Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 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 about the UK's presentation about UAP (Unidentified Aerial or Anomalous Phenomena) at a Five Eyes meeting. The MOD's final position in respect of this request was to refuse to confirm or deny whether it held the requested information, citing sections 23 (security bodies), 24 (national security), 26 (defence) and 27 (international relations) of FOIA.

2. The Commissioner's decision is that the MOD was entitled to rely on section 23(5) to refuse to confirm or deny whether it holds the requested information.

3. The Commissioner does not require further steps.

Request and response

4. The complainant submitted the following request to the MOD on 21 August 2024:

> "You will be aware, as it has released been released by the MOD earlier this month, that two MOD officials represented the UK in attending a Five Eyes (FVEY) meeting at the Pentagon on 24th May 2023. The meeting was entitled "FVEY Inaugural UAP Caucus Working Group".

As you may also be aware, an agenda of this meeting was published recently as part of a FOI request in the US. In this agenda, timetabled for 1015-1130 (i.e for 75 minutes), each of the other four FVEY partners (Australia, Canada, United Kingdom and New Zealand) were asked to provide 'partner UAP Updates' suggesting a UK briefing time of 15-20 minutes.

I am writing to request under the terms of the FOIA (2000) all details in all formats i.e. notes, presentation slides, videos etc from the United Kingdom UAP update section only, relating to information provided by the two MOD officials and any questions they received and responses they gave."

5. The MOD responded on 17 September 2024. It confirmed that a search had been conducted for the requested information and 'that your request has been assessed to fall within scope of' sections 24 (national security), 26 (defence) and 27 (international relations) of FOIA. The response also explained that the MOD considered section 23(5) (security bodies) of FOIA to provide a basis upon which to refuse to neither confirm or deny (NCND) whether any information was held.

6. The complainant contacted the MOD on 18 September 2024 and challenged this response and asked it to conduct an informal review of this decision, noting that if he was not satisfied with this response, he would then seek a formal internal review.

7. The MOD replied on 4 October 2024. It clarified its application of the exemptions as follows:

"Taking your further points into consideration, it may be helpful if I explain that when it comes to the case of sensitive material, the Department has an obligation to protect such information and apply appropriate exemptions under the Act. Prior to the release of information under US FOI legislation, the "Neither Confirm Nor Deny" (NCND) position for requests on this topic applied for the majority of exemptions. That still remains the case for Section 23(5) (Information supplied by, or relating to, bodies dealing with security matters).

However, since the US disclosure of information, the way in which we apply exemptions to similar FOI requests has changed in that, the NCND principle has not been engaged, and we can confirm some information is held, but this still remains exempt."

8. The response went on to explain that the MOD was satisfied that sections 23(5), 24, 26 and 27 of FOIA had been applied correctly.

9. The complainant contacted the MOD on 5 October 2024 and asked it to conduct a formal internal review of this position.

10. The MOD informed him of the outcome of the internal review on 24 January 2025. It explained that whilst the release of the agenda for the FVEY meeting of the 24 May 2023 (released on 13 June 2024) does affect how MOD may respond to some requests on this subject going forward in respect of the NCND principle, however, fundamentally each request is dealt with on a case by case basis. The MOD explained that having considered this request from first principles it had concluded that it should not have made a substantive response to the request under section 1, and rather that the:

> "position is that the NCND limb of the exemptions detailed below [ie sections 23(5), 24(2), 26(3) and 27(4)] are engaged, I have not made any assessment of the section 1 declaration made in the response of the 4th October 2024 confirming that information was held. This means I have not considered whether any information potentially gathered actually related to the wording of your request, or was outside the scope such as purely administrative information related to the attendance at the meeting."

Scope of the case

11. The complainant initially contacted the Commissioner on 1 December 2024 to complain about the MOD's handling of his request. He confirmed that he remained dissatisfied with its response following the completion of the internal review. He raised the following grounds of complaint:

- He disagreed with the application of the various exemptions cited by the MOD in its response of 4 October 2024 and its subsequent reliance on the NCND exemptions cited in the internal review response.

- He was also unhappy with the MOD's delay in completing the internal review. The Commissioner has considered the MOD's handling of the internal review in the Other Matters section because it is not a requirement of Part I of FOIA.

Reasons for decision

Section 1(1)(a) – duty to confirm or deny that information is held

12. The general right of access under FOIA is set out at section 1. Section 1(1)(a) provides that a public authority must confirm or deny that it holds information within the scope of a particular request. Section 1(1)(b) provides that the authority must communicate that information to the requester. Both parts of section 1 are subject to exemptions and exclusions.

Section 23 – security bodies

13. Section 23(5) states that the duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in section 23(3).

14. The test as to whether a disclosure would relate to a security body is decided on the civil standard of proof, that is, the balance of probabilities. In other words, if it is more likely than not that the disclosure would relate to a security body then the exemption would be engaged.

15. Section 23(5) provides a class-based, absolute exclusion from the duty to confirm or deny that information is held. If the requested information falls within the scope of section 23(1) (or would do so if it were held) then the public authority is entitled to rely on the exclusion. There is no requirement to consider information in the public domain, the consequences of confirmation or denial, the public interest in confirming or denying, or any other factors.

<u>The complainant's position</u>

16. The complainant argued that it is was illogical for the MOD to adopt the position of confirming that it held the information falling within the scope of this request in its responses of 21 August 2024 and 4 October 2024 but then to adopt a complete NCND response to the request in the internal review of 24 January 2025. In his view the previous confirmations that information was held undermined the MOD's attempt to adopt a NCND response at this stage.

17. With regard to the application of section 23(5), the complainant argued that it was necessary to give regard to the definition of UAPs in the context of this request. He explained that:

> "UAPs are, by definition, phenomena that exhibit some or all of the characteristics (known as the "five observables") which human technology, as defined by the scientific establishment, is currently incapable of creating. UAPs by the FVEY and NATO members own definitions, are not thought to be created, owned or operated by any nation or potential human aggressor group. UAPs are not drones (UAS), weather balloons, man-made vehicles or weather phenomena. UAPs exist and have been confirmed as real phenomena by all FVEY members and many other nations around the world including other NATO members. In summary, UAPs are the class of phenomena remaining once all other alternatives have been evaluated and dismissed - and the number of instances of these phenomena occurring each year are significant."

18. The complainant also noted that the UK's published policy on UAP's is clear and unequivocal, as set out by Baroness Goldie in the House of Lords (30th June 2021), "we no longer investigate reports of sightings of unidentified aerial phenomena. We have no plans to conduct our own report into UAP, because in over 50 years no such reporting has indicated the existence of any military threat to the UK".

19. The complainant argued that consistent with the UK government's own published policy, and the clear and concise definition of UAPs provided, the requested information is therefore not a matter for security bodies. Therefore, he could not see circumstances where a security body would be proactively seeking such information, this would contradict with published UK government policy. Alternatively, if information on UAP had inadvertently been collected by a security body, then given the declared non-threat of UAP this information could be disaggregated in the public interest.

The MOD's position

20. In its internal review response the MOD explained that:

> "I should advise that if information of the description you are seeking was held, it is possible that it could have been supplied by, or relate to, one or more of the bodies listed at section 23(3) of the Act. Due to the close relationship between MOD and the security bodies, and the subject matter of your request, I am satisfied that the exemption is engaged. I should make it clear that this response should not be taken to indicate that information falling in scope of section 23 is or is not held. I find that the Department was correct to neither confirm nor deny that the information in scope of this your request is held."

21. The Commissioner has also taken into account the MOD's submissions to him on case IC-292124-F1N2[1] which also sought information on this subject, in particular the parts of those submissions which were provided to him in confidence.

The Commissioner's position

22. The Commissioner is satisfied that given the subject matter of the information falling within the scope of the request, if any such information was held it is more likely than not that it would have been supplied by, or relate to, one of the bodies listed in section 23(3). The Commissioner finds further support for this position in the confidential submissions provided to him by MOD in respect of case IC-292124-F1N2.

23. With regard to the complainant's position that the MOD's earlier responses, prior to the internal review, undermine its application of the NCND exemptions cited in the review, the Commissioner would make two points.

24. Firstly, the responses of 21 August 2024 and 4 October 2024, whilst stating that information was held but exempt under section 24, 26 and 27, both adopted the position that in respect of section 23, the exemption being applied was section 23(5), ie the NCND provision of that exemption. The position adopted in those responses was therefore akin to this approach set out in the Commissioner's guidance:

> "You may confirm you hold at least some of the requested information but may still wish to conceal whether or not you hold additional information that either relates to a national security body or could undermine national security. In such a scenario you could respond to a request by confirming you hold some information, and then either disclose the information or withhold it, relying on appropriate exemptions. You could then also refuse to confirm or deny whether you hold any additional information, citing either sections 23(5), or 24(2), or both."[2]

25. In other words, the MOD's position in respect of section 23(5) at least, has been consistent in respect of its application of this exemption across all three of its responses to the complainant.

[1] https://ico.org.uk/media2/migrated/decision-notices/4031640/ic-292124-f1n2.pdf
[2] https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/how-sections-23-and-24-interact/

26. Secondly, as section 23(5) is a class-based, absolute exemption it is not, as noted above, necessary or relevant for a public authority to consider whether the requested information is the public domain. That is to say, given the way this exemption is formulated if the requested information (if held) would fall within the scope of the definition of section 23(1) then a public authority can seek to adopt an NCND response by virtue of section 23(5) of FOIA. It follows that for this particular NCND exemption, whether a public authority has previously confirmed or implied that relevant information is held does not, technically, undermine any subsequent application of section 23(5).

27. For the above reasons the Commissioner is therefore satisfied that the MOD can rely on section 23(5) of FOIA to refuse to confirm or deny whether it holds any information falling within the scope of this request.

28. In view of this decision the Commissioner has not considered the MOD's reliance on sections 24(2), 26(3) and 27(4) to also refuse to confirm or deny whether it holds information falling within the scope of the request.

Other matters

29. Although it does not form part of the decision notice the Commissioner has considered the complainant's dissatisfaction with the internal review.

30. 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]

31. 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]

32. The complainant was dissatisfied that the MOD took 76 working days to complete the internal review and that whilst the review contained an

[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

apology for the delay there was no explanation as to why the review had taken so long to be completed.

33. Moreover the complainant was dissatisfied that the MOD did not contact him and explain why the review had been delayed and inform him of his right to complain to the Commissioner at the point more than 40 working days had elapsed. The complainant noted that this recommendation was specifically included in the Practice Recommendation (PR) issued by the Commissioner on 16 October 2024 to the MOD.[5]

34. In submissions to the Commissioner the MOD clarified that the internal review took longer than expected to complete due to engagement with subject matter experts across a number of similar requests. In respect of the Commissioner's comments in PR as cited by the complainant, the MOD confirmed (as it had in its response to Commissioner following the PR) that action to ensure that this practice had been reinvigorated and followed, albeit it accepted that this had not been conducted effectively in this case.

35. The Commissioner will monitor future complaints made to him regarding the MOD in order to establish whether this practice is being applied consistently.

[5] "The MOD should make sure that, in cases where it has gone beyond the Code's recommendations for internal review timeliness, it contacts requestors to explain why this has happened and inform them of their right to complain to the Commissioner at this point. This will help mitigate any perception of 'stonewalling'".

Right of appeal

36. 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

37. 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.

38. 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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