclear weapons programme that were released to TNA. As part of the review process, a number of records were temporarily withdrawn from general access at TNA to mitigate the potential national security risk and allow the Subject Matter Experts (SMEs) within the MOD to assess them.

The decision to remove files, including the one in which you are interested in, from general access to enable a comprehensive review of their contents demonstrates the real concern that they contain potentially exempt information. Based on the rationale for the security review currently underway, I am also satisfied that any potentially exempt information present in the file is spread throughout the documentation, and not easily isolated.

I have noted that the initial response you received advised that it was likely your request would be considered burdensome in isolation, due to the subject matter of the file. I can advise that regardless of whether this may be the case, whilst the security review continues the effort required to process this request, or any other that seeks access to information included in the security review, would have a damaging impact on the progress towards completion of the review, whatever its size or subject. This is primarily due to the disruption that could be caused to the review schedule.

If the MOD were to prioritise each and every FOI request it received for individual files that are part of the security review, this would have a significant impact on the current schedule and effectiveness of the review process and indeed the ability, when required, of the very limited number of SMEs to work on other tasks associated with the nuclear programme. To effectively consider all the records in scope of the security review and return the information that can be released from to

public access as quickly as possible, the MOD must be able to continue to conduct the necessary assessments without distraction or disruption.

The work required to process this request is disproportionate when balanced against the public interest in ensuring that the security review of the files which have been withdrawn from public view at TNA is completed at its earliest opportunity, enabling as many records as possible to be open to the public again.

The MOD is working to deliver the security review for all recalled files and, where appropriate, make them available to the public at TNA as quickly as possible to meet its obligations under the Public Records Act. Adjustments to the schedule and diversion of resources to consider requests made through the Act would undoubtedly place a significant burden on the Department and disrupt the wider security review.”

Reasons for decision

Section 14(1) – vexatious requests

15. The following analysis considers whether the request was vexatious.
16. Section 14(1) of FOIA states that a public authority is not obliged to comply with a request for information if the request is vexatious.
17. The word “vexatious” is not defined in FOIA. However, as the Commissioner’s updated guidance on section 14(1)² states, it is established that 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.
18. FOIA gives individuals a greater right of access to official information in order to make bodies more transparent and accountable. As such, it is an important constitutional right. Therefore, engaging section 14(1) is a high hurdle.
19. However, the Commissioner recognises that dealing with unreasonable requests can strain resources and get in the way of delivering mainstream services or answering legitimate requests. These requests can also damage the reputation of the legislation itself.

² <https://ico.org.uk/for-organisations/dealing-with-vexatious-requests-section-14/>

20. The emphasis on protecting public authorities' resources from unreasonable requests was acknowledged by the Upper Tribunal (UT) in the leading case on section 14(1), *Information Commissioner vs Devon County Council & Dransfield* [2012] UKUT 440 (AAC), (28 January 2013) ("Dransfield")³. Although the case was subsequently appealed to the Court of Appeal, the UT's general guidance was supported, and established the Commissioner's approach.
21. Dransfield established that the key question for a public authority to ask itself is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress.
22. The four broad themes considered by the Upper Tribunal in Dransfield were:
 - the burden (on the public authority and its staff);
 - the motive (of the requester);
 - the value or serious purpose (of the request); and
 - any harassment or distress (of and to staff).
23. However, the UT emphasised that these four broad themes are not a checklist, and are not exhaustive. It stated:

"all the circumstances need to be considered in reaching what is ultimately a value judgement as to whether the request in issue is vexatious in the sense of being a disproportionate, manifestly unjustified, inappropriate or improper use of FOIA" (paragraph 82).

The MOD's view

24. In its response to the Commissioner, the MOD maintained that it was relying on section 14(1) on the basis that release of the files ahead of the defined schedule would compromise the review process:

"This process of review has been carefully considered and scheduled and the FOI Act and requests for particular files should not disrupt and drive changes to this. Other members of the public may not have resorted to making a request under the Act and are waiting patiently for their file to be reviewed and potentially returned to public access through TNA. The application of section 14 to this type of request is designed to ensure that the review process is not frustrated, and that the Department is

³ <https://administrativeappeals.decisions.tribunals.gov.uk/Aspx/view.aspx?id=3680>

being fair to all those who have interest in the material being considered under this scrutiny review.”

25. The MOD acknowledged that the size of the file requested (12 pages) was not large enough to engage section 14 on the grounds of volume of information requested, but sought to draw the Commissioner’s attention to his finding in a similar case⁴:

“However, this burden is arguably compounded by the broader impact processing would have on the wider security review. The Commissioner accepts that if the MOD were to prioritise each and every FOI request it received for these files then this would have a significant impact on the effectiveness of the security review and indeed the ability of the very limited number of SMEs to work on other tasks associated with the nuclear programme. The Commissioner accepts that there is obviously a genuine purpose and value to the wider security review and moreover that it is in the wider public interest that this review is completed as efficiently as possible. Consequently, the Commissioner has decided that despite the purpose and value of this request these are not enough to justify the impact on the MOD of complying with the request in July 2019 given the broader impact of processing this request within the timeframe required by FOIA would have on the MOD. She has therefore concluded that the MOD was entitled to refuse to comply with the request on the basis of section 14(1) of FOIA.”

The complainant’s view

26. In their complaint to the Commissioner the complainant stated:

“I do not believe the request can be considered as ‘vexatious’ for being a ‘burden’. As stated by the ICO website ‘if you are a larger public authority, it is not sufficient to argue that a request is burdensome because you have only allocated a small number of officers to handle requests.”

The Commissioner’s decision

27. In cases where a public authority is relying on section 14(1), it is for the public authority to demonstrate why it considers that a request is a disproportionate, manifestly unjustified, inappropriate or improper use of FOIA.

⁴ <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2617413/fs50879093.pdf> served 6 March 2020

28. The Commissioner accepts that the volume of information sought by the request itself is not substantial enough to be considered burdensome within the definitions provided by section 14(1), and notes that this point has also been accepted by the MOD in its submissions to the Commissioner. However, he also accepts the MOD's position as outlined in its internal review of 28 June 2024 that regardless of the size of the file, diverting resources away from the current review process in order to handle this request would have a broader impact on the review schedule, which has been designed with the intention to release the file back to TNA as quickly as reasonably can be expected.
29. Furthermore, while he acknowledges that his previous decision dates back almost five years and that the review has progressed significantly in this time, he does not consider it justifiable at such a late stage in proceedings for him to require the MOD to prioritise the present request ahead of completing the review according to the schedule already set and communicated. Particularly when this is likely to add considerable delays and impact the release of other files under review at stage five.
30. With this in mind, the Commissioner relies on his previous findings as set out in his previous decision, as outlined at paragraph 25 above.
31. The Commissioner believes that the MOD was entitled to rely on section 14(1) of FOIA to refuse the request because it was vexatious.

Right of appeal

32. 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

33. 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.
34. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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