ico. Information Commissioner's Office

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **24 March 2025**

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) seeking information held in respect of a particular RAF Police investigation, including material that was not used during the subsequent trial. The MOD withheld the requested information on the basis of sections 30(1)(a) to (c) (investigations) and section 40(2) (third party personal data) of FOIA.

2. The Commissioner's decision is that all of the requested information is exempt from disclosure on the basis of sections 30(1)(a) to (c) and that the public interest favours maintaining each of these exemptions.

3. The Commissioner does not require further steps.

Request and response

4. The complainant submitted the following request to the MOD on 28 February 2024:

> 'The MoD to fully disclose, all investigators material from the investigation under reference number [number redacted] to [name of complainant]. Also, fully disclose all unused material that was obtained during this investigation but was deliberately withheld by the RAF

Police and potentially Service Prosecution Authority during a legal system process.'

5. Following an extension to the time needed to consider the public interest test, the MOD responded on 25 April 2024 and confirmed that all of the requested information was exempt from disclosure on the basis of sections 30(1)(a) to (c) (investigations) of FOIA and that the public interest favoured withholding the information.

6. The complainant contacted the MOD on 7 May 2024 and asked it to conduct an internal review of this response.

7. The MOD informed him of the outcome of the internal review on 31 October 2024. The MOD clarified how, given the wording of the request, this had been interpreted:

> 'I note the pejorative terms in which you sought information under the Act in requesting what was allegedly "deliberately withheld by the RAF Police and potentially Service Prosecution Authority during a legal system process". MOD does not accept the premise upon which you have based your request. MOD has interpretated [sic] your request neutrally to mean: "all official documentation completed during the RAFP investigation of this case and the unused witness evidence not presented at trial".'

8. The internal review upheld the application of sections 30(1)(a) to (c) of FOIA to withhold this information and explained that section 40(2) (third party personal data) was also considered to apply to the information in scope. The MOD explained that it had concluded that it was not possible to release a redacted version of the requested information.

Scope of the case

9. The complainant initially contacted the Commissioner on 8 October 2024 in order to complain about the MOD's failure to complete the internal review. Following the completion of the internal review the complainant confirmed that he wished to challenge the MOD's decision to withhold the information falling within the scope of his request.

10. He was also dissatisfied with the length of time it took the MOD to complete the internal review.

Reasons for decision

Section 30 – Investigations and proceedings

11. The MOD argued that all of the information falling within the scope of this request was exempt from disclosure on the basis of sections 30(1)(a) to (c) of FOIA which state that:

    'Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of—

    (a) any investigation which the public authority has a duty to conduct with a view to it being ascertained—

    (i) whether a person should be charged with an offence, or

    (ii) whether a person charged with an offence is guilty of it,

    (b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or

    (c) any criminal proceedings which the authority has power to conduct.'

Is the exemption engaged?

12. The Commissioner has published guidance on section 30 which states that section 30(1) can only be claimed by public authorities that have a duty to investigate whether someone should be charged with an offence. The Commissioner considers that the phrase "at any time" means that information can be exempt under section 30(1) of FOIA if it relates to a specific ongoing, closed or abandoned investigation.[1]

13. In the context of this request, the RAF Police (RAFP) who carried out the investigation in question are a branch of the Service Police and were responsible for gathering information following the receipt of an allegation. Furthermore, the Commissioner understands that Service Police will then pass on their evidence to Service Prosecuting Authority (SPA) for assessment in accordance with the Criminal Procedures and Investigations Act 1996 disclosure rules.

[1] https://ico.org.uk/media/1205/investigations-and-proceedings-foi-section-30.pdf

14. The Commissioner is therefore satisfied the MOD has the duty to investigate criminal offences and has the power to conduct criminal proceedings.

15. With regard to the information falling within the scope of this request, the MOD explained that all of this material was held for the purposes of the specific investigation, and subsequent specific proceedings, referred to in the request. The information consists of an initial investigation report, additional evidence request, a Service Police Referral Report and unused material.

16. The Commissioner is satisfied that the withheld information was clearly held by the MOD for the purposes set out at sections 30(1)(a) to (c) of FOIA.

17. These exemptions are therefore engaged.

Public interest test

18. Section 30(1)(a) is subject to a public interest test. This means that even though the exemption is engaged, the information may only be withheld if, in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

19. In accordance with his guidance, when considering the public interest in maintaining exemptions the Commissioner considers that it is necessary to be clear what they are designed to protect.

20. The purpose of section 30 of FOIA is to protect the police's (and other applicable public authorities, in this case the Service Police's) function of carrying out effective investigations.

Public interest arguments in favour of disclosure

21. The MOD acknowledged that in favour of release is the general presumption of openness inherent in FOIA and that release would allow a greater understanding of the work of the RAFP and the SPA. The MOD also acknowledged that disclosure could enable the public to have a better understanding and greater confidence that military investigations are carried out properly.

22. The person who was the subject of the investigation to which this request concerns, is the Commissioner understands, also the complainant. In submissions to the Commissioner the complainant set out his concerns that during the course of his prosecution he was not provided with access to unused material gathered during the investigation despite requests from his representative. He explained that

that the MOD's continued withholding of such information, which should have been provided to him in 2019/2020, represented a 'continue[d] abuse of legal process' and disadvantaged him.

23. The complainant argued that there was a clear legitimacy to his request as he had 'wrongly accept[ed] military charges about my actions that were applied in the best interest of the MoD. Further, I could not supply evidence during a legal process because the MoD were withholding and continue to withhold undisclosed material that remains vital evidence to support my rightful actions'.

24. The complainant suggested any concerns the MOD had about disclosing the personal data of third parties could be addressed by the names and personal details of such individuals being removed from the material.

Public interest arguments in favour of maintaining the exemptions

25. The MOD argued that there is a strong public interest in preserving the integrity of proceedings and investigations conducted by public authorities. Those instructed to carry out such investigations on behalf of the authority should be free to establish the facts of the case and gather evidence without fear of subsequent reprisals. Disclosure of the information might prove detrimental to the future exercise of good practice and record keeping. There is also a need to maintain the integrity of the Service justice system as the sole forum for determining innocence or guilt.

26. The MOD rejected the complainant's position that there was a compelling public interest in the disclosure of the requested information. It noted that as the defendant in this case, the complainant had rights of appeal regarding the findings of the Court Martial. The MOD argued that not using or not disclosing all of the material gathered by the prosecuting authority does not constitute a miscarriage of justice.

27. In any event, the MOD advised that information gathered during the course of the investigation was separated into both "used" and "unused" evidence, all of which was passed to the SPA for assessment in accordance with the Criminal Procedures and Investigations Act 1996 disclosure rules. Only the evidence used in the trial is required to be disclosed to the defendant and his legal team prior to the prosecution of the case; however, the complainant and his legal representatives would have had the opportunity during proceedings to review details of the unused material and to request it be included in the used bundle.

28. The MOD argued that release of the information in the scope of the request under FOIA would be a gross breach of trust of the witnesses

who provided evidence and those involved in the investigation of the case.

29. The MOD noted that whilst the investigation and subsequent Court Martial are completed, the material requested might be required for subsequent appeal or judicial review purposes.

30. With regard to the complainant's suggestion that anonymised witness statements could be provided, the MOD argued that this did not arise as such information would still be exempt from disclosure on the basis of section 30 of FOIA.

Balance of the public interest arguments

31. The Commissioner appreciates that the complainant has a direct interest in accessing the withheld information. However, it is important to recognise that a disclosure under FOIA is a disclosure to the world at large and not just a private transaction between the public authority and the applicant.

32. Therefore, whilst the Commissioner recognises that the complainant has concerns about how this investigation and subsequent prosecution were handled, he is not persuaded that the disclosure of investigative materials under FOIA is the most appropriate route by which to challenge the alleged mishandling.

33. In his submissions to the Commissioner the complainant emphasised the importance of the unused material being provided to him / the defence. This is materially different from the information being disclosed under FOIA. This is precisely because, as noted above, release of such material under FOIA would not simply result in disclosure of this to the complainant (or his defence team) but would also result in material being disclosed to the world at large. As a result, in terms of assessing the balance of the public interest under FOIA the Commissioner has to consider the consequences of disclosing this material to the world at large.

34. In attributing weight to the public interest in disclosure, whilst the Commissioner recognises the broader public interests in disclosure of the information as above at paragraph 21, he is not persuaded that the complainant's allegations regarding the non-disclosure of information during the investigation and/or prosecution process amount to an overwhelming or compelling argument for disclosure of the requested information under FOIA.

35. The complainant's concerns in this regard are, in the Commissioner's opinion, more of a private interest rather than a public one. That is to say, the Commissioner is not aware of any broader or wider concerns

about the RAFP's and/or SPA's approach in this particular case. Nor is he aware of any potentially similar allegations in respect of other investigations conducted by the Service Police (evidence of which could potentially suggest that allegations of such a practice, ie not providing the accused with access to material, go beyond this case). The Commissioner's guidance is clear that in assessing the balance of the public interest, private interests of the requester are not relevant.[2]

36. In reaching the finding that the public interest arguments in disclosure attract limited weight the Commissioner has also placed weight on the MOD's point that the complainant had a right of appeal regarding the findings of the Court Martial.

37. Turning to the public interest arguments in maintaining the exemptions, the Commissioner recognises that there is a very strong public interest in protecting the investigative capabilities of public authorities. In this case the Commissioner accepts that disclosure of the information would provide an insight into how this investigation was conducted which risks compromising the approaches taken in future cases. The Commissioner considers that such an outcome would be firmly against the public interest.

38. The Commissioner also has concerns that disclosing information considered as part of a criminal investigation which has been received from third parties who assisted with the investigation could create a perception among military personnel (and the wider public) that sensitive information about criminal investigations may be disclosed to the world at large. In the Commissioner's view there is a real chance this may deter military personnel (and more broadly, the wider public) including witnesses, complainants and suspects from coming forward and cooperating with prosecuting authorities, particularly where criminal offences have been alleged. In the Commissioner's view there is a very significant public interest in avoiding that outcome and it is a factor of some weight in favour of maintaining the exemption in this case.

39. The Commissioner recognises that in attributing weight to the public interest in maintaining section 30 consideration should be given to the timing of the request and whether the investigation remains ongoing. The Commissioner recognises that the investigation and Court Martial have now been completed, but accepts, as the MOD has noted, that there remains the possibility of this being appealed or subject to judicial review. As a result, the Commissioner remains of the view that the

[2] https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/the-public-interest-test/#pit5

public interest arguments attract weight for the reasons set out above despite the fact that the investigation and prosecution process is complete.

40. In balancing the public interest under section 30, the Commissioner has considered whether the information in scope could be disclosed in anonymised form. However, in his view if steps were taken to anonymise the information then this would still not prevent the risk of the material that was then disclosed providing an insight into how this investigation was conducted which could in turn impact on the conduct and approach of similar investigations in to the future. In other words, in the Commissioner's view release of such material even in anonymised form still represents a risk of undermining the integrity of the RAFP investigatory processes and procedures. Linked to this point, the Commissioner also considers there to be value in the MOD's position that it is in the public interest that the Service justice system is seen as the sole forum for determining innocence or guilt, and that in his view the cherry picking or limited disclosure of information from an investigatory case file risks undermining the integrity of this forum.

41. In view of the above the Commissioner has therefore concluded that the public interest favours maintaining each of the exemptions contained within sections 30(1)(a) to (c). In reaching this finding the Commissioner wishes to emphasise that he recognises the importance to the complainant of accessing the requested information. However, for the reasons set out above, the Commissioner is not persuaded that despite the complainant's position and his concerns about the conduct of this investigation and prosecution, the broader public interest favours disclosure of such information.

Section 40(2) – third party personal data

42. Given the Commissioner findings in relation to section 30, he has not considered the MOD's reliance on section 40(2) of FOIA.

Other matters

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43. FOIA does not impose a statutory time within which internal reviews must be completed, albeit that the section 45 Code of Practice

recommends that such reviews should be completed within a reasonable timeframe.[3]

44. 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, unless there are legitimate reasons why a longer extension is necessary.[4]

45. The complainant explained that he was dissatisfied with the time it took the MOD to complete the internal review, which the MOD explained was a result of a heavy workload.

46. The Commissioner issued a Practice Recommendation (PR) to the MOD on 16 October 2024 to the MOD which, amongst other matters, addressed its delays in completing internal reviews.[5] The Commissioner will continue to assess the time it takes the MOD to complete internal reviews in the future.

47. There are two further matters which the Commissioner considers that it would be useful for him to address in this Other Matters section.

48. Firstly, in his submissions to the Commissioner the complainant questioned the basis upon which the MOD could introduce a new exemption, ie section 40(2), at the internal review stage. The Commissioner explained to the complainant that a number of previous Tribunal and court decisions have confirmed that public authorities can introduce new exemptions to withhold information at the internal review stage, during the course of an ICO investigation or before the Tribunal.[6]

49. In response the complainant suggested that the circumstances between his case and the one considered by the Tribunal were different and that each request should be considered on its own merits. The Commissioner agrees that a public authority's response to individual requests needs to be considered on the basis of the individual circumstances of each case. However, whether a public authority can rely on new exemptions after the refusal notice has been issued is a broader issue regarding how the legislation operates, rather than one which concerns the individual circumstances of a particular request. Furthermore, the Tribunal cited at

[3] https://www.gov.uk/government/publications/freedom-of-information-code-of-practice
[4] https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/request-handling-freedom-of-information/#internal
[5] https://ico.org.uk/media2/cyij2k4y/ministry-of-defence-practice-recommendation.pdf
[6] See paragraphs 29 to 33 of the Upper Tribunal case McInerney-v-InformationCommissioner-and-the-Department-for-Education-2015-UKUT-0047AAC.pdf

the footnote below was a finding of the Upper Tribunal and as a result that finding is considered to be binding. In any event, as explained in the above notice, the Commissioner is satisfied that all of the requested information is exempt from disclosure on the basis of section 30 and therefore he has not considered the MOD's application of section 40(2).

50. Secondly, although not cited by the MOD, the Commissioner is conscious that section 40(1) provides that information is exempt from disclosure under FOIA if it constitutes the requester's own personal data. Given the circumstances of this case, ie the complainant is seeking information from an investigation file, and he was the focus of that investigation, then some of the withheld information will be his own personal data. As a result, any such information – regardless as to the application of section 30 of FOIA – would be exempt from disclosure under FOIA by virtue of section 40(1) of FOIA.

51. The Commissioner understands that the complainant has previously made a subject access request (SAR) to the MOD under data protection legislation for information concerning his case which resulted in some information being provided.

Right of appeal

52. 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

53. 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.

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

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