

From Mrs S Gardiner



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Our references: FOI2017/12801

Mr James Jones

Via e-mail: request-444054-6cea4358@whatdotheyknow.com

10th July 2018

Dear Mr Jones

FREEDOM OF INFORMATION ACT 2000 – INTERNAL REVIEW

1. I am writing in response to your email of 4 May 2018, in which you requested an internal review of this Department's handling of your request for information 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 VI of the Code of Practice under section 45 of the Act, at: <http://www.justice.gov.uk/downloads/information-access-rights/foi/foi-section45-code-of-practice.pdf>. I apologise for the delay in completing the review.

Handling

2. In conducting my review of the handling of your request, I have focussed on the following requirements of 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 14(1) which does not oblige a public authority to comply with a request for information if the request is vexatious.

3. Your request, submitted to MOD on 5 December 2017, was worded s follows:

"Many thanks for your reply, dated 30th Nov. As a follow-up request, can you provide me with the servicing record sheets/logs for the four Mk10 seat assemblies involved in the Moray Firth Tornado collision? The sheets/logs should cover the period from the date of mod 02198 embodiment to 3rd July 2012."

4. In accordance with section 10(1) of the Act, a substantive response was due no later than 8 January 2018; the MOD response met the timescale. The response explained that section 14(1) does not oblige a public authority to comply with the section 1 obligations of the Act if a request for information is vexatious. There is no public interest test. It was further explained that this request was one in a series of requests submitted by you about "Tornado aircraft and ejection seats" which were deemed to have been made with "unreasonable persistence and frequency" and that to continue providing you with information on this subject placed an unreasonable cost and burden on the MOD. You were correctly advised of your right to appeal.

Substance

5. I have focussed this review on the use of section 14(1) that was applied in this case to refuse this (and any future) requests meeting the description of "Tornado aircraft and ejection seats".

Use of Section 14(1) (vexatious)

6. Although the Act is designed to give individuals a greater right of access to official information with the intention of making public authorities more transparent and accountable, section 14(1) allows them to refuse any requests which have the potential to cause a disproportionate or unjustified level of disruption, irritation or distress. It is important to note, however, that section 14 applies to the subject of the requests received by a public authority, not to the person who has submitted them. Each request must be judged on its own merits and cannot be deemed vexatious purely on the basis that the person who submitted that request has previously submitted one or more unrelated requests or that they were previously declared a vexatious correspondent under another regime.

7. The Information Commissioner has produced guidance to help public authorities determine if a request is vexatious and how to deal with a such a request¹. This guidance recognises that there are various relevant 'behaviours' which can be taken into consideration when determining if a request is vexatious under section 14(1). Sometimes a request may be so patently unreasonable or objectionable that it will obviously be vexatious; on other occasions it is necessary to make an assessment taking into account a range of factors.

8. Your request was determined as falling into this second category, therefore, I have looked at the whole history of your requests in relation to this refusal and made an objective assessment of the evidence of the impact on MOD, weighing up the evidence about the purpose and value of the request from a public perspective.

¹ <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>

9. The FOI Act is silent as to the meaning of the word 'vexatious' but, in the case of *Dransfield & Craven v Information Commissioner* in 2015, the Upper Tier Tribunal² took the view that the ordinary dictionary definition of 'vexatious' is only of limited use because the question ultimately depends upon the circumstances surrounding the request. The Tribunal placed particular emphasis on the issue of whether the request has adequate or proper justification and suggested that 'vexatious' could be defined in this context as "...manifestly unjustified, inappropriate or improper use of a formal procedure". This decision clearly established that proportionality and justification are central to any consideration of vexatiousness. It is also evident from this decision, and others since at Tribunal, that the threshold for declaring a request vexatious is high.

10. To determine if vexatiousness or burden exists I have noted the following factors:

- a. The response sought to make you vexatious on the topics of both (i) Tornado and (ii) ejection seats;
- b. The pattern of your information requests of late (9 in the past 12 months);
- c. This enquiry had a serious purpose, namely seeking to collate information so that you could apply to the Lord Advocate of Scotland to make a final decision regarding a renewed call for a Fatal Accident Inquiry into the accident involving the crash of a Tornado aircraft in the Moray Firth in 2012.

And, related to (c),

- d. The timing of the decision to declare this request vexatious.

Considering these factors, the Information Commissioner's guidance on the use of section 14 and the available Tribunal case law, I find that it was not reasonable for the Department to consider that there were sufficient grounds on which to apply section 14(1) on the grounds of 'behaviours'.

Use of Section 14(1) (burden)

11. Ordinarily, I would direct that the Department drop its reliance on section 14(1) and comply with the request. However, I have been provided with very good evidence of the burden that would be involved in processing it from first principles.

12. Since 1 January 2005 when the Act came into effect, the activities that can legitimately be considered in determining the cost of compliance against the appropriate limit under section 12 has been limited to those related to located and retrieving the requested information. However, the *Dransfield* case in 2015 set a legal precedent in that it indicated that public authorities could take into account the full burden of handling requests when determining whether they are entitled to apply s14(1) (vexatious requests). The Tribunal reasoned that section 14(1) can legitimately apply to a request where it is demonstrated that compliance would place what the court determined was a "grossly oppressive burden" on the relevant public authority if it were to process a request from first principles.

² <http://administrativeappeals.decisions.tribunals.gov.uk/Aspx/view.aspx?id=3680>

13. The Tornado fleet modification in question commenced in August 2007; as such the request covers a period of five years. Relevant records from the aircraft involved have been identified at RAF Marham within 26 boxes. In order to locate the specific information requested, the content of all 26 boxes would need to be searched manually in order to identify and retrieve the relevant material. It is assessed that one box alone could contain as many as 20,000 documents.

14. Having retrieved the relevant information from the boxes - estimated to be well in excess of 1000 pages – each document would have to be read to determine if any exemptions applied to the information, the application of redactions would then be considered before a final copy was prepared and approved for public release. These additional activities are estimated to require 5 to 8 days of work in themselves.

15. I am satisfied that the total effort involved in processing this request would exceed that envisaged by Parliament when it set a limit on the amount of effort that public authorities should expend in answering requests for information from members of the public under the legislation³. It follows that this request meets the “grossly oppressive burden” threshold and I therefore find that section 14(1) exemption applies to this request on grounds of burden.

16. There is no obligation upon public authorities to offer advice on a refinement when section 14(1) is engaged, although I consider it best practice to do so. In this case, however, I am unable to advise of any suitable refinement as reducing the scope of your request to a single airframe or shorter time period would also require a manual search of a number of boxes and would be likely to involve effort that exceeds the set limit.

17. It is, of course, open to you to make new requests but I would urge you to take a reasonable approach. Please bear in mind that all your enquiries impact upon the same areas of the Department each time, causing them to divert finite resources from key tasks and that the grounds for my decision to drop the ‘vexatious by behaviour’ argument in this case may not extend to future requests should their pattern and nature bring into question again whether they meet the relevant criteria.

Advice and assistance

18. Under section 16 of the Act, it is the duty of a public authority to help persons who propose to make, or have made requests for information. I note that most of your recent information requests have been in question form. Whilst it is open to you to make an information request in the form of a question, please be aware that section 1 of the Act requires public authorities to retrieve and locate the recorded information that meets the description of the request, held at the time the request was received.

19. The Act does not permit requesters to seek the opinions and explanations of officials from their corporate knowledge of a subject, such advice does not meet the requirements of section 1 of the Act. The case law suggests that a public authority need only make the appropriate declaration at section 1 of the Act and if a question can be answered by providing the applicant with copies of recorded information that it holds then it should do so. Otherwise it should simply state that it does not hold relevant information.

³ <http://www.legislation.gov.uk/uksi/2004/3244/contents/made>

Outstanding Requests

20. I note that several enquiries submitted by you have gone unanswered since the decision to make the subject of "Tornado aircraft and ejection seats" was deemed vexatious in January. As this review overturns that decision, I have listed these requests in an annex and if you confirm which, if any, of these you still require MOD to respond to, I will arrange for them to be relogged as new requests and processed in accordance with the Act.

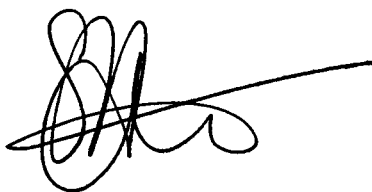
Conclusion

21. In summary, I find that:

- Your request was handled in accordance with sections 1 and 10 of the Act;
- For the reasons explained above, section 14(1) is not engaged on the grounds of vexatious behaviour but it is appropriate to refuse it on the grounds of process burden;
- Under section 16, advice and assistance has been provided at internal review stage to assist the processing of any future requests.

If you are 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 website at: <https://ico.org.uk>. The address is: Information Commissioner's Office, Wycliffe House, Water Lane, WILMSLOW, Cheshire, SK9 5AF.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Sandra Gardiner', with a long horizontal line extending to the right.

Sandra Gardiner

ANNEX to FOI2017/12801

Dated: 10 July 2018.

Serial	Serial number	Description of the Request	Date received
1.	No serial allocated	What mitigation was in place to avoid a tether strike? Clearly the risk was not ALARP without CWS.	12 December 2017
2.	No serial allocated	Further to my earlier email of this date can you advise me as to what is meant, on page 2, by. (a) ALARP[T] (b) (not all are)	12 December 2017
3.	FOI2018/00471	Just to advise you that I received the Safety Assurance Matrix annex by post. Thank you. Is it possible to receive the Tier 1 document, as the report that you have sent to me indicates that Tier 1 and 2 should be read together?	9 January 2018
4.	FOI2018/03377	"Please could I have a copy of Exhibit 606 to the Service Inquiry report into the accident involving Tornado GR4 ZD743 and Tornado GR4 ZD812 over the Moray Firth on 3 Jul 2012."	6 March 2018
5.	FOI2018/04638	Following the Red Arrow accident, involving the death of Flt Lt Cunningham, it was recommended that modifications should be made to the ejection seat safety pin and the Seat Pan Firing Handle (SPFH). Can you advise me as what modifications were finalised, and if they have now been embodied?	4 April 2018