

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 March 2023

Public Authority: Ministry of Defence

Address: Main Building
Whitehall
London
SW1A 2HB

Decision (including any steps ordered)

1. The complainant has requested information from the Ministry of Defence ("the public authority") in relation to a specific report. The public authority refused to confirm or deny whether it held the requested information under section 40(5) of FOIA.
2. The Commissioner's decision is that the public authority has correctly cited section 40(5B) of FOIA in response to the request as, if held, the information would contain third party personal information. However, as the public authority failed to respond to the request for information within 20 working days, it breached section 10(1). Additionally, as the public authority failed to issue a refusal notice within 20 working days, it has breached section 17(1) of FOIA.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Request and response

4. On 4 July 2022, the complainant wrote to the public authority and requested information in the following terms:

`1. A full copy of the report produced by [named individual], at public expense, following... investigation comprising interviews with twenty-

one Crown Servants in Brunei in the period 23-30 Apr 22, including all annexes and appendices to the same report.

2. Additionally, please could you tell me the exact length of the same report in number of pages. Could you please tell me the time and date of the report's distribution and the time and date of the report's archiving.

3. Additionally, the report is based upon twenty-one interviews with Crown Servants expressing their views on the "general climate and treatment of people posted to Brunei"; therefore, could you please tell me the method of recording these interviews (written record; Dictaphone etc.) and the time, dates and locations of these interviews being recorded. Could you please tell me the length in pages of the written records of these interviews (or the length in hours of their audio recording).

4. The ... investigation is described as "an external investigation". Please could you share the definition of "external investigation", where 2RGR is a unit belonging to 11X, pointing to relevant policy documents, where required. In an email to me from ... dated 24 Jun 22, in answer to a query, [named individual], writing of the above mentioned report, noted: "...' tasking was **not** a Climate Assessment but akin to one" ([Named individual]'s own emphasis).

5. Please could you therefore share the ...' mission statement and terms of reference for the... ' investigation in Brunei 23-30 Apr 22 including the criteria for selecting the twenty-one interviewees interviewed by the [redacted].

6. Please could you also share the Standard Operating Instructions for officers conducting taskings of this nature, which are not a Climate Assessment, but akin to one, pointing to relevant policy documents and independent assurance methods, where required.'

5. The public authority responded on 9 August 2022. It refused to confirm or deny whether it held any information falling within the scope of questions 1 to 5 on the basis of section 40(5) of FOIA. In relation to question 6, the public authority explained that it did not hold any information.

6. Following an internal review the public authority wrote to the complainant on 7 September 2022. It confirmed its reliance on section 40(5B) of FOIA in relation to questions 1, 2, 3 and 5. In relation to question 4, the public authority explained that it should have confirmed that it did not hold any recorded information.

Scope of the case

7. The complainant contacted the Commissioner on 9 September 2022, to complain about the way their request for information had been handled.
8. The Commissioner considers that the scope of this case is to determine whether the public authority is correct to rely on section 40(5B) of FOIA in relation to this request. The Commissioner will also consider the time taken to respond to the request.

Reasons for decision

Section 40(5B) – neither confirm nor deny

9. Section 1(1)(a) of FOIA provides that where a public authority receives a request for information, it is obliged to tell the applicant whether it holds that information. This is commonly known as the 'duty to confirm or deny'.
10. There are, however, exemptions from the duty to confirm or deny. It should be noted that when applying an exemption from the duty to confirm or deny, a public authority is not restricted to only considering the consequences of the actual response that it would be required to provide under s1(1)(a). For example, if it does not hold the information, the public authority is not limited to only considering what would be revealed by denying the information was held, it can also consider the consequences if it had to confirm it did hold the information and vice versa.
11. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the UK General Data Protection Regulation EU2016/679 ('UK GDPR') to provide that confirmation or denial.
12. The decision to use a 'neither confirm nor deny' response will not be affected by whether a public authority does or does not in fact hold the requested information. The starting point, and main focus for a 'neither confirm nor deny' response in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not particular information is held. The Commissioner's guidance explains that there may be circumstances in which merely confirming or denying whether or not a public authority holds

information about an individual can itself reveal something about that individual.

13. Therefore, for the public authority to be entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny it holds information falling within the scope of the request the following two criteria must be met:

- Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
- Providing this confirmation or denial would contravene one of the data protection principles

Would the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?

14. Section 3(2) of the DPA 2018 defines personal data as:

"any information relating to an identified or identifiable living individual".

15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

16. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

17. The Commissioner is satisfied, from reviewing the request and having considered the submissions provided by the public authority, that if the public authority were to either confirm or deny it held the information, it would, in effect, publicly confirm that the person named in the request holds (or held) a specific post and conducted certain duties within a known time period. The first criterion set out is therefore met.

18. The fact that confirming or denying whether the requested information is held would reveal the personal data of a third party (or parties) does not automatically prevent the public authority from refusing to confirm whether it holds this information. The second element of the test is to determine whether such a confirmation or denial would contravene any of the data protection principles.

19. The Commissioner agrees that should the public authority either confirm or deny holding information in relation to the request, it could lead to an individual being identified and information being released about them.

20. The Commissioner recognises that individuals have a clear and strong expectation that their personal data will be held in accordance with data

protection laws. In this case, the Commissioner is satisfied that the individual concerned, would not reasonably expect the public authority to confirm to the world at large whether it held particular personal information about them in response to a FOIA request.

21. He has also determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms, and that confirming whether or not the requested information is held would not be lawful.
22. Whilst the Commissioner notes the complainant's additional arguments, he can only address whether the public authority is correct to say that there is no lawful basis, under data protection law, to confirm or deny that it holds the requested information.
23. As there is no lawful basis for doing so, confirming or denying would be unlawful and therefore the public authority is entitled to rely on section 40(5B) of FOIA to neither confirm nor deny that the requested information is held.

Section 10(1) – time for compliance

24. Under section 10 of FOIA a public authority is obliged to respond to a FOIA request within twenty working days. In this case the Council failed to confirm that it did not hold some of the requested information within the statutory time for compliance. It therefore breached section 10 FOIA in the handling of this request.
25. Under FOIA section 17(1) a public authority must issue a refusal notice, within 20 working days of the request, if it is relying on an exemption to neither confirm nor deny that information is held. As the public authority failed to issue a refusal notice within 20 working days, it has breached section 17(1) of FOIA.

Right of appeal

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

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

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

27. 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.
28. 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

Roger Cawthorne
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF