

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 January 2019

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

Decision (including any steps ordered)

1. The complainant submitted a request to the Ministry of Defence (MOD) for information about a ship, HMS Fantome, which was wrecked off the coast of Nova Scotia in 1814. The MOD provided the complainant with some information falling within the scope of his request but sought to withhold further information on the basis of sections 27(1)(a), 27(2) (international relations), 40(2) (personal data), and 42(1) (legal professional privilege). The Commissioner has concluded that the MOD is entitled to rely on the various exemptions which it has cited. However, she has also concluded that the MOD breached section 17(3) by not completing its public interest considerations within a reasonable time period.

Request and response

2. The complainant submitted the following request to the MOD on 26 September 2017:

'Please provide copies of: All emails, letters, reports, plans, images and photographs in either electronic or paper format made, sent or received between 1 January 2004 and 31 December 2008 referring to, and/or in connection with, HMS Fantome.

The HMS Fantome I am referring to was commissioned between 1810 and 1811 (and had formerly been the French Brig the (la) Fantôme). The ship was wrecked off the coast of Nova Scotia in late November 1814.'

3. The MOD contacted the complainant on 24 October 2017 and confirmed that it held information falling within the scope of his request but it considered this to be exempt from disclosure on the basis of sections 27 (international relations) and 42 (legal professional privilege) of FOIA. However, it needed additional time to consider the balance of the public interest test. The MOD sent the complainant a further public interest test extension letter on 21 November 2017.
4. The MOD provided the complainant with a substantive response to his request on 1 February 2018. It provided him with 23 numbered documents albeit with some of the information contained within them redacted. The MOD explained that it was seeking to withhold information which fell within the scope of the request on the basis of the following sections of FOIA: 21 (information reasonably accessible to the applicant by other means); 27(1)(a), 40(2) (personal data), 41 (information provided in confidence) and 42(1). The MOD also noted that information had been redacted from documents 2 and 3 on the basis that it was not relevant to the complainant's request.
5. The complainant contacted the MOD on 23 March 2018 and asked it to conduct an internal review of this response. In doing so he explained that he wished to challenge the MOD's reliance on sections 27 and 42 of FOIA.
6. The MOD informed him of the outcome of the review on 12 September 2018. It explained that it was satisfied that parts of the requested information were exempt from disclosure on the basis of sections 27(1)(a), 42(1) and 40(2) of FOIA. The MOD also concluded that the information previously withheld on the basis of section 41(1) should in fact have been withheld on the basis of section 27(2) instead. Finally, the review concluded that section 21 did not apply as the website links were no longer active albeit that the information contained at the links was embedded within the information which had been disclosed to him.

Scope of the case

7. The complainant contacted the Commissioner on 21 August 2018 in order to complain about the way his request for information had been handled. More specifically, he was dissatisfied with:
 - The time it took the MOD to respond to his request;
 - The time it took the MOD to complete its internal review; and,
 - The MOD's decision to withhold information falling within the scope of his request on the basis of sections 27(1)(a), 27(2), 42(1) and 40(2) of FOIA.

Reasons for decision

Section 27(1)(a) – international relations

8. The MOD has relied on section 27(1)(a) of FOIA to redact information from the copies of documents 8, 9, 10 and 12 which were disclosed to the complainant. It has also withheld, in its entirety, the attachment to document 5 on the basis of section 27(1)(a) of FOIA.¹

9. Section 27(1)(a) states that:

'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice relations between the United Kingdom and any other State'

The MOD's position

10. In its responses to the complainant the MOD argued that given the continued level of cooperation between the UK government and other states on wrecks and other heritage matters, release of the information withheld on the basis of this exemption would undermine the trust and confidence that exists between the UK and its allies, potentially reducing future cooperation and ultimately having a negative effect on the negotiation over other heritage artefacts in the future. Furthermore, the MOD argued that if the information withheld on the basis of this exemption was disclosed then it is likely to have a negative impact on the willingness of other governments to share sensitive information with UK partners, especially in relation to the subject of heritage artefacts, and their willingness to be as forthcoming in negotiations about such matters in the future.

11. The MOD provided the Commissioner with more detailed submissions to support its reliance on section 27(1)(a) of FOIA. These submissions made direct reference to the content of the withheld information itself and therefore the Commissioner cannot, for obvious reasons, include such submissions in this decision notice. However, the MOD's overarching position was that despite the information being approximately 10 years old, the topic of negotiations in relation to access to heritage artefacts is still very much 'live' today. The MOD also

¹ The MOD explained to the Commissioner that the information originally redacted from document 4 on the basis of section 27(1)(a) was now considered to be out of scope of the request as it did not in fact concern HMS Fantome. The Commissioner accepts that this is the case and as with the information redacted from documents 2 and 3 the information falls outside the scope of the request as it does not concern HMS Fantome.

emphasized that such negotiations involve sensitive discussions and it was firmly of the view that disclosure of the information redacted on the basis of section 27(1)(a) would undermine ongoing and future similar negotiations by undermining the trust other states had in the UK in respect of such matters. The MOD also informed the Commissioner that in respect of a different FOI request, albeit also concerning wrecks, one state had been clear that it would not publish any information concerning negotiations and it would expect the same courtesy from the UK.

The complainant's position

12. The complainant advanced a number of points in support of his view that disclosure of the withheld information would not be likely to prejudice the UK's relationship with other states.
13. Firstly, he suggested that the MOD's reliance on section 27(1)(a) lacked both historical context and merit; the context being that HMS Fantome sank in November 1814 and however delicate the state of international relations is perceived to be, it was difficult to imagine an event so significant that its ramifications would span across three centuries and still have an impact on the UK's relationship with a particular state.
14. Secondly, he was not aware of either the US or Canadian governments making any express statements about the disclosure of information about HMS Fantome.
15. Thirdly, the complainant referred to the decision notice FS50178057 which concerned a request submitted to DCMS for information about the Rooswijk shipwreck.² In that decision notice the Commissioner concluded that some of the information was not exempt on the basis of section 27 as DCMS had failed to demonstrate that the likelihood of prejudice occurring if such information was disclosed was anything beyond hypothetical. The complainant argued that the same could be said for the MOD's position in respect of his request.
16. Fourthly, the complainant referred to two pieces of case law on the interpretation of the prejudice test: *John Connor Press Associates Limited v The Information Commissioner* [EA/2005/0005] at paragraph 14, where the Information Tribunal confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' and also the judgement

² https://ico.org.uk/media/action-weve-taken/decision-notices/2008/455532/FS_50178057.pdf

of Mr Justice Munby in *R (on the application of Lord) v Secretary of State for the Home Office* [2003]. In that case, the view was expressed that: 'Likely connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests'. In the circumstances of this case the complainant argued that that there is no real or significant risk of any prejudice being suffered, neither is there a very significant or weighty chance of prejudice to the identified public interests. Rather, in his view any risk imagined by MOD was simply a hypothetical possibility.

The Commissioner's position

17. In order for a prejudice based exemption, such as section 27(1) to be engaged the Commissioner considers that three criteria must be met:
 - Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.
18. Furthermore, the Commissioner has been guided by the comments of the Information Tribunal which suggested that, in the context of section 27(1), prejudice can be real and of substance '*if it makes relations more difficult or calls for a particular damage limitation response to contain or limit damage which would not have otherwise have been necessary*'.
19. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the MOD clearly relates to the interests which the exemption contained at section 27(1)(a) is designed to protect. With regard to the second criterion, having considered the withheld information, and taken into account the MOD's submissions to her, the Commissioner is satisfied that there is a causal link between disclosure of this information and

prejudice occurring to the UK's international relations with other states. Furthermore, she is satisfied that the resultant prejudice would be real and of substance.

20. Moreover, the Commissioner is satisfied that there is a more than hypothetical risk of prejudice occurring and therefore the third criteria is met. The Commissioner cannot elaborate in any great detail on why she has reached this view without referring to the content of the withheld information itself. However, the Commissioner accepts the MOD's view that in order for the UK to be able to conduct effective negotiations in respect of heritage artefacts it needs to enjoy the trust and confidence of its allies. Furthermore, the Commissioner is persuaded that disclosure of the information withheld on the basis of section 27(1)(a) would represent a real and significant risk of undermining this trust and confidence given the sensitivity of such discussions and the express wish of one partner that information of this nature is not disclosed in response to FOI requests.
21. The Commissioner has therefore concluded that section 27(1)(a) is engaged.

Public interest test

22. However, section 27(1) is a qualified exemption and therefore subject to the public interest test set out in section 2(2)(b) of the FOIA. The Commissioner has therefore considered whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.
23. The MOD acknowledged that there is a general public interest in the extent to which the UK cooperates with other states on wrecks and heritage matters and the release of the withheld information would provide greater understanding, openness and transparency about the nature of that cooperation. However, the MOD argued that there was a greater public interest in not compromising ongoing and future discussions about sensitive wrecks.
24. In his request for an internal review the complainant argued that if the contents of the HMS Fantome cargo, the wreck site, or the actual body of the wreck itself included items of interest taken from Washington DC in 1814 then the MOD or the appropriate department of the UK government would, or should, have complied with Article 11(1) of the 2001 UNESCO Convention on the Protection of Under Water Heritage ('the 2001 Convention') and also United Nations Convention on the Law of the Sea ('LOSC') and specifically Articles 149 and 303 of LOSC. The complainant suggested that given that notification is a requirement of the 2001 Convention, and the apparent lack of any such notification, then the HMS Fantome and its cargo are clearly either not of 'interest',

as defined by LOSC, or the UK government, having claimed sovereignty over the wreck site, has failed to comply with both the 2001 Convention and LOSC. The complainant argued that if the wreck or the wreck site does contain such artefacts and they are being left to disintegrate on the sea bed without UNESCO protection then that is a compelling reason for release of any information which would confirm this.

25. Furthermore, the complainant argued that disclosure of the withheld information could assist historians in understanding the events of the British Campaign in the Chesapeake and the attack on Washington in 1814.
26. With regard to the public interest in disclosing the withheld information, the Commissioner agrees that there is a public interest in the disclosure of information which would add to the public's understanding of how the UK liaises with other states in relation to matters of heritage artefacts. However, in her view the extent to which disclosure of the information withheld on the basis of section 27(1)(a) would add to the public's understanding of the case of HMS Fantome, beyond the details already included in the information disclosed to the complainant, is arguably limited. Furthermore, the Commissioner is not persuaded that the disclosure of the information withheld on the basis of section 27(1)(a) would add greatly to the historical understanding of this period. With regard to the public interest arguments in favour of maintaining the exemption the Commissioner accepts that there is a strong public interest in the UK being able to enjoy effective relations with the other states. In the context of this case, this includes the UK being able to conduct effective negotiations with other states about heritage artefacts. Given the limited insight that disclosure of the withheld information would bring in respect of HMS Fantome balanced against the negative effects on current and similar negotiations in the future, the Commissioner has concluded that the public interest favours maintaining the exemption contained at section 27(1)(a).

Section 27(2) – international relations

27. The MOD withheld the attachment to document 20 on the basis of section 27(2) of FOIA. The MOD explained that the attachment in question consists of advice from Le Chameau Explorations Limited's legal counsel to Nova Scotia Tourism regarding a licence application to explore the wreck of HMS Fantome.

28. Section 27(2) states that:

'Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.'

29. With section 27(3) clarifying that:

'For the purposes of this section, any information obtained from a State, organisation or court is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.'

30. In support of this application, the MOD explained that this document had been provided to it by Canada in order to assist in negotiations concerning this particular wreck site. The MOD explained that the Canadian government had recently indicated that they would not publish/release any documents in relation to negotiations about such matters so there is an implied expectation that the UK/MOD would not do the same. Consequently, the MOD argued that despite the information dating from approximately ten years ago, there was an expectation on Canada's part that this information remained confidential.

31. The complainant argued that the MOD's reliance on section 27(2) was fundamentally flawed for a number of reasons. Firstly, all applications for Heritage Research permits in Nova Scotia are deemed to be in the public domain unless a claim for confidentiality is made under section 19, 20 or 21 of the Freedom of Information and Protection of Privacy Act 1993 (Nova Scotia) and there is no evidence that such a claim was made or granted. As the content of the application, the content of the original permit and the refusal to grant a further permit in 2006 was common knowledge amongst the archaeological community in Nova Scotia and also the press in Canada, the complainant argued that it is highly unlikely that a request for confidentiality had been made and/or was granted. Further, and in any event, the complainant explained that the application for a permit in 2006 and previous permits were before the Nova Scotia Supreme Court during the judicial review proceedings and any confidentiality relating to the application, permits, and refusal

to grant the 2006 permit was waived. Still further, the complainant noted that much of the content of the original permit and the application for the 2006 permit is disclosed in the book *'Treasure Hunter: Diving for Gold on North America's death coast'* (2012) which was co-written by one of the partners of Le Chateau, Robert MacKinnon.

32. The Commissioner accepts that if a document is already in the public domain it is unlikely to be confidential. In the circumstances of this case, she recognises the complainant's knowledge of this subject and accepts his submissions about the nature of the information that would have been in the public domain during the time period covered by his request. However, in the Commissioner's view the information withheld on the basis of section 27(2) is different from the nature of the information described by the complainant. Whilst it is clearly related to Le Chateau Explorations Limited's licence application, the information does not constitute the formal application. Rather, the information consists of a detailed and lengthy legal analysis of the concept of sovereign immunity. As far as the Commissioner is aware such information is not in the public domain.
33. Moreover, in light of the MOD's submissions the Commissioner accepts that this information was provided to the UK by Canada in 2008 with an expectation that it would be treated confidentially and there is an expectation that it would still be treated as such. Therefore, the Commissioner is satisfied that the attachment to document 20 is exempt from disclosure on the basis of section 27(2) of FOIA.
34. Section 27(2) is a qualified exemption and therefore subject to the public interest test set out in section 2(2)(b) of the FOIA. The Commissioner has therefore considered whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing this information.
35. The MOD argued that release of the document would severely undermine the trust and confidence that exists between the UK and Canadian government, and with other allies. It argued in turn this could lead those international partners to be less willing to share sensitive information with the UK and have a negative effect on ongoing and future heritage artefact negotiations, outcomes which would be firmly against the public interest.
36. As discussed above, the Commissioner agrees that there is a public interest in the disclosure of information which would add to the public's understanding of how the UK liaises with other states in relation to matters of heritage artefacts. In contrast to the limited information withheld on the basis of section 27(1)(a), the Commissioner accepts that disclosure of the information withheld on the basis of section 27(2) would provide a more detailed insight into some of the issues concerning

the Le Chateau Explorations Limited's application for a permit to examine the wreckage of HMS Fantome. However, the Commissioner recognises that there is clear public interest in the UK being able to enjoy effective international relations with its partners. This includes being able to continue to receive confidential information from other states. The Commissioner has therefore concluded that the public interest favours maintaining the exemption contained at section 27(2) of FOIA.

Section 42(1) – legal professional privilege

37. Section 42 of FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings.
38. There are two categories of legal professional privilege: advice privilege and litigation privilege.
39. In this case the category of privilege the MOD is relying on is advice privilege. This privilege is attached to confidential communications between a client and its legal advisers, and any part of a document which evidences the substance of such a communication, where there is no pending or contemplated litigation. The information must be communicated in a professional capacity; consequently not all communications from a professional legal adviser will attract advice privilege. For example, informal legal advice given to an official by a lawyer friend acting in a non-legal capacity or advice to a colleague on a line management issue will not attract privilege. Furthermore, the communication in question also needs to have been made for the principal or dominant purpose of seeking or giving advice. The determination of the dominant purpose is a question of fact and the answer can usually be found by inspecting the documents themselves.
40. The MOD explained that the information withheld on the basis of section 42(1) consists of one paragraph contained in an email dated 12 December 2018 from a MOD lawyer to the Chief of the Naval Heritage department.
41. The complainant argued that the MOD cannot use legal professional privilege to prevent the release of documents if those documents contain information which consists of non-lawyer communications from either the British and Canadian jurisdictions or, if the documents are in the public domain. For example, copies of the trial bundles from the Nova Scotia judicial review case will still be in the possession of the MOD and, as they were submitted to the court in Nova Scotia; they are of course public documents. In addition, the documents within those bundles should not comprise lawyer to client communications but if they

do then such privilege will have been waived as a result of their submission to the court.

42. The Commissioner has examined the information which the MOD is seeking to withhold on the basis of section 42(1) of FOIA. She accepts that it constitutes a communication between a lawyer and their client the main purpose of which was the provision of legal advice. Moreover, she is satisfied that this information is not in the public domain. Therefore, section 42(1) of FOIA applies to this information.
43. However, section 42 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
44. The MOD acknowledged that there is a general public interest in the openness and transparency on this subject and that release of this information would assist the public in understanding how public authorities made their decisions.
45. However, the MOD argued that legal professional privilege is an important principle in the legal system and is based on the need to protect a client's confidence that communication with his or her legal advisor will be treated in confidence. It is important to ensure frankness between lawyer and client, which goes to serve the wider administration of justice, is protected. The withheld legal opinion has not been publicly disclosed and therefore retains its legally privileged status. It argued that government departments should be able to communicate freely with legal advisors in confidence and should be able to receive that advice in confidence. The MOD also explained that the advice remained 'live' despite its age and was still relevant to ongoing cases and therefore its disclosure would have a negative effect on the MOD's defence in any future heritage artefact negotiation. In the MOD's view this added weight to the public interest in maintaining the exemption.
46. Although the Commissioner accepts that there is a strong element of public interest inbuilt into legal professional privilege, she does not accept, as previously argued by some public authorities, that the factors in favour of disclosure need to be exceptional for the public interest to favour disclosure. The Information Tribunal in *Pugh v Information Commissioner* (EA/2007/0055) were clear:

'The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty than those in favour of maintaining the exemption'. (Para 41).

47. Consequently, although there will always be an initial weighting in terms of maintaining this exemption, the Commissioner recognises that there are circumstances where the public interest will favour disclosing the information. In order to determine whether this is indeed the case, the Commissioner has considered the likelihood and severity of the harm that would be suffered if the advice were disclosed by reference to the following criteria:

- how recent the advice is; and
- whether it is still live.

48. In order to determine the weight that should be attributed to the factors in favour of disclosure the Commissioner will consider the following criteria:

- the number of people affected by the decision to which the advice relates;
- the amount of money involved; and
- the transparency of the public authority's actions.

49. With regard to the age of the advice, the Commissioner accepts the argument advanced on a number of occasions by the Tribunal that as time passes the principle of legal professional privilege diminishes. This is based on the concept that if advice is recently obtained it is likely to be used in a variety of decision making processes and that these processes are likely to be harmed by disclosure. However, the older the advice the more likely it is to have served its purpose and the less likely it is to be used as part of any future decision making process.

50. In many cases the age of the advice is closely linked to whether the advice is still live. Advice is said to be live if it is still being implemented or relied upon and therefore may continue to give rise to legal challenges by those unhappy with the course of action adopted on that basis.

51. In the circumstances of this case the Commissioner accepts the MOD's position that despite the age of the information it remains live. In light of this the Commissioner believes that there is a significant and weighty public interest in upholding the exemption. With regard to the disclosure of the information, the Commissioner agrees that there is a public interest in the release of information which would allow the public to understand how public authorities make decisions. However, in comparison to the range of information disclosed by the MOD in response to this case, in the Commissioner's opinion disclosure of the small amount of information withheld on the basis of section 42(1)

would be unlikely to add significantly to the public's understanding of this issue. Consequently, taking into account the significant public interest in protecting LPP, the Commissioner is satisfied that the public interest clearly favours maintaining the exemption contained at section 42(1) of FOIA.

Section 40(2) – personal data

52. Section 40(2) of FOIA states that personal data is exempt from disclosure if its disclosure would breach any of the data protection principles contained within the Data Protection Act 1998 (DPA).³

53. Personal data is defined in section (1)(a) of the 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.'

54. The MOD redacted the names and contact details of civil servants, government officials and other third parties from documents disclosed to the complainant. The Commissioner is satisfied that such information constitutes personal data.

55. With regard to the information redacted on the basis of section 40(2), the MOD argued that disclosure of this information would breach the first data protection principle. This states that:

'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 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.'

56. The relevant condition in this case is the sixth condition in schedule 2 which states that:

³ On 25 May 2018 the General Data Protection Regulation and Data Protection Act 2018 came into force. However, in line with the provisions contained within the Data Protection Act 2018 under FOIA for any request where a public authority has responded before 25 May 2018 the DPA 1998 applies.

'The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject'.

57. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:
- The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
 - what the public authority may have told them about what would happen to their personal data;
 - their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights (ECHR);
 - the nature or content of the information itself;
 - the circumstances in which the personal data was obtained;
 - any particular circumstances of the case, eg established custom or practice within the public authority; and
 - whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.
 - The consequences of disclosing the information, ie what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor the Commissioner may take into account:
 - whether information of the nature requested is already in the public domain;
 - if so the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?
58. Furthermore, notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling legitimate interest in disclosure to the public.
59. In considering 'legitimate interests', in order to establish if there is a compelling reason for disclosure, such interests can include broad

general principles of accountability and transparency for their own sake, as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to consider a proportionate approach.

60. The Commissioner accepts that it is established custom and practice for the MOD, and other public authorities, to redact the names and contact details of junior staff and non-front line staff from any disclosures under FOIA. In light of this, she accepts that disclosure of such information would be against the reasonable expectations of these individuals. In this context she also accepts that any third parties who had contacted the MOD in relation to this matter would also have a reasonable expectation that their names and contact details would not be disclosed. Furthermore, the Commissioner is not persuaded that there is a particularly strong or compelling legitimate interest in the disclosure of these names and contact details. Disclosure of this category of information would therefore breach the first data protection principle and such information is therefore exempt from disclosure on the basis of section 40(2) of FOIA.

Time taken to consider the balance of the public interest test

61. Section 1(1) of FOIA provides 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.'

62. Section 10(1) of FOIA provides that 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.
63. Under section 17(3) a public authority can, where it is citing a qualified exemption, have a 'reasonable' extension of time to consider the balance of the public interest. The Commissioner considers it reasonable to extend the time to provide a full response, including public interest considerations, by up to a further 20 working days, which would allow a public authority 40 working days in total. The Commissioner considers that any extension beyond 40 working days should be exceptional and requires the public authority to fully justify the time taken.
64. In the circumstances of this case the MOD took 89 days to consider the balance of the public interest test. The Commissioner considers this to be an unreasonable period of time and therefore the MOD breached section 17(3) of FOIA.

Other matters

65. FOIA does not contain a time limit within which public authorities have to complete internal reviews. However, the Commissioner's guidance explains that in most cases an internal review should take no longer than 20 working days in most cases, or 40 working days in exceptional circumstances. In this case the MOD took 156 working days to complete its internal review response. The Commissioner hopes that in future cases the MOD ensures that the internal reviews are completed within the timeframes set out within her guidance.

Right of appeal

66. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

67. 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.

68. 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

Jonathan Slee
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