

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 October 2024

Public Authority: Ministry of Defence

Address: Whitehall
London
SW1A 2HB

Decision (including any steps ordered)

1. The complainant has requested information from the Ministry of Defence ("MOD") regarding the deaths of Locally Employed Civilians (LECs) in Afghanistan. The MOD originally relied on sections 26, 38 and 40 of FOIA to refuse part of the request, however it has subsequently withdrawn its reliance on section 26 in respect of part 3 of the request and has instead relied on section 12 of FOIA (cost of compliance).
2. The Commissioner's decision is that the MOD was entitled to rely on section 12(1) of FOIA to refuse to disclose the information in respect of part 3 of the request. The Commissioner also finds that the MOD complied with its section 16 obligation to offer advice and assistance.
3. The Commissioner does not require further steps to be taken.

Request and response

4. On 26 October 2022 the complainant made the following request to the MOD:-

"Please can you provide further details of the 26 LECs who died between 2001 and 2018 while working as interpreters with British forces in Afghanistan

I require their:

Reference: IC-308957-H9H7

*names

*full job titles

*the circumstances of their deaths

Please consider each part of these three points separately when responding to this FOI.

My FOI follows a previous disclosure (please see the link below).

I maintain a public interest in that these individuals should be named and publicly recognised for their sacrifices. British military veterans feel they should be treated as ones of our own.”

5. The MOD responded to the request on 29 September 2023, citing sections 26 and 38(1)(a) and (b) and 40(2) of FOIA as a basis for non-disclosure of the names of the LECs, and the full circumstances of their deaths, however it disclosed the other requested information.
6. The complainant sought an internal review of the MOD’s handling of part 3 of the request on 4 October 2023. A response to this was provided on 16 September 2024. The reviewer now stated that section 26 was incorrect and that now section 12(1) of FOIA applied to the withheld information in part 3 of the request.

Scope of the case

6. As the complainant's request for internal review only focused on part 3 of their request, the Commissioner in this decision notice has only examined the MOD's application of section 12(1) of FOIA to that part of the request.

Reasons for decision

Section 12 – cost of compliance

7. The following analysis covers whether complying with the request would have exceeded the appropriate limit.
8. Section 12(1) of the FOIA states that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the "appropriate limit" as set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Fees Regulations")
9. The appropriate limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 at £600 for central government, legislative bodies and the armed forces and at £450 for all other public authorities. The appropriate limit for the public authority is £600.
10. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) effectively imposes a time limit of 24 hours for the public authority.
11. Regulation 4(3) of the Fees Regulations states that a public authority can only take into account the cost it reasonably expects to incur in carrying out the following permitted activities in complying with the request:
 - determining whether the information is held;
 - locating the information, or a document containing it;
 - retrieving the information, or a document containing it; and
 - extracting the information from a document containing it.

12. A public authority does not have to make a precise calculation of the costs of complying with a request; instead only an estimate is required. However, it must be a reasonable estimate. The Commissioner considers that any estimate must be sensible, realistic and supported by cogent evidence. The task for the Commissioner in a section 12 matter is to determine whether the public authority made a reasonable estimate of the cost of complying with the request.
13. Section 12 is not subject to a public interest test; if complying with the request would exceed the cost limit then there is no requirement under FOIA to consider whether there is a public interest in the disclosure of the information.
14. Where a public authority claims that section 12 of FOIA is engaged it should, where reasonable, provide advice and assistance to help the requester refine the request so that it can be dealt with under the appropriate limit, in line with section 16 of FOIA.

The public authority's position

15. The MOD explained to the Commissioner that information in scope of part 3 of the complainant's request, namely more detail on the circumstances of each death, is not held in a central location and if held, is likely to be contained amongst other personnel casualty reports, or other incident reports (for example relating to an IED which may have killed one or more people).
16. The MOD stated that it has been advised by the relevant staff members that to first determine if the information is held, then locate, retrieve and extract such information will greatly exceed the cost limit under section 12 of the Act.
17. Initially there would be a requirement to view repository databases of at least 5 areas of the Department (including the single services) to identify where information relating to these 26 individuals may be located. If records indicate that information may be held relating to the 26 LECs, it is then likely that a minimum of 26 boxes of uncatalogued hard copy information would need to be manually examined. This is due to the speed and unprecedented circumstances of the Evacuation from Afghanistan as part of Op Pitting.
18. Each of these boxes are estimated to contain around 1000 pages of documentation. Much of this information could be excluded relatively quickly through an initial read through; however, it is also the case that a significant amount of information would need to be scrutinised more closely to identify what, if any, relevant information is held.

19. The MOD has also stated that some further information relevant to the complainant's request may be held in its digital archives database, however this would require a manual review.
20. The MOD has estimated that to carry out the tasks listed above, i.e. the searching through both hard copy and digitally held information, would take a minimum of 128 hours and is satisfied that it would greatly exceed the cost limit under section 12(1) of the Act to process part 3 of the request.

The Commissioner's view

21. Based on the above calculations and work outlined by the MOD to comply with part 3 of the request, the Commissioner is satisfied that complying with this would exceed the appropriate limit.
22. The Commissioner notes that, even if the MOD's estimate was slightly high, in order for it to comply with the request without exceeding the cost limit, it would be likely to need to review each page contained within the boxes within one second (the average time taken to review the digital archives database is unknown and would obviously add to the overall time taken) which the Commissioner does not consider feasible.
23. Complying with the request would therefore exceed the cost limit and so the public authority was entitled to rely on section 12(1) of FOIA to refuse the request.

Procedural matters

Section 16 – advice and assistance

24. Section 16 of FOIA requires public authorities to provide reasonable advice and assistance to those making, or wishing to make, information requests.
25. When a public authority refuses a request because the cost of compliance exceeds the appropriate limit, it should explain to the requester how they could refine their request such that it would fall within that limit. In rare cases, it will be appropriate for the public authority to explain to the requester why their request cannot be meaningfully refined.

26. The MOD stated that it recognises that much of the effort described in the section 12 cost estimate above reflects the efforts to find all potentially relevant information related to the circumstances of each death held by the MOD. It also considers that the complainant has been provided with some information in the scope of part 3 of his request as part of its initial response.
27. With this in mind the MOD advised the complainant that the information that was provided to them was extracted from information that included only data for personnel where a claim for compensation was made and may not reflect the totality of interpreters who died in the specified period. The MOD has clarified that there is some very minor further detail relating to the circumstances of death of some of the individuals, which consists of entries on a spreadsheet, and the MOD has stated that it is open to the complainant to request this data alone, and such a request could be processed within the section 12 cost limit.
28. The MOD further informed the complainant that it is unlikely that it could offer a suggestion on any refinement they could make in relation to specific casualty reports that may be held by it that could be processed within the cost limit under section 12 due to the nature of the way information is held by the MOD, as described in paragraph 13 above.
29. The Commissioner is therefore satisfied that the MOD did comply with section 16 of FOIA when dealing with this request.

Other matters

30. The Commissioner expects public authorities to conduct internal reviews within 20 working days – 40 working days in exceptional circumstances. This accords with paragraph 5.4 and 5.5 of the section 45 Code of Practice.5
31. The MOD did not do so and failed to meet the Commissioner's request handling standards.

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.

Deirdre Collins
Senior Case Officer
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