

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 January 2019

Public Authority: The 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) for the forenames and date of birth of a particular individual who had served in World War Two. The MOD refused to provide him with this information on the basis of section 40(2) (personal data) of FOIA. The complainant disputed its reliance on this exemption and also argued that the MOD had failed to provide him with adequate advice and assistance in line with its duties under section 16 of FOIA. The Commissioner has concluded that the requested information is exempt from disclosure on the basis of section 40(2) of FOIA and that in all the circumstances of the case there is no further advice and assistance it could have reasonably provided to the complainant.

Request and response

2. The complainant submitted the following request to the MOD on 31 May 2018:

'I am trying to research the owner of an item of World War 2 equipment I have which is marked on the back 7944685 CPL BURDETT J. There is possibly another initial that could be an E but this is too badly worn to be sure. The nature of the item would indicate that he has served in the Middle East.'

I am fully aware of the need to provide a death certificate and of course the £30 fee for any service record but in terms of a death certificate I cannot apply for this until I can firmly identify exactly which J BURDETT I am looking for.

A search of family history sites has identified some 41 possible J BURDETT's who could have served in WW2. The list of those I have identified along with dates of death I have been able to find is attached. Could I therefore ask if you could possibly identify the correct J BURDETT Service Number 7944685 from this list in order that I can obtain a death certificate.'

3. The MOD responded on 7 June 2018 and explained that information on military records is exempt from disclosure on the basis of section 21 of FOIA as it makes such information available through its publication scheme. The MOD provided the complainant with details of the process by which such information could be accessed in line with its publication scheme. The MOD also explained that any information contained in a record of Service which is not within its description of information it will disclose under the publication scheme, eg medical or disciplinary information, is exempt from disclosure by virtue of section 41 (information provided in confidence) or section 44 (prohibition on disclosure) of FOIA as its disclosure would breach Article 8 of the European Convention on Human Rights; the right to a private and family life.
4. The complainant contacted the MOD on 8 June 2018 and explained that he was disappointed with its response given that it ignored much of the information set out in his letter of 31 May 2018. The complainant noted that he was well aware of the need to provide a death certificate in order access a service record. However, he needed to identify the correct Cpl Burdett in order to apply for a death certificate. Consequently the complainant requested that the MOD *'please advise Burdett's Christian name or names and date of birth. As without this information I can progress no further.'*
5. In response the MOD did acknowledge that there was a file within its archive for a J Burdett with the service number quoted by the complainant. However, it reiterated its position that it could not provide him with the date of birth and full name of the individual in question without proof of death or written consent if the individual was still alive.
6. The complainant contacted the MOD again on 9 June 2018 and explained once more the particular circumstances of his request and suggested that in light of these circumstances the MOD's responses were not particularly helpful. He argued that the MOD's approach left researchers in an impossible position in that they cannot apply for the

service records without a death certificate, assuming that there was one, but they could not apply for a death certificate because the MOD would not confirm essential information needed to obtain a copy of the certificate. Furthermore, the complainant noted that the approach the MOD was taking in this case was in contrast to his experience of the Royal Marine and RAF records, both of which had provided him dates of birth and confirmed the full names of other individuals thus allowing him to apply for a death certificate in those cases. The complainant also drew attention to the provision of section 16 of FOIA which provides that public authorities should provide advice and assistance to individuals who have made, or who propose to make requests.

7. The MOD responded on 25 June 2018. It explained that personal information relating to a living individual is subject to the terms of both the General Data Protection Regulation (GDPR) and the Data Protection Act 2018 (DPA) and that until such times as an individual is proven to be deceased, and no longer subject to these regulations, personal information cannot be shared with a third party without the explicit consent of the individual. The MOD explained its policy was that in the absence of proof of death the data subject should be presumed to be alive until the 116th anniversary of their birth. The MOD noted that this conservative assumption reflects the importance which the MOD attaches to the protection of personal data and its requirement for a copy of a death certificate. The MOD explained that it had noted the complainant's comments regarding disclosure of similar information in the past, and indeed the fact that in relation to this complaint it had confirmed the existence of a file without receipt of proof of death. The MOD explained that both of these lapses had been reported to the appropriate persons and were now being investigated. Finally, with regard to section 16 of FOIA the MOD explained that applicants for third party data are directed to the relevant part of the government website which explained how to apply for service records of former personnel, including the requirements of doing so. The MOD also noted that the website included advice on how to conduct searches for the details of deceased service personnel at no cost before making a request to the MOD.
8. The complainant contacted the MOD again on 26 June 2018 to complain once again about the MOD's handling of his request.
9. In response to this correspondence, the MOD completed an internal review of its handling of this request and informed the complainant of the outcome in a letter dated 25 July 2018. The review explained that the response of 25 June 2018 clearly explained its position in relation to this request. However, the MOD noted that its response should have cited section 40 of FOIA. Furthermore, the MOD explained that in all the circumstances of case it should have applied section 40(5) of FOIA to

neither confirm nor deny that any information within the scope of the request was held.

Scope of the case

10. The complainant contacted the Commissioner on 30 July 2018 in order to complain about the MOD's failure to provide him with the information that he requested, namely the full name and date of birth of '7944685 CPL BURDETT J'. The complainant was also dissatisfied with the level of advice and assistance the MOD provided to him.
11. During the course of the Commissioner's investigation, the MOD explained that it was no longer seeking to rely on section 40(5) of FOIA to refuse to confirm or deny whether it held the requested information. It explained that having considered the particular facts of this case, the MOD was prepared under FOIA to confirm that it held the requested information albeit that it remained of the view that this information was exempt from disclosure on the basis of section 40(2) of FOIA.
12. By way of an explanation of this shift in position, the MOD explained that it received significant numbers of 'genealogical' requests each year and these are handled by the Disclosure branches of the Army, Navy and RAF. The MOD noted that the Army alone received 10,000 requests per annum for the records of deceased service personnel. The MOD explained that to make such requests more manageable and try and meet the section 10(1) time scale within FOIA, Disclosure branches will endeavour to be consistent every time a certain type of information is requested, regardless of whether the information is held or not. Therefore, taking account the need of Disclosure branches to adopt a consistent approach in dealing with voluminous requests and where a death certificate has not been provided, MOD's policy is that a section 40(5) response should be issued. The MOD acknowledged that the difference in terms of the risk in breaching personal data between providing a section 40(5) and a section 40(2) response in cases of this kind is small. However, the decision as to whether it was appropriate to confirm whether requested information was held was one that was beyond the desk level work of the Disclosure branch staff who process these applications in their thousands. In addition, it is not known what information could be revealed on a particular Service person until the file is recalled from the MOD's archives, for example whether they may have served in sensitive roles which may then require a neither confirm nor deny response.

Reasons for decision

Section 40 - personal information

13. Section 40(2) of the FOIA 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(3) or 40(4) is satisfied.
14. In this case the relevant condition is contained in section 40(3A)(a). 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 set out in Article 5 of the GDPR ('the DP principles').
15. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the DPA. If it is not personal data then section 40 FOIA cannot apply.
16. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the data protection principles under the DPA.

Is the information personal data?

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

"any information relating to an identified or identifiable living individual".
18. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
19. 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.
20. 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.
21. The Commissioner accepts that the full name and date of birth of an identifiable living individual is clearly their personal data. In the circumstances of this case, the relevant question is whether Cpl Burdett is still alive. The MOD explained to the Commissioner that its policy was that in the absence of proof of death the data subject should be presumed to be alive until the 116th anniversary of their birth. This is

because the longest living UK citizens in recent times are reported to have died at the age of 115. The MOD confirmed that 116 years had not yet passed since the birth of Cpl Burdett. Moreover, the MOD explained that it did not hold information that confirms the individual is deceased. The MOD acknowledged that its policy of assuming an individual is alive until 116 years may be considered to be 'over-cautious', but it explained that it owed a duty of care to its veterans.

22. In his submissions to the Commissioner, the complainant raised two points with regard to this particular policy. Firstly, he explained that the record of deaths on family history websites are all drawn from official records so the MOD should take these into account in determining whether the individual in question was deceased. Secondly, whilst the MOD applies 116 years of age to such records, The National Archives uses 100 years of age for such records.
23. In a previous decision notice, FS50695574, the Commissioner accepted that the MOD's policy of assuming an individual was 116 years old was a reasonable approach to requests for service records.¹ The Commissioner finds no reason to deviate from this previous decision. She remains of the view that this is a reasonable approach given the substantial amount of personnel records that the MOD holds and the importance of protecting the privacy of the individuals to whom they relate. With regard to the complainant's suggestion that the MOD use open source records to determine whether the individual in question is alive or not, in the Commissioner's view FOIA does provide any obligation on it to do so. However, she has commented on this issue further in relation to her findings about section 16 of FOIA.
24. In the circumstances of this case, the Commissioner is satisfied that the withheld information both relates to the Cpl Burdett in question and identifies the individual concerned. This information therefore falls within the definition of 'personal data' in section 3(2) DPA.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2172595/fs50695574.pdf>

Would disclosure contravene principle (a)?

25. Article 5(1)(a) GDPR states that:-

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

26. In the case of a 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 (i.e. if there is a GDPR Article 6 lawful basis for processing, and if the processing is generally lawful), fair, and transparent.

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

27. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that “processing shall be lawful only if and to the extent that at least one of the” bases listed in the Article applies. One of the bases in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.

28. The Commissioner considers that the basis most applicable on the facts of this case would be that contained in Article 6(1)(f) GDPR which provides as follows:-

“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”².

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

² 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 2018) 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 subparagraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.

- 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.
30. The Commissioner considers that the test of “necessity” under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

31. In considering any legitimate interest(s) in the disclosure of the requested information public under FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes as well as case specific interests.
32. Further, 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. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
33. The chronology of the request set out earlier in this notice provides an indication as to why the complainant believes that there is a legitimate interest in the disclosure of the information. That is to say, he needed to identify the correct Cpl Burdett so that he could apply for a copy of his death certificate (assuming of course he was deceased) because without this death certificate he would not be able to access Cpl Burdett’s service record via the process in place in the MOD’s publication scheme. The complainant suggested that the MOD’s approach placed researchers like himself in an impossible situation; it would not provide Cpl Burdett’s service record without a death certificate but he could not identify the correct Cpl Burdett, and thus get a copy of his death certificate, without the MOD’s assistance in providing the individual’s date of birth and forenames.
34. The Commissioner accepts that the complainant has a legitimate interest in accessing the withheld information, ie to provide him with the information he needs so that he can access the service record of Cpl Burdett. More broadly, the Commissioner accepts that there is a legitimate interest in researchers, and the public in general, being able to access service records of former service personnel.

Is disclosure necessary?

35. '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 disclosure would not be necessary if the legitimate aim could be achieved by something less. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
36. Based upon the facts of this case, the Commissioner accepts that disclosure of the withheld information is necessary in order for the requester to access the service record of Cpl Burdett.

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

37. 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.
38. The MOD explained that its policy on the release of personal information is publicly available. The MOD emphasised that this policy made it clear that information relating to living individuals will only be released with the express written consent of the data subject, or proof of an appropriate Court Order or Power of Attorney. The MOD explained that it had also stated that information relating to the deceased will only be made available on provision of proof of death. Therefore, the MOD argued that a data subject's reasonable expectation would be that it would handle his or her information in accordance with this policy and not release any personal information relating to them unless these conditions are met.
39. Furthermore, the MOD explained that disclosure of such information has the potential to cause distress to former service personnel. It explained that there was evidence of families being previously targeted by medal or memorabilia collectors seeking further information about items in their possession, or the previous owner so that they can confirm provenance. The MOD argued that this can be distressing and it has a commitment to protect individuals and their families from such intrusion and distress as far as is reasonable.

40. The Commissioner recognises the conundrum that the complainant faces in attempting to access the service file of Cpl Burdett and the fact that without the information he requested he is unable to access this file. She accepts that his interests in accessing this information do deserve recognition and some weight in the balancing exercise. However, the Commissioner notes that the data subject would have a very clear expectation that their personal data would not be disclosed. In light of this, and given the understandable importance the MOD places on protecting the personal data of veterans, the Commissioner has determined that there is an insufficient legitimate interest to outweigh the data subject's fundamental rights and freedoms, and that the disclosure of the information would not be lawful.

Fairness

41. Given the conclusion the Commissioner has reached above on lawfulness, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair.
42. The Commissioner has therefore decided that the MOD was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Section 16 – advice and assistance

43. Section 16 of FOIA places an obligation on public authorities to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.
44. As explained above, in line with section 16, the MOD referred the complainant to the relevant government website which gave details of how to apply for a service record and details of how to search for details of deceased service personnel. In its submissions to the Commissioner, the MOD noted the complainant's concerns about the level of advice and assistance which had been provided. However, it suggested that it was difficult to see what further advice or assistance could be usefully provided to aid the complainant in his research without releasing information which would identify Cpl Burdett, precisely the information the MOD would consider to be exempt from disclosure under section 40(2) of FOIA.
45. The complainant argued that the MOD was acting unreasonably in not providing him with advice and assistance to allow him to access the service record in question. In particular, as noted above he suggested that the MOD could use genealogical websites to identify whether the

individual in question was deceased. Furthermore, the complainant noted that the MOD had suggested to him that it was for him to conduct his own searches in order to determine whether Cpl Burdett had died but the complainant argued that it was only the MOD who held the necessary information to allow him establish whether this was the case.

46. In the Commissioner's opinion there is no further advice and assistance which the MOD could be reasonably expected to provide the complainant with in this case without revealing information which itself would be exempt from disclosure on the basis of section 40(2) of FOIA. The Commissioner notes the complainant's suggestion that the MOD used the genealogical websites he identified to establish whether the Cpl Burdett was deceased. However, given the voluminous nature of such requests that the MOD receives, in the Commissioner's view it is not reasonable to expect the MOD to conduct open source research in order to determine whether information requested under FOIA pertains to a living or deceased individual.

Right of appeal

47. 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: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

48. 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.
49. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Jonathan Slee
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