

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 13 February 2014

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

#### Decision (including any steps ordered)

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1. The complainant requested the information related to the outcome of a complaint of bullying and harassment against a named individual.
2. The Commissioner's decision is that the public authority is excluded from confirming or denying whether it holds the information requested by virtue of section 40(5)(b)(i) FOIA.
3. The Commissioner does not require the public authority to take any steps.

#### Request and response

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4. On 22 September 2013, the complainant wrote to the public authority and requested information in the following terms:

*'As part of Case No. 27/01, under section NDA Section 39, [Named Person] was on a date between 10 February 2000 and 12 April 2000, guilty of conduct to the prejudice of good order and Naval discipline in pursuing a course of conduct that amounted to harassment of [Named Person], which he knew or ought to have known, amount to harassment.*

*I would like to know what form of administrative action/punishment was served upon [Named Person] as a result of being found guilty of these charges.'*

5. On 26 September 2013 the complainant made an additional request to the public authority in the following terms:

*'I would like to include in my request details of any reprimand, severe reprimand or fines that may have been issued to [Named Person], as a result of the investigation mentioned in my original request.'*

6. On 11 October 2013 the public authority responded. It neither confirmed nor denied holding any information within the scope of the request on the basis of the exemption at section 40(5) FOIA.
7. Following an internal review the public authority wrote to the complainant on 5 November 2013. It upheld the original decision and clarified that it had specifically relied on the exemption at section 40(5)(b)(i) FOIA.

### **Scope of the case**

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8. On 5 November 2013, the complainant contacted the Commissioner to complain about the way his request for information had been handled.
9. The scope of the investigation therefore was to determine whether the public authority was entitled to neither confirm nor deny holding any information within the scope of the requests (NCND) on the basis of section 40(5)(b)(i).

### **Reasons for decision**

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#### **Section 40(5)(b)(i)**

10. The provisions of section 40 subsections 1 to 4 generally exempt personal data from unfair disclosure. In relation to a request for the personal data of individuals other than the applicant (i.e. the person making the request), section 40(5)(b)(i) further excludes a public authority from complying with the duty imposed by section 1(1)(a)<sup>1</sup> if to do so would reveal personal data and contravene any of the data protection principles. Therefore, a public authority is by virtue of section 40(5)(b)(i) excluded from confirming or denying whether it holds

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<sup>1</sup> Section 1(1)(a) states: 'Any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request...' This requirement is commonly referred to as the duty to confirm or deny.

requested information if to do otherwise would reveal personal data and contravene any of the data protection principles.

Is the requested information personal data?

11. Personal data is defined in section 1(1) of the Data Protection Act 1998 (DPA) as:

*'.....data which relate to a living individual who can be identified from those data or from those data and other information which is in the possession of, or likely to come into the possession of, the data controller; and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any person in respect of the individual.'*

12. Sensitive personal data is defined in section 2 (a – h) of the DPA. Section 2(g) specifically states that sensitive personal data consists of information as to the commission or alleged commission of any offence.
13. The request relates to the outcome of a complaint of bullying and harassment against [Named Person].
14. The Commissioner finds that the requested information, if held, would relate to persons named in the request. He therefore finds that the requested information is personal data within the meaning of section 1(1) of the DPA. He also finds that the requested information, if held, would relate to the commission or alleged commission of an offence (ie harassment) and is therefore sensitive personal data within the meaning in section 2(g) of the DPA.

Would complying with section 1(1)(a) contravene any of the Data Protection Principles?

15. As mentioned, for section 40(5)(b)(i) to apply, complying with the duty under section 1(1)(a) must reveal personal data and contravene any of the data protection principles.

16. The first data protection principle states:

*'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 [of the DPA] is met and*
- (b) *in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.*

17. The public authority explained that in the circumstances, confirming or denying whether it holds information within the scope of the request

would be unfair to [Named Person]. It would be prejudice the legitimate rights and freedoms of [Named Person] and besmirch [Named Person]'s character.

18. The Commissioner accepts that it would be unfair in the circumstances described by the public authority for it to confirm or deny whether it holds information within the scope of the request. He considers that in the circumstances, the nature of the request is likely to carry a reasonable expectation by [Named Person] that an NCND response would be given by the public authority. It is information which relates to very serious allegations against [Named Person]. Confirming or denying whether the public authority holds the requested information would therefore constitute a significant invasion of privacy.
19. The Commissioner is also satisfied that none of the conditions in schedule 3 have been met.
20. In view of the above, the Commissioner finds that confirming or denying whether the public authority holds information within the scope of the request would contravene the first data protection principle. The public authority was therefore entitled to rely on the exclusion at section 40(5)(b)(i) FOIA.
21. The Commissioner appreciates that the brevity of his reasoning above might prove frustrating to the complainant. However, that is the consequence of the approach that the Commissioner has to take in order not to reveal any information which could defeat the purpose of relying on section 40(5)(b)(i) in the first place.

## Right of appeal

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22. 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: [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)

23. 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.
24. 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 .....**

**Alexander Ganotis**  
**Group Manager – Complaints Resolution**  
**Information Commissioner’s Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**