

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 April 2012

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

Decision (including any steps ordered)

1. The complainant has requested the official précis of the proceedings of the board of inquiry into the loss of RAF flight Anson VL 312 on 20 February 1961 (the précis), an incident in which the complainant's father was killed.
2. The Commissioner's decision is that the Ministry of Defence (MOD) should not have relied on the section 44(1) and 38(1) exemptions of the FOIA and so has not complied with its duty under section 1(1)(b) of the Act to disclose the information requested; he upholds the complaint.
3. The Commissioner requires MOD to disclose the précis of the proceedings of the Board of Inquiry into the loss of Anson VL 312 on 20 February 1961 excluding the name of the author which is outside the scope of the complaint in this case.
4. MOD must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 24 March 2011, the complainant wrote to MOD saying that he, "*understood there is a board of inquiry report and it is a report that I would appreciate sight of*". The board of inquiry concerned the loss of Anson VL 312 on 20 February 1961, an incident in which the complainant's father was killed.

6. On 26 March 2011 MOD told the complainant that it no longer held a copy of the board of inquiry proceedings; MOD said that the official précis of the board of inquiry was all that its archives contained. On 20 April 2011 MOD disclosed a re-typed redacted copy of the précis and said that the précis had been redacted in accordance with FOIA requirements laid out in sections 40 (Personal information) and 44 (Prohibitions on disclosure). The précis was all of the information held falling within the scope of the request.
7. On 13 June 2011 MOD said additionally that if the information had not been withheld under section 44 then it would also have been withheld on health and safety grounds (section 38 FOIA).
8. Following an internal review, MOD wrote to the complainant on 4 August 2011. MOD maintained its redactions relying on section 44(1)(a) of FOIA in conjunction with Article 8 – the right to respect to private or family life – of the European Convention on Human Rights as incorporated into the Human Rights Act 1998 (the 1998 Act).
9. MOD said that it also relied on the health and safety exemption in section 38(1)(a) of the FOIA. MOD added that it continued to withhold the name of a junior officer, a flight lieutenant, relying on section 40(2) FOIA; this was to protect his personal data on the grounds that he had been named in the précis as a junior officer and was presumed still to be alive.

Scope of the case

10. On 23 September the complainant contacted the Commissioner to complain about the way his request for information had been handled. He said that this year was the 50th anniversary of his father's death on the flight and he required closure regarding the circumstances surrounding the accidental loss of Anson VL 312 on 20 February 1961. The complainant indicated that he accepted the refusal to provide the name of the flight lieutenant who was the author of the report on the basis that it was exempt under section 40(2). The Commissioner has therefore excluded that information from his consideration and the analysis set out below relates to the remainder of the information in the précis.

Reasons for decision

Prohibitions on disclosure (section 44)

11. Section 44(1) of FOIA provides that:

"Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-

(a) is prohibited by or under any enactment...".

12. MOD said that the redacted information related to deceased service personnel who were unrelated to the requester. MOD added that it had an obligation to protect controversial information which related to the private lives of the families of the deceased service personnel from third party disclosure. MOD contended that unpublished information about family history was part of a wider body of information relating to the private lives of the families concerned (even if not all of that information was known to the families themselves). MOD said that families "*have a right*" to expect that controversial information held by MOD about their deceased relatives would not be disclosed by MOD to a third party without their agreement. Even if known to them, they themselves might want to protect sensitive information of this nature from disclosure beyond the family and MOD had to respect that right to family privacy.

13. MOD sought to rely on its duty of care to respect for private or family life under Article 8 of the European Convention on Human Rights, as embodied in the Human Rights Act 1998. MOD considered that disclosure would be an invasion of privacy for any remaining family members of the deceased aircrew and that such information would be exempt from release under section 44 FOIA.

14. The Commissioner considers that Article 8 of the 1998 Act does not operate as a statutory bar to disclosure and has therefore decided that section 44(1)(a) does not provide an exemption from disclosure.

15. In reaching this decision he has been guided by the Tribunal's opinion in the case of *Bluck (Pauline Bluck v IC and Epsom & St Helier University Hospitals NHS Trust (17 September 2007))* where the Tribunal indicated that it:

"would not be in favour of translating the general principles laid down in Article 8 into the form of specific legal prohibition to which we believe section 44 is intended to apply."

It continued:

"...we do not believe that the effect of the Human Rights Act is to elevate to the level of a directly enforceable legal prohibition the general terms of Article 8" (para 31).

In the light of this the Commissioner's view is that the Human Rights Act 1998 does not operate as a statutory bar for the purposes of section 44 and that therefore that exemption is not engaged.

Health and safety (section 38)

16. Section 38(1) of FOIA provides that:

"Information is exempt information if its disclosure under this Act would, or would be likely to—

(a) endanger the physical or mental health of any individual..."

17. MOD told the Commissioner that it is content to release information about perceived negligence of service personnel to their own next of kin, as the duty of care to protect family members from distress of disclosure is much less if they request the information themselves. The Commissioner understands, however, that this would be a restricted disclosure to the family outside of the FOIA. In such situations if the information contains anything likely to be particularly distressing to relevant families MOD may give a warning prior to disclosure.
18. However, MOD said that it has an obligation to protect relevant families from third party disclosure of controversial information which relates to perceived negligence by deceased servicemen. MOD said that unpublished information about family history was part of a wider body of information relating to the private lives of the families concerned (even if not all of that information is known to the families themselves). MOD's policy is not to disclose controversial information about deceased servicemen to a third party without the agreement of the relevant family. Even if information is known to the family, they might want to protect it from wider disclosure and MOD had to respect family privacy. Freedom of information disclosure is considered to be disclosure to the world at large, not just to an individual. Disclosing more widely information which would risk tarnishing the memory of service personnel would, MOD said, risk causing substantial distress to the families concerned.
19. Section 38 is only engaged if disclosure of the information in question would 'endanger' an individual. The Commissioner takes the view that 'endangerment' in this context amounts to a prejudice test, and that

there should be evidence of a significant risk to the physical or mental health or safety of an individual for the exemption to be engaged. In order to engage this exemption therefore the public authority must demonstrate that disclosure of the information in question would, or would be likely to, have a detrimental effect upon the physical or mental health of any individual, or the safety of any individual, that is more than trivial or insignificant. To demonstrate a danger to mental health under this section, clinical evidence of a psychiatric condition is not necessary, but the effect of the disclosure upon any individual's mental health must go beyond stress or worry.

20. The Commissioner identified the families of the deceased service personnel as persons whose health and safety had the capacity to be endangered by disclosure.
21. The Commissioner considered that disclosure of previously unknown information could be capable of causing distress to individual family members and endangering their health and safety. In considering whether the likelihood of endangering health and safety in this specific case, had been demonstrated, the Commissioner had regard to the content of the information, the fact that disclosure to the public could result in new information being imparted to family members and the arguments put forward by the MOD.
22. In the Commissioner's view he has seen no evidence from MOD to suggest that endangerment would, or would be likely to, arise to the health and safety of surviving relatives of the aircrew in this particular case beyond the stress and worry that such information might be expected to cause in any family. In reaching this decision he has also had regard to the substantial passage of time of some 50 years since the incident which occurred in 1961. Whilst he is mindful that the age of the information could mean that disclosure could bring back upsetting memories, he has not been provided with evidence to show that this would result in anything more substantial than stress or worry.
23. As he has seen no evidence that disclosure would, or would be likely to, endanger the physical or mental health of any individual, the Commissioner has decided that the health and safety exemption set out in section 38 FOIA is not engaged in this case. He would point out that any future requests for similar information would have to be considered on a case by case basis.

Right of appeal

24. 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

25. 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.
26. 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

Jo Pedder
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