

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 December 2024

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

Decision (including any steps ordered)

1. The complainant submitted a request to the Ministry of Defence (MOD) about weapons smuggling from Serbia to Kosovo. The MOD initially confirmed that it held information falling within the scope of the request but considered this to be exempt from disclosure on the basis of sections 26 (defence) and 27 (international relations) of FOIA. At the internal review stage the MOD determined that section 12(2) (cost limit) of FOIA applied to part of the request and therefore on the basis of this provision refused to comply with the entirety of the request.
2. The Commissioner's decision is that the MOD can rely on section 12(2) of FOIA to refuse to comply with the entire request.
3. However the MOD's handling of this request resulted in procedural breaches of the legislation, namely sections 10(1) and 17(3) of FOIA.
4. The Commissioner does not require further steps.

Request and response

5. The complainant submitted the following request to the MOD on 3 November 2023:

1. Please provide me with the information that the Fusiliers supplied to KFOR and HMG suggesting that weapons were being smuggled across the border from Serbia into Orthodox churches in ambulances into Kosovo.
2. Please also supply sitreps and briefings held by the MOD from the Fusiliers to KFOR between October 2022 up to the date of their departure from Kosovo.
3. Any Defence Intelligence reports/analysis on smuggling of weapons across the Serbia/Kosovo border.
4. I also wish to request MOD briefing papers provided to Sir Stuart Peach for his visits to Kosovo and Serbia in February and October 2022.

6. The MOD responded on 18 January 2024 and confirmed that it held some information falling within the scope of the request but it considered this to be exempt from disclosure on the basis of sections 26 and 27 of FOIA.
7. The complainant contacted the MOD on the same day and asked it to conduct an internal review of this decision. He argued that the MOD's response had not provided any details of the public interest factors considered and furthermore that in his view it was likely that most of the information could be released with only genuinely exempt information withheld.
8. The MOD informed the complainant of the outcome of the internal review on 28 October 2024. It explained that when the request was initially responded to a full search to locate information falling within the scope of part 3 of the request was not conducted. Rather, the exemptions cited were applied to unforeseen information on the basis that information was held and the releasing it could compromise UK Forces operating in the area and undermine diplomatic relations, and therefore prejudice defence and international relations. However, the MOD acknowledged that to meet the obligations of section 1 of FOIA, a public authority should first determine what if any information is held, and it should have undertaken a meaningful search for information before considering the application of exemptions.
9. Furthermore, the MOD explained that it had now established that it was not possible to determine if it held information falling within the scope of part 3 of the request without exceeding the appropriate cost limit provided for at section 12(2) of FOIA. The MOD further explained that if one part of a request exceeds the appropriate cost limit, a public authority does not have to answer any parts of the request. Therefore, the MOD's position was that it is relying on section 12 of FOIA to refuse this request in its entirety. Under section 16 of FOIA, the MOD suggested that the complainant may wish to consider refining part 3 of

the request to a specific date to enable it to conduct relevant searches within the cost limit.

Scope of the case

10. The complainant initially contacted the Commissioner on 4 July 2024 to complain about the MOD's handling of his request. At that stage the complainant explained that he wished to challenge the MOD's decision to withhold information falling within the scope of his request on the basis of sections 26 and 27 of FOIA. He was also dissatisfied with the MOD's failure to complete the internal review.
11. In view of the internal review outcome, the Commissioner informed the complainant that in his opinion the MOD were entitled to rely on section 12 of FOIA to refuse the entirety of the request and that as a result a decision notice issued on this case would not require the MOD to take any further steps in relation to this request. The complainant did not seek to dispute such a finding (and noted that he had now submitted a refined request) but explained that he wished a decision notice to be issued so that there was a record of the MOD's handling of this request.

Reasons for decision

Section 12 – cost of compliance exceeds the appropriate limit

12. Section 12 of 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 cost limit.
13. The appropriate limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations') at £600 for public authorities such as the MOD.
14. 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 of FOIA effectively imposes a time limit of 24 hours for the public authority to deal with the request.
15. Where a public authority is relying on section 12(1) to refuse a request it must still confirm whether or not it holds the information. However, a public authority may rely on section 12(2) if the cost of determining whether the information is held would, on its own, exceed the appropriate limit.

16. If section 12(2) applies, the public authority does not need to confirm or deny that it holds the information.
17. 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.
18. 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. In accordance with the First-Tier Tribunal decision in the case of *Randall v IC & Medicines and Healthcare Products Regulatory Agency EA/20017/0004* 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.
19. Section 12 of FOIA is an absolute exemption and 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.
20. The MOD’s internal review explained that:

“11. Section 12(2) requires a public authority to estimate the cost of confirmation or denial, rather than to formulate an exact calculation. However, in this case it is not possible to provide a reasonable estimate of how long it may take to locate the information in scope of your request, if held, due to the nature of the searches that would be required. Although a search for information is likely to be limited to a few areas of the Department, as there is no time limit associated with part 3 of your request, it is possible that information could be held dating back beyond 25 years, but at least since NATO’s peacekeeping missions in Kosovo began (1999).

12. Information of this age, if held, is likely to be either in hard copy format, or has passed through numerous changes in IT and electronic archive database, that searching for such material would not be straightforward. Information, if held, is likely to be contained within a country or area assessment report related to those in your request. There would therefore be a requirement to first locate any relevant

country/area assessments in hard copy format that is held in MODs archives, and then manually review each one to determine if any relevant information is held. The same requirement would also be the case for anything held in MODs electronic archives and it is unlikely that a key word search could be carried out for any older information that may be held.”

21. In the Commissioner’s view given the broad timeframe of the request and the different formats within which potentially relevant information could be held, it is reasonable to conclude that section 12(2) of FOIA applies to part 3 of the request. Furthermore, the MOD is correct to state that if one part of a request exceeds the appropriate cost limit, then it is entitled to rely on section 12 of FOIA to refuse the entirety of the request, even if some information falling in other parts of the request could, in theory, be provided without the cost limit being met. Therefore, the Commissioner is satisfied that the MOD is entitled to refuse the entirety of this request on the basis of section 12 of FOIA.

Procedural matters

22. Section 1(1) of FOIA:

“(1) Any person making a request for information to a public authority is entitled—

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

23. Section 10(1) requires a public authority to comply with the requirements of section 1(1) within 20 working days. If a public authority is seeking to withhold information, section 17(1) requires a public authority to issue a refusal notice stating which exemptions apply within the same timeframe. If a public authority relies on section 12 to refuse a request, section 17(5) dictates that it must issue a refusal notice stating that, again within the same timeframe.
24. In this case the MOD’s initial response was not issued until 51 working days after the request. It therefore breached section 10(1) by failing to issue this response within 20 working days.
25. Furthermore, as explained above, the MOD applied exemptions to information without conducting a full search for information falling within the scope of the request. It was therefore only at the internal review stage that the MOD determined that section 12(2) applied to part 3 of

the request. Technically, then the Commissioner considers that the MOD breached section 17(5) by failing to issue a refusal notice within 20 working days of the request, albeit that this delay also had a wider impact on the complainant's access rights which the Commissioner has commented on below in the Other Matters section.

Other matters

26. 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.¹ 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.²
27. In this case the MOD took 9 months to complete the internal review.³
28. Whilst such a delay is clearly unacceptable in any case, in the circumstances of this request this had a particularly detrimental impact on the complainant because it was only at the review stage that the MOD established that it could not actually comply with the request within the appropriate cost limit. Therefore it was only at that stage – nearly a year after he submitted his initial request – that the complainant was in a position to submit a refined request.
29. The Commissioner notes that the MOD's internal review accepted that its initial handling of this request did not meet the requirements of the legislation and apologised for this.
30. In the Commissioner's view the MOD's handling of this request provides a clear example of the need – and importance – for public authorities of determining if they can comply with a request within the cost limit before considering the application of any exemptions to information which is located. It also acts as a clear reminder of the importance of considering the application of exemptions on the basis of the actual

¹ <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

² <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/request-handling-freedom-of-information/#internal>

³ The Commissioner has recently issued a Practice Recommendation to the MOD regarding its FOI performance, including its delays in completing internal reviews.
<https://ico.org.uk/media/action-weve-taken/practice-recommendations/4031462/practice-recommendation-fpr0987683.pdf>

information which the public authority holds rather than the information which it assumes it holds.

Right of appeal

31. 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

32. 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.
33. 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
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