

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 March 2022

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

Decision (including any steps ordered)

1. The complainant submitted a two part request to the Ministry of Defence (MOD) seeking information about the RAF's application of the pay proposals as detailed in a report by the Armed Forces' Pay Review Body. The MOD confirmed that it held information falling within the scope of the first part of the request but considered this to be exempt from disclosure on the basis of section 36(2)(c) (effective conduct of public affairs) of FOIA. The MOD explained that it did not hold any information falling within the scope of the second part of the request. The complainant challenged the MOD's response to the second part of the request.
2. The Commissioner is satisfied that on the balance of probabilities the MOD does not hold any information falling within the scope of the second part of the request.
3. No steps are required.

Request and response

4. The complainant submitted the following request to the MOD on 14 March 2020:

'1. This FOI request pertains to the Defence Engineering Remuneration Review (DERR) and the RAF's application of the associated pay

proposals, as detailed in the AFPRB [Armed Forces' Pay Review Body] 48th Report (Appendix 3) - 'Category 2: qualifications and professional registration. An EPRA targeted at all RAF OFs and ORs tied to professional attainment from Eng Tech through to IEng and CEng, and that again includes retrospective recognition, for implementation in PR18.'

2. Accordingly, the following is requested under FOI:

- a. A copy of the DERR Report.
- b. Correspondence pertaining to the RAF's application of the AFPRB-approved DERR Category 2 payment, in particular regarding affordability of the proposal versus retrospective claim deadline.

3. I draw your attention to the AFPRB's comment in their 48th Report - 'It was surprising to us that not every engineer we spoke to was even aware of the existence of the Defence Engineering Remuneration Review (DERR), suggesting to us that MOD needs to do more to improve its communications.'

- 5. Following a number of holding responses sent on 16 April and 21 May 2020 the MOD contacted the complainant on 10 July 2020 and confirmed that it held information falling within the scope of his request. However, it considered this information to be exempt from disclosure on the basis of section 36 (effective conduct of public affairs) of FOIA and explained that it needed additional time to consider the balance of the public interest test.
- 6. The MOD provided the complainant with a substantive response to his request on 20 August 2020. It explained that the public interest test considerations had been completed and that the public interest favoured withholding the requested information.
- 7. The complainant contacted the MOD on the same day and asked it to conduct an internal review of this refusal.
- 8. The MOD informed him of the outcome of the internal review on 16 October 2020. The review explained that in relation to request 2a no separate DERR report was held. Rather, the review process led to a number of Papers of Evidence (POE) being submitted to the AFPRB and it was this information which was considered to be in the scope of that request. The MOD concluded that such information was exempt from disclosure on the basis of section 36(2)(c) of FOIA and that the public interest favoured maintaining this exemption. In relation to request 2b, the MOD explained that there was no evidence that correspondence sought by this request had in fact been located and assessed with regard to its potential disclosure under FOIA. Therefore, the MOD

explained that it had instructed Air Command, the part of the MOD which had initially handled the request, to re-process that part of it.

9. Air Command contacted the complainant on 18 November 2020 and explained that no correspondence falling within the scope of request 2b was in fact held.

Scope of the case

10. The complainant contacted the Commissioner on 22 November 2020 in order to complain about the MOD's handling of his request. The Commissioner established with the complainant that he did not wish to contest the MOD's reliance on section 36(2)(c) to withhold information falling within the scope of request 2a. However, he did wish to contest the MOD's position that it did not hold any information falling within the scope of request 2b.

Reasons for decision

Section 1 – Right of access to information

11. In cases such as this where there is some dispute as to whether information falling within the scope of the request is held, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
12. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request.
13. In applying this test the Commissioner will consider the scope, quality, thoroughness and results of the searches, and/or other explanations offered as to why the information is not held.

The complainant's position

14. The complainant explained that he had worked for the RAF for many years and in light of his experience he did not accept that there were no email correspondence, affordability spreadsheets, point briefs, presentations etc in existence that would have supported the drafting of the above Paper submitted to the AFPRB. He argued that the affordability of this proposal was key to the implementation of an arbitrary deadline that had disadvantaged many RAF personnel and it was therefore this affordability detail that he sought to gain access to. The complainant acknowledged that the MOD may seek to apply an exemption under FOIA to such correspondence but in his view to argue

that such correspondence did not exist, given the practice within the RAF and MOD for briefs, presentations and emails, was not credible.

The MOD's position

15. As part of his investigation of this complaint the Commissioner asked the MOD to respond to a number of questions regarding its handling of this request. The Commissioner has set out below the nature of these questions and summarised the MOD's response to each below.

16. **Question:** What searches have been carried out to locate information falling within the scope of request 2b and why would these searches have been likely to retrieve any relevant information?

Response: The RAF Reward Pay Policy Team (RAF Reward) conducted an electronic search using the terms 'DERR' and/or 'Defence Engineering Remuneration Review' and/or 'affordability'. The aim of such searches being to highlight correspondence relating to DERR/Defence Engineering Remuneration Review affordability. However, such searches only retrieved the DERR PoE itself.

In addition, MOD Armed Forces Remuneration Team (MOD AF Rem) conducted the same electronic searches, as well as 'EPRA' and 'Engineering Professional Recognition Award' and these returned no records containing any detail on RAF affordability.

17. **Question:** Please describe thoroughly any searches of relevant paper/electronic records and include details of any staff consultations.

Response: The MOD referred to the answer to the previous question. In addition, the MOD explained that RAF Reward referred the question to the RAF Engineering Branch and Trade Advisors as they were consulted in the development of the DERR. RAF Reward also consulted with the MOD AF Rem team which searched electronic records only; no paper copies of information are held by this team.

The MOD explained that one individual who was involved in the discussions, but had moved to a post outside of these teams, was approached in relation to the request and internal review and a search of their mailbox was conducted but the correspondence was not found. Staff from the relevant teams have also searched relevant team sites but the information has not been located.

The MOD explained that between the work to develop the EPRA proposal for the 2018 pay round, and the data searches undertaken, a number of key personnel in the MOD AF Rem team who conducted the work within the work have changed post; two individuals have left the Armed Forces

which means that there is no access to their individual email accounts. The MOD explained that there had also been a team re-organisation.

18. **Question:** If searches included electronic data, which search terms were used and please explain whether the search included information held locally on personal computers used by key officials (including laptop computers) and on networked resources and emails.

Response: As noted above, the MOD explained that RAF Reward conducted an electronic search using the terms 'DERR' and/or 'Defence Engineering Remuneration Review and/or affordability'. This search was conducted within emails and electronic records. No records falling within the scope of request 2b were found following searches of MOD laptops and office-based computers that would have been available to staff during the work.

The MOD also explained that MOD AF Rem undertook the same electronic searches, for 'DERR', 'Defence Engineering Remuneration Review', as well as 'EPRA' and 'Engineering Professional Recognition Award'. These searches were on email records, both personal email and multiuser email accounts, current and previous SharePoint sites, and MOD's current electronic record archive system. Again no relevant records were found.

19. **Questions:** Was any recorded information ever held relevant to the scope of the request 2b but deleted/destroyed? If recorded information was held but is no longer held, when did the MOD cease to retain this information? Does the MOD have a record of the document's destruction?

Response: The MOD explained that outside of the PoE which fell within the scope of request 2a, none of the requested information was located, and it is impossible to confirm if it existed but was destroyed prior to the request being submitted. The MOD explained that staff are not obliged to record the destruction of individual hard copy documents unless they are classified as SECRET or above. The information located in scope of this request, whilst sensitive, is not classified at such a level. There is no formal procedure to record the destruction of any documents that exist purely in electronic format.

20. **Question:** What does the MOD's formal records management policy say about the retention and deletion of records of this type?

Response: With reference to the MOD Records Appraisal Report 2020, Armed Forces Pay evidence papers are not required to be maintained for permanent preservation. The only formal records that are maintained electronically are the final PoE as approved by MOD (No.10 and HMT) Ministers.

21. **Question:** Is there a business purpose for which the requested information should be held? If so what is this purpose?

Response: The endorsed PoE are maintained to provide an internal audit trail of Government evidence to the AFPRB. The information requested would have been working level development before the PoE were approved by MOD centre, secured final Governmental agreement and was shared with the AFPRB. There is no business requirement to retain any working documents once the PoE has been endorsed.

22. **Question:** Does the MOD wish to make any comments about the complainant's grounds of complaint, namely that it is unsustainable to suggest that there is no correspondence held to support the drafting of the Paper submitted to the AFPRB.

Response: Whilst the MOD acknowledged the complainant's point, it explained that all relevant teams had searched mailboxes and team sites for correspondence as per part 2b of the request and that no correspondence had been located. The MOD emphasised that it had spent a significant amount of staff time searching mailboxes and team sites from the initial handling of the request, at the internal review stage and as part of its response to the Commissioner's investigation.

The MOD advised that it had located some correspondence but the emails located related to a different part of the DERR (a new addition to the core pay structure) and were originated after the Engineering Professional Recognition Award (EPRA) was implemented (one off payments for Engineering Accreditation), so are not in scope of the request.

The MOD also explained that that the affordability work was conducted 'internally' between relevant RAF teams involved in the affordability work but this was not shared with the central team, as responsibility for affordability does not rest with it. The MOD explained that it had been advised that much of this work was conducted 'face to face' for which no official record is held.

The MOD reiterated that there are two main teams that were involved in this matter: MOD AF Rem and the RAF Reward Team, and emphasised that as stated above extensive searches had been conducted but the correspondence in scope of part 2b of the request has not been found.

23. An additional point also emerged as part of the Commissioner's engagement with the MOD in relation to this complaint which is also relevant.

24. The Commissioner established with the MOD that it does hold documents and costing spreadsheets which supported the pay award/affordability. However, the MOD explained that:
- (a) these documents and costing spreadsheets did not form part of the DERR report and so did not form part of the information in the scope of request 2(a).
 - (b) The documents and costing spreadsheets do not constitute 'correspondence' which would fall within the scope of request 2b.
25. In relation to the latter point, the MOD explained that the documents and costing spreadsheets have been filed as a record, as per policy, but that the correspondence, ie emails, in which members of the RAF teams working on the bid would have likely to have shared these documents with each other during the development of the paper have not been.
26. The MOD's position was that if the complainant wished to access the documents and costings spreadsheets that supported the preparation of the DERR report, he would have to submit a new request. However, the MOD explained that despite the passage of time since the initial request any such request would be likely to be refused on the basis that the information is exempt from disclosure on the basis of section 36(2)(c) of FOIA.

The Commissioner's position

27. Having considered the MOD's submissions to him, the Commissioner is satisfied that on the balance of probabilities the MOD does not hold any information falling within the scope of request 2b. He has reached this conclusion on the basis of the following reasons:
28. Firstly, the searches for any relevant correspondence that the MOD has undertaken have focused on the teams/areas within the organisation that are likely to hold any relevant information. That is to say MOD AF Rem and the RAF Reward Team.
29. Secondly, not only have the MOD's searches for correspondence focused on the appropriate areas of the organisation, the search terms used to interrogate the records are ones that in the Commissioner's view are sufficiently logical and focused to ensure that if any relevant correspondence was held then it would be been located.
30. Thirdly, the Commissioner notes that there is no business reason for the MOD to have retained correspondence falling within the scope of request 2b. Therefore, it seems plausible that correspondence falling within the scope of that request was, at some point, held by the MOD but has subsequently been deleted or not retained. In making this point, the Commissioner is conscious of the time that has elapsed between the work being carried out on the subject matter, ie prior to the publication

of the 48th AFPRB report in July 2019, and the date of the request in March 2020.

31. Fourthly, the Commissioner appreciates that in his submissions to the him the complainant argued that it was very unlikely that the MOD did not hold any information about the affordability of the proposals. However, in light of the MOD's submissions to the Commissioner, it is the case that it does hold some information which supports the pay award/affordability, but that such information is not in the form of 'correspondence' and therefore does not fall within the scope of request 2b. That is to say the documents and cost spreadsheets described above which have been retained as records. In the Commissioner's view, the existence of such records arguably supports the MOD's position that no correspondence falling within the scope of request 2b is held. This is because the absence of correspondence regarding affordability does not equate to the absence of any information about affordability at all; rather such information is simply held in a format that does not fall within the scope of request 2b.

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.

Signed

Jonathan Slee
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