

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 13 August 2018

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

#### Decision (including any steps ordered)

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1. The complainant requested copies of the work cards covering the installation of the HUMS modification on two specific helicopters.
2. The Commissioner's decision is that the Ministry of Defence ("the MoD") does not hold the requested information in respect of one of the helicopters. In respect of the other helicopters, it has provided some information and was entitled to rely on Section 40(2) (Third Party Personal Data) of the FOIA to withhold the remainder. However the MoD breached Section 10 of the FOIA by failing to provide its response within 20 working days.
3. The Commissioner does not require the MoD to take further steps.

#### Background

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4. Prior to this request, the complainant had made several requests for information which the MoD relied upon Section 12 (Cost Exceeds Appropriate Limit) to refuse.

#### Request and response

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5. On 5 December 2017, the complainant wrote to the MoD and requested information of the following description:

*"I request that details of the work cards covering the installation of the HUMs Programme as previously requested. These tail numbers are XZ596 and XZ586."*

6. On 6 February 2018, the MoD responded. In relation to XZ596, it provided a redacted version of the information. It relied upon Section 40 to withhold the redacted information.
7. In respect of XZ586, it stated that it did not hold the requested information.
8. The MoD provided the outcome of its internal review on 8 March 2018. It upheld its original position – although it did release two further documents to the complainant. The MoD stated that it did not consider the documents to fall within the scope of the original request but provided them when it became clear that the complainant wanted copies.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 28 March 2018 to complain about the way his request for information had been handled.
10. In particular, the complainant believes that the MoD is using Section 40 to withhold vital information on aircraft safety. The complainant also raised whether the MoD was correct in stating that it did not hold information relating to tail number XZ586.
11. The scope of the Commissioner's investigation and the following analysis is to:
  - a. Determine whether further information is held within the scope of the request.
  - b. Determine whether Section 40 was cited correctly.
  - c. Determine whether the MoD has complied with the procedural aspects of the FOIA.

## Reasons for decision

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### Procedural Matters

12. Section 1(1) of the 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.*

13. Section 8(1) of the FOIA states:

*In this Act any reference to a "request for information" is a reference to such a request which –*

- (a) is in writing,*
- (b) states the name of the applicant and an address for correspondence, and*
- (c) describes the information requested.*

14. The Commissioner considers that the request in question fulfilled these criteria and therefore constituted a valid request for recorded information under the FOIA.

15. Section 10 of the FOIA states that responses to requests made under the Act must be provided "*promptly and in any event not later than the twentieth working day following the date of receipt.*"

16. As the MoD did not respond to the request within 20 working days, it therefore breached Section 10 of the FOIA.

### XZ586 – is further information held?

17. The MoD has carried out extensive searches for the files containing the requested information in relation to tail number XZ586 but has been unable to locate them.

18. The MoD has stated to the Commissioner that the relevant files were recalled from its TNT archive in 2015 by a desk officer undertaking an investigation. That desk officer has since left the MoD, but was contacted in relation to the files. The officer stated that he had passed

the files to a third party which was supposed to return the documents to the TNT archive.

19. The third party has also been contacted by the MoD. The particular employee to whom the files were passed has now left the company and no longer lives in the UK.
20. The third party has carried out searches at its own premises but has been unable to locate the missing files.
21. The MoD has also searched its electronic records. The requested information would have been held in hard copy and only the covering page has been scanned into the MoD's GOLDesp database. A redacted version of this document has been provided to the complainant. The Commissioner's analysis of Section 40 also covers this document.
22. The MoD has stated that its own policy requires such information to be retained for a minimum of five years after the aircraft has ceased flying.

*The Commissioner's view*

23. It appears that the MoD's record-keeping may have been deficient in this particular instance and that this has led to the file being mislaid.
24. Nevertheless, the Commissioner's remit in this instance is to determine whether, as a matter of fact, the information *is* held by the MoD – and not whether it *should be* held.
25. The MoD has been candid with the Commissioner about the deficiencies in the handling of this information and given a clear explanation of why the requested information in relation to tail number XZ586 was not held. The Commissioner accepts that explanation and therefore, concludes that no further information is held.

Section 40 – Personal Data

26. Section 40 of the FOIA states that<sup>1</sup>:

*(1) 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.*

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<sup>1</sup> As the Data Protection Act 1998 was still in force at the point the Council responded to the request, the Commissioner has considered this case under the law which existed at the time.

- (2) *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.*
- (3) *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 [1998 c. 29.] 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 [1998 c. 29.] Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.*
- (4) *The second condition is that by virtue of any provision of Part IV of the [1998 c. 29.] 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).*

27. The definition of personal data is set out in section 1 of the Data Protection Act 1998:

*"...data which relate to a living individual who can be identified*

- a) from those data, or*
- b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual."*

28. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them,

has some biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

29. Having viewed the withheld information, the Commissioner is satisfied that the information which has been redacted is the names, initials and signatures of the individuals who carried out the maintenance work – and hence would identify them. The redacted information is therefore unquestionably the personal data of those individuals and hence the test at Section 40(2)(a) has been met.

*Would disclosure contravene any of the Data Protection principles?*

30. Schedule 1 of the Data Protection Act 1998 lists the eight Data Protection principles. The MoD considers that the disclosure of the withheld information would contravene the First Data Protection Principle which states that:

*"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."*

31. The first matter for the Commissioner to consider is whether disclosure of the requested information would indeed contravene the First Data Protection Principle and hence engage the exemption at Section 40(2). The Commissioner's approach when considering the First Principle is to start by looking at whether the disclosure would be fair. If disclosure would be *unfair*, the exemption is engaged immediately. Only if the Commissioner finds that disclosure would be fair will she go on to look at lawfulness or whether a Schedule 2 condition can be satisfied.
32. In assessing whether disclosure would be unfair, and thus constitute a breach of the First Data Protection Principle, the ICO takes into account a number of factors, including the following:
- a. What reasonable expectations does the data subject(s) have about what will happen to their personal data?
  - b. What are the consequences of disclosure?
  - c. Are there any legitimate interests in disclosure which would outweigh the rights and freedoms of the data subject(s)?
33. The MoD has stated that the individuals identified within the withheld information were employed by a contractor. It noted that they "do not hold (and have never held) public facing positions within this company and would therefore not expect their names to be released in to the public domain. The MOD have been unable to contact the individuals to ask whether they are willing to consent to the disclosure of their

personal data and have therefore taken the position that their expectation would be for their data to be withheld. The MoD also points out that, in addition to being the personal data of the individuals, signatures are commonly used on documents as proof of identity. Their release would aid the potential for fraud or misrepresentation.

34. The documents in question detail the overall Health & Usage Monitoring System (HUMS) modification to the particular aircraft. Within that programme there are a number of tasks which must be completed and the engineers responsible for carrying out this work are required to sign off each individual task as it is completed. This is done on MoD Form 707b.
35. There is an expectation that this paperwork will be retained. In the event of the particular aircraft being the subject of an investigation or litigation, the paperwork would be analysed to check who had carried out particular maintenance work and hold that person accountable if the work had been sub-standard.
36. Whilst the individuals involved would have had an expectation that their personal data would be disclosed to an investigation panel or a court, they would not have expected it to be disclosed to the public at large.
37. The Commissioner agrees with the MoD that disclosure of this information would involve biographical details about the individuals involved.
38. She further agrees with the MoD that disclosure of the individuals' signatures in particular would leave the individuals at risk of fraud or mis-representation.
39. The key point here is that disclosure under the FOIA is considered to be disclosure to the world at large. It is the equivalent of the MoD publishing the information on its website. The MoD must consider the detriment that might be caused to the individuals by disclosure of this material, not just to the complainant, but to the wider world.
40. Given that the Commissioner is satisfied that non-disclosure of the withheld information to the public at large is a reasonable expectation, then there would be some level of distress from disclosure, on the basis that information, which could potentially be used to perpetuate a fraud, has been made widely available.
41. Next, the Commissioner has gone on to consider whether there is a pressing social need for the information to be disclosed which might make a disclosure under the circumstances fair – in spite of the individuals' expectations. The question is whether the public has a

legitimate interest in the disclosure of the information, to the wider world, which outweighs any unwarranted intrusion into the rights of the individuals to have their information remain private.

42. The Commissioner is aware that the complainant in this case has had a long-running debate with the MoD about the safety of this particular type of aircraft.
43. The complainant has argued that disclosure of the withheld information is necessary to show that maintenance work on the aircraft has been carried out to the required standard. He has accused the MoD of using the Section 40 exemption to "conceal the work activity."
44. The Commissioner considers that there is a legitimate public interest in ensuring that any vehicles being used by the armed forces have been maintained to the highest standard and that contracted work has been carried out. There is also an inherent value in ensuring accountability in the spending of public money.
45. However, the question in this case is not whether the Form 707b should be released at all, but whether it needs to include the names, signatures and initials of junior employees of a third party contractor in order to satisfy the public interest in ensuring the safety of the aircraft. The Commissioner considers that the public interest is adequately served by the release of the redacted Form 707b. Disclosing the additional personal data would add very little value to the wider public, whilst causing great detriment to the individuals involved.
46. The Commissioner is further reassured by the fact that the complete, unredacted versions of Form 707b would be available to any Inquiry, were it necessary. She considers that this provides an appropriate mechanism for ensuring the accountability of the MoD, the contractor and its employees.
47. The MoD has informed the Commissioner that the aircraft to which the information relates is no longer in service and that its last flight had been more than 18 months prior to the request being submitted. There could not therefore have been any "live" safety issues at the time of the request – substantially weakening any legitimate interest in disclosure.
48. Other than the complainant's own private interest in the information being disclosed, the Commissioner has failed to establish any pressing social need for the withheld information to be disclosed.
49. The Commissioner recognises that the legitimate interests of the complainant must be weighed against any unwarranted prejudice to the rights, freedoms and legitimate expectations of the individuals who carried out the maintenance work. Having considered all of the above,



the Commissioner's decision is that disclosure of the withheld information *would* be unfair to those individuals.

50. Having determined that disclosure under the FOIA would be unfair to the data subjects, it is not necessary to go on to consider whether any of the Schedule 2 conditions would be met.
51. The Commissioner concludes that the exemption provided by Section 40(2) was engaged and so the MoD was not obliged to disclose the requested information.

### **Other matters**

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52. During the course of her investigation, the Commissioner became concerned, based on correspondence from the complainant, that the information she had been supplied with, by the MoD<sup>2</sup>, showed fewer redactions than the copy the complaint was originally provided with. The complainant provided the Commissioner with a copy of the information with which he has been supplied and the Commissioner has checked that against the documents supplied by the MoD. She is satisfied that there is no discrepancy between the two sets of documents and the only redactions were as described above.
53. The complainant also suggested that the information he had been provided with was not what he originally requested. He stated that he had originally asked for the work card on "Modification 1178". That information was not specified, however, in the information request to which this notice relates.

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<sup>2</sup> The MoD supplied a complete copy of the withheld information to the Commissioner, with all the information visible but the redactions marked.

## Right of appeal

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54. 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: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

55. 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.
56. 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 .....**

**Ben Tomes  
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