

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 June 2024

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

Decision (including any steps ordered)

1. The complainant has submitted a request seeking information contained in JSP 441 (which concerns information management policies) on two particular topics. The MOD asked the complainant to clarify part of his request. The complainant disputes the MOD's view that such clarification was needed, albeit as part of his correspondence with the MOD it then established what it understood this part of the request to be asking for. The MOD subsequently disclosed the information it held on one of the requested topics (subject access requests) and explained that it did not hold any information regarding the other topic (law enforcement processing). The complainant also disputes this latter finding.
2. The Commissioner's decision is that the MOD was correct, under section 1(3) of FOIA, to seek clarification of the request. Furthermore, he is satisfied that on the balance of probabilities the MOD does not hold any information falling within the part of the request seeking information about law enforcement processing.
3. The Commissioner does not require further steps.

Request and response

4. The complainant submitted the following request to the MOD on 7 August 2023:

'As directed by the ICO on 31 July 2023, I am writing to make a "refined request" for "a topic or element of JSP 441".

I should be grateful if the MOD would "provide [me] with the parts of its policy dealing with law enforcement processing" and "provide [me] with the parts of its policy dealing with... the handling of [subject access requests] SARs."¹

5. The MOD responded on 22 August 2023 and informed the complainant that:

'The Ministry of Defence (MOD) requires further information to determine what information would be within the scope of your request. We are uncertain what is understood by "law enforcement processing", there is nothing in JSP 441 with that specific descriptor. To help you with narrowing your searches, I have attached a document that I hope will be of assistance (please see attached). It contains the titles of the five main sections of JSP 441, namely: Information Legislation; Information Management; Data; Information Exploitation; Knowledge Exploitation. Behind these title pages in the Wiki are lists of contents entitled "pages in categories".

Please note that although the number of pages in these "pages in categories" titles appear to be short (ranging from 1-12 pages), they are designed to contain an overview of the subject in question but then contain multiple hyperlinks to other documentation (which can then itself lead to further documentation). This includes - as a small example - other MOD policy documents and handbooks published internally, strategy documents that are available in the public domain, links to non-standard forms of information and guidance such as workshops. You will also see that some of the titles of the "pages in categories" are repeated through the document, as the non-linear Wiki format of JSP 441 allows for the flexibility of information to feature in more than one of the five main sections where appropriate.

¹ The complainant had previously submitted a request to the MOD seeking a copy of the latest version of JSP 441 in its entirety. The MOD refused this request on the basis of section 14(1) (vexatious) of FOIA, which the Commissioner upheld the application of in decision notice IC-232699-G2T3. In that notice, the Commissioner noted that at paragraph 26 "using the 2017 version of JSP 441 [which the complainant already had] and the master list of 'pages in categories', the complainant should be able to identify a topic or element of JSP 441 which could form the subject of a refined request." <https://ico.org.uk/media/action-weve-taken/decision-notice/2023/4026078/ic-232699-g2t3.pdf>

If you would like to specify which of the “pages in categories” are of interest to you, please submit this as [a] refined FOI request and I will be very happy to examine them for suitability for release to you.’

6. The complainant contacted the MOD on 17 October 2023. He argued that it was unreasonable for the MOD to have requested clarification of the information he was seeking because in his view this was adequately described in his request. He therefore asked the MOD to conduct an internal review of its handling of his request. As part of this correspondence he noted that the MOD had failed to ascertain ‘what is understood by “law enforcement” processing. The complainant noted that this was defined in the Commissioner’s guidance on ‘Law Enforcement Processing’.
7. The MOD informed the complainant of the outcome of the internal review on 26 October 2023. It remained of the view that it was necessary to ask for clarification in relation to his request before determining the correct response under section 1 of FOIA as the reference to ‘law enforcement’ was potentially ambiguous. The MOD noted that given the reference to the complainant’s reference Commissioner’s guidance, it was now clear that the scope of his request was limited to ‘law enforcement’ processing in relation to the Data Protection Act 2018 (DPA).
8. The MOD contacted the complainant again on 17 November 2023 and noted that as he had now provided clarification of the part of his request seeking information about law enforcement it was in a position to respond. In relation to this first part of the request, the MOD explained that following a search for information it had not located any information falling within scope. By way of an explanation of this position, the MOD noted that it “does not have Departmental guidance on the processing of personal data for law enforcement purposes and its obligations under Part 3 of the Data Protection Act 2018. Under Section 16 of the FOIA (Advice and Assistance) we can confirm that officials refer to the wording of the legislation and the ICO’s guide when necessary.” In relation to the second part of the request, the MOD provided the information about the handling of SARs contained in the relevant section of JSP 441. The MOD noted that a small amount of information had been redacted on the section basis of section 26 (defence) of FOIA.

Scope of the case

9. The complainant contacted the Commissioner on 29 December 2023 in order to complain about the MOD’s handling of his request of 7 August 2023. For the purposes of this decision notice, the complainant raised

two issues: Firstly, in his view the MOD did not need to ask him to clarify his request, and nor should it have taken his communication of 17 October 2023 as clarification of his position. Secondly, he disputed the MOD's position that it did not hold information falling within the first part of his request, ie the parts of JSP 441 dealing with law enforcement processing. The complainant did not seek to challenge the MOD's application of section 26.

Reasons for decision

Section 1(3) – clarification of a request

10. To be valid under FOIA, a request must fulfil the criteria set out in section 8 of the legislation, namely:

'(a) is in writing,

(b) states the name of the applicant and an address for correspondence, and

(c) describes the information requested.'

11. With regard to (c), section 1(3) of FOIA states that:

'Where a public authority—

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement, the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.'

12. This means that if the description of the information is unclear or ambiguous, a public authority must ask the requester for clarification.

The MOD's position

13. The MOD's rationale for asking the complainant to clarify his request was set out in its initial response of 22 August 2023 which is quoted above. The MOD expanded on its reasoning in the internal review where it explained that:

'...it was not clear what information you were seeking as there is nothing in JSP 441 with the specific descriptor of "law enforcement processing" and yet it was clear from your request that this was a "refined request" for "a topic or element of JSP 441".

Public authorities are required to process requests objectively and avoid reading into them meanings that are not obvious from the wording. Given that your previous requests on this subject have sought information from the whole of JSP441 rather than a limited element of this guidance, it was important MOD understood what information you sought by the term "law enforcement processing", before determining the correct response under section 1 of the Act. Requesters cannot assume any specialist knowledge on the part of those who undertake the initial processing of FOI requests.

In your reply of 17 October, you provided a link to the ICO's Guide to Law Enforcement Processing which explains that:

"The Guide to Law Enforcement Processing is part of our Guide to Data Protection. It is for those who have day-to-day responsibility for data protection in organisations with law enforcement functions.

It explains the data protection regime that applies to those authorities when processing personal data for law enforcement purposes. It covers part 3 of the Data Protection Act 2018 (DPA 2018)..."

As you know from my previous internal reviews under FOI2023/012694, FOI2023/026685 and now my recent release to you of all the contents boxes and the information contained within them, JSP 441 provides guidance to MOD personnel on information management issues in their broadest sense and is not exclusively a guide to the processing of personal data.

I am satisfied that section 1(3) was applied correctly in this case as the reference to 'Law Enforcement' was potentially ambiguous in this context. Your response, however, has made it clear that the scope of your request was limited to "law enforcement" processing in relation to DPA18.'

The complainant's position

14. The complainant argued that his request was neither unclear nor ambiguous, and therefore the MOD was not entitled to seek clarification from it. Rather in his view the MOD was able to ascertain what was meant by 'law enforcement processing' without any further clarification needed from him. He argued that the MOD had, as acknowledged, by the references in the internal review, taken into account his previous dealings with the department and had failed to interpret his request objectively. Rather, in his opinion the MOD had allowed its own views about the validity of previous his previous criticisms to influence how it had read the request. Furthermore, the complainant argued in his view there were previous examples of him being 'misled' by the MOD in

respect of its handling of his requests on the subject of JSP 441 (he specifically directed the Commissioner to the request which was the subject of a previous complaint, IC-232835-H3Z2).

The Commissioner's view

15. Given that JSP 441 does not focus simply on matters concerning the DPA, but information management issues more broadly, the Commissioner accepts that it was not unreasonable for the MOD to seek clarification on what 'law enforcement processing' was meant to refer to. Whilst the reference to SARs in the other part of the request may, to those with knowledge of the DPA, have suggested that the reference to 'law enforcement processing' did indeed mean such processing in the context of that legislation only, the Commissioner considers the MOD's decision to ask for clarification was genuinely based on its desire to properly understand what the complainant was asked for. He can see no reason or other motive for the MOD seeking such clarification. The Commissioner would also add that if a public authority is unsure about what a requester wants – as he accepts was the case here – clearly it is in the complainant's interests that the public authority would seek such clarification; as, in his view, it legitimately did in this case. Moreover, in the Commissioner's view there is no evidence to support the complainant's suggestion that in its handling of this request there was any attempt by the MOD to mislead the complainant.

Section 1 – information requested

16. As noted above, the complainant did not accept the MOD's position that it did not hold information in JSP 441 dealing with law enforcement processing.
17. In cases such as this where there is some dispute as to whether information falling within the scope of the request is held, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
18. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request.
19. In applying this test the Commissioner will consider the scope, quality, thoroughness and results of the searches, and/or other explanations offered as to why the information is not held.

The complainant's position

20. In support of his position, the complainant argued that the MOD had failed to conduct reasonable searches of JSP 441 to locate information

relevant to this part of his request and extract any relevant information. In particular, he noted that searching the document for 'law enforcement processing' was insufficient to locate any relevant information. He alleged that JSP 441 does contain definitions of "law enforcement" data, "law enforcement" processing and "law enforcement" activities, as well as other references to the processing of data for "law enforcement".

The MOD's position

21. As set out in the MOD's response above, it conducted searches of JSP 441 but did not locate any relevant information. More specifically, the MOD informed the Commissioner that the phrase "law enforcement" did not appear in an context whatsoever when an electronic word search was conducted of the whole online JSP 441 edition. Again, as noted above, by way of explanation of this position the MOD informed the complainant that it "does not have Departmental guidance on the processing of personal data for law enforcement purposes and its obligations under Part 3 of the Data Protection Act 2018. Under Section 16 of the FOIA (Advice and Assistance) we can confirm that officials refer to the wording of the legislation and the ICO's guide when necessary".

The Commissioner's position

22. The Commissioner considers the MOD's search of JSP 441 would have been sufficient to locate any information, it were held. He also notes from the MOD's position, as quoted in the last paragraph, that it has no business reason or need for information about law enforcement processing to be contained in JSP 441. In addition, the Commissioner notes that in the 18 page document of headings from JSP 441 disclosed to the complainant on 22 August 2023, none of these suggest in any way that information will be contained in JSP 441 that would concern law enforcement processing. Whilst the Commissioner notes the complainant's view that information on this topic is contained within JSP 441, he has seen no evidence to support this view.
23. The Commissioner is therefore satisfied on the balance of probabilities that the MOD does not hold information falling within the part of the request that sought information about law enforcement processing.

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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

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.

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