

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 September 2019

Public Authority: Ministry of Defence

Address: Main Building
Whitehall
SW1A 2HB

Decision (including any steps ordered)

1. The complainant submitted a request to the Ministry of Defence (MOD) seeking all communications sent and received by a particular special adviser relating to a newspaper article concerning the testing of a Trident missile. The MOD confirmed that it held information within the scope of the request but it considered this to be exempt from disclosure on the basis of qualified exemptions within FOIA and it needed additional time to consider the balance of the public interest. The MOD continued to extend the time it needed to consider the balance of the public interest before deciding to refuse this request on the basis of section 14(1) of FOIA because of the burden of complying with it.
2. The Commissioner has concluded that the MOD can refuse to comply with the request on the basis of section 14(1) but breached section 17(5) of FOIA by failing to issue a refusal stating this within 20 working days of the request.
3. The Commissioner does not require any steps to be taken.

Request and response

4. The complainant submitted the following request to the MOD on 21 July 2017:

'I would like copies of all communications sent and received by special adviser [name redacted] between January 1, 2017 and the date of this request which relate in any way to the publication by The Sunday

Times of No 10 covering up the misfire of Trident during a test off the coast of America.'

5. The MOD contacted the complainant on 22 August 2017 and confirmed that it held information falling within the scope of his request but it considered it to be exempt from disclosure on the basis of qualified exemptions within FOIA and it needed additional time to consider the balance of the public interest test. This response did not say which qualified exemptions were considered to apply.
6. The MOD continued to send the complainant further public interest extension letters at monthly intervals. In light of these delays, the complainant contacted the MOD on 10 September 2018 and asked it to conduct an internal review.
7. The MOD acknowledged receipt of this correspondence on 1 October 2018 and explained that it was investigating why the request was taking so long to respond to and it would update him in due course.
8. The MOD contacted him again on 17 December 2018 and advised that a substantive response to the request should be issued by 31 January 2019.
9. A substantive response was eventually sent to the complainant on 17 May 2019. The response explained that despite the significant amount of time and resources spent reviewing and preparing the information for disclosure, it was still not in a position to release the information. It had therefore decided to refuse the request on the basis of section 14(1) (vexatious) of FOIA given the burden involved in complying with the request.
10. The complainant responded on the same day in order to explain that he was dissatisfied with this response.
11. The MOD informed him of the outcome of the internal review on 17 June 2019. The review concluded that section 14(1) of FOIA applied to the request and provided some further details to explain why complying with it would place a grossly excessive burden on the MOD.

Scope of the case

12. The complainant initially contacted the Commissioner on 11 May 2019 in light of the MOD's failure to provide him with a substantive response to his request. Once the MOD had issued this response, and it upheld it at the internal review stage, the complainant confirmed that he wished to challenge the MOD's reliance on section 14(1) of FOIA. He explained to

the Commissioner that he was also dissatisfied with the length of time it had taken the MOD to provide a substantive response to his request.

Reasons for decision

Section 14(1) – vexatious requests

13. Section 14(1) of FOIA allows a public authority to refuse to comply with a request if it is considered to be vexatious.
14. In the Commissioner's view, 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. This will usually involve weighing the evidence about the impact on the authority and balancing this against the purpose and value of the request. This should be judged as objectively as possible; in other words, would a reasonable person think that the purpose and value are enough to justify the impact on the public authority.
15. In particular, the Commissioner accepts that there may be cases where a request could be considered to be vexatious because the amount of time required to review and prepare the information for disclosure would place a grossly oppressive burden on the public authority. This is the position adopted by the MOD in this case.
16. The Commissioner believes that there is a high threshold for refusing a request on such grounds. This means that a public authority is most likely to have a viable case where:
 - The requester has asked for a substantial volume of information **and**
 - The authority has real concerns about potentially exempt information, which it will be able to substantiate if asked to do so by the Commissioner **and**
 - Any potentially exempt information cannot easily be isolated because it is scattered throughout the requested material.

The MOD's position

17. The Commissioner notes at this point that part of the MOD's submissions to her refer to details of the requested information which the MOD considers to be sensitive. These parts of the submissions have not therefore been included in this decision notice but the Commissioner has considered them as part of her assessment of section 14(1) of FOIA.

18. With regard to the first criterion, the MOD explained in the internal review that the majority of the information that is held in scope of this request consists of email exchanges, which were either sent or received, by the special adviser named in the request. However, this also includes any information he may have been in receipt of as a copy addressee. The MOD noted that the publication of articles on high-profile defence topics, such as the one in question, is likely to generate a wide engagement from across Government and interest in Parliament which in turn would lead to the creation of background and briefing material to respond to any further press enquiries or support any formal Ministerial statements to Parliament. The MOD explained that as the request specifically asks for all communications that relate in 'any way' to the publication of the article, in its view all such information fell within the scope of the request.
19. With regard to the second criterion, the MOD explained that the information falling within the scope of request related to the UK's nuclear deterrent. In light of the sensitive nature of the topic, the MOD explained that an initial assessment of the information determined that parts of the information would attract the exemptions contained at sections 24 (national security), 26 (defence), 27 (international relations), 35 (formulation of Government policy), and section 40 (personal data) of FOIA.
20. With regard to the third criterion, the MOD explained that based on its examination of the requested material the potentially withheld information was scattered throughout the material and could not be easily isolated.
21. In support of its reliance on section 14(1) the MOD emphasised that in preparing its response to this request one individual had already spent 120 working hours in collating and assessing the material and that further consultation with stakeholders both within the MOD and across government would be necessary in order to ensure that all exempt information was properly identified and protected. The MOD also argued that following the application of the exemptions mentioned above, any released information would be effectively meaningless and would not place any new or additional information in to the public domain which would assist the public to participate further in informed debate over the nature of Trident testing.

The Commissioner's position

22. With regard to the first criterion, the Commissioner accepts that given the breadth of the request, seeking as it does all emails sent or received by a particular individual which relate in 'any way' to the article in question, a substantial amount of information falls within the scope of the request.
23. With regard to the second criterion, given the subject of the matter of request, namely the UK's nuclear deterrent, the Commissioner accepts that the MOD's concerns about potentially exempt information being caught by the request are legitimate ones.
24. With regard to the third criterion, the Commissioner is satisfied that the MOD has demonstrated that it would have real difficulties in identifying the exempt information and preparing the information for publication. In the Commissioner's view this difficulty is evidenced by the fact that one individual has already spent 120 working hours, or approximately 16 working days, collating and considering the application of exemptions to the information in question. The Commissioner also noted that further consultation, both within the MOD and beyond, would be necessary before this process could be completed.
25. The Commissioner is therefore satisfied that the MOD has demonstrated that the three criteria are met and consequently that the MOD has provided compelling evidence to demonstrate that complying with the request would place a grossly excessive burden on it. Nevertheless, the Commissioner has considered whether the purpose and value of the request are enough to justify the impact on the public authority.
26. The Commissioner appreciates that the newspaper article referred to by the complainant concerns a serious matter, namely the alleged misfiring of a Trident missile during a test. Moreover, the Commissioner appreciates that the newspaper article in question led to a discussion in Parliament as to the nature of these allegations.¹ In light of this interest the Commissioner accepts that there is arguably a serious purpose and value to the request to inform the public about the internal departmental and government discussions about the newspaper article and the matters it relates to. However, the Commissioner is conscious that as the MOD has explained, the processing of the request is unlikely to result in the disclosure of any new or additional information regarding Trident missile testing. The Commissioner accepts this to be a valid

¹ <https://hansard.parliament.uk/Commons/2017-01-23/debates/F1A6B273-AC23-4408-9B0C-81FE88B081F2/TridentTestFiring>

point given the sensitivity of information associated with the nuclear deterrent programme. Furthermore, the Commissioner recognises the significant resources that the MOD has already expended on this request, namely 120 working hours or 16 working days, and that additional work would be needed to process this request. Taking these factors into account the Commissioner has concluded that despite the benefits of disclosure, given the significant burden which complying with the request would place on the MOD, section 14(1) should be upheld.

Delays in processing the request

27. Section 1(1) of FOIA provides that 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.'

28. Section 10(1) of FOIA provides that a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.
29. Section 17(1) of FOIA requires a public authority that is seeking to refuse to comply with a request on the basis that information is exempt must issue a requester with a refusal notice stating that this is the case within 20 working days. Furthermore, section 17(5) requires a public authority that is relying on section 12 or 14 of FOIA to issue a requester with a refusal notice stating that this is the case within the same time period.
30. Under section 17(3) a public authority can, where it is citing a qualified exemption, have a 'reasonable' extension of time to consider the balance of the public interest. The Commissioner considers it reasonable to extend the time to provide a full response, including public interest considerations, by up to a further 20 working days, which would allow a public authority 40 working days in total. The Commissioner considers that any extension beyond 40 working days should be exceptional and requires the public authority to fully justify the time taken.
31. As the chronology of the request above makes clear, the MOD initially sought to extend the time it needed to consider the balance of the public interest test before it eventually decided to apply section 14(1) of FOIA. As a consequence of these delays the MOD has breached section 17(5) as it failed to provide the complainant with refusal notice citing section 14(1) within 20 working days of his request; indeed it took the MOD 464 working days to issue a substantive to this response. In its submissions to the Commissioner the MOD has outlined the factors that led to such a delay. Despite such factors, the Commissioner is firmly of the view that

such a delay in processing a request is unacceptable and risks undermining the purpose of the legislation itself.

32. The MOD acknowledges that it should have informed the complainant of the burdensome nature of his request and refused it under section 14(1) from the outset. The MOD has explained that its central FOI team has delivered a number of training and awareness sessions to desk officers from secretariats across the department to explain where section 14(1), on the basis of burden of complying with the request, can and should be applied. The Commissioner welcomes this initiative and hopes that it will ensure that the delays experienced by the complainant in relation to this request are not repeated.

Right of appeal

33. 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@justice.gov.uk

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

34. 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.
35. 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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