

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 July 2013

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

Decision (including any steps ordered)

1. The complainant requested information about directed energy devices. The Ministry of Defence (the 'MOD') initially confirmed that information was held; however it later advised the complainant that no information was held. During the Information Commissioner's (the 'Commissioner's') investigation the MOD located and disclosed some information in scope of the request. By responding late twice the MOD breached section 10 of FOIA. It also breached section 1(1)(b) in failing to disclose information it held relevant to the request by the time of the internal review.
2. The Commissioner's decision is that the Ministry of Defence (the 'MOD') has, on the balance of probabilities, now disclosed all the information it holds relevant to the request. He does not require the MOD to take any steps.

Background

3. At the start of his investigation, and having reviewed information submitted by the complainant in support of his complaint, the Commissioner asked the MOD for an explanation of some of the key terms referenced in the supporting documentation.
4. On 16 April 2013 the MOD responded, explaining that directed energy devices ('DE devices') include such things as 'the use of radio frequency, laser and acoustic and other non-lethal weapons'. It provided the Commissioner with an expanded explanation of DE devices from a restricted, internal publication, confirming that DE devices are used primarily for non-weapon purposes.

5. The MOD stated DE devices may produce effects that could allow the device to be used as a weapon against certain threats e.g. laser range-finders and designators used against sensors that are sensitive to light. It said that DE devices are primarily used against equipment rather than people.
6. The MOD advised it has a very limited number of DE devices and has a legal obligation to ensure that at every stage of procurement (from fundamental research to a system being brought into service) it complies with legislation and international treaties the UK has ratified.
7. The MOD explained that a directed energy weapon ('DE weapon') is a weapon which uses directed energy primarily as a means to damage, disrupt or destroy equipment and facilities or injure or kill personnel (e.g. laser or radio frequency weapons).
8. The complainant had drawn the Commissioner's attention to references to 'electronic warfare' ('EW') Again, the more detailed explanation was taken from a restricted source, but in essence the MOD explained EW is not used on people, but is primarily the use of equipment to intercept or disrupt communications systems used by the enemy.
9. Again based on the complainant's submissions, the Commissioner asked the MOD to explain why it is spending large sums of money on EW specialist MASS. In response, the MOD stated that EW is largely based around defence and as the battlefield becomes more technologically advanced so the MOD needs to spend money to defend against these threats and protect its own capability. It confirmed there are a large number of checks and approvals systems in place whenever any piece of equipment is bought by the MOD.
10. The MOD wished for it to be noted, however, that this money is spent on EW and not DE devices and that the two are not interchangeable.

Request and response

11. On 4 August 2012, the complainant wrote to the MOD via the *WhatDoTheyKnow.com* website and requested information in the following terms:

"With reference to section 2A8 'Emerging Technology' of MOD document JWP-80 (ics-www.leeds.ac.uk/papers/pmt/exhibits/2270/jwp3_80.pdf), can you confirm or deny that directed energy devices are being used on persons within the UK?"

If the answer is in the affirmative; can you tell me if there is any specific policy or doctrine in place to instruct against misuse?

Could you please specify the name and nature of any such document?

Can you tell me the appropriate means, channel or method by which someone might complain if they believed that they were the subject of the misuse of such technology?"

12. The MOD responded late on 4 October 2012. Whilst it confirmed that it held information on the subject requested, it did not disclose or exempt any information per se but instead advised that "*Directed energy devices are not being used on people within the UK*". Under section 16 of FOIA (duty to provide advice and assistance) the MOD gave the complainant some information about Long Range Acoustic Devices ('LRAD') which had been deployed in support of a police-led safety and security operation during the Olympics.
13. Following further correspondence on 5 October 2012 in which the complainant stated his view that the response was "*inaccurate*" and included some weblinks, the MOD provided a second response on 12 October 2012.
14. At this point the MOD advised the complainant "*I have reviewed the response I provided and believe that I should have stated clearly that the response was 'information not held'. I must apologise for this error.*" The MOD also confirmed it had examined the internet links forwarded by the complainant, but considered that the material did not affect its response.
15. On 8 November 2012 the complainant wrote to the MOD to request an internal review.
16. The MOD sent him the outcome of its internal review on 3 December 2012. Whilst it acknowledged the delay in responding to the request, together with its error in stating that information was held in its response of 4 October 2012, it upheld its position as of 12 October 2012 that no information was held pursuant to the request.

Scope of the case

17. The complainant contacted the Commissioner on 18 December 2012 to complain about the way his request for information had been handled. He submitted weblinks to 12 documents which he considered to be relevant to the Commissioner's investigation.

18. During the course of the investigation the MOD disclosed some information which it now considered to be in scope. Some information was redacted under exemptions from the FOIA, but these have not been considered by the Commissioner as the complainant has confirmed that he did not wish to contest them.
19. The Commissioner has therefore investigated whether, on the balance of probabilities, any further information is held by the MOD relevant to the complainant's request other than has been provided.

Reasons for decision

Section 1

20. Section 1 of FOIA states 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."

21. The task for the Commissioner here is to determine whether, on the balance of probabilities, the MOD holds any further information relevant to the request which it has not disclosed to the complainant. Applying the civil test of the balance of probabilities is in line with the approach taken by the Tribunal when it has considered the issue of whether information is held in past cases.
22. The Commissioner reviewed the information the complainant had submitted in support of his complaint and wrote to the MOD asking it a number of questions based on his review. He also asked the MOD to provide details of the searches it had undertaken in order to respond to the request.
23. The MOD advised that it had emailed all areas which might have held relevant information, and was assured that no information was held. It said these searches would have been unlikely to retrieve any information as DE devices are not being used on civilians within the UK and hence, on the balance of probabilities, it is highly likely that the MOD holds no information.
24. On 23 April 2013 the MOD contacted the Commissioner to explain that the way in which it had handled the request had been due to its reading

of it at the time. It said that because its response to the first part of the request (whether DE devices are being used on people in the UK) was 'no', it had not gone on to consider whether recorded information is held in relation to the remaining three parts of the request.

25. Having now revisited the request in light of the Commissioner's investigation, the MOD said it considered that "*implicit*" in the request is a request for information about DE devices "*being used as weapons*", i.e. the complainant was asking the MOD to confirm or deny whether it was using devices against people, not whether it has such devices or weapons. In view of this, the MOD confirmed it had located some recorded information about a DE device designed to be deployed as a weapon and that had been used in the UK which it now considered to be in scope. It stated that it was in the process of reviewing this information.
26. The Commissioner would make two points relating to this. First, he does not recognise that there is such a thing as an "*implicit*" information request for the purposes of section 1 of the FOIA. It is well established that where there is any doubt about the scope of a request, the focus should be on an objective reading of that request. The only information covered by an information request is that which is identified in an objective reading of the scope of the request. Where a public authority believes that a complainant may be seeking other information to that identified in the request, it should revert to the requester for clarification, rather than employ guesswork.
27. Secondly, the Commissioner considers it clear that the information located by the MOD was clearly within the scope of the complainant's request, which was for "*directed energy devices ... used on persons within the UK*". In any event, therefore, no recourse to what was "*implicit*" in the request was necessary.
28. On 30 April 2013, following its review of the recorded information it had identified, the MOD wrote to the complainant. It referenced the advice and assistance initially provided under section 16 in its first response of 4 October 2012, namely that a Long Range Acoustic Device ('LRAD') system was deployed in the UK in support of the police-led safety and security operation during the Olympics, but not as a weapon. The MOD confirmed it had now established that this advice was based on recorded information it held.
29. The identified information consists of draft and final versions of two letters written about LRAD in response to questions from MPs on behalf of their constituents. The MOD provided this information to the complainant.

30. The MOD advised that the information provided also indicated that additional information in scope of questions 2 and 3 of the request (policy or doctrine to instruct against misuse) may have been held in the form of operating instructions for the LRAD. Therefore, the MOD decided to start from first principles and to reinitiate a full search for any additional information in scope of the request.
31. On 22 May 2013, the MOD wrote to the complainant again. It reconfirmed that it had provided information in relation to question 1 in its previous response of 30 April 2013. In relation to questions 2 and 3 of the request, the MOD advised that it held two documents entitled '*539 ASRM Long Range Acoustic Device (LRAD) 1000x Standard Operating Procedures for an LCVP*' and '*Long Range Acoustic Device (LRAD) on LVCP Mk5 Safety Case Submission*'.
32. This information was disclosed to the complainant with some minor redactions, to which, as covered above at paragraph 9, the complainant did not object. The MOD also confirmed that no information was held in respect of question 4 of the request.
33. On 7 June 2013, the MOD wrote to the complainant to confirm it holds two documents which contain some information relevant to the request. It is unclear from the correspondence in this case whether the documents have been disclosed to the complainant. The MOD apologised for the delay in correctly handling the request.
34. In order to assist his determination as to whether the MOD held any further information beyond that which it disclosed during the investigation, the Commissioner asked the MOD to clarify which definitions it applies and uses in relation to EW, DEW and DED. The MOD provided the Commissioner with the definitions which come from a restricted source (details of the source were supplied), which it has utilised since 2003.
35. Having reviewed the definitions, the Commissioner is satisfied that the MOD's source and the MOD itself have definitions which make a clear distinction between DE devices and DE weapons in a military context that were established at least ten years ago. The MOD added that it would "*define various sights and instruments that we use with our kit as DE devices - we can use them as weapons, but they are not necessarily weapons in their own right.*"

Conclusion

36. The Commissioner has concluded that, on the balance of probabilities, the MOD does not hold any further information relevant to the request, other than that which it provided during the investigation.

Sections 1 and 10

37. Section 10(1) of the FOIA provides:

"...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."

38. The MOD has committed a twofold breach of section 10(1) in this case. First, it did not respond to the request of 4 August 2012 until 4 October 2012. Secondly, the information within the scope of the request that was disclosed during the Commissioner's investigation was not provided within 20 working days of receipt of the request.
39. In disclosing information within the scope of the request significantly outside the 20 working days limit, the MOD also breached section 1(1)(b) of FOIA, ie if information is held it should be communicated to the applicant. The details of the case have been recorded for future monitoring purposes.

Other matters

40. At the internal review stage the complainant also asked for digital copies of communications the MOD had made and received in coming to its position to respond to his request. The MOD did not provide the digital copies of communications or make reference to this in its review result; however the Commissioner has since established that the MOD is handling this as a new request.

Right of appeal

41. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

42. 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.
43. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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