



**First-Tier Tribunal  
(General Regulatory Chamber)  
Information Rights**

**Appeal reference: EA/2017/0051**

**GERRY ROWLAND**  
and  
**THE INFORMATION COMMISSIONER**

First Respondent

and  
**MINISTRY OF DEFENCE**

Second Respondent

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**DECISION**

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**Heard:** 15 August 2017, 29 March 2018 and again thereafter. The Tribunal apologise for the delay in promulgation due to unforeseen circumstances.

**Introduction:**

**[1]** This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“the FOIA”) The appeal is against the decision of the Information Commissioner (“the Commissioner”) contained in a Decision Notice (“DN”) dated 28 February 2017 (reference FS50647275) which is a matter of public record.

**[2]** The Tribunal Judge and lay members sat to consider this case on 15<sup>th</sup> August 2017.

### **Factual Background to this Appeal:**

[3] Full details of the background to this appeal, Mr Rowland's request for information and the Commissioner's decision are set out in the Decision Notice and not repeated here, other than to state that, in brief, the appeal concerns the question of whether the Ministry of Defence ("the MoD") held any more information beyond that which was already disclosed to the Appellant, and whether it had correctly applied the exemptions under s40 (2) personal data and s42 (1) legal professional privilege.

### **Chronology:**

16 April 2015 & 2 Oct 2015	Appellant's request for documents pertaining to advice given to soldiers on the effect of finding at Courts Martial or Summary Hearing MoD deem request vexatious and refuse under s14(1)
4 Jan 2016	Commissioner upholds MoD's refusal
6 June 2016	FTT allows the appeal and orders disclosure
8 June 2016	Appellant requests further information on advice given regarding criminal records
11 June 2016	Appellant further requests legal advice provided to CGS and government ministers on this issue
13 June 2016	MoD highlights to Appellant the overlapping nature of his requests Appellant clarifies request and provides further context to assist
10 Aug 2016	MoD provides some information and withholds some under ss42 (1) and 40(2)
14 Aug 2016	Appellant challenges reliance on s42 (1) and suggested that MoD had more information than that which had been located
16 Sept 2016	MoD explains methodology for retrieving information provided to Appellant, stating that it holds nothing further and upholds reliance on s42 (1)
19 Sept 2016	Appellant complains to Commissioner
28 Feb 2017	Commissioner's Decision Notice FS50647275 rejecting Appellant's complaint

### **Relevant Legislation:**

***s1 FOIA Information held or not held***

- (1) 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.

***s42 Legal professional privilege.***

- (1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.
- (2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.

**Commissioner's Decision Notice:**

**[4]** The Commissioner must decide on the balance of probabilities whether the public authority holds the requested information. In the instant case, the Appellant gave reasons as to why he considered that the MoD held more information than that which it located in its searches. During the course of the Commissioner's investigation the MoD did locate and provide to the Appellant copies of documents it had previously overlooked, but gave further explanations of the steps taken to locate the information highlighted by the Appellant. As a result of these explanations, the Commissioner was satisfied that no further information was held, deeming the MoD's efforts to have been "reasonable and logical", and the searches to have been "extensive".

**[5]** The Commissioner also examined the information withheld under s42 (1). It pertains to an email sent by a member of MoD Central Legal Service to a member of the Personnel Training Secretariat relating to advice on the proposed contents of a pamphlet entitled "Your rights if you are accused of an offence". The Commissioner was satisfied that the dominant purpose of this correspondence constitutes the seeking and provision of legal advice. As this pamphlet was in use, the advice remained 'live' and there was consequently a "significant and weighty public interest in upholding the exemption". She found there was no failure by the MoD to comply with its obligations under the Human Rights Act, and so nothing to dislodge the presumption in favour of maintaining the exemption.

## **Notice of Appeal:**

[6] The Appellant raised two grounds of appeal:

**Public Interest** - there was an “exceptionally strong” public interest in disclosing the information withheld under s42(1), as the Appellant suspected that the entire Summary Hearing process within the MoD was not ECHR compliant; and;

**Further information held** -the Appellant provided his reasons for believing further information to exist and suggested avenues for exploring how to obtain it.

He also stated that the core of his request was to establish “the official position” of the MoD on the provision of advice to soldiers and personnel on this issue, and in particular whether it is the official position that no individuals have been misled as to the implications of disciplinary findings on a ‘civilian’ criminal record. At the core of his request was a desire to know how many members of the Armed Forces have been given incorrect legal advice as to the consequences of disciplinary action resulting in a criminal record, and what action the MoD plans to take in that regard.

## **Commissioner’s Response:**

### ***Ground 1 – public interest***

[7] The Commissioner stated that it was not for her to determine whether the MoD was in fact in breach of the HRA. It is for the Appellant to provide clear, compelling and specific reasons to justify disclosure, and a general assertion that the withheld advice may be incriminatory is not sufficient. Having regard to the content of the pamphlet, which clearly advises soldiers that convictions will be recorded on the Police National Database, there is no strong public interest in disclosing the underlying legal advice.

### ***Ground 2 – further information held***

[8] The scope of the MoD’s searches were based on a reasonable understanding of the scope of the Appellant’s requests, and were carried out with reasonable rigour and thoroughness. Whilst it is accepted that the MoD identified further information during the course of the Commissioner’s investigation, it does not follow that the searches were insufficient; in fact, it has added to the rigour of the searches conducted. A significant volume of material has already been disclosed to the Appellant, and the Commissioner

stands by her conclusion that on the balance of probabilities the MoD does not hold further information.

[9] The Commissioner also adds that the Appellant appears now to be arguing that the MoD did not offer sufficient advice and guidance about how to narrow his request. As this was not raised before the Commissioner, it was argued that it is not a proper ground of appeal. Nevertheless, regarding the 'official position', the Commissioner makes two observations:

- i) if there is no record of an official position, then this is information that the MoD does not hold under s1(1); and
- ii) the Appellant appears concerned that there are inconsistencies in the MoD's position on the issue, but under FOIA the MoD is not required to provide an explanation of the information disclosed nor to address any apparent inconsistencies.

#### **Reply by the Appellant:**

[10] The Appellant provided to the Tribunal a document that he contended constituted a briefing note in order to illustrate what he saw as a shortfall in the search method utilised by MoD to locate the information. He requested that the individuals involved in the search were contacted and requested to assist his request, and reiterated that he wished further assistance in order to refine his request. The Appellant was strongly of the view that further information existed, and claimed that twelve journalists were briefed "off the record" by Army personnel on this issue. He also provided links to concerns raised by members of the armed forces regarding the issue.

#### **Commissioner's Response:**

[11] The Commissioner disputed that the document the Appellant referred to in his reply had not been disclosed to him by the MoD, noting that he did not complain of the document being omitted in his Notice of Appeal but instead asked for further relevant information held by the Adjutant General ('AG') or Chief of General Staff pertaining to the document. Insofar as any journalists were briefed or made a FOIA request, this is the first time such an issue has been raised by the Appellant, and the Commissioner considered the information too vague to enable the Commissioner or the Tribunal to assess properly the adequacy of the searches.

[12] The seriousness of the Appellant's purpose is accepted by the Commissioner, and while the request for assistance under s16 was not raised as part of the original complaint received by the Commissioner, the points were addressed in the Commissioner's Response to the Notice of Appeal.

**Appellant's Response:**

[13] The Appellant suggested that he had evidence that a particular email was not located in the course of the searches that should easily have been found within the parameters of the search. This, he claimed, proved that even with such close association with the relevant departments the search was inadequate and items have been missed. He also provided letters held by the MoD in which this issue was raised, noting that they had not been disclosed in the course of his request. The letters suggested that further information was held that the Appellant asserted had not been found and disclosed, most specifically legal advice on the conduct of disciplinary hearings and their consequences.

[14] To this end, the Appellant noted that the AG had shown "situational awareness" of this issue, and it is therefore logical to conclude that, if the AG were abiding by his duties, he would have drafted improved guidance, sought legal advice, provided additional training and/or compiled reports detailing what lessons could be learned for continuous improvement. Evidence suggests an improved training course was being discussed at high levels, and the Appellant asserted that the reason for any such course being created would necessarily have to be passed on to those creating and delivering it. Further information regarding this course must exist.

[15] The Appellant also asserted that MoD Ministers had been "extensively briefed", and a large amount of information would exist to that end that has not been disclosed to the Appellant. He suspected that an individual or individuals had breached s77 FOIA, that is by altering, destroying or concealing any record with intent to prevent disclosure. He also provided the court with two cases from the summary appeal court, namely *Balewai* and *Deacon*, and alleged that the MoD shifted its position between the two cases. His concern was that this was done to prevent a "deluge of historical cases" involving incorrect legal advice provided to members of the Armed Forces.

### **Ministry of Defence Reply:**

**[16]** The MoD adopted the Commissioner's submissions, and provided a witness statement from Mr Damien Paterson, Head of the Army Secretariat, the upshot of which was to assert that the MoD had taken all reasonable steps to identify, locate and retrieve the requested information, "comfortably" passing the thresholds for ss12 and 14 FOIA. One email has been withheld under s42(1) as comprising legal professional privilege in the form of advice on proposed amendments to a pamphlet informing service personnel of their rights when accused of offences. As this pamphlet is still in use, the advice is still 'live'.

**[17]** Mr Paterson informed the Tribunal that the issue pertaining to incorrect advice about disciplinary proceedings came to light in 2012, and was "resolved" in 2014 by the issuing of a pamphlet entitled "Your rights if you are accused". Drafts of this were provided to Mr Rowland, and the final version is available in the public domain. Mr Rowland's request, although seemingly straightforward, is logistically challenging to facilitate as the information is stored across four IT systems. One initial search identified c.150,000 pages of information that would have to be read and considered. This, when considered alongside the ten other requests that the Appellant had submitted, was considered to impose a disproportionate burden on the MoD. The re-focussed request located c.75,000 pages of information. Even when focussed further with the Appellant's suggested search terms, the result was "many hundreds of documents" that resulted in 100 hours of consideration. The MoD contended that it had taken all steps which "might realistically yield further information", and there was nothing left it could conceivably do to locate further information.

**[18]** Where the Appellant has requested specific documents, steps have been taken to find and disclose these to him. The MoD holds no recorded information about how many soldiers have been given incorrect advice. In excess of 20,000 summary hearings for the Army were carried out between 2010 and 2014, so to determine how many of those may have been given incorrect legal advice is "an impossible task" requiring the MoD to review all of these cases. The MoD had retained no specific information on this.

**[19]** Mr Rowland also appeared to have widened his request from the Army to include all of the Armed Forces, and requested further information about details of remedies for those misadvised. The MoD noted that the case of Deacon as provided by the Appellant referred to an action taken by a member of the RAF, and relates to matters that no person in Army Headquarters could be expected to know about. The MoD was also concerned that the Appellant appeared to conflate Parliamentary Questions with ministerial correspondence,

and explained how the MoD would not necessarily retain information if it came to it in a certain form.

**Conclusion:**

[20] The Tribunal accepts that the purpose underlying the Appellant's request is an important and pertinent one, especially insofar as it pertains to the possibility of miscarriages of justice. The Appellant does not dispute that his request can and indeed has generated a vast amount of information through which it had to search. The MoD has declined to rely on the cost limitation provision of s12 FOIA, and taken what we accept to be a pragmatic approach. The Tribunal must consider the original request, which was limited to "soldiers" serving in the Army. It cannot be widened at this stage to include members of the other branches of the Armed Forces. Nothing has been shown to the Tribunal that would dislodge the MoD's contention that it has done everything that could reasonably be expected to yield relevant information, and the Tribunal is satisfied that, on the balance of probabilities, nothing further exists. Accordingly we can find no error of fact or Law in the DN has been established. The appeal is therefore refused, and no further action is required.

Brian Kennedy QC

Date of decision: 16 August 2018.

Promulgated date: 22 August 2018.