

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 November 2024

Public Authority: Ministry of Defence

Address: Whitehall
London
SW1A 2HB

Decision (including any steps ordered)

1. The complainant submitted a multipart request to Ministry of Defence (MOD) seeking information about James Cleverly and his role in the army reserves. The MOD confirmed that it held information for some parts of the request but withheld this on the basis of section 40(2) (personal data) and refused to confirm or deny whether it held information falling within the scope of other parts of the request on the basis of section 40(5B)(a)(i) of FOIA.
2. The Commissioner's decision is that the MOD is entitled to rely on sections 40(2) of FOIA to withhold the information sought by parts 1, 2, 4 and 6 of the request and is entitled to rely on 40(5B)(a)(i) of FOIA to refuse to confirm or deny whether it holds information falling within the scope of parts 7 – 14, 16 and 17 of the request.
3. The Commissioner does not require further steps.

Request and response

4. The complainant submitted a multipart FOI request to the MOD on 10 November 2023 concerning James Cleverly and his role in the army reserves. A copy of this request is included in the annex to this notice.

5. The MOD responded on 7 December 2023. It refused to confirm or deny whether it held any information falling within the scope of the request on the basis of 40(5A) (personal data) of FOIA.
6. The complainant contacted the MOD on 8 December 2023 in order to ask for an internal review. He raised the following points:
 - As he was not the data subject of the request, rather Rt Hon James Cleverly was, the exemption contained at section 40(5A) of FOIA was not relevant.
 - Parts 15, 18 and 19 of his request did not seek any personal data regarding Mr Cleverly.
 - There was a 'public interest' in the disclosure of the information he had requested about Mr Cleverly, particularly taking into account the fact that the information provided to him by 1st (UK) Division¹ appeared to contradict the various sources in the public domain concerning Mr Cleverly's position as an existing reservist in the army.
7. The MOD informed the complainant of the outcome the internal review on 4 October 2024. The MOD revised its position in relation to the request. For parts 1, 2, 4 and 6 it confirmed that it held information but it considered this to be exempt from disclosure on the basis of section 40(2) of FOIA. For parts 3 and 5 of the request it provided the following information "James Cleverly was a Staff Officer in 1st (UK) Armoured Division and also served in the 100 (Yeomanry) Regt RA." For the remaining parts of the request, ie parts 7 to 19, the MOD explained that it was refusing to confirm or deny whether it held any information on the basis of section 40(5B)(a)(i) of FOIA.
8. In a separate response provided to the Commissioner alongside the internal review, the MOD explained that it considered parts 15, 18 and 19 of the request to be a continuation of previous questions, particularly part 11, and these parts of the request also sought Mr Cleverly's personal information. The MOD explained to the Commissioner that if he, and the complainant, took the view that these questions did not relate to Mr Cleverly's personal information then it could re-process these parts. Having considered this, the Commissioner asked the MOD to re-process these parts of the request.
9. As a result the MOD provided the complainant with a revised response to parts 15, 18 and 19 of the request on 13 November 2024. The MOD

¹ The complainant had previously been advised by a representative for the 1st (UK) Division that Mr Cleverly was no longer a serving member of the army reserves.

explained that it did not hold any recorded information falling within the scope of these parts of the request.

Scope of the case

10. The complainant contacted the Commissioner on 9 March 2024 in order to complain about the MOD's handling of his request, specifically its decision to withhold information falling within the scope of his request. In view of the outcome of the MOD's internal review, this decision notice focuses on the MOD's reliance on section 40(2) of FOIA to withhold the information falling within the scope of parts 1, 2, 4 and 6 of the request and its reliance on section 40(5B)(a)(i) of FOIA to refuse to confirm or deny whether it holds information falling within the scope of parts 7 to 14, 16 and 17.

Reasons for decision

Section 40(2) – personal data: parts 1, 2, 4 and 6 of the request

11. Parts 1, 2, 4 and 6 of the request all sought information relating to Mr Cleverly's last service dates in various roles and parts of the army. The MOD withheld such information on the basis of section 40(2) of FOIA.
12. Section 40(2) provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
13. In this case the relevant condition is contained in section 40(3A)(a)². This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
14. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of FOIA cannot apply.

² As amended by Schedule 19 Paragraph 58(3) DPA.

15. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

16. Section 3(2) of the DPA defines personal data as:

'any information relating to an identified or identifiable living individual'.

17. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
18. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
19. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
20. The Commissioner is satisfied that the information requested by parts 1, 2, 4 and 6 of the request clearly seek Mr Cleverly's personal data as the information in question is about him and has biographical significance for him. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
21. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
22. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

23. Article 5(1)(a) of the GDPR states that:

'Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject'.

24. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

25. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

26. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

'processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child'³

27. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:-

- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

28. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

³ Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

Legitimate interests

29. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
30. The MOD acknowledged that disclosure of the information would contribute to the public's understanding of Mr Cleverly's role within the armed forces.
31. The complainant highlighted that Mr Cleverly still publishes that he is a current serving senior commissioned officer in the army reserves.⁴ The complainant emphasised that this was in direct contrast to information provided to him by a representative of the 1st (UK) Division. The complainant argued that if this was correct, and the information published by Mr Cleverly was wrong, then the public clearly had a right to know this.
32. Furthermore, with regard to the current crisis in the Middle East, the complainant referenced the International Criminal Court of Justice's preliminary findings of 26 January 2024 in a case brought by South Africa against Israel concerning alleged violations by Israel of its obligations under the Genocide Convention in relation to Palestinians in the Gaza Strip.⁵
33. The complainant argued that:
- "All UK MP's & Civil Servants have a legal duty to 'PROTECT' the civilian Palestinian population from 'GENOCIDE' which is codified in domestic law under the International Criminal Court Act 2001."
34. And further that:

⁴ The complainant cited these links in response to this <https://www.cleverly4braintree.com/about> and <https://www.linkedin.com/in/jamescleverly/>

⁵ <https://www.icj-cij.org/node/203447>

"If he [Mr Cleverly] is still a serving Senior Commissioned Officer (reserve) then the 1st (UK) Division statement must be investigated for attempting to pervert the course of justice, and Lt Col Cleverly must be disciplined by his superiors for apparent breach of Kings Regulations etc. in relation to his formal training and awareness of the Rules of Engagement, Geneva Conventions and their protocols etc.

The public good / public interest in this request far exceeds any data privacy of the data subject, when it relates to information that he has already placed squarely in the public domain for years and which persists on a global basis."

35. The Commissioner accepts that there is a legitimate interest in Mr Cleverly's role within the armed forces given that he is a high profile politician, and was, at the time of the request, a Cabinet minister.

Is disclosure necessary?

36. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so a measure would not be necessary if the legitimate aim could be achieved by something less. Disclosure under FOIA must therefore be the least restrictive means of achieving the legitimate aim in question.
37. The Commissioner accepts that disclosure of the requested information is the only way in which clarity could be provided in respect of the particular information which has been sort by parts 1, 2, 4 and 6 of the request. The Commissioner is satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

38. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
39. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;

- whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
40. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
41. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
42. The MOD explained that in determining whether this information could be disclosed, it had taken into account key factors such as the MOD publicly recognising some of Mr Cleverly's work and achievements during his army career and his high profile role in HM Government. However, the MOD noted that although Mr Cleverly has publicly released some personal information relating to his armed forces career, it argued that disclosure of the information sought by these requests would represent an infringement into his privacy and there is an expectation that this information, like for any other military person, would not be released. The MOD noted that the information had not been routinely made publicly available and it had been unable to locate any information which confirms the position nor has it been published in official sources. In such cases, the MOD argued that there is no requirement for it to release detailed personal information about an individual's military service to the world at large.
43. The Commissioner also notes the complainant's points regarding the apparently contradictory information he had been given regarding Mr Cleverly's current status within the army reserves. During the course of the Commissioner's investigation the MOD confirmed that the statement provided to the complainant by a representative of the 1st (UK) Division was incorrect and that according to MOD's records, Mr Cleverly is still in the Reserves Service, as confirmed on the Braintree Conservative website.
44. In the Commissioner's view this clarity directly addresses part of the complainant's reasons as to why the requested information should be disclosed. Whilst the Commissioner accepts that disclosure of the information sought by these parts of the request would provide further transparency regarding Mr Cleverly's army career, in his view there is a limited legitimate interest in such a disclosure, despite Mr Cleverly's role

as a high profile politician. Moreover, the Commissioner is not clear how disclosure of such information would directly address the complainant's point regarding the current crisis in the Middle East and the action, he believes, that should be taken in respect of Mr Cleverly in light of this.

45. In contrast, the Commissioner accepts the MOD's position that Mr Cleverly would have an expectation that the detailed information sought here would not be released to the world at large, in line with the expectation of other members of the armed forces. The Commissioner also notes that despite the information that is in the public domain about Mr Cleverly's army career, this does not extend to the information sought by these parts of the request. The Commissioner also accepts that disclosure of such information could represent an infringement into Mr Cleverly's privacy.
46. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh Mr Cleverly's fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information sought by parts 1, 2, 4 and 6 of the request would not be lawful.
47. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.
48. The information sought by parts 1, 2, 4 and 6 of the request is therefore exempt from disclosure on the basis of section 40(2) of FOIA.

Section 40(5) – personal data: parts 7 – 14, 16 and 17 of the request

49. Section 40(5B)(a)(i) of the FOIA allows a public authority to refuse to confirm or deny that particular information is held. It will apply where the mere act of confirming or denying would itself reveal the personal data of an individual other than the requester and that revelation would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
50. The first step for the Commissioner is to determine whether just confirming or denying that the information is held would reveal personal data as defined by the DPA. If it would not, section 40(5B)(a)(i) of FOIA cannot be relied upon.
51. Secondly, and only if the Commissioner is satisfied that confirming or denying would reveal personal data, he must establish whether that revelation would breach any of the DP principles.

Would confirmation or denial reveal personal data?

52. Questions 7 to 10 seek information about when, and on what grounds, Mr Cleverly received certain medals. The MOD explained that despite the fact that Mr Cleverly has been seen wearing the medals in public, this does not necessarily mean that it is able to confirm that related recorded information in scope of questions 7 to 10 is, or is not, held. The MOD explained that there are a number of ways that Mr Cleverly could have met the qualification criteria or been provided with the medals, including by other government departments or organisations. As such, the MOD argued that, in the absence of any public confirmation, when and who Mr Cleverly received the medals from is his personal information.
53. The Commissioner agrees with this analysis and accepts that if the MOD confirmed whether or not it held information falling within the scope of these parts of the request this would result in the disclosure of Mr Cleverly's personal data.
54. The MOD explained that the remaining questions to which section 40(5) had been applied concerned the 'apparent misrepresentations' by Mr Cleverly. Furthermore, the Commissioner notes that the questions seek to establish what actions, if any, had been taken against Mr Cleverly in view of these 'apparent misrepresentations'. The Commissioner accepts that if the MOD confirmed whether or not it held information falling within the scope of these questions then that this would also result in confirmation as to whether particular actions in respect of Mr Cleverly had taken place. Such a confirmation or denial would therefore result in the disclosure of Mr Cleverly's personal data.

Would confirming or denying that the information is held contravene principle (a)?

55. The fact that confirming or denying that information is held would reveal the personal data of an identifiable living individual does not automatically prevent the public authority from doing so. The second element of the test is to determine whether confirming or denying that the information is held would contravene any of the DP principles.
56. Again, as with the Commissioner's analysis above in relation to section 40(2), the most relevant DP principle in this case is principle (a) and the lawful basis most applicable is basis 6(1)(f) of the GDPR.
57. As result the Commissioner must consider whether there is a legitimate interest in confirming or denying if the information is held; whether a confirmation or denial is necessary; and whether such legitimate

interests confirming whether information is held override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

58. For the reasons discussed above, the Commissioner accepts that there is a legitimate interest in the disclosure of information about the army career of high profile politician who has publicly discussed his role in the armed forces. The Commissioner accepts that it could therefore be argued that it is necessary to confirm whether the information sought by requests 7 to 10 is held by the MOD. In relation to the remaining questions, the Commissioner is not aware of the allegations against Mr Cleverly having been made more widely. Nevertheless, the Commissioner would also accept that confirmation or denial as to whether such information is held is arguably necessary to bring transparency to this issue given the serious nature of the allegations.
59. With regard to the balance of interests, in relation to the information sought by questions 7 to 10, the MOD emphasised that whilst it noted that the medals may have been worn by Mr Cleverly at public events, no further official information has been published in scope of these questions. Furthermore, as noted above, there are a number of ways in which Mr Cleverly could have been awarded such medals.
60. The Commissioner accepts that confirming or denying whether the MOD holds such information could provide an insight into the basis upon which these medals were awarded. However, the Commissioner would question to the degree to which confirmation of such information is required to meet any particular pressing or overwhelming public interest. Further, he accepts that Mr Cleverly would not necessarily expect such information to be disclosed and that to do so could infringe his privacy.
61. Therefore, for questions 7 to 10 the Commissioner has determined that there is an insufficient legitimate interest to outweigh the data subject's fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so confirming or denying that the information is held would not be lawful. Given the above conclusion that confirming or denying that the information is held would be unlawful, the Commissioner considers that he does not need to go on to consider whether confirming or denying that the information is held would also be fair or transparent.
62. With regard to the balance of interests for the information sought by the remaining questions, the MOD acknowledged there is a public interest in knowing whether Mr Cleverly is subject to any wrongdoing which the complainant considered merited investigation, but it emphasised that there was nothing already in the public domain about this. The Commissioner accepts that despite Mr Cleverly's profile, he would not

expect public confirmation to be given as to whether or not he was subject to particular actions or investigations (if indeed that were the case). The Commissioner accepts that such a confirmation or denial would present a significant infringement of his privacy. The Commissioner has therefore reached the same findings in respect of the remaining questions as he has in paragraph 61 for questions 7 to 10.

63. In view of the above the MOD is entitled to refuse to confirm or deny whether it holds recorded information falling within the scope of parts 7 – 14, 16 and 17 of the request on the basis of section 40(5B)(a)(i).

Other matters

64. FOIA does not impose a statutory time within which internal reviews must be completed, albeit that the section 45 Code of Practice explains that such reviews should be completed within a reasonable timeframe.⁶ The Commissioner expects that most internal reviews should be completed within 20 working days, and even for more complicated requests, reviews should be completed within a total of 40 working days.⁷ In this case the MOD took 10 months to complete the internal review.
65. The Commissioner has recently issued a Practice Recommendation to the MOD regarding its FOI performance, including its delays in completing internal reviews.⁸

⁶ <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

⁷ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/request-handling-freedom-of-information/#internal>

⁸ <https://ico.org.uk/media/action-weve-taken/practice-recommendations/4031462/practice-recommendation-fpr0987683.pdf>

Right of appeal

66. 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

67. 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.
68. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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

Request submitted to MOD on 10 November 2023:

“[1] What was Lt Col James Cleverly's last date of reckonable service in His Majesties Armed Forces (reserve)?

[2] When did Lt Col James Cleverly last serve as a member of Central Volunteers HQ Royal Artillery?

[3] Did Lt Col James Cleverly serve as a Staff Officer in 1st (UK) Armoured Division?

[4] When did Lt Col James Cleverly last serve as a Staff Officer in 1st (UK) Armoured Division / 1st (UK) Division?

[5] Did Lt Col James Cleverly serve with 100 (Yeomanry) Regt RA?

[6] When did Lt Col James Cleverly last serve with 100 (Yeomanry) Regt RA?

[7] When was Lt Col James Cleverly awarded HM The Queen's Platinum Jubilee Medal?

[8] On what grounds was Lt Col James Cleverly eligible for HM The Queen's Platinum Jubilee Medal?

[9] When was Lt Col James Cleverly awarded The King's Coronation Medal 2023?

[10] On what grounds was Lt Col James Cleverly eligible for The King's Coronation Medal 2023?

[11] Is Lt Col James Cleverly (retired - assuming [representative of the 1st (UK) Division name redacted] statement is accurate) still subject to Kings Regulations, Reserve Land Forces Regulations and Administrative procedures in relation to his apparent misrepresentations and the damage it has already caused to the reputation of the British Armed Forces on active deployment in direct support of the ongoing Israeli war crimes, ethnic cleansing and genocide carried out on the Palestinian civilian population of the Occupied Territories, specifically the Gaza Strip?

[12] What actions are being taken or considered by the MOD in respect to any such breach by Lt Col James Cleverly (retired - assuming [representative of the 1st (UK) Division name redacted] statement is accurate) as previously communicated in my letters of 2nd November 2023 and 7th November 2023 (attached)?

[13] What actions are being taken or considered by the British Army in respect to any such breach by Lt Col James Cleverly (retired - [representative of the 1st (UK) Division name redacted] statement is accurate) as previously communicated in my letters of 2nd November 2023 and 7th November 2023 (attached)?

[14] What actions if any are 1st (UK) Division taking or considering taking to urgently communicate with the general public about the serious consequences of this apparent misrepresentation of facts?

[15] What actions if any are 1st (UK) Division taking or considering taking to urgently communicate with the general public about the Divisions training standards and compliance with British Armed Forces Rules of Engagement, and compliance with International Law, including but not limited to the Geneva Conventions and their Additional Protocols?

[16] What actions if any are the MOD taking or considering taking to urgently communicate with the general public about the serious consequences of this apparent misrepresentation of facts?

[17] What actions if any are the British Army taking or considering taking to urgently communicate with the general public about the serious consequences of this apparent misrepresentation of facts?

[18] What actions if any are the MOD taking or considering taking to urgently communicate with the general public about the Divisions training standards and compliance with British Armed Forces Rules of Engagement, and compliance with International Law, including but not limited to the Geneva Conventions and their Additional Protocols?

[19] What actions if any are the British Army taking or considering taking to urgently communicate with the general public about the Divisions training standards and compliance with British Armed Forces Rules of Engagement, and compliance with International Law, including but not limited to the Geneva Conventions and their Additional Protocols?"