

From Mrs S Gardiner



# Ministry of Defence

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Our reference: FOI2020/06141

Dr Emma Briant

Via email: [request-667498-65a9a2f9@whatdotheyknow.com](mailto:request-667498-65a9a2f9@whatdotheyknow.com)

2<sup>nd</sup> November 2020

Dear Dr Briant,

## **FREEDOM OF INFORMATION ACT 2000 – INTERNAL REVIEW**

1. I am writing in response to your email of 6 September 2020 in which you requested an internal review of the handling of your request under the Freedom of Information Act 2000 (the Act). The purpose of this review is to consider whether the requirements of the Act have been fulfilled. Its scope is defined by Part 5 of the Code of Practice<sup>1</sup> under section 45 of the Act.

### **Handling**

2. In conducting my review of the handling of your request, I have focussed on the following provisions in the Act:

- a. Section 1(1)(a) which, subject to certain exclusions, gives any person making a request for information to a public authority the entitlement to be informed in writing by the public authority whether it holds information of the description specified in the request;
- b. Section 1(1)(b) which, subject to certain exemptions, creates an entitlement to receive the information held by the public authority;
- c. Section 10(1) which states that, subject to certain provisions allowing extensions of time, the public authority must comply with the requirements of section 1(1) promptly, and in any event not later than the twentieth working day following the date of receipt;
- d. Section 16(1) which states that it is the duty of a public authority to provide help and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it; and

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<sup>1</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/722165/FOI-Code-of-Practice-July-2018.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/722165/FOI-Code-of-Practice-July-2018.pdf)

e. Section 17(1) which states that, where it claims that information is exempt information, the public authority must, within the time for complying with section 1(1), give the applicant a notice which states the fact, specifies the exemption(s) in question and states why the exemption applies.

3. Your request for information, received by the MOD on 28 May 2020, was worded as follows:

*"Please could I ask former Lieutenant Commander Steve Tatham's start date working for the UK military, initial rank, exact date of each change of rank and those corresponding ranks, and the exact date he left service and what rank he was when he left service on that date please.*

*Please could you tell me if he then continued as a reserve officer continuously after this date and if that continues to be his service relationship now ie is he still a reservist. I appreciate your time and assistance."*

4. Section 10(1) of the Act requires that you receive a response by no later than the twentieth working day following date of receipt which in this case was by 25 June 2020. The response by the Navy Secretariat, issued on 3 June 2020 and therefore within statutory timescale, advised that it neither confirmed nor denied that it held information relevant to your request by virtue of section 40(5) (personal information). You were correctly advised of your right to appeal, in the first instance to the MOD for an internal review, and then if still not content, to the Information Commissioner in accordance with section 50(1) of the Act.

5. In summary, your request was handled in accordance with Act.

### **Substance**

6. My review has looked again at whether the exemption cited in the substantive response was correct and my findings are below.

### **Application of section 40(5) (personal information)**

7. Section 40(5) of the FOIA sets out the conditions under which a public authority can give a neither confirm nor deny (NCND) response where the information requested is, or would constitute, personal data. In order not to breach the DP principles<sup>2</sup>, a public authority is required to respond with the application of the exemption at section 40. In this case, section 40(5B)(a)(i) which states that:

*"The duty to confirm or deny does not arise in relation to other information if or to the extent that any of the following applies—*

*(a) giving a member of the public the confirmation or denial that would have to be given to comply with section 1 (1)(a)—*

*(i) would (apart from this Act) contravene any of the data protection principles."*

8. The information you have requested, in relation to a named individual's military service, would clearly constitute his personal information if held. I have therefore considered whether confirming or denying that the requested information is held would be a breach of the DP Principles.
9. In determining whether the confirmation that a named individual has undertaken military service is fair and lawful, one of the factors for consideration is to decide whether there is a legitimate interest in making the section 1 declaration to the public and the balance between this and the rights and freedoms of the data subject.
10. Normally there would be an expectation on the department to protect the personal data of any current or ex-military personnel, which includes the confirmation of service, unless they are in a sufficiently senior enough role or their work has been publicly recognised by the MOD. However, as part of my investigation I have identified that there are many articles available in the public domain in which Cdr Tatham has attributed himself to that enable the MOD to safely confirm that he did serve in the Royal Navy, including a report authored by himself during his time as the Director of Media & Communication Research at the UK Defence Academy's Advanced Research & Assessment Group. Additionally, there are entries in the London Gazette that refer to his rank changes towards latter and more senior end of his career. I am satisfied that, from the publicly available information, Cdr Tatham would be content for the MOD to make a declaration under section 1 of the Act, and that such a declaration would be fair and lawful.
11. Given the circumstances in this case, I find that the MOD was incorrect to engage the exemption at section 40(5) of the Act, and that it can confirm that it holds information in scope of your request. Some of the information, however, is exempt under section 40(2) of the Act.

### **Section 40(2) (Personal Information)**

12. Section 40(2) of the Act provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A), (3B) or 40(4A) is satisfied. In this case, the relevant condition is contained in section 40(3A)(a). This applies where the disclosure of the information to any member of the public 'would contravene any of the data protection principles' relating to the processing of personal data set out in Article 5 of the GDPR ('the DP principles')<sup>2</sup>.
13. In particular, Article 5(1)(a) GDPR states that 'Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject'. The lawful basis provided in Article 6(1) of the GDPR is the most applicable, which is as follows:

*'processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child'.*

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<sup>2</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1528874672298&uri=CELEX:02016R0679-20160504>

14. The Act is designed to increase openness, transparency and accountability in public authorities through the rights of public access to recorded information. Although section 40 is not subject to the public interest test (PIT), in determining whether the disclosure is fair and lawful, I have considered whether there is a legitimate interest in the public or a requester having access to the information, and the balance between this and the rights and freedoms of the data subject. In determining if the information can be released, I have also taken into account key factors such as the MOD publicly recognising some of Cdr Tatham's work and achievements during his Navy Career.

15. Although Cdr Tatham has been publicly recognised, I have to consider whether or not the release of the information would be fair and lawful given the expectations that he would have in MOD protecting his information. To disclose all of the requested information would represent an infringement into his privacy and he would have an expectation that his career path with MOD, like any other serving or ex-military personnel, would not be released into the public domain. All of the information that you have requested is not routinely made publicly available, and in this case I have been unable to locate any evidence (outside of what has been published in the London Gazette) that Cdr Tatham has made a public declaration of the detailed information you seek. I find that there is no requirement for MOD to release his personal information to the world at large.

16. In summary, I find that to release the information held in scope of your request that is not already in the public domain would prejudice the rights and freedoms or legitimate interests of the individual, and such processing would be both unfair and unlawful and would breach the first principle in DPA18. Therefore, in this case, section 40(2) of the Act is applied to the details of Cdr Tatham's Naval career which are not already in the public domain.

#### **Use of Section 21 (information reasonably accessible to the applicant by other means)**

17. Section 21 of the Act states that information is exempt from disclosure if it is already reasonably accessible by other means. Section 21 is an absolute exemption which does not require a public interest test.

18. Some information on dates and changes to Cdr Tatham's career is published in the Gazette and is therefore withheld under section 21 of the Act, as it is already reasonably accessible to you. The relevant entries we have located can be found below:

- <https://www.thegazette.co.uk/London/issue/59499/supplement/14302/data.pdf> - promotion from Actg. Cdr to Cdr in Royal Navy on 30<sup>th</sup> June 2010
- <https://www.thegazette.co.uk/London/issue/60952/supplement/3/data.pdf> – Records Cdr Tatham being placed on the Retired List (own request) as of 3<sup>rd</sup> July 2014.
- <https://www.thegazette.co.uk/London/issue/60965/supplement/4/data.pdf> - Entered in the rank of Cdr (RNR) on 3<sup>rd</sup> July 2014.

19. It is open to you to carry out further research for any other entries that may appear in the Gazette. To confirm, the second link listed above shows that Stephen Tatham left the Royal Navy in the rank of Commander (Cdr).

## **Section 16 (advice and assistance)**

20. Section 16(1) of the Act places an obligation on public authorities such as MOD 'to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it'.

21. You may wish to be aware that when qualifying as an officer in the Royal Navy full time individuals will have the rank of Midshipman. Following role-specific training and 30 months service individuals are promoted to the Lieutenant. The two ranks above this are Lieutenant Commander and then Commander. Further information on promotion through the ranks in the Royal Navy can be found here -

<https://www.royalnavy.mod.uk/careers/navy-life/shaping-your-career>.

## **Conclusion**

22. In summary I find that:

- a. Your request was handled in accordance with the requirements of the Act.
- b. MOD is able to confirm that information in scope of your request is held. However, some of this information is exempt from disclosure under section 40(2) of the Act.
- c. Section 21 (information reasonably accessible to the applicant by other means) applies as some information you have requested is the same information that is already in the public domain, and links have been provided.
- d. Some section 16 (advice and assistance) relating to career progression within the Royal Navy has been provided to you.

If you remain dissatisfied with the review, you may make a complaint to the Information Commissioner under the provisions of section 50 of the Act. Further details of the role and powers of the Commissioner can be found on the following website: <https://ico.org.uk>. The address is: Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF.

Yours sincerely,



Sandra Gardiner