

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 29 July 2010

Public Authority: The Ministry of Defence
Address: Level 6, Zone E
Main Building
Whitehall
London
SW1A 2HB

Summary

The complainant requested information relating to the purchase of military battery-charging equipment by the Ministry of Defence. The request was refused on the grounds of cost under section 12(1) of the Act. The complainant provided further information and clarification which enabled a part response to be given, with some elements relating to purchase costs redacted on the basis of the exemption provided by section 43(2) of the Act, that the information was commercially sensitive. The Commissioner's decision is that the public authority were entitled to refuse full compliance on the grounds of section 12 of the Act and, following receipt of the complainant's clarification, correctly provided the non-exempt information it was able to locate within the cost limit.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. The complainant describes his company as the exclusive distributor for a range of batteries and battery charging products to the UK and US military markets. He asserts that the products have been provided to the UK military otherwise than through his company.

The Request

3. On 18 December 2008 the complainant submitted the following request for information to the Ministry of Defence (MoD) by email:

"If [products distributed by the complainant's company] have been supplied [to the MoD], we would like to understand which project the orders relate to, who the supplier was and date and volume of products supplied."

4. On 7 January 2009, the MoD requested clarification of the complainant's request, asking:

"Is the information you require relating specifically to the supply of the Natek military battery charger or battery chargers in general? To assist in our search are you able to provide the relevant NSN (NATO Stock Number)?"

5. On 8 January 2009, the complainant replied. He clarified that he was requesting all information concerning all Natek battery charger products which have been supplied to the MoD whether directly supplied by Natek or by any third party (other than his own company) located anywhere in the world. He also clarified that the request was to include any products which have been manufactured or assembled by third parties under licence by Natek or where Natek intellectual property is identified in any battery charger products supplied to the MoD. He did not provide any NSN references. Under section 1(3) of the Act, a public authority is not obliged to comply with section 1(1) of the Act unless it is supplied with the further information requested.
6. Also on 8 January, in a subsequent email, the complainant extended the scope of his request by making a second request, for the inclusion of all communications concerning the Natek chargers whether directly from/to Natek or from/to any third parties as defined in his previous email.

7. On 16 January 2009, the MoD issued a refusal notice to the complainant. It stated that the information was being refused under section 12 of the Act (costs for compliance) because it had been assessed that the costs would exceed £600 (the statutory limit applicable to the MoD under the Act). It explained that the reason for this was that the information was not held centrally and the costs of interrogating all records relating to batteries, on various IT systems, were disproportionate. Without knowing the NATO Stock Numbers (NSNs), or any contractor or contract details for the procurement, there was no easy way to identify Natek products. It also explained that local purchase arrangements were not held centrally and could not be included in its figures.
8. The complainant responded on 16 January 2009, requesting that the MoD advise him on its process for obtaining information sought by an exclusive distributor, including the appropriate channels for request through to contact details at ministerial level. He maintained that the MoD has various departments *"which hold information concerning the supply of and communication of information concerning battery chargers"* including Combat Systems Support DLO Andover. He indicated his difficulty with the MoD's position that there is no easy way to identify Natek products without either contractor or contract details, or NSNs. He maintained that the MoD has an obligation, both under freedom of information legislation and to his company as an exclusive distributor, to provide the information requested. He also asked the public authority to advise on MoD communication with third parties concerning his request, correspondence to date, or the exclusive position of his company.
9. The MoD replied on 4 February 2009. It explained that the MoD stores records on a number of electronic databases and these can be searched using a specific search term. The principal Army stock system had been searched using the term 'Natek' in the contractor field without success, which indicated that no records of purchases from that contractor had been entered on that database. Similarly, this process would not produce results for Natek equipment purchased from third parties.
10. The MoD explained to the complainant that, for this reason, he had been asked to provide NSNs for the products in which he was interested. The only alternative would be a manual search of all the MoD's records which would be a time consuming task, the cost of which would exceed the £600 limit. It was suggested to the complainant that if he could provide Manufacturer's Part Numbers, this would enable the MoD to interrogate its records for any centrally held information although, as before, records of local purchase arrangements would not be included. The Commissioner observes that

this advice and assistance is as required by a public authority under section 16 of the Act.

11. The complainant replied on 4 February. He repeated his request for advice about the MoD process and appropriate points of contact, including contact at ministerial level. He argued that, as the MoD advertises requirements for batteries and chargers, and closely tracks those products, it will have a record of all batteries and battery chargers supplied, including records for warranty, service and maintenance requirements. This, he argued, indicates that the MoD will have a clear record of its requirements and contracts with third party suppliers, together with the location of manufacture and whether the items were manufactured under licence. He stated that the MoD is familiar with the Natek range of products and therefore he believed this would not cause any real difficulty.
12. In support of this, he provided the names of three individuals with whom he had had contact relating to the possible supply of his products. One particular individual named had been in email contact with the complainant's company and was familiar with the products. The complainant also provided references to his company website, and the manufacturer's website. He commented that he was aware that the MoD had visited his website in 2006, and more recently.
13. The complainant then listed 10 products by their model names, and provided four NSN references. He also re-stated his request for advice on any MoD communication with third parties concerning his request, correspondence or his company's exclusive position.
14. The MoD responded on 5 March 2009. It acknowledged the provision of NSNs for Natek battery chargers and confirmed that a search of all the MoD systems had identified some information. It provided information, redacting some elements from two documents because it was exempt from disclosure under section 43 of the Act, as it was commercially sensitive. Individual names and telephone numbers were also redacted as they were not relevant to the information the complainant had requested.
15. There followed exchanges of correspondence and emails between the complainant and various parties at the MoD including, from the complainant, additional queries and requests for information which re-stated his requirement for searches of all databases for all Natek charging solutions. The complainant also repeated previous statements that, in addition to the Freedom of Information Act, he required the MoD to respond under competition law. A letter from the complainant to the MoD of 19 May 2009 summarised the information requested as follows:

- "1. Identification of Natek charging solutions which have been the subject matter of communications with 3rd parties (reference to Natek charging solutions means the entire range currently developed and in the course of development)*
- 2. Identification of Natek charging solutions which have been supplied to the MoD (including sample/demonstration charging solutions) and identification of the supplying parties? [sic]*
- 3. Identification of communications concerning Natek charging solution technologies.*
- 4. Identification of communications taken place [sic] concerning [the complainant's company] and its markets."*

16. This correspondence culminated in a letter from the MoD of 23 June 2009 which explained the MoD's position that he had, by then, received everything that he was entitled to under the Freedom of Information Act and reminding him of his right to an internal review.
17. The complainant requested an internal review on 23 June 2009. On 11 August 2009, the MoD wrote to the complainant with the outcome of the review it had conducted.
18. The internal review clarified the original refusal on the grounds of section 12 of the Act (costs for compliance). It acknowledged that the term 'disproportionate cost' used in that refusal had no meaning in the terms of the Act. It explained that the MoD's stock systems held over 1000 NSNs relating to battery chargers and a manual search of the three principal stock systems (ie those for the Royal Navy, Army and Royal Air Force) would (allowing 5 minutes per NSN, per system) take over 264 man-hours which corresponded to a cost of £6612, over 10 times the statutory £600 limit. It was explained that the complainant's provision of NSNs on 4 February had enabled the MoD to make a search of this refined request and therefore its response of 5 March was in accordance with the statutory timescales.
19. The internal review also reconsidered the redaction of cost price information from the information disclosed, under the exemption provided by section 43 of the Act and concluded that this had been correctly withheld. It acknowledged the removal of name and contact information which was not considered relevant to the request and commented that, were the complainant to request that information, consideration would have to be given to the application of section 40(2) (which relates to the personal data of third parties) to that information in any event.
20. The complainant replied on 17 August 2009. He argued that the £6612 cost of compliance with his request required consideration in the

context of *the "continued huge waste of public money associated with defence spending on certain projects"* and that a comparison between the costs of meeting his *"legitimate demand for information"* and other MoD expenditure, might cause the MoD to consider whether it wished to rely on these grounds for refusal.

21. He argued that the information requested was required to ensure that the MoD was not acting contrary to his commercial interests. He also argued that, if the MoD was suppressing information to protect its position as well as that of third parties, it is not in the public interest to protect its commercial interests and those of a private organisation.
22. The complainant also commented that he had, on 16 January, provided the MoD with advice as to where it might find sources of the information he had requested. He stated that he had also provided further contact details for possible sources of information, and examples of NSNs. The complainant also confirmed that he had never attempted to identify the price of the products supplied and rejected what he describes as the MoD's attempt to suggest in its correspondence that his requests were focused on pricing information. He also stated that he has requested identification [of MoD personnel].

The Investigation

Scope of the case

23. On 22 August 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - He believes the MoD is suppressing information it holds, which he has requested.
 - He states that the MoD's basis for refusal is 'disproportionate cost' and section 43(2) of the Act, (prejudice to commercial interests). He acknowledges that he has made clear to the MoD that he has no interest in pricing information.
 - He argues that, by providing partial information to his company under the [freedom of information] legislation, the MoD has waived any right to suppress or withhold information.
 - The complainant states that he requested disclosure of the identities of MoD personnel involved in communications concerning his stipulated requests and the MoD response was to refer to section 40(2) of the Act.

- The complainant indicates that he had received *“a number of communications from a MoD member of staff who had personally been involved in communications falling within the scope of our requests.”* Those communications post-dated his requests for information and made reference to his request. On that basis, the MoD had *“waived its rights to stipulate that it does not require to disclose the identities.”*
24. In a subsequent letter to the Commissioner, dated 31 August 2009, the complainant repeated his position that he has no interest in pricing information. He indicated his belief that the MoD's internal review shows that the MoD is withholding information on public interest grounds, claiming that this would prejudice commercial interests and that, by this action the MoD appears to be stating that it discriminates between SMEs (Small and Medium Enterprises, such as the complainant's company) and major contractors (such as the company which provided the products disclosed to him on 5 March) with regard to freedom of information requests.
25. The complainant has argued to the Commissioner that, by its disclosure of 5 March 2009, the MoD has waived its right to withhold information. The Commissioner does not agree with that argument.
26. The Commissioner would draw attention to one possible consequence if that position were adopted: if a public authority, in response to a request for information, discloses some information but, legitimately, withholds other information under one or other of the exemptions provided at part II of the Act, the complainant's position would appear to be that the fact that some information is disclosed precludes withholding the other information. If that were the case, if any information should be withheld in response to a request, then a public authority would be unable to release any information it would otherwise disclose as that would, according to the complainant, invalidate its right to apply an exemption to the information it should not disclose. This 'all or nothing' approach to FOI is clearly not in the spirit of the Act, not in the public interest, nor is it anticipated in the drafting of the legislation.
27. The Commissioner cannot exclude the possibility that the MoD holds more information about the supply of Natek products, nor has the MoD argued that it does not hold more information meeting the description in the complainant's request. This is not, it should be understood, the same as an admission by the MoD that more information is held. The MoD has merely explained that, without further information from the complainant, it is unable to locate any information which it might hold without lengthy searches which, it estimates, will exceed the statutory cost limit.

28. The Commissioner has therefore considered the complainant's arguments and has decided that those elements which can be addressed as a complaint under section 50 of the Act are as follows:

- the refusal under section 12 of the Act (referred to above as 'disproportionate' costs);
- the possible application of section 40 (personal data) to the names and addresses withheld in the information provided in response to the clarified request.

29. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

Chronology

30. On 29 October 2009 the Commissioner wrote to the complainant to outline the scope of the investigation he proposed to conduct. He explained, among other things, that, as the MoD had requested clarification in order to be able to provide a response, its responses relate to the point at which that clarification had been received. The Commissioner also explained that the redactions in some elements of the disclosed information related to pricing information and had been withheld on the basis of the exemption at section 43 of the Act, because disclosure would be prejudicial to commercial interests. As the complainant had already made clear that he had no interest in pricing information, the Commissioner did not intend to pursue that matter further. The Commissioner explained, at that stage, that the focus of his investigation would be to determine whether the MoD held any more information meeting the description in his request which should be disclosed.

31. The complainant responded on 6 November 2009. He stated that he considered his original request for information had not been addressed and disputed that this request has been confined to those elements identified in the clarification he had provided. He stated that the MoD had at no time gone on record as stating that no other information was held by it. He also explained that, in his email of 4 February 2009 he identified three individuals within the MoD who he expected would hold information relating to his request. He stated that he had communicated with one of these individuals and that therefore correspondence exists which has not been provided. He considered, therefore, that the MoD is fully aware of the Natek charging solutions. He re-stated that he had no interest in pricing information but that the Commissioner's grounds for not considering the redactions under section 43 of the Act were inaccurate and consequently he required

this element to be considered as *"the grounds founded upon are incorrect"*. He rejected the Commissioner's argument, commenting,

"We have clearly stated we have no interest in prices. We do have a very clear interest in whatever else is contained within that documentation [...]"

32. On 6 November 2009, the Commissioner replied to the complainant. He explained that a request for information is effectively modified by any clarification provided by the applicant under section 1(3) of the Act. He also explained the distinctions between redaction, extraction and disclosure as he was not sure from the complainant's correspondence that he had correctly interpreted the meaning of 'redaction' in this context.

33. On 6 November 2009 the Commissioner also wrote to the MoD, asking it to clarify whether the assistance of the three individuals named by the complainant had been sought by the MoD at the time and whether the redactions on the basis of section 43 of the Act related exclusively to the pricing information described previously. He also requested further details relating to the public authority's estimate of the costs and searches and also clarification of the status of any responses to the complainant's subsequent requests for information.

34. On 8 November the complainant wrote again to the Commissioner, stating:

"We have immense difficulty understanding why there appears to be an ongoing difficulty with interpreting what has been requested, what has been produced and what has not been addressed with regard to our requests."

35. He confirmed that he was aware of the terms 'redaction, extraction and disclosure' and indicated that he considered the focus of the Commissioner's investigation should be on *"identifying what has not been disclosed by the MoD rather than apparent justification of MoD behaviour"*. To that end, he repeated his belief that the names he had provided on 16 January and 5 February would have been of assistance to the MoD in responding to his request.

36. On 24 November the MoD responded. It confirmed that the Commissioner's interpretation of the redactions it had made under section 43 was correct – that the redaction was only in respect of pricing information contained in the disclosed documents, no other information was withheld under section 43. It also explained that, by the time of the complainant's request, responsibility for battery supply had been changed and, of the three people named, only one remained

in post. While he had not been asked personally, the department of which he was head had been contacted as part of the normal search process. It provided a copy of the calculation of costs it had estimated as part of its process for the section 12 refusal. The public authority also commented that it had attempted to address the complainant's further queries in the normal course of business where possible but, where these were considered to be (in effect) a re-statement of the original request, no further response was given because the MoD position was that he had had all the information he was entitled to from his original request and a further response would have meant breaching its decision on the application of section 12. The MoD was also aware that the complainant had declared his intention to take matters further, by which it understood he intended a legal challenge under competition legislation. Because of this, the MoD considered it necessary to preserve its position.

37. On 25 November the Commissioner wrote to the complainant indicating that his initial assessment was that the costs estimate used by the MoD in its refusal of 16 January had been reasonably arrived at and that, therefore, the MoD refusal of his request under section 12 was correctly given. The complainant's subsequent provision of the clarification requested by the MoD had enabled it to locate some information, which it had provided. The Commissioner also clarified the MoD's use of the exemption provided by section 43 of the Act and advised the complainant that his provision of clarification on 4 February was, by virtue of section 1(3) and section 10(6) of the Act, deemed to create a new timescale for compliance of 20 working days from that date, therefore the MoD response on 5 March was in accordance with the provisions of section 10 of the Act. The Commissioner observed that it appeared that the MoD had used the clarification reasonably in its searches for information matching the description in his request.

38. On 4 December the complainant wrote to the Commissioner. He disagreed with the Commissioner on several points, principally:

- The MoD estimate of the time taken to conduct its searches was grossly overstated. He proposed a counter-estimate of approximately 5 minutes per division, making a total of 15 minutes, though he offered no explanation of his reasons for arriving at this figure.
- He voiced his suspicions that the Commissioner had not personally checked if the searches had been performed.
- He disagreed with the Commissioner's arguments on the application of section 1(3) to his request (that the clarification modifies the request and extends only as far as the public authority is reasonably able to use it), commenting *"does the office of the Information*

Commissioner really appreciate how ridiculous this defence of the MoD sounds?"

- He disagreed with the Commissioner's assessment that the MoD had used the clarification reasonably, because it was apparent that none of the three named individuals had been consulted personally by the MoD.
- He disagreed with the Commissioner's interpretation of certain elements of the internal review, his interpretation of the purpose and scope of the redactions made under section 43 and also with the Commissioner's view that a 'failure to deny' the existence of information is not the same as an admission that information exists.

39. On 4 December the public authority contacted the Commissioner to clarify that it believed that the names of the two individuals who no longer had responsibilities in the relevant field had not been contacted because the provision of NSN reference numbers enabled it to provide a response without their contribution. The public authority undertook to locate the individuals and ask them whether they would be able to provide any further assistance in locating information.

40. On 23 December, the MoD confirmed that it had managed to contact the named individuals, one of whom confirmed that he recalled the complainant's name but would not have been able to shed any light on the request as he did not recognise the Natek product name. The other individual was not part of the relevant procurement team but an expert adviser on the subject. He explained that he also would not have been able to identify any purchases of Natek Batteries. He was, however, able to provide further useful background information, specifically:

- With regard to the range of battery products in use by the UK military, the database contains details of over 3000 products, of which 800 are active.
- Many battery products are purchased directly but others are provided by various subcontractors as part of an overall product package or via logistical support arrangements.
- Natek products may have been provided from sources other than the distributor if they are used by another contractor in their own products.

Analysis

Substantive Procedural Matters

Section 12

41. The complainant did not provide the clarification, requested by the MoD on 7 January, until 4 February 2009. This was some time after his request had been refused on 16 January 2009 on the grounds of cost under section 12 of the Act. That refusal had been given on the basis of the responses provided by the complainant on 8 January which had, in effect, broadened the scope of the original request for information further. A public authority is entitled, under regulation 5(2) of The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the 'Fees Regulations') to consider the aggregated cost of one or more requests which relate, to any extent, to the same or similar information and are received by the public authority within any period of 60 consecutive working days.
42. The complainant has not given the Commissioner any explanation why he did not provide the NSN numbers for all the products he was interested in, when this was requested by the MoD. The Commissioner has considered the complainant's statement that this nevertheless does not restrict the scope of his original request, and he disagrees with that view.
43. The relevant section of the Act is Section 1(3). Section 1 is quoted in full in the legal annex to this Decision Notice, but section 1(3) states:

Section 1(3) provides that –

'Where a public authority –

- (a) reasonably requires further information in order to identify and locate the information requested, and*
- (b) has informed the applicant of that requirement,*

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.'

44. From this, it follows that the public authority can only be obliged to comply with subsection 1 to the extent that the clarification provided by the applicant enables it to do so. Indeed, unless the complainant provides the information requested by the public authority at section 1(3)(b), the public authority is not obliged to provide a response at all.

In effect, therefore, the original request for information is modified by the clarification provided, to the extent that this provides information requested by the public authority. This is also consistent with section 10 of the Act:

Section 10(1) provides that –

'Subject to subsections (2) and (3), 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.'

Section 10(6) provides that –

'In this section –

"the date of receipt" means –

(a) the day on which the public authority receives the request for information, or

(b) if later, the day on which it receives the information referred to in section 1(3);

45. The consequence of section 10(6)(b) is that the request for information is not deemed to have been received by the public authority until it has received any clarification it reasonably requires. As the request is not considered to have been received until the clarification is also received, it follows that the original request is incomplete, until accompanied by that clarification. It must therefore be the case that the public authority cannot treat the original request in isolation and will take account of the clarification provided in response to its request for further information.

46. Other, relevant, circumstances have previously been considered by the Information Tribunal, in the case of *Roberts* (EA/2008/0050)¹ which stated at paragraph 20:

"We acknowledge the importance of public authorities discussing the scope of a request in an attempt to adjust it so that complying with it would not exceed the costs limit. However, that does not lead us to conclude that a failure to act in this way renders a section 12 costs estimate invalid."

47. The Information Tribunal has linked a refusal under section 12 of the Act with a corresponding duty to provide advice and assistance (as to

¹ [http://www.informationtribunal.gov.uk/DBFiles/Decision/i275/Roberts%20v%20IC%20\(EA-2008-0050\)%20Decision%2004-12-08.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i275/Roberts%20v%20IC%20(EA-2008-0050)%20Decision%2004-12-08.pdf)

ways in which the request may be refined to enable a response to be given) under section 16 of the Act. But, if such advice and assistance is not given, that does not invalidate the refusal and therefore the original request has still been dealt with. Any subsequent request, whether a refined request or even a simple re-statement of the original request, should consequently be treated as a new request.

48. To summarise the above: the request for information of 18 December 2008 is amended by the clarification and expanded request submitted on 8 January 2009. Following the subsequent refusal, the advice and assistance provided by the MoD on 4 February 2009 leads to further clarification received on 4 February 2009, which constitutes a new request, albeit one that draws on the 18 December original as its starting point. This therefore affects both the scope of the request, hence the content of the public authority's response, and the timescale for its compliance.

49. Having received the complainant's clarification on 4 February 2009, the MoD provided a response on 5 March in which it disclosed information it had located using the NSN references provided. The previous refusal of the 18 December 2008 request, under section 12 of the Act, remains valid for the reasons given by the Information Tribunal in *Roberts*. The complainant believes that he is still entitled to a further response to that request for information and, moreover, that the disclosure provided in response to his clarified request of 4 February 2009 indicates that the MoD is withholding information which it holds and which should be disclosed to him.

50. For the reasons examined in paragraphs 41-47 above, the Commissioner considers that the MoD's refusal of the complainant's 18 December 2008 request for information, on 16 January 2009, is not invalidated by his subsequent provision of clarification. Therefore, provided the Commissioner is satisfied that the 16 January refusal was correctly given, then the complainant's argument that he is still entitled to a response to his 18 December 2008 request will not be upheld.

51. The Fees Regulations stipulate those processes which can be taken into account when a public authority is estimating the costs it expects to incur in responding to a request for information. The applicable processes at Regulation 4(3) are:

- (a) determining whether it holds the information;
- (b) locating the information, or a document which may contain the information;
- (c) retrieving the information, or a document which may contain

the information; and

(d) extracting the information from a document containing it.

52. The relevant sections of the Fees Regulations are quoted in full in the legal annex to this Decision Notice.
53. The MoD provided the Commissioner with a copy of the costs estimate made prior to its refusal of the request. This assessed the cost at 88.16 hours to interrogate each of the MoD's demand systems (databases), allowing 5 minutes each for the 1058 NSNs known to apply to battery chargers. As there are 3 demand systems (one each for Army, Navy and RAF) it calculated a total of 265.45 hours, which translates into a cost estimate of £6612. This relates only to the process required to determine whether the MoD holds information on those databases.
54. The public authority further explained that these three systems would not include any purchases made under local purchase arrangements, and that provisioning staff had searched the name 'Natek' in the contractor field with no results. This indicates that no items have been purchased directly from a contractor with that name but does not rule out purchases from other suppliers. The only search options remaining require the NSN reference.
55. The Commissioner notes that the estimate provided is with reference to item (a) in the list at paragraph 51, above, and that therefore it would be reasonable to expect further costs to be incurred in the processes required to locate, retrieve and extract the information in the terms provided by items (b), (c) and (d) in the same paragraph. The estimate undertaken by the public authority does not offer any clarification of its anticipated level of costs for these last three processes as it is clear from the estimate that the costs limit is exceeded by the first process in any case.
56. The MoD subsequently provided the Commissioner with further details of the processes required in searching its various databases. This informed the assessment it made, leading to the refusal of the request for reasons of cost. It explains that:
- a search of MoD stores information systems requires a NATO stock number (NSN). It is not possible to search on the word 'Natek' or to conduct a global search using part numbers;
 - there are approximately 16 million NSNs, of which approximately 6 million are UK-sourced NSNs and, of those, 1058 relate directly to battery chargers;

- each of the armed forces (ie Army, Navy and Air Force) has its own stores management system which in turn controls several satellite inventory management systems;
- in addition, project teams are authorised to order stock 'off-computer' (ie not through normal stores channels) if for a specific project. These local purchases will not show up on the databases above and information on such local purchases is not held centrally by the MoD.

57. To further explain the procedure, the public authority provided one example of the sort of process which would be required, using the Army system.

- The 'ISIS' database is interrogated to indicate which service an item was purchased for.
- The 'Stores System 3' database records 'live' Army demands (the last 10 transactions for the item in question).
- The Purchase Management System database holds transaction histories for two years prior to the last 10 transactions, above.
- The 'EDW' database holds historical data older than that held above, but supplier details are coded so cross-referencing of possible 'hits' would be required to establish relevance to a request.

58. The extent of the searches will vary, depending on the individual NSN. While some NSN entries will comprise little information, other, more popular, entries could have upwards of 80-90 transactions recorded against them. The MoD considers that the estimate of 5 minutes, per NSN, is a reasonable average given that, while the searches under some NSN entries will be shorter, some may require more than 5 minutes to interrogate the databases using the process described above.

59. The MoD also comments that searches for local purchases would be outside the scope of the process above and, similarly, the complainant's modified request for 'all communication' or 'all information' would require additional searches outside this process.

60. The Information Tribunal in the case of *Roberts* (EA/2008/0050)² considered the issue of what constitutes a 'reasonable estimate' stating, at paragraph 9:

"Section 12 does not require the public authority to make a precise calculation of the costs of complying with a request. Only

² Available online at

[http://www.informationtribunal.gov.uk/DBFiles/Decision/i275/Roberts%20v%20IC%20\(EA-2008-0050\)%20Decision%2004-12-08.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i275/Roberts%20v%20IC%20(EA-2008-0050)%20Decision%2004-12-08.pdf)

an estimate is required. That estimate, however, must be a reasonable one and may only be based on the activities covered by Regulation 4(3)."

and also at paragraph 10:

"It is not sufficient for a public authority simply to assert the appropriate limit has been exceeded. As was made clear in Randall (EA/2007/0004) an estimate has to be 'sensible, realistic and supported by cogent evidence' "

61. The Commissioner agrees that the evidence provided by the MoD in support of its estimate of an average of 5 minutes to search the database for each NSN, is sensible and realistic and therefore, given the need to search 1058 NSNs, the Commissioner considers that the refusal on the basis of section 12 of the Act (costs for compliance) was correctly given. The Commissioner notes that the requirement under section 12 is for an estimate, there is no associated requirement to have conducted the searches, if the public authority reasonably estimates that the cost limit would be exceeded. The complainant is therefore correct when he asserts that the Commissioner has not personally checked that the searches have been performed.
62. The complainant has, in correspondence with the MoD, argued that in the context of the *"huge waste of public money associated with defence spending"* the sum of £6612, which the MoD estimates to be the cost of all the required searches, does not constitute appropriate grounds for refusal of his request. He appears to be arguing, in effect, that as MoD (defence) expenditure is very substantial and there is a common suspicion that not all of it is cost-effective, then an overspend on his request should be considered reasonable in the circumstances.
63. Even if the Commissioner agreed with this view, the provisions of the Act do not allow for it to be taken into account. The Act is specific in its provision of an upper cost limit for compliance and the Fees Regulations prescribe the cost limit which applies in the circumstances. For a central government department such as the MoD, this limit is set at £600, based on a statutory rate of £25 per hour, so the cost limit of £600 equates to 24 hours work by one person. If the cost of compliance with a request is judged to exceed this limit, a public authority is entitled to either refuse the request or issue a fees notice for the full estimated cost of compliance and, if that fee is not paid within three months of the issue of the notice, the public authority is not obliged to comply with section 1 of the Act.
64. The Commissioner therefore finds that the original refusal on 16 January 2009, on the grounds of cost under section 12 of the Act was

legitimate on the basis of a reasonable estimate. Consequently, the complainant is not entitled to any further response to his request of 18 December 2008.

Section 1

65. Turning to the information provided by the complainant on 4 February 2009, this comprised two main elements:

- the clarification comprising NSNs and other part numbers; and
- the names of three individuals who might be of assistance.

The complainant had previously (8 January) clarified his interest in all Natek battery charger products.

66. The MoD had requested the first element as part of its request for clarification of 7 January, and used this in conducting searches which gave rise to the information disclosed on 5 March 2009. It has acknowledged that the information volunteered by the complainant, the details of the three named individuals, was not used directly. By the time of the complainant's request, only one of these individuals remained in post and, while he was not directly contacted, the department which he heads was contacted in the course of normal searches.

67. The relevant provision of the Act is section 1(3), as detailed in paragraph 39, above. The Information Tribunal in the case of *Barber* (EA/2005/0004)³ stated, at paragraph 5:

"However, where the public authority cannot easily identify the information then s.1(3) provides a mechanism whereby the authority can seek to clarify the request and if this further information is not supplied then the authority is not obliged to comply with the request."

68. The Commissioner would agree that it is for the public authority to assist an applicant by explaining what it needs in order to comply with his request. Section 1(3) provides that a public authority is not obliged to comply with section 1(1) unless it is provided with this information, which implies that unless the precise clarification is received, by law it does not have to deal with the request. Clearly, however, if the applicant provides information which can be used by the public authority, then even if it is not what it requested, it would be good practice for the public authority to use it so far as it reasonably can as a means of clarifying the request.

³ Available online at http://www.informationtribunal.gov.uk/Documents/decisions/barber_v_information.pdf

69. The present situation is, however, slightly different. The complainant did provide clarification which conformed to that which the MoD had requested, but also provided additional information which he considered would be of assistance. However, applying the same reasoning as that explained in paragraphs 44 and 68, the Commissioner is satisfied that, given the circumstances of the case and in particular the roles of the individuals named at the time when the request was received, the additional information provided was not in fact of assistance in clarifying the request in a way that would have materially affected the outcome.

70. In the event, the individuals were contacted by the MoD during the course of the Commissioner's investigation and were unable to provide any further help.

Exemptions

Section 43

71. The information disclosed to the complainant on 5 March 2009 excluded elements which were redacted by the MoD for two reasons.

- The information was 'commercially sensitive' and redacted to comply with the exemption provided by section 43 of the Act.
- Name and contact telephone information was redacted because it was not requested.

72. The complainant appears to have inferred from the MoD's response that it was withholding other information on the basis of the exemption provided by section 43 of the Act. In other words, the MoD was refusing to disclose information he was entitled to, because that was contrary to the commercial interests of the supplier. The Commissioner, having seen the redacted documents disclosed to the complainant, interpreted the MoD response differently and explained this to the complainant, who continued to maintain his previous view.

73. The information redacted under section 43(2) of the Act comprised pricing information, namely unit prices for specified quantities and a costs and price breakdown contained in an MoD 'Task Authorisation Form'. The Commissioner did not find it necessary to request unredacted copies of these documents to verify this fact as it was clear, from the redactions applied in named columns or in itemised sections of documents, what the nature of the redacted information was.

74. The Commissioner therefore sought clarification from the MoD, which confirmed that the only application of section 43 to the information

was in respect of the redaction of the pricing information from the specific documents disclosed. The complainant has repeatedly stated that he is not interested in pricing information, it was not mentioned in either the original request, or in the clarification subsequently supplied. Consequently, the Commissioner has not investigated the redaction of that pricing information under section 43(2) any further.

Section 40

75. The MoD also redacted names and contact telephone number details from the disclosed information. It was explained that this had been removed *"since it is not relevant to the information you have requested"*. At internal review, it was further explained that, were the complainant to request this information specifically, the MoD would need to consider the application of section 40 (personal data) to the information. The Commissioner has therefore considered whether section 40 would have been applicable in the circumstances and, if so, whether the information should be withheld.
76. Information is exempt from disclosure by virtue of sections 40(2) and 40(3)(a)(i) if it constitutes the personal data of person(s) other than the applicant, and its disclosure would contravene any of the data protection principles contained in the Data Protection Act 1998 (DPA). A full text of section 40 is available in the Legal Annex at the end of this Notice.

Information Constituting Personal Data

77. The definition of personal data under section 1 of the DPA includes data which relates to a living individual who can be identified from those data.
78. The names of the officials clearly constitute their personal data as defined by section 1 of the DPA. The Commissioner has produced guidance to assist public authorities in determining what information could constitute personal data⁴. The names of the individuals in conjunction with their job titles, contact details or roles could be used to identify and distinguish them from a group. Therefore, this information could be accurately described as their personal data and section 40 of the Act will apply.

First Data Protection Principle

79. The first data protection principle provides, in part;

⁴ Available online at http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/160408_v1.0_determining_what_is_personal_data_-_quick_reference_guide.pdf

“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 is met [...].”

80. The disclosure of personal data must firstly be fair and lawful and, if this is found to be the case, must satisfy at least one of the conditions in Schedule 2.
81. Therefore, in considering whether or not disclosing the details of the junior officials would contravene the first data protection principle, the Commissioner will take into account their reasonable expectations, rights and freedoms, as well as the legitimate interests of the public.
82. The Commissioner considers that, generally, there is not likely to be a strong argument for disclosing the names of junior officials as they are not responsible for projects and policies of sufficiently high profile to merit a public interest in knowing their identities. Senior officials are held accountable for such projects and policies in accordance with their level of involvement. Therefore, the disclosure of personal data of the individual who signed a purchase order, or recommended the purchase of a particular item on the basis of established guidelines or policies, is less likely to be in the public interest than that of the person responsible for setting them.
83. The public interest lies in knowing whether the guidelines or policies are appropriate for the circumstances, and in whether they have been established fairly and reasonably. To the extent that those people who hold the responsibility for setting such procedures should be held publicly accountable, the disclosure of their personal details may be considered fair. That is not to say that those who simply carry-out the tasks associated with those procedures are similarly accountable.
84. It is further argued that even if there were a legitimate interest in ensuring the accountability of junior officials, such processing would be unfair by reason of prejudice to their rights and freedoms or legitimate interests. Disclosure of their personal details and contact information would create the possibility that they could receive unwelcome communication. In other words there is a reasonable expectation of anonymity that extends in general to all junior officials and on that basis it would be unfair to disclose their names and contact details.
85. The Commissioner is guided in this by the findings of the Information Tribunal in *BERR v ICO and Friends of the Earth* (EA/2007/0072)⁵. The Tribunal reviewed relevant case law and considered whether the

⁵ Available online at http://www.informationtribunal.gov.uk/Documents/decisions/DBERRvIC_FOEFinaldecision_web0408.pdf

names of officials attending meetings were personal data. The Tribunal had concluded at paragraph 101 that:

"[...] junior officials, who are not spokespersons for their organisations or merely attend meetings as observers or stand-ins for more senior officials, should have an expectation of privacy. This means that there may be circumstances where junior officials who act as spokespersons for their organisations are unable to rely on an expectation of privacy;

The question as to whether a person is acting in a senior or junior capacity or as a spokesperson is one to be determined on the facts of each case"

This may be seen to acknowledge the general expectation of privacy for junior officials and that it is something which may be relied upon, except in circumstances where a junior official has a public-facing role, such as a spokesperson.

86. The Commissioner has produced guidance⁶ to assist public authorities in the application of section 40. In the Commissioner's view, information about a person's private life would deserve more protection than information about them acting in an official capacity, and the more senior a person is, the less likely that information about them acting in an official capacity would deserve protection.
87. In the Commissioner's view, there could be a legitimate interest in disclosing the names of individuals notwithstanding their rank (i.e. senior or junior) who had significant input in policy formulation or development. However, the documentation disclosed to the complainant is largely administrative purchasing paperwork or other communications of an administrative nature. There is no suggestion that the documents disclosed in redacted form constitute any policy-setting or associated decision-making processes and therefore there are no legitimate interests in members of the public learning the identity of the individuals concerned.
88. The Commissioner has decided that, irrespective of the MoD's arguments about the irrelevance of the personal data to the request, and its redaction of that information on that basis, the names and contact details of junior officials would anyway be exempt from disclosure under the provisions of section 40(2) and 40(3)(a)(i) of the Act because this would constitute their personal data and they would have had a reasonable expectation that these data would not be

⁶ Available online at http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/personal_information.pdf

disclosed. There is no legitimate interest in learning the details of the individuals as their input is not such that public scrutiny could be considered to be in the public interest, therefore the disclosure of the names and contact details redacted from the documents provided to the complainant would have been unfair. It has therefore not been necessary to go on to consider the applicability of any of the conditions in Schedule 2 of the DPA.

The Decision

89. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

90. The Commissioner requires no steps to be taken.

Right of Appeal

91. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals
PO Box 9300
Arnhem House
31 Waterloo Way
Leicester
LE1 8DJ

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

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

Dated the 29th day of July 2010

Signed

**Graham Smith
Deputy Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

S.1 General right of access

Section 1(1) 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.'

Section 1(2) provides that -

'Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.'

Section 1(3) provides that –

'Where a public authority –

(c) reasonably requires further information in order to identify and locate the information requested, and

(d) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.'

Section 1(4) provides that –

'The information –

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or

deletion that would have been made regardless of the receipt of the request.'

Section 1(5) provides that –

'A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).'

Section 1(6) provides that –

'In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as 'the duty to confirm or deny'.'

S.12 Exemption where cost of compliance exceeds appropriate limit

Section 12(1) provides that –

'Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.'

Section 12(2) provides that –

'Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.'

Section 12(3) provides that –

'In subsections (1) and (2) 'the appropriate limit' means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.'

Section 12(4) provides that –

'The secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority –

- (a) by one person, or*
- (b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,*

the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.'

Section 12(5) – provides that

'The Secretary of State may by regulations make provision for the purposes of this section as to the costs to be estimated and as to the manner in which they are estimated.'

S.40 Personal information

Section 40(1) provides that –

'Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.'

Section 40(2) provides that –

'Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and*
- (b) either the first or the second condition below is satisfied.'*

Section 40(3) provides that –

'The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of 'data' in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-*
 - (i) any of the data protection principles, or*
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and*
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.'*

Section 40(4) provides that –

'The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).'

Section 40(5) provides that –

'The duty to confirm or deny-

- (a) *does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and*
- (b) *does not arise in relation to other information if or to the extent that either-*
 - (i) *he giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or*
 - (ii) *by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).'*

Section 40(6) provides that –

'In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.'

Section 40(7) provides that –

'In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act.'

S.43 Commercial interests

Section 43(1) provides that –

'Information is exempt information if it constitutes a trade secret.'

Section 43(2) provides that –

'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).'

Section 43(3) provides that –

'The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).'

The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004

The appropriate limit

3. - (1) This regulation has effect to prescribe the appropriate limit referred to in section 9A(3) and (4) of the 1998 Act and the appropriate limit referred to in section 12(1) and (2) of the 2000 Act.

(2) In the case of a public authority which is listed in Part I of Schedule 1 to the 2000 Act, the appropriate limit is £600.

(3) In the case of any other public authority, the appropriate limit is £450.

Estimating the cost of complying with a request – general

4. - (1) This regulation has effect in any case in which a public authority proposes to estimate whether the cost of complying with a relevant request would exceed the appropriate limit.

(2) A relevant request is any request to the extent that it is a request-

(a) for unstructured personal data within the meaning of section 9A(1) of the 1998 Act[3], and to which section 7(1) of that Act would, apart from the appropriate limit, to any extent apply, or

(b) information to which section 1(1) of the 2000 Act would, apart from the appropriate limit, to any extent apply.

(3) In a case in which this regulation has effect, a public authority may, for the purpose of its estimate, take account only of the costs it reasonably expects to incur in relation to the request in-

(a) determining whether it holds the information,

(b) locating the information, or a document which may contain the information,

(c) retrieving the information, or a document which may contain the information, and

(d) extracting the information from a document containing it.

(4) To the extent to which any of the costs which a public authority takes into account are attributable to the time which persons undertaking any of the activities mentioned in paragraph (3) on behalf of the authority are expected to spend on those activities, those costs are to be estimated at a rate of £25 per person per hour.

Estimating the cost of complying with a request - aggregation of related requests

5. - (1) In circumstances in which this regulation applies, where two or more requests for information to which section 1(1) of the 2000 Act would, apart from the appropriate limit, to any extent apply, are made to a public authority -

(a) by one person, or

(b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,
the estimated cost of complying with any of the requests is to be taken to be the total costs which may be taken into account by the authority, under regulation 4, of complying with all of them.

(2) This regulation applies in circumstances in which-

(a) the two or more requests referred to in paragraph (1) relate, to any extent, to the same or similar information, and

(b) those requests are received by the public authority within any period of sixty consecutive working days.

(3) In this regulation, "working day" means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971^[4] in any part of the United Kingdom.

The Data Protection Act 1998

SCHEDULE 1 THE DATA PROTECTION PRINCIPLES

SCHEDULE 1, PRINCIPLE 1 provides that –

'1 Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.'

SCHEDULE 2 CONDITIONS RELEVANT FOR PURPOSES OF THE FIRST PRINCIPLE: PROCESSING OF ANY PERSONAL DATA

SCHEDULE 2 provides that –

'1 The data subject has given his consent to the processing.

2 The processing is necessary—

(a) for the performance of a contract to which the data subject is a party, or

(b) for the taking of steps at the request of the data subject with a view to entering into a contract.

3 The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.

4 The processing is necessary in order to protect the vital interests of the data subject.

5 The processing is necessary—

(a) for the administration of justice,

(b) for the exercise of any functions conferred on any person by or under any enactment,

(c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or

(d) for the exercise of any other functions of a public nature exercised in the public interest by any person.

6 (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

(2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.'